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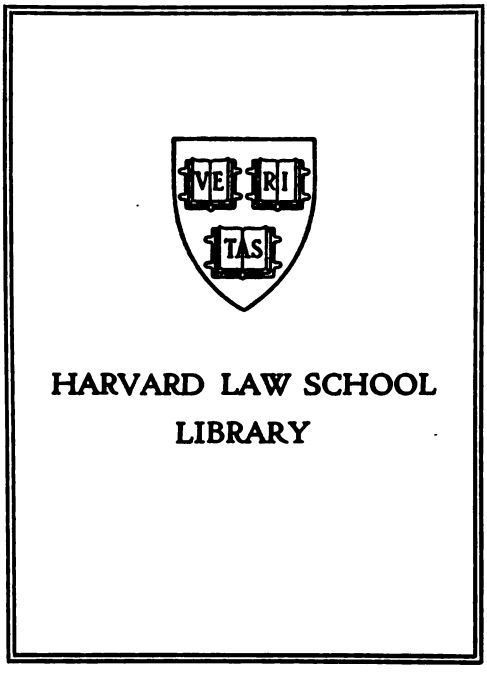

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THE NEBRASKA SYNOPTICAL DIGEST

A DIGEST OF THE

DECISIONS OF THE SUPREME COURT OF NEBRASKA

COMPILED FROM VOLUMES 1 TO 80 NEBRASKA REPORTS AND VOLUMES 1 TO 5 NEBRASKA REPORTS (UNOFFICIAL) INCLUSIVE

—WITH—

COMPLETE TABLES OF CASES CITED AND OVERRULED

VOLUME I

J. H. BROADY, Jr., Editor
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OWNED AND PUBLISHED BY
THE STATE JOURNAL COMPANY
LINCOLN, NEBRASKA
1910

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PREFACE.

This digest, covering all cases reported in volumes 1 to 80 of the Nebraska Reports and volumes 1 to 5 Nebraska Reports (Unofficial) inclusive, is designed to supply an urgent demand of persons having need to trace the decisions of the Supreme Court of Nebraska.

Through the courtesy of the publishers of The American Digest the American scheme of classification is used and followed as closely as is practical in a local work of this kind. The style and form adopted, and especially the plan of running the complete analysis at the head of each topic, is modeled more particularly from the Ohio Cyclopedic Digest. Strictly speaking, under the American Digest scheme of classification no matter is duplicated. We have departed from this rule to the extent that we have duplicated, in a measure, matter of close application. Realizing that in attempting such duplication the editor is apt to encounter difficulties, since it is impossible to draw a consistent line of demarcation, we have refrained from a liberal use thereof, depending on the user's knowledge of the classification and the cross-references to make this a ready and useful reference to the decisions digested.

It is urged that the user of this digest always keep in mind the fact that under this classification scheme all matter of specific application is treated in the specific topics; and he should familiarize himself with the different topic heads, and with the analysis and cross-references thereunder, as they necessarily explain the scope of each topic. The general topics, such as *Evidence, Pleading, Parties,* etc., include only matter of a general nature.

Each digest paragraph is numbered consecutively in each topic and followed by a reference to the year in which the decision was rendered by the court. Citation to the official reports and to the various reports of selected cases follow the matter. The official reports are cited "Neb.," the unofficial reports "Unof." Citations to the Northwestern Reports, the American series, and the Lawyers' Reports Annotated follow the Nebraska citation in parentheses.

Overruled points are indicated in the paragraph in brackets following the citations, reference being made to the overruling case. A complete table of overruled cases, alphabetically arranged, is included in volume 3 of this digest immediately preceding the table of digested cases, showing the point overruled with the overruling cases following. This table includes modified points and those changed by statutes.

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The table of cases, at the end of volume 3 of this digest, gives the titles of the cases and citation to the Nebraska Reports, followed by a reference to the digest topic where digested and the number of the paragraph as it appears in that topic. The title of each case is also run adversely, *e. g., Doe v. Roe,* — Neb. —, A. & E., 47; Ev. 150; Trial 196, showing that the case of *Doe v. Roe* reported in — volume of the Nebraska Reports on page — is digested in the topics of *Appeal and Error,* paragraph 47; *Evidence,* 150, etc. The same case appears *Roe, Doe v.,* the proper title being *Doe v. Roe.*

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In the topic of *Mortgages,* under division *Foreclosure,* subdivision *Sale,* is found a cross-reference to *Judicial Sales.* This is necessary in order to keep all such matter together and avoid a duplication of the whole in both topics, since the court has not held a definite line of distinction between mortgage sale and judicial sale. In many instances the court speaks of mortgage sales as judicial sales and again as mortgage sales, and since the procedure is the same in both cases it is all treated in the topic of *Judicial Sales.*

Volumes 76 to 80 of the Nebraska Reports were worked from proof pages before publication, and citations to the cases therein have reference neither to the Lawyers' Reports Annotated nor to the American series of reports; and minor corrections also may have been made in these cases by the Supreme Court reporter before they were finally published.

This opportunity is taken by the editors to express their appreciation of the courtesies and interest shown during the progress of their work by the clerk and the reporter of the Supreme Court of this State.

J. H. BROADY, JR.

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NEBRASKA SYNOPTICAL DIGEST.

VOLUME I.

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ABATEMENT AND REVIVAL.

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Another action pending.

Pendency of another information against defendant, see *Criminal Law*, § 163.

Stipulation to rest pending determination of another suit as waiver of abatement, see *Stipulations*, § 12.

——— Ground of abatement in general.

1. (1892.) The pendency of a former suit between the same parties may be shown in abatement when a judgment in such suit would be a bar to a judgment in the second action. It is immaterial that one is legal and the other equitable in nature. *State, ex rel. Chicago, B. & Q. R. Co., v. North Lincoln St. R. Co.*, 34 Neb. 634 (52 N. W. 368).

2. (1894.) The mere pendency in the courts of another jurisdiction of an action between the same parties, and concerning the same subject-matter, cannot be successfully pleaded in bar or abatement. *Kilpatrick v. Kansas City & B. R. Co.*, 38 Neb. 620 (57 N. W. 664; 41 Am. St. Rep. 741).

3. (1895.) A plea that another action is pending in the same court between the same parties, involving the same subject-matter and seeking the same relief, when proved, is a good defense to a second action, though one is an action at law and the other a suit in equity. *Monroe v. Reid*, 46 Neb. 316 (64 N. W. 983).

4. (1899.) Pendency of a former suit between the same parties on the same cause of action in the same court is ground for abatement. *Spencer v. Johnston*, 58 Neb. 44 (78 N. W. 482).

——— Applicability to mandamus.

5. (1892.) The plea of the pendency of another suit in bar is applicable to proceedings in mandamus. *State, ex rel. C., B. & Q. R. Co. v. North Lincoln St. R. Co.*, 34 Neb. 634 (52 N. W. 368).

——— Identity of causes.

6. (1871.) A verdict of a jury in one case, in order to operate an abatement of another, must have been recovered for the identical cause of action and between the same parties. *McReady v. Rogers*, 1 Neb. 124 (93 Am. Dec. 333).

7. (1909.) When the pendency of a prior suit is pleaded in abatement, the case must be the same, or it will not be sustained. There must be the same parties or such as represent the same interest; the same rights must be asserted and the same relief prayed for. This relief must be founded on the same facts, and the essential basis of the relief must be the same in both actions. As a general rule, where a judgment in a prior

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suit would be a bar to a judgment in the second suit brought in the same or another court of concurrent jurisdiction, the plea of other suit pending will be held good. *Richardson v. Opelt*, 60 Neb. 180 (82 N. W. 377).

8. (1895). To constitute a good defense, that another action is pending in the same court, it is necessary for the party seeking the abatement of the present action, by reason of the pendency of that already commenced, to plead and prove the connection of the former action to the same subject-matter, the relations of the parties therein to be the same as that in the case in which the plea is interposed, and that the relief sought is practically identical with that sought in the second action. *Monroe v. Reid*, 46 Neb. 316 (64 N. W. 983).

9. (1901.) To constitute a defense of another action pending, defendant must plead and prove that the two causes of action are identical. *Metcalf v. Bockoven*, 62 Neb. 877 (87 N. W. 1055).

10. (1901.) To abate a suit because of the pendency of another action, it must appear that the subject-matter is so far identical that a recovery in one action would bar a recovery in the other. *Metcalf v. Bockoven*, 1 Unof. 822 (96 N. W. 406).

——Action of different jurisdiction.

11. (1901.) Where, pending an action to recover a debt secured by mortgage, plaintiff sues in equity in a federal court to enforce his lien, as authorized by section 848 of the code, the pendency of the equity action did not work the abatement of the suit at law. *Garneau v Kendall*, 61 Neb. 396 (85 N. W. 291).

——Sufficiency of proof.

12. (1897) A plea of another suit pending is not sustained by proof of an order dismissing, without prejudice, a former suit on the same cause of action, and of the filing by plaintiff of a motion for a new trial upon which no action has been taken. *Council Bluffs Savings Bank v. Griswold*, 50 Neb. 753 (70 N. W. 376).

——Necessity, mode, and waiver of objection.

13. (1892.) The objection that another suit is pending must be raised by proper pleadings, or it will be waived. *Gregory v. Kenyon*, 34 Neb. 640 (52 N. W. 685.)

14. (1894.) An objection on the ground that there is another action pending for the same cause must be made before a trial on the merits or it will be waived. *Smith v. Spaulding*, 40 Neb. 339 (58 N. W. 952).

Misnomer of plaintiff.

15. (1884.) An objection to the name in which plaintiff brings suit must be raised by a plea in abatement. *Smelt v. Knapp*, 16 Neb. 53 (20 N. W. 20).

Disability of party pending suit.

16. (1904.) Section 45 of the code expressly enacts that an action shall not abate by reason of the disability of a party happening during its pendency. In such cases a duty devolves upon the court to take such steps as shall become necessary to protect and preserve the rights of the incapacitated party. *Simmons v. Kelsey*, 72 Neb. 534 (101 N. W. 1).

Transfer of title, right or interest.

Effect of repeal of statute, see *Statutes*, §§ 285-290.

——In general.

17. (1882.) In case of a transfer of interest during the pendency of a suit, 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. This substitution may be made as often as there is a transfer of interest. *Temple v. Smith*, 13 Neb. 513 (14 N. W. 527).

17*a*. (1908.) The insolvency of, and the appointment of a receiver for, the original plaintiff, who has assigned the cause of action prior to the appointment of a receiver and since the action was begun, does not prevent the prosecution of the action in the name of the original plaintiff. *McCague Savings Bank v. Croft*, 80 Neb. 702 (115 N. W. 315).

17*b*. (1908.) Where the transfer of the subject of an action is made by the plaintiff during its pendency, the action may be prosecuted for the benefit of the assignee in the name of the original plaintiff, such party remaining *in esse*. *McCague Savings Bank v. Croft*, 80 Neb. 702 (115 N. W. 315).

18. (1900.) Under the provisions of section 45 of the code a party may continue as plaintiff and prosecute to final judgment after having transferred his interest pending the litigation. *Schabery v. McDonald*, 60 Neb. 493 (83 N. W. 737).

——Dissolution of partnership or corporation.

19, 20. (1902.) A cause of action in favor of a copartnership against a sheriff and his bondsmen to recover the penalty

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provided by section 34, chapter 28, Compiled Statutes, does not abate by the dissolution of the copartnership, but survives to the individual members of such copartnership. *O'Shea v. Kavanaugh*, 65 Neb. 639 (91 N. W. 578).

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21. (1900.) Under section 63, chapter 16, Compiled Statutes, a suit does not abate by the dissolution of a corporation plaintiff or defendant organized under the laws of this state. *Schmitt & Bro. Co. v. Mahoney*, 60 Neb. 20 (82 N. W. 99).

——— **Termination of term of office.**

22. (1889.) An answer, in an action against a county clerk to compel a report as to certain fees collected, setting up a termination of his term of office, does not state a defense. *State, ex rel. Franklin County, v. Cole*, 25 Neb. 342 (41 N. W. 245).

——— **Removal or discharge of administrator.**

23. (1901.) An action does not abate by the removal or discharge of an administrator as party plaintiff during its pendency. *Edney v. Baum*, 2 Unof. 173 (96 N. W. 167).

Death of party, in general.

Death of parties after submission on appeal, see *Appeal and Error*, §§ 599-601.

Death of partner as abating action against firm, see *Partnership*, §§ 171,172.

24. (1882.) If on the death of a party, a cause survived to or against some other of the parties the action does not abate as to the survivors. *Fox v. Abbott*, 12 Neb. 328 (11 N. W. 303).

——— **Plaintiff.**

25. (1902.) By virtue of section 455, code of civil procedure, an action under section 11, chapter 91*a*, Compiled Statutes, would not completely abate on the death of the plaintiff, but could be revived and maintained by his personal representative. *Cleland v. Anderson*, 66 Neb. 252 (92 N. W. 306).

26. (1900.) A pending action for personal injuries does not abate by the death of the plaintiff. *Webster v. City of Hastings*, 59 Neb. 563 (81 N. W. 510).

27. (1877.) Where upon the death of a plaintiff there is an order of revivor in the name of the administrator duly entered, the failure of the clerk to change the title of the case accordingly is not fatal to the judgment subsequently rendered. This is a mistake that may be remedied on motion, even after judgment. *Brandt v. Albers*, 6 Neb. 504.

28. (1906.) When the sole plaintiff in an action dies, the effect is to suspend further proceedings until the action has been revived in the name of the legal representatives of the deceased. *Street v. Smith*, 75 Neb. 434 (106 N. W. 472).

——— **Defendant.**

29. (1878.) An action pending against a deceased person at the time of his death, may, if the cause of action survive, be prosecuted to final judgment; and the executor, administrator, or heir may be admitted to defend the same. *Gillette v. Morrison*, 7 Neb. 263.

30. (1878.) Where it is sought to revive an action after the death of defendant the only question at issue are, First, the death of defendant, and Second, the substitution of the administrator and heirs of the estate. If the cause of action survives, the court cannot inquire into the merits. *Gillette v. Morrison*, 7 Neb. 263.

31. (1901.) *Held*, In the present case, that the petitioner is entitled to have the action revived in his name as the lawful representative of the deceased plaintiff. *Hayden v. Huff*, 62 Neb. 375 (87 N. W. 184).

32. (1902.) An administration of the estate in accordance with law must be procured if it is desired to carry on litigation after defendant dies intestate. *Buck v. Hogeboom*, 63 Neb. 672 (88 N. W. 857).

Death of father to whom liquor furnished.

33. (1879.) The death of a husband and father does not cause an action for loss of the means of support, against a saloonkeeper, to abate. *Roose v. Perkins*, 9 Neb. 304 (2 N. W. 715; 31 Am. St. Rep. 409).

Revival of actions.

Survival of action for causing death, see *Death*, §§ 13-16.

Revivor of action to quiet title, see, *Quieting Title*, §§ 59.

——— **Right of revival in general.**

34. (1878.) The right to revive an action is not dependent on the discretion of the court or judge making the order, but, under the conditions and within the time limited by statute, is a matter of right. *Gillette v. Morrison*, 7 Neb. 263.

35. (1901.) The right to revivor under the provisions of section 45 of the code rests in the exercise of a sound discretion by the trial court, governed by equitable principles, which requires reasonable diligence and

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good faith on the part of those invoking its action; the right to revival to be granted or refused according to the circumstances and nature of the case. *Hayden v. Huff*, 62 Neb. 375 (87 N. W. 184).

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36. (1902.) There is no authority under title 13 of the code of civil procedure for the substitution of the legal representative, or successor, of a deceased suitor at the instance of a litigant having no interest in the controversy adverse to that of the party who died. *Jameson v. Bartlett*, 63 Neb. 638 (88 N. W. 860).

——Persons who may revive.

37. (1902.) When one of several plaintiffs in error dies the right to have an erroneous judgment against all of them reversed attaches to the survivors. *Jameson v. Bartlett*, 63 Neb. 638 (88 N. W. 860).

38. (1892.) Where, pending an action to set aside a deed to real estate, and to quiet title, the plaintiff dies intestate, the action may be revived and continued in the names of the heirs at law of such deceased person. *Rakes v. Brown*, 34 Neb. 304 (51 N. W. 848).

39. (1907.) A cause of action by a husband for a loss of services and expenditures for medical attendance, etc., occasioned by a negligent and wrongful injury to his wife, is one which survives and is assignable. *Forbes v. City of Omaha*, 79 Neb. 6 (112 N. W. 326).

——Necessity of revival.

40. (1898.) Where a party dies after a judgment has been rendered against him, his administrator may prosecute error without procuring an order reviving the action in his name. *Webster v. City of Hastings*, 56 Neb. 245 (76 N. W. 565).

41. (1902.) Where one of several plaintiffs or defendants dies, in an action pending in this court on error, the right of action, if it survives to or against the remaining parties, may be enforced without bringing the representative or successor of the deceased party into the case. *Jameson v. Bartlett*, 63 Neb. 638 (88 N. W. 860).

42. (1904.) If the plaintiff in an action die after judgment, but before satisfaction thereof, no valid execution can be had upon the property of the judgment defendant until the judgment has been revived in the manner provided for in section 472 of the code. *Vogt v. Daily*, 70 Neb. 812 (98 N. W. 31).

——Time for revival.

43. (1901.) The limitation of the statute as to time, contained in the provisions for summary proceedings to revive an action on a conditional order, does not apply to proceedings for revivor under the provisions of section 45 of the code. *Hayden v. Huff*, 62 Neb. 375 (87 N. W. 184).

44. (1901.) If an action is not revived within one year from the time an order of revivor might have been first made, and this fact is made to appear by affidavit, it is made the duty of the court in which the action is pending to strike it from the docket. *Hayden v. Huff*, 62 Neb. 375 (87 N. W. 184).

45. (1901.) Under the provisions of the code entitled "Revivor of Actions," sections 456-470, an action may be revived in the name of the representatives or successor in interest of a deceased party to the action, on a conditional order, without the consent of the adverse party, at any time within one year from the time when the order might have been first entered. *Hayden v. Huff*, 62 Neb. 375 (87 N. W. 184).

——Mode and proceedings for.

46. (1892.) The mode provided by title 13 of civil code, for reviving actions by conditional order of revivor, is not exclusive. Section 45 of the code confers authority upon the court to allow the action to be prosecuted by or against the representatives or successors in interest of a deceased party. For this purpose supplemental pleadings may be filed and summons served as in the commencement of an action. *Rakes v. Brown*, 34 Neb. 304 (51 N. W. 848).

47. (1898.) Service of a conditional order of revivor must be made in the same manner as a summons, and it seems that service upon the attorney of record is insufficient unless a summons may be so served. *Missouri P. R. Co. v. Fox*, 56 Neb. 746 (77 N. W. 57).

48. (1901.) By section 45 of the code, where the cause of action survives, the court may allow the action to continue by or against the representatives or successor in interest by the filing of supplemental pleadings and the service of summons, as in the commencement of an action. *Hayden v. Huff*, 62 Neb. 375 (87 N. W. 184).

49. (1901.) The summary mode pointed out in code of civil procedure, sections 456-460, for the revivor of an action is not exclusive. *Hayden v. Huff*, 62 Neb. 375 (87 N. W. 184).

50. (1902.) The serving of the conditional order of revivor, confers jurisdiction upon the substituted party. *Link v. Reeves*, 63 Neb. 424 (88 N. W. 670).

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51. (1906.) Where the beneficiary is made a coplaintiff with the trustee in a foreclosure action, and dies while the suit is pending, irregularity or error in reviving the suit in the name of his administrator is without prejudice to further proceedings in the case, as he was not a necessary party plaintiff. *Abrams v. Taintor*, 76 Neb. 109 (107 N. W. 225).

——— **Order of revival as res adjudicata.**

52. (1877.) The statute provides the mode and regulates the practice in cases of revivor of actions, and the judgment or final order of revivor under the mode prescribed, unless reversed or vacated on error, is conclusive, and cannot be reviewed on the subsequent trial of the cause. *Hendrix v. Rieman*, 6 Neb. 516.

53. (1877.) When an action has been revived, a plea *ne unques administrator* subsequently pleaded, is bad, and may be treated as surplusage. *Hendrix v. Rieman*, 6 Neb. 516.

54. (1898.) Where revivor of an action is sought by conditional order, the hearing in pursuance thereof is the proper occasion to try the right of the successor, and by the absolute order the matter becomes *res judicata*, and cannot be retried with the case on its merits. *Missouri P. R. Co. v. Fox*, 56 Neb. 746 (77 N. W. 57).

——— **Proceedings after revival.**

55. (1898.) When a cause has been revived by conditional order duly made absolute, it is not essential that amended or supplemental pleadings be filed alleging the capacity of the new party, as such averments would not be traversable and the fact already appears of record. For the same reason it is proper to refuse the adverse party leave by supplemental pleadings to tender an issue based on the matter of revivor. *Missouri P. R. Co. v. Fox*, 56 Neb. 746 (77 N. W. 57).

56. (1902.) Where a cause is properly revived in this court in the name of the administrator of a deceased defendant in error, no summons in error is required to be served upon that administrator. *Link v. Reeves*, 63 Neb. 424 (88 N. W. 670).

——— **Waiver of service of conditional order.**

57. (1898.) A failure to serve a conditional order of revivor goes only to the jurisdiction of the person, and is waived by a voluntary general appearance. *Missouri P. R. Co. v. Fox*, 56 Neb. 746 (77 N. W. 57).

58. (1900.) Issuance of summons or conditional order of revivor *held* waived where defendant filed objection to the substitution. *Schaberg v. McDonald*, 60 Neb. 493 (83 N. W. 737).

Revival in supreme court.

59. (1900.) The provisions of the code relative to abatement and revivor of actions are applicable to causes brought to the supreme court. *Schmitt & Bro. Co. v. Mahoney*, 60 Neb. 20 (82 N. W. 99).

60. (1905.) When a county judge dies pending a proceeding against him in the nature of an information in *quo warranto* for the alleged usurpation of functions and powers in excess of the jurisdiction conferred upon him by law, his successor in office cannot, upon motion of the relator, be substituted as respondent in his stead after the cause has proceeded to judgment in the district court, and while it is pending in the supreme court on petition in error. *State v. Gower*, 73 Neb. 304 (102 N. W. 674).

Revival in justice court.

61. (1885.) The provisions of the code for the revival of actions and judgments apply to actions before justices of the peace. *Miller v. Curry*, 17 Neb. 321 (22 N. W. 559).

ABDUCTION.

See *Kidnapping*.

ABETTOR.

Liability for assault, see *Assault and Battery*, §§ 6, 7.

Liability for crime, see *Criminal Law*, §§ 42-47.

To conversion, see *Trover and Conversion*, §§ 17, 18.

A ORTION.

Statutory provisions.

1. (1907.) The words, "at any stage of *utero-gestation*" as used in section 6 of the criminal code, defined, and held to mean "at any stage of pregnancy." *Edwards v. State*, 79 Neb. 251 (112 N. W. 611).

Accessories.

2. (1895.) One who induces a physician to procure an abortion on a woman and makes all preliminary arrangements is an accessory to the crime and liable therefore, even though he took no actual part in it.

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Dixon v. State, 46 Neb. 298 (64 N. W. 961).

Evidence.

Effect of testimony of witness differing from that given on preliminary hearing, see *Witnesses*, §§ 396-399.

3. (1895.) Where defendant in a prosecution for abortion testifies in chief that his acquaintance with the woman was not intimate, it may be shown by him, on cross-examination, that he had been criminally intimate with her. *Dixon v. State*, 46 Neb. 298 (64 N. W. 961).

4. (1907.) In a prosecution for homicide for procuring an abortion, a dying declaration of the deceased, in which she describes the defendant as having performed the operation, together with evidence of a confession made by defendant upon his arrest, and also the finding of instruments in his valise when he was arrested, sustains a conviction. *Edwards v. State*, 79 Neb. 251 (112 N. W. 611).

5. (1907.) In a prosecution for homicide in procuring an abortion under section 6 of the criminal code, dying declarations of the deceased may be admitted in evidence, under the same conditions and limitations as in prosecutions for murder or manslaughter. *Edwards v. State*, 79 Neb. 251 (112 N. W. 611).

ABSCONDING.

Grounds for attachment, see *Attachment*, §§ 26-30.

ABSENCE.

Ground for attachment, see *Attachment*, §§ 26-30.

Of counsel and ground for continuance, see *Continuance*, §§ 8, 9.

Affidavit for continuance for absence of witness, see *Continuance* §§ 34-49.

Continuance for absence of evidence, see *Continuance*, § 50.

ABSTRACTS OF TITLE.

Abstracter's bond.

1. (1896.) The bond required by section 65, chapter 73, Compiled Statutes, is designed as security for those who may be damaged through the negligence or inefficiency of abstracters. *Thomas v. Carson*, 46 Neb. 765 (65 N. W. 899).

2. (1898.) The statute relating to bonded abstracters, Compiled Statutes 1897, chapter 73, sections 65-69, was intended to extend the liability of abstracters beyond the limits fixed by the common law. *Gate City Abstract Co. v. Post*, 55 Neb. 742 (76 N. W. 471).

Liability of abstracter.

3. (1898.) An abstracter of title is liable to a person for whom he or it has prepared and furnished an abstract of title to property for the damages suffered by such person in consequence of an omission to notice in the abstract an incumbrance against, or matter which affects, the title. *Security Abstract Title Co. v. Longacre*, 56 Neb. 469 (76 N. W. 1073).

4. (1898.) One who purchases real estate on the faith of a certificate of title furnished to his vendor by a bonded abstracter may maintain an action for damages grounded on the failure of the abstracter to make a proper search and true certificate. *Gate City Abstract Co. v. Post*, 55 Neb. 742 (76 N. W. 471).

5. (1898.) It is no defense in an action by an administrator against an abstracter to recover damages accrued by reason of a defect in an abstract prepared by him, on the faith of which the plaintiff testator purchased land against which there was a decree of sale to, that the administrator allowed a sale of the property for a sum less than the amount of the lien foreclosed. *Security Abstract Title Co. v. Longacre*, 56 Neb. 469 (76 N. W. 1073).

6. (1896.) T., the plaintiff, purchased a real estate mortgage relying upon the certificate accompanying an abstract of title, in which it was recited that C., the abstracter, had carefully examined the records of the office of the county clerk, the clerk of the district court, and county treasurer; and that there were of record in said offices no liens upon the property described except as in said abstract mentioned. *Held*, That C. is not liable on his bond on account of the omission from said abstract of a prior mortgage upon the property conveyed, then of record in the office of the register of deeds. *Thomas v. Carson*, 46 Neb. 765 (65 N. W 899).

7. (1896.) In an action on an abstracter's bond for damages for knowingly omitting a

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prior mortgage, the fact that the omission of the prior mortgage was the result of a conspiracy between C., the abstracter, E., the mortgagor, and P., to whom the subsequent mortgage was given, *held*, not material, since the certificate relied upon by the plaintiff imparted notice of C.'s engagement and the extent of the liability assumed by him. *Thomas v. Carson*, 46 Neb. 765 (65 N. W. 899).

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Right of purchaser to rely on abstract.

8. (1895.) An intending purchaser or mortgagee of real estate relies and acts upon the recitals of an abstract made of the title to such real estate at his peril, and is charged with notice of the actual condition of the records. *Rice v. Winters*, 45 Neb. 517 (63 N. W. 830).

9. (1901.) Whether in matters pertaining to the title of real estate a person may rely on an abstract of title duly made and certified without making an examination of the public records in order to free himself from the charge of culpable neglect, when relief is asked in a court of equity on the ground of mistake, *quaere*. *Peters v. Huff*, 63 Neb. 99 (88 N. W. 179).

ABUSE OF PROCESS.

See *Process*, §§ 248-253.

ABUTTING OWNERS.

Liability for public improvements, see *Municipal Corporations*, VII, D.

Compensation for taking property for public use, see *Eminent Domain*, §§ 75-78; 117-126.

Consent of, to construct street railroad, see *Street Railroads*, §§ 1, 1a.

Duty to repair sidewalks, see *Municipal Corporations*, §§ 660-665.

Rights in street, see *Municipal Corporations*, IX, A.

Rights in public roads, see *Highway*, I, D.

ACCEPTANCE.

Of draft or order, see *Bills and Notes*, §§ 17-29.

Necessity for acceptance of offer, see *Contracts*, §§ 19-24.

Of chattel mortgage, see *Chattel Mortgages*, §§ 42, 43.

Of benefits as estoppel, see *Estoppel*, §§ 105-115.

Of security as waiver of mechanics' lien, see *Mechanics' Lien*, §§ 218-227.

Of service of process, see *Process*, §§ 83, 84.

Of chattels by buyer, see *Sales*, §§ 154-160.

Of offer of compromise, see *Compromise and Settlement*, §§ 3-4.

Of tender, see *Tender*, §§ 22-24.

Of offer to sell real property, see *Vendor and Purchaser*, §§ 3-14.

ACCESSION.

CROSS REFERENCE.

Intermingling of goods, see *Confusion of Goods*.

1. (1890.) The doctrine of accession of property applies where one has wilfully, as a trespasser, taken the property of another, and altered it in substance or form by his own labor. Where, however, the appropriation was through a mistake of fact, and labor has been expended upon it which converts it into something very different from the original article and greatly increases its value, and the value of the original article is insignificant in comparison with the new product, the title to the property in its converted form will pass to the person who has thus expended his labor, the original owner to recover the value of the original article. *Baker v. Meisch*, 29 Neb. 227 (45 N. W. 685).

ACCESSORIES.

To larceny, see *Larceny*, § 26.

To embezzlement, see *Embezzlement*, § 10.

Liability for crime, see *Criminal Law*, §§ 48, 49.

To murder, see *Homicide*, §§ 25-28.

Proof and variance, see *Indictment and Information*, §§ 130, 131.

Conviction of when charged as principal, see *Indictment and Information*, §§ 140-142.

ACCIDENT.

Accident insurance, see *Insurance*.

Cause of death, see *Death*.

Ground for new trial, see *New Trial*, II, C.

ACCOMPLICES.

See *Criminal Law*.

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ACCORD AND SATISFACTION.

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ANALYSIS.

Execution of accord and satisfaction, § 1.
——— Acceptance of conditional offer, §§ 2, 3.
Consideration, §§ 4-9.
Part payment of liquidated claim, §§ 10-22.
Mistake in adjustment of demand, § 23.
Satisfaction by one joint wrongdoer, § 24.
Effect of pleading settlement as a defense, § 25.
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Review, §§ 37, 38.

CROSS REFERENCES.

See, also, *Compromise and Settlement; Payment; Release.*

Payment of particular kinds of obligations, see specific topics.

Execution of accord and satisfaction.

1. (1902.) Where parties enter into an agreement whereby the one agrees to pay, and the other to accept, a certain sum in full satisfaction and discharge of a disputed claim urged by the latter against the former, such agreement constitutes a valid contract between the parties. *Masillon Engine & Thresher Co. v. Prouty*, 65 Neb. 496 (91 N. W. 384).

——— Acceptance of conditional offer.

2. (1896.) A being indebted to B in an uncertain amount sent to the C bank the amount which A conceded to be due, with instructions to pay the sum to B but only in full settlement, and on his signing a receipt to that effect. B, protesting that more was due, accepted the money and signed the receipt, but caused the bank to send back, accompanying the receipt, a letter declaring that he only received the money on account and not in settlement. *Held*, that by receiving the money he had accepted the condition on which it was tendered, and that his protest availed nothing. The terms of the receipt and the refusal of the bank to pay the money except upon his signing it were notice to him that the bank had no authority to pay it except on the condition that it should be received in full settlement. *Treat v. Price*, 47 Neb. 875 (66 N. W. 834).

3. (1896.) Where a certain sum of money is tendered by a debtor to a creditor on the condition that he accept it in full satisfaction of his demand, the sum due being in dispute, the debtor must either refuse the tender or accept it as made, subject to the condition. If he accepts it, he accepts the condition also, notwithstanding any protest he may make to the contrary. *Treat v. Price*, 47 Neb. 875 (66 N. W. 834).

Consideration.

4. (1896.) If a consideration is necessary to sustain a settlement made by the payment and receipt in full satisfaction of the sum which the debtor admits to be due, it is found in the fact that the creditor by accepting such sum thereby avoids the delay, expense, and labor of an accounting, and avoids threatened litigation. *Treat v. Price*, 47 Neb. 875 (66 N. W. 834).

5. (1896.) The fact that the sum paid in settlement of an unliquidated demand is only the amount that the debtor concedes to be due does not invalidate the settlement. *Treat v. Price*, 47 Neb. 875 (66 N. W. 834).

6. (1902.) If an agreement for satisfaction and discharge of a disputed claim contemplates the surrender of evidence of indebtedness, on the part of the creditor, on payment of the amount agreed upon, in an action on such contract, the creditor is entitled to recover on a showing of readiness and willingness to perform his part of such contract. *Massillon Engine & Thresher Co. v. Prouty*, 65 Neb. 496 (91 N. W. 384).

7. (1904.) That it is uncertain which of two parties, both of whom deny liability, is liable for a debt of a fixed and certain amount, is a sufficient consideration to support a settlement between one of such parties and the creditor, whereby the creditor accepts a part of the amount due in dis-

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charge of the debt. *Chicago, R. I. & P. R. Co. v. Brown*, 70 Neb. 696 (97 N. W. 1038).

8. (1904.) An accord, even between the plaintiff and a third party, as to the subject-matter of an action, and a satisfaction moving from such third party to the plaintiff, are available in bar of the action, if the defendant has authorized or ratified the settlement. *Chicago, R. I. & P. R. Co. v. Brown*, 70 Neb. 696 (97 N. W. 1038).

9. (1905.) An accord to be good must be in full satisfaction and must be executed. A promise to execute or to perform at a future time would not support the plea of accord and satisfaction. *Bankers Union of the World v. Favalora*, 73 Neb. 427 (102 N. W. 1013).

Part payment of liquidated claim.

10. (1888.) W., in 1883, entered the service of B. & B., operators of a mill, as a miller and mill hand, and remained in their service until 1886. During said time B. & B. moved their mill to another place, in consequence of which the same was not operated during a period of from one to two months, and during which time W. assisted the other workmen in making such removal; and also, by direction of one of the partners, worked for a time at getting out posts. During the whole term of his service, W., every Saturday night, with the knowledge of B. & B., entered his time on their account books kept in the mill, including the time when he was engaged in removing the mill and getting out posts. About the time he quit their service, W., toegther with one of the partners, examined the books and agreed upon a sum or balance due to W. In an action by W. against B & B. for said balance, *held*, that he could recover against the firm for the whole amount, although, as between the partners, but one of them (J. G. B.) should pay for the time W. was engaged in getting out posts. *Brewer v. Wright*, 25 Neb. 305 (41 N. W. 159).

11. (1894.) A compromise of honest differences, whereby a less sum that that claimed has been paid and accepted in full of plaintiff's claim, bars the right of plaintiff to insist upon a recovery of the amount originally claimed by him. *Slade v. Swedeburg Elevator Co.*, 39 Neb. 600 (58 N. W. 191).

12. (1896.) The word "liquidated," when used in respect to the rule that an accord and satisfaction discharges an unliquidated demand, means that the amount due has been ascertained and agreed upon by the parties or is fixed by operation of law. *Treat v. Price*, 47 Neb. 875 (66 N. W. 834).

13. (1896.) The rule that where a certain sum is due from one to another, the payment of a lesser sum is not a discharge as to the remainder, though the parties agree that the payment is made in discharge of the entire debt, does not apply to an unliquidated claim, or to a *bona fide* dispute as to the amount due. *Treat v. Price*, 47 Neb. 875 (66 N. W. 834).

14. (1896.) The fact that the sum paid in settlement of an unliquidated demand, is only the amount that the debtor concedes to be due, does not invalidate the settlement. *Treat v. Price*, 47 Neb. 875 (66 N. W. 834).

15. (1896.) A creditor who accepts money tendered by the debtor unconditionally does not by that act estop himself from maintaining an action to recover any further sum that may be due. *Beckman v. Birchard*, 48 Neb. 805 (67 N. W. 784).

16. (1896.) The rule that where a certain sum is due from one to another, the payment of a lesser sum is not a discharge as to the remainder, though the parties agree that the payment is made in discharge of the entire debt, does not apply to an unliquidated claim, or to a *bona fide* dispute as to the amount due. *Treat v. Price*, 47 Neb. 875 (66 N. W. 834).

17. (1897.) A payment of a part only of a liquidated past-due debt, in full settlement, is not good as an accord and satisfaction. *McIntosh v. Johnson*, 51 Neb. 33 (70 N. W. 522).

18. (1897.) To an action on a policy of insurance the defendant pleaded that after the loss it had made a settlement with the insured, whereby it agreed to pay a certain sum in sixty days, and that, relying on such settlement, it had accepted orders of the insured in favor of third persons for a portion of the amount, and had admitted indebtedness in garnishment proceedings which resulted in a judgment against it for another portion, the aggregate amount assumed being less than the amount of the settlement. It was not alleged that these obligations had been paid. *Held*, That this neither operated as an accord and satisfaction, nor did it estop the plaintiff from rescinding the agreement on the ground of fraud. *Omaha Fire Ins. Co. v. Thompson*, 50 Neb. 580 (70 N. W. 30).

19. (1901.) The payment of a lesser sum than is due on a liquidated and undisputed

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demand does not constitute an accord and satisfaction. *Sheibley v. Dixon County*, 61 Neb. 409 (85 N. W. 399).

20. (1902.) The acceptance by the creditor of a debtor's check for less than the whole amount of a past due liquidated account will not operate as an accord and satisfaction, unless such check is accompanied by the condition that such acceptance shall be a full satisfaction and payment of the whole debt. *Fremont Foundry & Machine Co. v. Norton* 3 Unof. 804 (92 N. W. 1058).

21. (1902.) Acceptance of a check for a less amount than the contract price of a steam boiler, without condition save a statement accompanying in the nature of a counterclaim, will not bar the creditor's right to recover the balance. *Fremont Foundry & Machine Co. v. Norton*, 3 Unof. 804 (92 N. W. 1058).

21*a*. (1908.) Where a debtor remits by mail a sum less than the amount due, but which he in good faith believes to be all that is due or claimed by the creditor, the fact that he marks the check upon the margin "in full to date," or in the account which he renders describes it as "Check to balance in full," does not constitute it a payment made in settlement of a disputed claim, and the acceptance of such check by the creditor is not an accord and satisfaction. *Canadian Fish Co. v McShane*, 80 Neb. 551 (114 N. W. 594).

22. (1902.) When there is a *bona fide* dispute between parties as to the amount due upon an account, and the debtor tenders a less amount than the claim in full settlement, which the creditor accepts, with knowledge that it was tendered as a full settlement, the dispute will be a sufficient consideration to uphold the settlement, and will bar a recovery upon the remainder of the claim. *Chicago, R. I. & P. R. Co. v. Buckstaff*, 65 Neb. 334 (91 N. W. 426).

Mistake in adjustment of demand.

23. (1901.) Where through mistake a county clerk is allowed to retain fees in excess of his salary, the adjustment of the account between him and the county is not a bar to an action by it to recover the excess. *Sheibley v. Dixon County*, 61 Neb. 409 (85 N. W. 399).

Satisfaction by one joint wrong-doer.

24. (1889.) The rule is, that where the damages are uncertain accord and satisfaction before judgment by one of several joint wrong-doers is satisfaction as to all; but the discharge of a party not shown to be a joint wrong-doer will not operate as a discharge of the other defendants. *Wardell v. McConnell*, 25 Neb. 558 (41 N. W. 548).

Effect of pleading settlement as a defense.

25. (1904.) A plea interposing the defense of accord and satisfaction made between plaintiff and a third person, is of itself a ratification of the settlement. *Chicago, R. I. & P. R. Co. v. Brown*, 70 Neb. 696 (97 N. W. 1038).

Pleading.

26. (1901.) 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. *Perdew v. Tillma*, 62 Neb. 865 (88 N. W. 123).

27. (1899.) Where the defense to an action is accord and satisfaction, the plea, to be good, must aver an acceptance by the creditor, in satisfaction of his debt, of the property which the debtor alleges he delivered to him in full payment of the claim sued for. *Van Housen v. Broehl*, 58 Neb. 348 (78 N. W. 624).

28 (1896.) To a petition upon a cause of action not controverted, where there is attempt to be pleaded an accord and satisfaction, the plea is bad when the performance necessary to constitute the satisfaction is not alleged. *Goble v. American Nat. Bank of Kansas City*, 46 Neb. 891 (65 N. W. 1063).

Evidence.

29. (1890.) Taken and construed in connection with the several allegations and admissions set out and contained in the pleadings, the following paper writing set out in defendant's answer, to wit: "Received from C. T. Treat $6,532.27, in full settlement of the within contract and in full of all demands, I hereby release him and also the Fremont, Elkhorn and Missouri Valley R. R. Co., and the Chicago and North-Western Ry. Co., from all claims, actions, to me against any or either of them by reason of any connection I may have had with them heretofore," *held*, to be a receipt and not a contract, and hence subject to explanation and contradiction. *Price v. Treat*, 29

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Neb. 536 (45 N. W. 790). [Overruled. *Treat v. Price*, 47 Neb. 875.]

30. (1899.) Evidence *held* to conclusively establish the defense of accord and satisfaction of a claim on a policy of life insurance. *Vernon v. Union Life Ins. Co.*, 58 Neb. 494 (78 N. W. 929).

31. (1900.) In an action for alleged conversion of money neither payment nor accord and satisfaction can be shown under a general denial. *Barker v. Wheeler*, 60 Neb. 470 (83 N. W. 678; 83 Am. St. Rep. 541). [Rehearing. 62 Neb. 150.]

32. (1901.) An agreement of accord and satisfaction, which has been performed, between a county board representing the county and those having claims against the county, may be proven by parol evidence in the absence of any written record or minutes of the county board of such agreement. *Green v. Lancaster County*, 61 Neb. 473 (85 N. W. 439).

33. (1903.) The burden of proof is upon the party admitting a settlement to establish the facts relied on in avoidance thereof. *Linton v. Cathers*, 70 Neb. 598 (97 N. W. 799).

34. (1905.) Evidence showing the leasing of farm lands and providing for the application of one-half of the owner's share of the grain raised on the payment of a note held by the tenant sustains a verdict of accord and satisfaction of the note. *Walsh v. Lunney*, 75 Neb. 337 (106 N. W. 447).

35. (1905.) Evidence in an action for services rendered as an attorney held to sustain a finding that a payment in money and notes "of all old matters up to date "was not intended to include the services sued for. *Cathers v. Linton*, 75 Neb. 420 (106 N. W. 468).

Instructions.

36. (1901.) Instructions bearing on a defense of accord and satisfaction, in an action against a county for commission for selling county bonds, *held* to be proper. *Green v. Lancaster County*, 61 Neb. 473 (85 N. W. 439).

Review.

37. (1894.) Where there is sufficient evidence to justify a finding that there has been an executed compromise of all differences between the parties to the action, the judgment of the trial court will not be reversed. *Slade v. Swedeburg*, 39 Neb. 600 (58 N. W. 191).

38. (1885.) In an action on an account to which the defense of settlement is pleaded, and the jury finds that a settlement has been had, a verdict for defendant will not be disturbed. *Johnson v. Ellis*, 17 Neb. 608 (24 N. W. 214).

ACCOUNT.

CROSS REFERENCES.

See, also, *Account, Action on; Account Stated; Payment; Release; Tender.*

As subject to attachment, see *Attachment*, § 65.

Interest on account, see *Interest.*

Accounting by charitable institution, see *Charities*, § 8.

For surplus on sale of chattels on foreclosure, see *Chattel Mortgages*, §§ 313-315.

By executors and administrators, see *Executors and Administrators*, §§ 310-348.

Accounting by partners, see *Partnership*, §§ 283-332.

Accounting to principal by agent, see *Principal and Agent*, §§ 53-63.

Accounting by joint tenant, see *Tenancy in Common*, §§ 27, 28.

By trustee, see *Trusts*, §§ 144-149.

Limitation of action on account, see *Limitation of Actions*, §§ 40-42.

Right to.

1. (1901.) Where one, in obedience to an order of a court of competent jurisdiction, has turned over to a receiver appointed by it assets in his hands belonging to an insolvent, he cannot be compelled in a suit in another court, between different parties, to account therefor. *Carter v. Dime Savings Bank*, 61 Neb. 587 (86 N. W. 29).

1*a*. (1899.) A mortgagor of buildings on leased land is entitled to an accounting by mortgagee for rents and profits applied to the obligations secured. *Edling v. Bradford*, 30 Neb. 593 (46 N. W. 836).

1*b*. (1908.) Where, in a suit to enforce a contract by a plaintiff who has obtained the same by means of sharp, unconscionable and fraudulent practices, the defendants claim as affirmative relief an accounting for rents received by the plaintiff, the maxim "he who seeks equity must do equity" may be applied, and there may be deducted from the amount otherwise due

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the defendant for such rents the amount of money expended by the plaintiff in their behalf and the reasonable value of his services performed for their benefit. *Blondel v. Bolander*, 80 Neb. 531 (114 N. W. 574).

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Jurisdiction.

2. (1876.) Under the code, discovery has ceased to be one of the objects sought in a court of equity. Jurisdiction, therefore, in cases of mutual accounts between the parties, cannot be maintained on that ground, and is restricted to cases which have their origin in intimate or confidential relations of the parties, and does not extend to ordinary cases of mutual accounts between creditor and debtor. *Lamaster v. Scofield*, 5 Neb. 148.

3. (1892.) A justice of the peace has no jurisdiction over an action for an accounting between persons of a fiduciary relation. *Carlson v. Beckman*, 35 Neb. 392 (53 N. W. 203).

Review.

4. (1895.) A judgment in an action for an accounting reversed and sent to a referee to make certain reports, which report is affirmed and decree entered. *Warren v. Raben*, 46 Neb. 115 (64 N. W. 355).

5. (1899.) In an action for an accounting, when the amount of recovery awarded by the verdict is too small, it may call for a reversal of the judgment. *Yager v. Exchange Nat. Bank*, 57 Neb. 310 (77 N. W. 768).

6. (1903.) Where, in an action for an accounting, questions of fact only are presented and the trial court's findings are supported by the evidence, the decree will not be disturbed. *Haslach v. Wolf*, 4 Unof. 306 (93 N. W. 996).

ACCOUNT, ACTION ON.

ANALYSIS.

Requisites of account, § 1.
Application of payments, § 2.
Interest, §§ 3, 4.
Limitation of action, § 5.
Pleading, §§ 6-13.
——— Exhibits, §§ 14-16.
——— Answer, § 17.
——— Amendments, § 18.
Issues on assigned account, §§ 19-21.
Parties, § 22.
Presumptions, § 23.
Burden of proof, § 24.
Admissibility of evidence, §§ 25-27.
Weight and sufficiency of evidence, §§ 28-34.
Instructions, §§ 35-38.
Verdict, §§ 39, 40.
Judgment, §§ 41, 42.
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CROSS-REFERENCES.

See, also, *Account; Account Stated.*

Limitation of action on, see *Limitation of Actions*, §§ 40-42.

Account as subject to attachment, see *Attachment*, § 65.

Admissibility in evidence of books of account, see *Evidence*, §§ 312-318.

Requisites of account.

Examination of books of county treasurer, see *Counties*, §§ 267, 268.

1. (1899.) An item in an open account which includes not only a disbursement of the debtor's money in the hands of the creditor, but also a disbursement of the creditor's private funds for the debtor's use and benefit, is a legitimate and valid charge. *Sibley v. Rice*, 58 Neb. 785 (79 N. W. 711).

Application of payments.

2. (1888.) In an action on an account, part of which was barred by the statute of limitations, it was the duty of the court to apply all the payments made before the bar of the statute, to the liquidation of that part of the debt which was barred; and if any part of the plaintiff's claim was not barred, to render judgment thereon for the amount

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due. *Ashby v. Washburn*, 23 Neb. 571 (37 N. W. 267).

Interest.

3. (1892.) Unsettled accounts do not draw interest until the expiration of six months from the date of the last item therein. *Staker v. Begole*, 34 Neb. 107 (51 N. W. 468); (1897) *Garneau v. Omaha Printing Co.*, 52 Neb. 383 (72 N. W. 360).

4. (1902.) Money due on an unsettled book account for goods sold and delivered, will only bear interest at the rate of seven per cent., beginning six months after the date of the last item. But where, in a suit on such account, evidence is introduced showing that at the time the goods were ordered it was agreed between the parties that the account should draw interest at ten per cent. after a certain date, and a jury allowed such interest, the verdict will not be set aside for that reason only. *Lindell v. Deere, Wells & Co.*, 66 Neb. 87 (92 N. W. 164).

Limitation of action.

5. (1901.) An action on account is barred in four years. *Mizer v. Emigh*, 63 Neb. 245 (88 N. W. 478).

Pleading.

6. (1881.) A petition which states that certain goods were sold and delivered by the plaintiffs to the defendants, sets forth a copy of the account, alleges that there are no credits thereon and no part thereof has been paid, and that there is due from the defendants to the plaintiffs a definite sum, is not subject to demurrer as not stating a cause of action. *Stubendorf v. Sonnenschein*, 11 Neb. 235 (9 N. W. 91).

7. (1883.) The action was on an account, a copy of which was attached to and made a part of the petition. The account was between the plaintiff in error and F. L. Stetson & Co. and showed a balance in favor of the latter. There being no assignment of the account by F. L. Stetson & Co. to David R. Stetson, the defendant in error, nor any allegation showing ownership in him, *held*, that the petition would not support the judgment in his favor. *Thompson v. Stetson*, 15 Neb. 112 (17 N. W. 368).

8. (1883.) The provision of section 129 of the code, which provides in effect that a plaintiff may set out in his petition a copy of the account or instrument sued on, with all credits, and allege that there is due thereon from the defendant to the plaintiff a specified sum, is permissive merely, and the facts may be averred in any proper form. *Collingwood v. Merchants Bank*, 15 Neb. 118 (17 N. W. 359); (1899) *Fletcher v. Co-operative Publishing Co.*, 58 Neb. 511 (78 N. W. 1070).

9. (1891.) A petition alleging that there is due from defendant to plaintiff, for laborer's wages for work and labor done and performed by the plaintiff for the defendant at her request, in the years 1886, 1887, and 1888, the sum of $466.55, no part of which has been paid, states a sufficient cause of action, although subject to a motion to make more definite and certain. *Small v. Poffenbarger*, 32 Neb. 234 (49 N. W. 337).

10. (1891.) Prayer in the petition should be for a definite sum and not "for the amount of said bill, with costs." *Flannagan v. Heath*, 31 Neb. 776 (48 N. W. 904).

11. (1896.) In an action founded upon an account it is sufficient for the plaintiff to give a copy of the account with all credits and indorsements thereon and to state that there is due to him on said account from the defendant a specified sum which he claims with interest. *McArthur v. Clarke Drug Co.*, 48 Neb. 899 (67 N. W. 861).

12. (1896.) Where the facts stated in an account and in the petition in a suit thereon, under section 129 of the code, show a liability of defendant to plaintiff, a demurrer on the ground that the petition does not state a cause of action cannot be sustained. *McArthur v. Clarke Drug Co.*, 48 Neb. 899 (67 N. W. 861).

13. (1899.) Where, in a suit on account, a copy of such account is attached to the petition; and where terms are used in the petition which clearly show the significance of the figures; and where the account, as shown by the copy, is admitted in the answer, an objection that the petition is defective will not avail. *Minzer v. Willman Mercantile Co.*, 59 Neb. 410 (81 N. W. 307).

——— **Exhibits.**

14. (1896.) A pleading in which the only cause of action is for "money due, as per account hereto attached, and marked Exhibit B," but which is accompanied by no exhibit or allegation showing the nature of the alleged indebtedness, fails to state a cause of action. *Home Fire Ins. Co. v. Arthur*, 48 Neb. 461 (67 N. W. 440).

15. (1896.) The failure to attach an exhibit, to which reference is made in a pleading, is not of itself ground for a de-

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murrer, provided the matters alleged in such pleadings amount to a cause of action or defense. *Home Fire Ins. Co. v. Arthur*, 48 Neb. 461 (67 N. W. 440, 441).

16. (1896.) In a suit on an account for goods sold and delivered, where the petition is framed under said section 129 and there is attached to such petition a copy of the account sued on, such account must be considered as a part of the petition when construing the allegations thereof. *McArthur v. Clarke Drug Co.*, 48 Neb. 899 (67 N. W. 861).

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——— **Answer.**

17. (1899.) In a suit on an account for services an answer containing a general denial and averring that the charges are unreasonable and unjust does not present inconsistent defenses. *Cate v. Hutchinson*, 58 Neb. 232 (78 N. W. 500).

——— **Amendments.**

18. (1898.) Where a bill of particulars filed before a justice of the peace and a petition filed on appeal to the district court declare on an account in favor of plaintiff as the original creditor, the petition cannot be amended during the trial in the district court, to show that plaintiff claims by assignment. *Western Cornice & Mfg. Works v. Meyer*, 55 Neb. 440 (76 N. W. 23).

Issues on assigned account.

19. (1892.) Where there is an absolute assignment of an account so that the assignor parts with his entire interest therein, as between the parties the amount of consideration therefor is not a material inquiry. *Barnett v. Ellis*, 34 Neb. 539 (52 N. W. 368).

20. (1892.) If there was a defense to the account when assigned, and the assignee is a mere donee, the same defense may be interposed as if the action was by the assignor. If the assignor claims as a bona fide purchaser and the rights of creditors are affected, the amount and kind of consideration become material. *Barnett v. Ellis*, 34 Neb. 539 (52 N. W. 368).

21. (1892. No defense having been shown against the account, error of the court in restricting the cross-examination of certain witnesses as to the consideration for the assignment *held* not prejudicial. *Barnett v. Ellis*, 34 Neb. 539 (52 N. W. 368).

Parties.

22. (1896.) In suing upon an account plaintiff should give his Christian name rather than his initial letters. *Small v. Sandall*, 48 Neb. 318 (67 N. W. 156).

Presumptions.

23. (1898.) Where the relation of debtor and creditor exists, an account rendered and not objected to within a reasonable time, is to be regarded as *prima facie* correct. *Missouri P. R. Co. v. Palmer*, 55 Neb. 559 (76 N. W. 169).

Burden of proof.

24. (1891.) When an action is brought upon an account for goods sold and delivered, the burden of proof is upon the defendant to prove payment. *Lamb v. Thompson*, 31 Neb. 448 (48 N. W. 58).

Admissibility of evidence.

25. (1895.) In an action to recover for lumber sold and delivered it was not error to suppress from depositions of plaintiff and an alleged assignor of the order from defendant as the evidence shows the lumber was billed by mistake the plaintiff may recover regardless of the assignment. *Bushnell v. Chamberlain*, 44 Neb. 751 (62 N. W. 1114).

26. (1898.) Rejection of a lease between landlord and tenant in an action on an account for labor performed on the premises by a third person prior to the time when the tenancy was to commence, not prejudicial error. *Herzke v. Blake*, 54 Neb. 465 (74 N. W. 959).

27. (1899.) In a suit for services rendered it is error to exclude testimony of a witness who has shown himself qualified and competent to testify to the character and value of the services. *Cate v. Hutchinson*, 58 Neb. 232 (78 N. W. 500).

Weight and sufficiency of evidence.

28. (1892.) Evidence in an action on an account held to sustain the finding and judgment rendered. *Fransen v. Eller*, 34 Neb. 664 (52 N. W. 284); (1887) *Goodman v. Pence*, 21 Neb. 459 (32 N. W. 219); (1889) *Watte v. Wickersham*, 27 Neb. 457 (43 N. W. 259); (1891) *Conklin v. Graham*, 32 Neb. 546 (49 N. W. 460); (1891) *Houston v. Pepperl*, 32 Neb. 828 (49 N. W. 803); (1895) *Gray v. Godfrey*, 43 Neb. 672 (62 N. W. 41); (1895) *Bushnell v. Chamberlain* 44 Neb. 751 (62 N. W. 1114); (1899) *Hubbard v. Seitz*, 58 Neb. 351 (78 N. W. 620).

29. (1884.) About the 1st of December, 1881, one D. sent a money order for $3 to S. & Co. of St. Louis. A receipt for $300 was returned. D. alleged that on the same

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day on which the money order was sent he forwarded to S. & Co. a draft for $300 which he had received in the spring of 1880. *Held*, That the evidence failed to show that the draft in question was sent. *Shapleigh & Co. v. Dutcher*, 15 Neb. 563 (20 N. W. 32).

30. (1888.) Evidence in an action on an account for services *held* to sustain a verdict for plaintiff. *Brewer v. Wright*, 25 Neb. 305 (41 N. W. 159).

31. (1893.) In an action on account for flour sold and delivered, a number of defenses were set up which the proof failed to sustain, the evidence sustains a verdict for the plaintiff. *Reed v. Davis Milling Co.*, 37 Neb. 391 (55 N. W. 1068).

32. (1893.) In an action upon an account for goods sold and delivered a question arose as to whom the credit was extended. The defendant insisted that the credit was extended to a firm; and the plaintiff that it was extended to a member of the firm individually. The evidence discussed in the opinion *held* sufficient to sustain a verdict in favor of the plaintiff. *Deranlieu v. Jandt*, 37 Neb. 532 (56 N. W. 299).

33. (1895.) In an action for a bill of lumber, evidence that defendant ordered the same through a third dealer who has gone out of business, and had previously made plaintiff, dealers in lumber, his agent and plaintiff filled the order shipping the material to defendant who credited such third dealer with the amount due against a note made by the suposed seller, supports a verdict for plaintiff. *Bushnell v. Chamberlain*, 44 Neb. 751 (62 N. W. 1114).

34. (1903.) In an action on account for livery hire and drayage a verdict for plaintiff for $127 is sustained by the evidence. *Matousheb v. Dutcher*, 67 Neb. 627 (93 N. W. 1049).

Instructions.

35. (1888.) In an action on an account for wages, instructions as to an alleged settlement and, as a basis of a counterclaim, certain damage to machinery, *held*, proper. *Brewer v. Wright*, 25 Neb. 305 (41 N. W. 159).

36. (1894.) Instructions as to payment by note, in an action on an account, *held* to properly present the issues in the case. *Howell Lumber Co. v. Campbell*, 38 Neb. 567 (57 N. W. 383).

37. (1896. In an action to recover an account for personal services, instructions examined, and *held* to propertly state the issues; and evidence examined and *held* to sustain the verdict. *O'Brien v. Parsons*, 49 Neb. 729 (68 N. W. 1020).

38. (1899.) Where, in an action on an account, payment is pleaded, it is proper to instruct the jury that they may consider evidence in regard to prior related transactions between the parties to aid them in determining whether the plea is sustained. *Ottens v. Fred Krug Brewing Co.*, 58 Neb. 331 (78 N. W. 622).

Verdict.

39. (1893.) The evidence being in writing and practically undisputed as to the amount due the plaintiff, a verdict for a sum greatly less cannot be sustained. *Porter v. Sherman County Banking Co.*, 36 Neb. 271; 40 Neb. 274 (54 N. W. 424; 58 N. W. 721).

40. (1897.) In an action for labor performed in the improvement of a highway upon request of one claiming to represent a principal having no legal existence, damages assessed in plaintiff's favor to the amount of $427.92 not excessive. *Learn v. Upstill*, 52 Neb. 271 (72 N. W. 213).

Judgment.

41. (1888.) In an action on an account the items of the account had nearly all been furnished more than four years prior to the commencement of the suit; the plaintiff's testimony was to the effect that the debt had been contracted under a special contract providing for the payments to be made for a part of the material within thirty days after it was furnished, the remainder when defendant's dwelling-house was completed; the demand for that which had been furnished on the thirty days' credit was barred by the statute of limitations at the time of the commencement of the action. *Held*, That, if this testimony was correct, the district court erred in rendering judgment for the whole claim. *Ashby v. Washburn*, 23 Neb. 571 (37 N. W. 267).

42. (1893.) Where the answer admits there is due the plaintiff a certain sum, much smaller than claimed in the petition, and all the averments of new matter in the answer are unequivocally denied by the reply, judgment must be for at least the amount admitted to be due. The allowance of costs being discretionary, none are taxed as incident to the above judgment, because of the confused condition of said issues as presented in the district court. *McConnell*

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v. First Nat. Bank of Lincoln, 38 Neb. 252 (56 N. W. 1013).

Review.

43. (1885.) In an action on an account, where a jury is waived and a trial had to the court, if the judgment is not supported by the evidence it will be set aside. *Hunt v. Mewis*, 17 Neb. 422 (23 N. W. 10).

44. (1885.) In an action on an account to which the defense of settlement is set up, and the jury believes a disputed account has been settled and renders a verdict accordingly, such verdict will not be disturbed. *Johnson v. Ellis*, 17 Neb. 608 (24 N. W. 214).

45. (1888.) Where, in an action on an account and set-off, the testimony is nearly equally balanced, the verdict will not be set aside as being against the weight of evidence. *Camp & Compton v. Sadler*, 22 Neb. 732 (36 N. W. 144).

ACCOUNT STATED.

ANALYSIS.

Nature and definition, §§ 1-4.
Express promise to pay, §§ 5, 6.
Fraud, mistake, and correction, §§ 7-9.
Conclusiveness, § 10.
Failure to object, §§ 11, 12.
Usury as a defense, § 13.
Interest on account, § 14.
Pleading, §§ 15, 16.
Evidence, §§ 17-21.
Instructions, §22.

CROSS REFERENCES.

See, also, *Account; Account, Action On.*

Nature and definition.

1. (1900.) An account stated is merely an agreement between persons who have had previous transactions, fixing the amount due as the result of an accounting. *Jorgensen v. Kingsley*, 60 Neb. 44 (82 N. W. 104).

2. (1896.) An account stated is an agreement between persons who have had previous dealings determining the amount due by reason of such transactions. *Hendrix v. Kirkpatrick*, 48 Neb. 670 (67 N. W. 759).

3. (1904.) In stating an account, as in making any other agreement, the minds of the parties must meet, and the transaction must be understood by the parties as a final adjustment of the respective demands between them, and the amount then due. *Haish v. Dillon*, 71 Neb. 290 (98 N. W. 818).

4. (1886.) An account stated is an agreement between persons who have had previous transactions, fixing the amount due in respect to such transactions. As distinguished from a mere admission or acknowledgment it is a new cause of action. It is not a contract upon a new consideration and does not create an estoppel, but establishes *prima facie* the accuracy of the items charged without further proof. *McKinister v. Hitchcock*, 19 Neb. 100 (26 N. W. 705).

Express promise to pay.

5. (1880.) An account stated is an agreement between the parties to an account that all the items thereof are correct. In an action to recover the balance due upon such account, it is not necessary for the plaintiff to prove an express promise by the defendant to pay the same. *Claire v. Claire*, 10 Neb. 54 (4 N. W. 411).

6. (1896.) The rendering of an account between parties and agreeing upon the amount due as appearing therefrom will support an action for the balance thereby shown without an express promise to pay. *Hendrix v. Kirkpatrick*, 48 Neb. 670 (67 N. W. 759).

Fraud, mistake, and correction.

7. (1883.) A settled account is *prima facie* correct, and it will not be disturbed except for fraud or mistake in the settlement. But if fraud or mistake is shown the settlement will to that extent be considered as having been made upon mistake or imposition, and the omissions and mistakes will be corrected. *Kennedy v. Goodman*, 14 Neb. 585 (16 N. W. 834).

8. (1886.) Proof that a banker concealed the real condition of a depositor's account and failed to credit him with certain

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deposits and charged him with items with which he was not chargeable, will vitiate an account stated; and the question of fraud is for the jury. *McKinister v. Hitchcock*, 19 Neb. 100 (26 N. W. 705).

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9. (1902.) Where a settlement is entered into between two parties in reliance on the accuracy and correctness of books of account kept by one of the parties, and it is subsequently discovered that the books have been erroneously kept, and that the party keeping them has not accounted for all the money which he has received, such a settlement will be set aside and a new accounting had although there may have been no intentional fraud practiced by the bookkeeper, and the failure to account may have been due to mistakes alone. *Leidigh v. Keever*, 2 Unof. 343 (96 N. W. 106).

Conclusiveness.

10. (1894.) An account stated does not bar a recovery for items not within the contemplation of the parties when the settlement was made. *Clarke v. Kelsey*, 41 Neb. 766 (60 N. W. 138).

Failure to object.

11. (1896.) The failure to object to an account rendered is admissible in evidence as tending to prove an acknowledgment of its correctness, its weight or sufficiency for such purpose being a question of fact for the consideration of the jury. *Hendrix v. Kirkpatrick*, 48 Neb. 670 (67 N. W. 759).

12. (1898.) Where the relation of debtor and creditor exists an account rendered and not objected to within a reasonable time will be regarded as *prima facie* correct. *Missouri P. R. Co. v. Palmer*, 55 Neb. 559 (76 N. W. 169).

Usury as defense.

13. (1900.) In an action on an account stated, the defense of usury is avoidable without alleging that the balance due was agreed to in consequence of fraud or mistake. *Jorgensen v. Krinksley*, 60 Neb. 44 (82 N. W. 104).

Interest on account.

14. (1887.) Where an action is prosecuted upon an account stated by a defendant, and in which he charges himself with interest on money in his hands at the rate of ten per cent. per annum, this will imply a promise to pay interest at that rate, if the proof shows the statement to have the effect of an account stated. *Savage v. Aiken*, 21 Neb. 605 (33 N. W. 241).

Pleading.

15. (1880.) When the petition states a cause of action on an account stated between the plaintiff and defendant, and further that for the balance due upon the stated account the defendant executed and delivered to the plaintiff a promissory note, but a single cause of action is set out. *Claire v. Claire*, 10 Neb. 54 (4 N. W. 411).

16. (1889.) In an action on an account stated, defendant after a general denial set up for a counter-claim that the amount claimed was for intoxicating liquors, sold by plaintiffs, who were wholesale dealers, without license. *Held*, That such answer amounted to a plea of confession and avoidance, and rendered proof of their account by plaintiff unnecessary. *Gillen v. Riley*, 27 Neb. 158 (42 N. W. 1054).

Evidence.

17. (1885.) The *prima facie* presumption is in favor of an account which has been stated by the parties, and as a general rule it will not be disturbed unless there was fraud or mistake in the settlement which is established by clear proof. *Keller v. Keller*, 18 Neb. 366 (25 N. W. 364).

18. (1885.) Where there has been a settlement of accounts between parties, and a promissory note given by one of them for the amount found due, the burden of proof is on the maker of the note to show that the settlement did not include debts owing to him from the adverse party. *Keller v. Keller*, 18 Neb. 366 (25 N. W. 364).

19. (1894.) Where plaintiff sued on an account stated, and defendant denied that an account had been stated, but admitted that there was due to plaintiff a less amount than claimed, the finding of the jury sustaining the defendant's averments will not be disturbed when, as in this case, they are sustained by competent evidence, no error of law having occurred on the trial. *Sterling Lumber Co. v. Stinson*, 41 Neb. 368 (59 N. W. 888).

20. (1903.) When suit is brought on an account stated, plaintiff can only recover by showing both the account and an unqualified assent of defendant to its correctness. *Cahill, Swift Mfg. Co. v. Morrisey Plumbing Co.*, 3 Unof. 865 (93 N. W. 204).

21. (1896.) Verdict for defendant, in error, who sued to recover upon an account stated, *held*, from an examination of the evidence, to be warranted thereby. *Hen-*

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driz v. Kirkpatrick, 48 Neb. 670 (67 N. W. 759).

Instructions.

22. (1893.) An instruction, "When a settlement is made, and a promissory note is given as a result of the settlement, the giving of the note is *prima facie* evidence that all matters in difference between the parties at the time of the settlement were settled in the settlement; and this presumption must prevail until a preponderance of the evidence shows that there were matters in the difference at the time between the parties that were not included in such settlement," *held*, applicable to the testimony and not erroneous. *Wagner v. Ladd*, 38 Neb. 161 (56 N. W. 891).

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ACCRETION.

See *Water and Watercourses*, §§ 61-69.

ACKNOWLEDGMENT.

ANALYSIS.

Nature and functions, §§ 1-3.
Statutory provisions, §§ 4, 5.
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Nature of officer's act, § 13.
Authority to take, §§ 14, 15.
——— Disqualification of officer to take, §§ 16-21.
Requisites and sufficiency, in general, §§ 22-25.
——— Necessity to show when officer's commission expires, §§ 26, 27.
——— Voluntary act, §§ 28-30.
——— Identity of grantor, § 31.
Conclusiveness, §§ 32, 33.
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Acknowledgment of officer not using seal, § 36.
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Parol evidence to show acknowledgment, § 42.
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Impeachment of acknowledgment, §§ 44, 45.
——— Weight and sufficiency of evidence, §§ 46-53.
Admissibility in evidence, §§ 54-57.

CROSS REFERENCES.

Of assignment for benefit of creditors, see *Assignment for Benefit of Creditors*, §§ 33-35.

Acknowledgment of illegitimate child, see *Bastards*, §§ 3-6.

Of chattel mortgage, see *Chattel Mortgages*, §§ 40, 41.

Of dedication of land to public, see *Dedication*, § 2.

Acknowledgment of debt as tolling running of statute of limitations, see *Limitations of Actions*, §§ 120-138.

Of conveyance of homestead, see *Homesteads*, §§ 114-116.

Necessity of seal to acknowledgment, see *Notaries*, §§ 7-9.

Nature and functions.

1. (1896.) The functions of an acknowledgment to a deed are twofold: (1) To authorize the deed to be given in evidence without further proof of its execution; (2) to entitle it to be recorded; and unless the real estate conveyed or incumbered the homestead of the grantors, an acknowledgment is not essential to the validity of the conveyance. *Horbach v. Tyrrell*, 48 Neb. 514 (67 N. W. 485; 37 L. R. A. 434).

2. (1878.) The functions of an acknowledgment are to authorize the deed to be given in evidence without further proof of its execution, and to entitle it to be recorded. The acknowledgment is no part of the deed itself. *Burbank v. Ellis*, 7 Neb. 156.

3. (1899.) The office of an acknowledgment is to furnish authentic evidence that the instrument acknowledged has been duly executed and is entitled to be recorded. *Fisk v. Osgood*, 58 Neb. 486 (78 N. W. 924).

Statutory provisions.

4. (1896.) Sections 5 and 41 of chapter 43, Revised Statutes of 1866, entitled "Real Estate," relating to acknowledgment of deeds, were enacted at the same time, as

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parts of the same statute, and being in some of their provisions so repugnant that both could not be executed, inasmuch as they conflicted, the last section—41—prevailed and the other was repealed. *Omaha Real Estate & Trust Co. v. Kragscow*, 47 Neb. 592 (66 N. W. 658).

5. (1896.) Section 5 of an act entitled "Of real estate and the alienation thereof by deed," and relating to acknowledgment of deeds, passed January 26, 1856 (Session Laws, p. 80, ch. 31), as amended February 13, 1864 (Session Laws, p. 58, ch. 12), was in direct and irreconcilable conflict with the provisions of section 44 of chapter 31 of the same statute, passed at the same time, and, consequently, operated its repeal by implication. *Omaha Real Estate & Trust Co. v. Kragscow*, 47 Neb. 592 (66 N. W. 658).

Necessity of acknowledgment.

6. (1876.) An instrument, purporting to be the deed of a *feme covert*, without her acknowledgment, is void as to her. It is no deed. *Roode v. State*, 5 Neb. 174 (25 Am. Rep. 475).

7. (1881.) A deed of real estate executed, witnessed, and delivered, is effectual to pass title, though not acknowledged or recorded. *Harrison v. McWhirter*, 12 Neb. 152 (10 N. W. 545).

7*a*. (1893.) A deed in other respects sufficient and regular is effective, as between the grantor and grantee therein, to pass complete title even though executed in a foreign state it is there acknowledged before only a purported justice of the peace as to whose genuine signature, official character and power, there is no accompanying certificate of a proper officer having a seal. *Connell v. Galligher*, 36 Neb. 749 (55 N. W. 229).

8. (1894.) The grantee in a deed of real estate acquires title thereto or execution and delivery to him of such deed, though the deed is neither acknowledged or recorded and be afterwards lost; and a sheriff's deed, made in pursuance of an execution sale against such grantee passes legal title to the purchaser. *Connell v. Galligher*, 39 Neb. 793 (58 N. W. 438); 46 Neb. 372 (64 N. W. 965).

9. (1896.) A conveyance of real estate, such real estate being the homestead of the grantors, is, unless acknowledged, absolutely void. *Horbach v. Tyrrell*, 48 Neb. 514 (67 N. W. 485; 37 L. R. A. 434); *Havemeyer v. Dahn*, 48 Neb. 536 (67 N. W. 489; 58 Am. St. Rep. 706; 33 L. R. A. 332).

10. (1897.) As between the parties an acknowledgment is not essential to the validity of a conveyance, unless the property be a homestead, or for the purpose of barring dower. *Linton v. Cooper*, 53 Neb. 400 (73 N. W. 731).

11. (1897.) A conveyance by a married woman of her separate property, not her homestead, is valid between the parties although not acknowledged. *Linton v. Cooper*, 53 Neb. 400 (73 N. W. 731).

12. (1904.) The acknowledgment by both husband and wife of an instrument whereby it is sought to convey or incumber a homestead, is an essential step in the due execution of such instrument. *Solt v. Anderson*, 71 Neb. 826 (99 N. W. 678).

Nature of officer's act.

13. (1896.) In this state the act of an officer in taking the acknowledgment of the grantor to a conveyance of real estate is a ministerial one. *Horbach v. Tyrrell*, 48 Neb. 514 (67 N. W. 485; 37 L. R. A. 434).

Authority to take.

14. (1872.) County clerks are authorized to take the acknowledgment of deeds conveying real estate. *Franklin v. Kelley*, 2 Neb. 79.

15. (1899.) A United States commissioner has no authority to take acknowledgments of real estate conveyances executed in Nebraska. *Interstate Saving & Loan Ass'n v. Strine*, 58 Neb. 133 (78 N. W. 377).

——— Disqualification of officer to take.

16. (1896.) What relationship or what interest possessed by an officer disqualifies him from taking an acknowledgment must be determined from the facts and circumstances of the case in which the question is presented, rather than by any general rule. *Horbach v. Tyrrell*, 48 Neb. 514 (67 N. W. 485; 37 L. R. A. 434).

17. (1896.) A notary public is not disqualified from taking an acknowledgment of a mortgage made to a corporation, merely because it is shown that he was at the time secretary and treasurer of the mortgagee, it not appearing that he was a stockholder in such corporation or otherwise beneficially interested in having the mortgage made. *Horbach v. Tyrrell*, 48 Neb. 514 (67 N. W. 485; 37 L. R. A. 434).

18. (1896.) An attorney, who is a no-

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tary public, is not disqualified from taking an acknowledgment of a mortgage made to his client, merely because he holds for collection the claim secured by such mortgage, it not appearing that the attorney had any beneficial interest in having the mortgage made, nor that the amount of his compensation in any manner depended upon such mortgage being made. *Havemeyer v. Dahn*, 48 Neb. 536 (67 N. W. 489; 58 Am. St. Rep. 706; 33 L. R. A. 332).

19. (1902.) A national bank, which held a note for collection, belonging to another bank, of which it was a large stockholder, took a renewal thereof and included in such renewal note an amount of its own unsecured debt against the maker and at the same time obtained a mortgage upon the homestead of the debtor, signed by himself and wife, and acknowledged before a notary who was an officer and stockholder of the national bank, to secure the payment of the said renewal note. *Held*, That the national bank and its stockholders had a direct pecuniary and beneficial interest in the transaction and hence the acknowledgment was void. *Wilson v. Griess*, 64 Neb. 792 (90 N. W. 866).

20. (1904.) A clerk in a private bank, who is the son-in-law of the owner of the bank, and who although designated as cashier has no pecuniary interest in the bank except salary, is not disqualified by interest, from taking an acknowledgment as notary to a mortgage given to the bank. *Banking House of A. Castetter v. Stewart*, 70 Neb. 815 (98 N. W. 34).

21. (1902.) On the grounds of public policy an officer is disqualified from taking the acknowledgment of a mortgage given to secure an indebtedness, evidenced by a note, of which he is the real owner. *Hedbloom v. Pierson*, 2 Unof. 799 (90 N. W. 218).

Requisites and sufficiency in general.

22. (1878.) A certificate of acknowledgment is sufficient if it shows that the requirements of the statute have been complied with in substance. *Burbank v. Ellis*, 7 Neb. 156.

23. (1882.) A certificate of acknowledgment, in which it was shown that the grantors appeared and acknowledged the instrument to be "their voluntary act," omitting the words "and deed," *held*, to be a substantial compliance with the statute. *Spitznagle v. Vanhessch*, 13 Neb. 338 (14 N. W. 417).

24. (1892.) A certificate of acknowledgment to a deed which states that "personally came Catherine Tozier, to me known to be the identical person whose name is affixed to the above instrument as grantor, and acknowledged the same to be her voluntary act and deed," which certificate is signed by an officer authorized to take acknowledgments, and attested with his official seal, is valid. *Gregory v. Kenyon*, 34 Neb. 640 (52 N. W. 685).

25. (1882.) The exact words of the statute are not indispensable to a good certificate of acknowledgment. It is sufficient if a full meaning intended to be conveyed is clearly expressed. *Spitznagle v. Vanhessch*, 13 Neb. 338 (14 N. W. 417).

——— Necessity to show when officer's commission expires.

26. (1907.) A certificate of a notary public not authenticated by a statement either engraved upon his seal or written under his official signature of the date of the expiration of his commission or term of office is void. *Sheridan County v. McKinney*, 79 Neb. 220 (112 N. W. 329). [Overruled, 79 Neb. 223.]

27. (1907.) Failure of a notary to write under his official signature the date when his commission expires does not render his certificate void. *Sheridan County v. McKinney*, 79 Neb. 223.

——— Voluntary act.

28. (1881.) Under a statute requiring a chattel mortgage to be acknowledged, on acknowledgment "This mortgage was acknowledged before me by P. this eighteenth day of September, 1875," is insufficient since it does not recite that the instrument was executed voluntarily. *Becker v. Anderson*, 11 Neb. 493 (9 N. W. 640).

29. (1882.) A certificate of acknowledgment to a deed, which showed simply that the grantors appeared before the officer taking it "and acknowledged that they executed the same," is invalid. The certificate must show that the execution of the deed is "voluntary" on the part of the grantor. *Spitznagle v. Vanhessch*, 13 Neb. 338 (14 N. W. 417).

30. (1891.) A certificate of acknowledgment to a real estate mortgage which does not show that the mortgagor voluntarily executed the instrument is invalid. *Keeling v. Hoyt*, 31 Neb. 453 (48 N. W. 66).

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——— Identity of grantor.

31. (1878.) A certificate which shows that "On the 29th day of September, 1862, personally appeared before me, David Dorrington, mayor of Falls City," etc. *held*, a sufficient statement of the identity of the grantor. *Burbank v. Ellis*, 7 Neb. 156.

Conclusiveness.

32. (1883.) The certificate of acknowledgment of a notary public, with his official seal attached, is sufficient proof of the due execution in another state of a deed of real estate lying in this state. *Galley v. Galley*, 14 Neb. 174 (15 N. W. 318).

33. (1899.) When the party executing a deed or mortgage knows that he is before an officer having authority to take acknowledgments, and intends to do whatever is necessary to make the instrument effective, the acknowledging officer's official certificate will be, in the absence of fraud, conclusive in favor of those who in good faith rely on it. *Council Bluffs Savings Bank v. Smith*, 59 Neb. 90 (80 N. W. 270; 80 Am. St. Rep. 669).

Defects and irregularities.

34. (1901.) A mere irregularity in taking an acknowledgment does not invalidate it. *Morris v. Linton*, 61 Neb. 537 (85 N. W. 565).

34*a*. (1896.) Where a deed to a homestead from a husband and wife to a third person, the grantee to reconvey to the wife, was actually acknowledged by a notary in Nuckolls county, but by mistake he certified that he was a notary of Webster county where the deed was recorded, the rights of a judgment creditor of the husband are not thereby affected, and the deed having been actually signed, acknowledged and delivered, conveys the legal title. *Roberts v. Robinson*, 49 Neb. 717 (68 N. W. 1035; 59 Am. St. Rep. 567).

35. (1883.) The objection to a deed, that the acknowledgment was taken before a county clerk, is cured by the second section of the act approved Feburary 24, 1883. *Davis v. Huston*, 15 Neb. 28 (16 N. W. 820).

Acknowledgment of officer not using seal.

36. (1880.) An acknowledgment by an officer not using an official seal must have attached a certificate of the clerk of a court of record, or other certifying officer, showing that the acknowledging officer was at the time such an officer; that he was acquainted with his handwriting, and believed the signature to be genuine; and that the acknowledgment and execution are according to law. *Irwin v. Welch*, 10 Neb. 479 (6 N. W. 753).

Foreign acknowledgment.

37. (1876.) A deed of conveyance of land must be executed and acknowledged as directed by the statutes of the state in which the land is situated; if the deed is executed in another state and the statute provides that it shall be executed and acknowledged according to the laws of such state, it must be so executed. *Roode v. State*, 5 Neb. 174 (25 Am. Rep. 475).

38. (1876.) Where a deed is executed and acknowledged in another state before a commissioner of deeds of this state, a notary public, or other officer using an official seal, the law presumes a compliance with the law of the place of execution, and no further authentication is necessary. But in all other cases there must be attached thereto a certificate of the clerk of a court of record or other certifying officer, under his official seal. *Hoadley v. Stephens*, 4 Neb. 431. [Overruled to commissioner. 47 Neb. 592-612.]

39. (1881.) When a deed is made in another state the certificate of acknowledgment of a notary public thereto, duly attested by his official seal, entitles such deed to be recorded without further authentication. *Green v. Gross*, 12 Neb. 117 (10 N. W. 459).

40. (1895.) The first paragraph of the syllabus in *Hoadley v. Stephens*, 4 Neb., 431, is overruled to the extent in which it relates to the acknowledgment of deeds in another state than this, before a commissioner of deeds for this state. *Omaha Real Estate & Trust Co. v. Kragscow*, 47 Neb. 592 (66 N. W. 658).

41. (1901.) Under section 6, chapter 73, Compiled Statutes, providing for the execution of deeds in a foreign country, the word "consul" means any person invested by the national government with the functions of consul-general, vice-consul-general, consul or vice-consul. *Morris v. Linton*, 61 Neb. 537 (85 N. W. 565).

Parol evidence to show acknowledgment.

42. (1904.) That an acknowledgement, by a husband and wife, of an instrument conveying a homestead, or placing an incumbrance thereon, should appear from the instrument itself in the form of a certificate of the officer before whom the acknowledg-

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ment was taken, and, in the absence of such certificate, it is not competent to show by parol that the instrument was in fact acknowledged. *Solt v. Anderson*, 71 Neb. 826 (99 N. W. 678).

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Changing description of property after acknowledgment.

43. (1885.) An officer taking the acknowledgment of a deed or mortgage cannot after the execution of the instrument change the description of the premises mortgaged or conveyed without the assent of the mortgagor or grantor, even to make the description conform to the contract as he understood it. *Pereau v. Frederick*, 17 Neb. 117 (22 N. W. 235).

Impeachment of acknowledgment.

44. (1885.) A certificate of acknowledgment of a deed or mortgage is *prima facie* correct, and cannot be impeached except for fraud, collusion, or imposition. *Pereau v. Frederick*, 17 Neb. 117 (22 N. W. 235).

45. (1901.) The certificate of an officer having authority to take the acknowledgment of a deed cannot be impeached except for fraud, collusion or imposition. *Boldt v. Becker*, 1 Unof. 75 (95 N. W. 509).

——Weight and sufficiency of evidence.

46. (1892.) A certificate of acknowledgment of a deed or mortgage, in proper form, can be impeached only by clear, convincing, and satisfactory proof that the certificate is false and fraudulent. *Phillips v. Bishop*, 35 Neb. 487 (53 N. W. 375); *Barker v. Avery*, 36 Neb. 599 (54 N. W. 989); (1901) *Davis v. Kelly*, 62 Neb. 642 (87 N. W. 347); (1904) *McGuire v. Wilson*, 5 Unof. 540 (99 N. W. 244).

47. (1892.) In an action to foreclose a mortgage on a homestead, the acknowledgment to the wife being in dispute, the evidence introduced is sufficient to sustain a finding in favor of the validity of the acknowledgment. *Phillips v. Bishop*, 35 Neb. 487 (53 N. W. 375).

48, 49. (1901.) The certificate of an officer having authority to take acknowledgments, cannot be impeached by showing merely that such officer's duty was irregularly performed. *Council Bluffs Savings Bank v. Smith*, 59 Neb. 90 (80 N. W. 270; 80 Am. St. Rep. 669); *Morris v. Linton*, 61 Neb. 537 (85 N. W. 565).

50. (1903.) Pleading and proof that acknowledgment of a mortgage upon a family homestead taken by an officer and stockholder in a loan company which was agent for the loaner, *held* not to invalidate the acknowledgment. *Gilbert v. Garber*, 69 Neb. 419 (95 N. W. 1030).

51. (1904.) The evidence to impeach successfully the certificate of acknowledgment of a notary public must be clear, convincing and satisfactory that the certificate is false and fraudulent. *Banking House of A. Castetter v. Stewart*, 70 Neb. 815 (98 N. W. 34).

52. (1904.) Evidence examined, and *held* insufficient to impeach the certificate of acknowledgment of the mortgage in controversy. *McGuire v. Wilson*, 5 Unof. 540 (99 N. W. 244).

53. (1907.) A certificate of acknowledgment of a deed or mortgage, in proper form, can be impeached only by clear, convincing, and satisfactory proof that the certificate is false and fraudulent; and whilst the making of a false certificate is a fraud upon the party against whom it is perpetrated, yet the mere evidence of a party purporting to have made the acknowledgment usually cannot overcome the officer's certificate, nor will such evidence, slightly corroborated, overcome it. *Sheridan County v. McKinney*, 79 Neb. 223.

Admissibility in evidence.

54. (1896.) Deed executed in another state before an officer having no seal, to be admissible in evidence, must be certified in the manner provided by statute. *O'Brien v. Gaslin*, 20 Neb. 347 (30 N. W. 274).

54*a*. (1876.) A deed executed and acknowledged by a justice of the peace, in Virginia, offered in evidence to prove that the grantors had parted with the legal title to certain real estate therein mentioned, is properly excluded, there being no evidence that it was executed and acknowledged according to the laws of Virginia. *Hoadley v. Stephens*, 4 Neb. 431.

55. (1889.) The date of an acknowledgment of a deed, when dated earlier than the deed itself, will prevail over that of the deed, and such acknowledgment is admissible in evidence over the objection of the discrepancy in the dates. *Buck v. Gage*, 27 Neb. 306 (43 N. W. 110).

56. (1894.) The record of a deed is not admissible in evidence unless the certificate of acknowledgment is substantially in ac-

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cordance with the statute. *Maxwell v. Higgins*, 38 Neb. 671 (57 N. W. 388).

57. (1897.) A valid acknowledgment permits a conveyance to be received in evidence without further proof, but one not acknowledged may be received in evidence if its execution and delivery be otherwise proved. *Linton v. Cooper*, 53 Neb. 400 (73 N. W. 731).

ACQUIESCENCE.

Of use of land as evidence of dedication, see *Dedication*, §§ 41, 42.

Estoppel by acquiescence, see *Estoppel*, §§ 95-123.

Of agent's act, see *Principal and Agent*, §§ 265-267.

Of deed, see *Deeds*, § 134.

ACTION.

ANALYSIS.

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Election of remedies, see *Election of Remedies*.

Liability for tort for prosecuting legal right, see *Torts*, § 4.

Compelling action, see *Mandamus*.

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I. GROUNDS AND CONDITIONS PRECEDENT.

Right of action.

1. (1898.) The denial to a litigant of a right expressly conferred upon him by statute, which right he has not waived and which he has demanded in due time and in a proper manner, is reversible error. *First Nat. Bank of Chadron v. Engelbrecht*, 57 Neb. 270 (77 N. W. 685). [Rehearing, 58 Neb. 639.]

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2. (1901.) The existence of a lawful claim implies, ordinarily, the right to enforce such claim by action. *Ayres v. Thurston County* 63 Neb. 96 (88 N. W. 178).

3. (1903.) A plaintiff must recover on the strength of his own case, not on the weakness of the defendant's case; it is his right, not the defendant's wrong-doing, that is the basis of recovery. *Home Fire Ins. Co. v. Barber*, 67 Neb. 644 (93 N. W. 1024; 108 Am. St. Rep. 716; 60 L. R. A. 927).

3*a*. (1903.) The guarantee in the bill of rights, that every person shall have a remedy, by due course of law, for every injury done him in his lands, goods, person or reputation, is not a guarantee of a remedy for every species of injury in respect of such matters, but only for such as result from an invasion or infringement of a legal right, or the failure to discharge a legal duty or obligation. *Goddard v. City of Lincoln*, 69 Neb. 594 (96 N. W. 273).

4. (1907.) All facts which, taken together, are necessary to fix the responsibility for an injury complained of constitute a cause of action. *Johnson v. American Smelting & Refining Co.*, 80 Neb. 256 (116 N. W. 517).

——Cause accruing in foreign state.

5. (1884.) A cause of action which accrued in Iowa under a statute of that state may be enforced in the court of this state. *Delahaye v. Heitkemper*, 16 Neb. 475 (20 N. W. 385).

Motive for bringing suit.

6. (1896.) Where one has a valid cause of action against another, his motive in instituting it is immaterial, and the fact that it is inspired by malice is no defense. *Jacobson v. Van Boening*, 48 Neb. 80 (66 N. W. 993; 58 Am. St. Rep. 684; 32 L. R. A. 229).

7. (1900.) The motive which induces a party to defend a suit brought against him will not be inquired into, but rather his legal rights in the premises. *State v. German Savings Bank*, 61 Neb. 87 (84 N. W. 599).

Abstract questions of law.

8, 9. (1902.) Abstract questions of law cannot be made the subject of litigation. There must be real parties, and a *res* in dispute that will become *res judicata* when the litigation is determined. *State, ex rel. Wright, v. Savage*, 64 Neb. 702 (91 N. W. 557); (1903) *State, ex rel. Kennedy, v. Broatch*, 68 Neb. 687 (94 N. W. 1016; 110 Am. St. Rep. 477).

Defenses.

10. (1896.) The mere dismissal of an action and a publication by plaintiff that he did wrong in bringing the suit cannot be shown in bar of a subsequent suit upon the same cause of action. *Oliver v. Lansing*, 48 Neb. 338 (67 N. W. 195).

Persons entitled to sue.

11. (1888.) The real party in interest under section 29 of the code is the person entitled to the avails of the suit. *Hoagland v. Van Etten*, 22 Neb. 681 (35 N. W. 869).

12. (1888.) A mere assignee having no interest in the result of suit, but who obtains an assignment upon a promise to pay the assignor the amount he may derive from the action, is not the real party in interest, and cannot maintain the action. *Hoagland v. Van Etten*, 22 Neb. 681 (35 N. W. 869).

13. (1892.) When an action is brought in the proper name of one of the plaintiffs followed by the words "& Co.," a demurrer on the ground of a defect of parties plaintiff no doubt will lie, but not for want of legal capacity to sue. *Brookmire & Co. v. Rosa*, 34 Neb. 227 (51 N. W. 840).

14. (1892.) An action brought in the name of James H. Brookmire & Co. is not subject to demurrer for want of legal capacity of the plaintiff to sue. One of them at least, on the face of the record has such capacity, and as the demurrer applies to all the members of the supposed firm it should be overruled. *Brookmire & Co. v. Rosa*, 34 Neb. 227 (51 N. W. 840).

15. (1902.) While a third party may maintain an action or a defense under an agreement between others made for his benefit, it must appear that there was an intent by the promisee or person with whom the agreement was made to secure some benefit to such third party, and, also, that there existed some privity between the promisee and the party to be benefited. *Frerking v. Thomas*, 64 Neb. 193 (89 N. W. 1095).

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16. (1904.) The courts will not entertain a controversy concerning the title or right of possession of real or personal property, except at the instance of some person or persons having or claiming a right thereto derived from, or recognized by, the laws of this state or of the United States. *Bonacum v. Murphy*, 71 Neb. 487 (104 N. W. 180).

17. (1904.) Whether a liability arising from a breach of a duty prescribed by statute or ordinance accrues for the benefit of an individual specially injured thereby, or whether such liability is exclusively of a public character, depends upon the nature of the duty enjoined and the benefits to be derived from its performance. *Frontier Steam Laundry Co. v. Connolly*, 72 Neb. 767 (101 N. W. 995; 68 L. R. A. 425).

Persons liable.

18. (1883.) As a general rule, no one can be subjected to a suit and judgment at law unless he, or one whose legal representative he is, has done some unlawful act, either of commission or omission, or failed in the discharge of some duty. *Jones v. Duras*, 14 Neb. 40 (14 N. W. 537).

II NATURE AND FORM.

Nature of habeas corpus proceedings, see *Habeas Corpus*, §§ 1-8.

Nature of action for conversion, see *Trover and Conversion*, § 20.

Nature and form of remedy in general.

19. (1881.) Under the code there is but one form of action, and that consists of a statement of the facts constituting the cause of action. *Rhea v. Reynolds*, 12 Neb. 128 (10 N. W. 549).

20. (1881.) The very object of the code is to abolish the technical rules that prevailed previous to its existence, by which the rights of parties were frequently sacrificed. *Rhea v. Reynolds*, 12 Neb. 128 (10 N. W. 549).

21. (1882.) Where a statute, which confers the means of acquiring a right, prescribes an adequate special mode of determining, by a judicial investigation, the fact upon which the right depends, that mode is exclusive. *Tierney v. Cornell*, 3 Neb. 267.

22. (1891.) When a statute gives a right that did not before exist, and it prescribes a remedy for its enforcement, that remedy is exclusive. *Blain v. Wilson*, 32 Neb. 302 (49 N. W. 224).

23. (1894.) It is not material by what name, or whether by any, an action under the code is designated. The pleader should state the facts, and if they constitute a cause of action, the law affords the remedy without reference to the form of the action. *Skinner v. Skinner*, 38 Neb. 756 (57 N. W. 534).

24. (1896.) Under our system of pleading the nature of an action is determined not alone by the prayer for relief, but also from the character of the facts alleged. *Stephens v. Harding*, 48 Neb. 659 (67 N. W. 746).

25. (1896.) The term "action" is applicable to almost any proceedings in court, by which one pursues that remedy which the law affords him. *Gibson v. Sidney*, 50 Neb. 12 (69 N. W. 314).

For the recovery of money only.

26. (1879.) An action for the recovery of money only is one where it is sought to reduce a debt to judgment upon which an execution may issue and be levied upon any property of the defendant not exempt. *Jones v. Null*, 9 Neb. 57 (1 N. W. 867).

Civil or criminal.

27. (1882). The test of determining whether a cause is civil or criminal in nature is to inquire whether the proceedings is by indictment or action; if by indictment it is criminal; if by action, civil. *Mitchell v. State*, 12 Neb. 538 (11 N. W. 848).

Legal or equitable.

28. (1876.) Although the distinction between acts at law and suits in equity has by statute been abolished, a purely legal claim must be determined by the rules of a law court, while claims of an equitable nature must be determined according to the rules of equity. *Wilcox v. Saunders*, 4 Neb. 569.

29. (1881.) All distinctions between actions at law and suits in equity are abolished except such as inhere in the nature of the case. *Rhea v. Reynolds*, 12 Neb. 128 (10 N. W. 549).

30. (1893.) It is not the object of the code to abolish existing remedies in cases where no provision is made therein for the prosecution of actions. Cases involving substantial rights, which are clearly outside the provision of the code, may be prosecuted in accordance with the practice previously recognized in courts of common law and equity. *Smithson v. Smithson*, 37 Neb. 535 (56 N. W. 300; 40 Am. St. Rep. 504).

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31. (1897.) One pleading facts sufficient to constitute a cause of action may have proper relief, whether the cause is denominated an action at law or a suit in equity. *Alter v. Bank of Stockham*, 53 Neb. 223 (73 N. W. 667).

32. (1898.) The distinction between law and equity is not abolished in this state. Section 2 of the code of civil procedure, however, provides that there shall be but one form of action, called a "civil action," in which rules of law or doctrines of equity may, under proper pleading and proper states of facts, either or both be enforced. *Hopkins v. Washington County*, 56 Neb. 596 (77 N. W. 53).

33. (1899.) The nature of an action, whether legal or equitable, is determinable from its main object as disclosed by the averments of the pleading and the relief sought. *Lett v. Hammond*, 59 Neb. 339 (80 N. W. 1042).

34. (1899.) An action for breach of an agreement to purchase land at judicial sale, manage and sell the same, and account to the judgment debtor for the surplus over certain liens, is a law action in which plaintiff is entitled to a jury, although it involves an accountng. *Lett v. Hammond*, 59 Neb. 339 (80 N. W. 1042).

35. (1902.) When the jurisdiction of the district court is invoked, either by an action at law, or a suit in equity, its judgment or decree can not be successfully assailed for want of jurisdiction, on the ground that an issue triable to a jury was tried to the court. *Bannard v. Duncan*, 65 Neb. 179 (90 N. W. 947).

36. (1903.) Applications for equitable relief on the probate side of the county court in matters within the exclusive jurisdiction of that court, are to be deemed suits in equity, and are governed by the general rules of pleading applicable to such suits in the district court. *Genau v. Abbott*, 68 Neb. 117 (93 N. W. 942).

37. (1904.) A single creditor cannot maintain an action at law against a part of the stockholders of an insolvent corporation for a violation of the provisions of section 136, chapter 16 of the Compiled Statutes. Such action should be brought in equity, by the receiver if there be one, or by a creditor on his own behalf, and for all the other creditors similarly situated, against all of the stockholders of the corporation. *Emanuel v. Barnard*, 71 Neb. 756 (99 N. W. 666).

Equitable relief in action at law.

38. (1894.) Where an action is begun in the district court by a petition seeking legal relief, there being an answer praying for equitable relief, and a trial by jury being waived, an objection to a judgment granting equitable relief upon the ground that the action was at law is not well founded. The district courts are courts of general legal and equitable jurisdiction, no forms of action are recognized, and the court has power to administer either legal or equitable relief according as the pleadings warrant and the proof requires. *Kirkwood v. First Nat. Bank of Hastings*, 40 Neb. 484 (58 N. W. 1016; 42 Am. St. Rep. 683; 24 L. R. A. 444).

39. (1904.) In an action at law, a prayer for equitable relief is of no avail, unless the petition states facts which will authorize the court to grant such relief. *Emanuel v. Barnard*, 71 Neb. 756 (99 N. W. 666).

Waiver of objection as to form.

40. (1887.) Where parties have made up the issues in a case without objection to the particular form of the action, they will be held to have waived any errors in that regard. *Downie v. Ladd*, 22 Neb. 531 (35 N. W. 388).

41. (1902.) A party defendant in an action to quiet title, cannot be heard to complain that the action was brought on the equiy side of he docket, when by his answer he has invoked the action of the court in his own behalf. *McBride v. Whitaker*, 65 Neb. 137 (90 N. W. 966).

III. JOINDER.

Of action for false imprisonment and malicious prosecution, see *False Imprisonment*, § 15.

Causes in malicious prosecution, see *Malicious Prosecution*, §§ 43, 44.

Of parties or causes in mandamus, see *Mandamus*, § 45.

Of claim for overcharge with action for damage for delay in shipment, see *Carriers*, § 84*a*.

Of contempt with action for malpractice against attorney, see *Contempt*, § 49.

Misjoinder of actions against trustee, see *Trusts*, §§ 187, 188.

Demurrer for misjoinder of causes of action, see *Pleading*, § 224.

Single and entire causes of action.

42. (1904.) A petition in an action on a bond by a gas company to indemnify a city

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from loss by reason of excavations in streets, to recover the amount of a judgment recovered against the city by personal injuries sustained by driving into such an excavation, setting out the bond and making the sureties parties defendant, states but a single cause of action and not demurrable for improper joinder of causes of action. *Omaha Gas Co. v. City of South Omaha*, 71 Neb. 115 (98 N. W. 437).

43. (1904.) A single transaction, causing a single item of damage, constitutes a single cause of action. *Otoe County v. Dorman*, 71 Neb. 408 (98 N. W. 1064).

Joinder of causes of action.

44. (1887.) A cause of action against a county treasurer for his act in seizing and selling plaintiff's house and improvements for taxes may be joined with one based on the act of his deputy in seizing and selling grain of plaintiff for taxes. *Freeman v. Webb*, 21 Neb. 160 (31 N. W. 656).

45. (1892.) An action of ejectment, under our practice, may be joined with one to recover rents and profits. *Fletcher v. Brown*, 35 Neb. 660 (53 N. W. 577).

46. (1895.) Causes of action for malicious prosecution, for damage to plaintiff by arresting occupants of her place of business, and for slander may be properly joined. *Dinges v. Riggs*, 43 Neb. 710 (62 N. W. 74).

47. (1901.) Proceedings to set aside a former decree relating to the same matter and a suit to foreclose the mortgage involved, may be prosecuted in one action. *Cushing v. Schoenemann*, 1 Unof. 482 (96 N. W. 346).

48. (1904.) An action to determine property rights not growing out of the marriage relation can not be joined with an action for divorce, and where such causes of action are joined in a petition a demurrer thereto for misjoinder of causes of action should be sustained. *Reed v. Reed*, 70 Neb. 775 (98 N. W. 76).

49. (1904.) Where a petition for a divorce contains a second cause of action for the settlement and adjudication of property rights, not growing out of the marriage relation, a demurrer thereto for misjoiner of causes of action should be sustained. *Reed v. Reed*, 70 Neb. 779 (98 N. W. 73).

——— **Contract and tort.**

50. (1901.) The joinder of a cause of action in a contract with a cause of action in tort is a misjoinder of causes of action. *Commercial Union Assurance Co. v. Shoemaker*, 63 Neb. 173 (88 N. W. 156).

——— **Legal and equitable.**

51. (1877.) Legal and equitable causes of action may be properly joined whenever they fall within section 87 of the civil code. *Turner v. Althaus*, 6 Neb. 54.

52. (1877.) Legal and equitable causes of action may be properly joined whenever they fall within section 87 of the code of civil procedure. This section of the statute is not in conflict with section 9, article VI of the constitution, by which district courts are given "both chancery and common law jurisdiction." *Turner v. Althaus*, 6 Neb. 54.

53. (1880.) Under certain statutory restrictions legal and equitable causes of action may be joined in the same suit, but they must be existing, not merely prospective, causes of action. *Weinland v. Cochran*, 9 Neb. 480 (4 N. W. 67).

54. (1888.) Where a cause of action in equity is set forth in a petition—as to remove a cloud from the title of real estate—and in the second count facts to show the plaintiff's right to an action of ejectment are pleaded, both being for the same tract of land, a demurrer on the ground of misjoinder will not lie. *Keens v. Gaslin*, 24 Neb. 310 (38 N. W. 797).

——— **Parties and interests involved.**

55. (1899.) Two causes of action on two separate contracts cannot be united in one petition unless each cause of action affects all parties made defendants. *Barry v. Wachosky*, 57 Neb. 534 (77 N. W. 1080).

56. (1902.) The mere fact that two distinct and several contracts with two different persons are for the performance of the same service, will not authorize causes of action against such persons upon their several contracts to be joined in one action. *Stewart v. Rosengren*, 66 Neb. 445 (92 N. W. 586).

57. (1906.) In an action by several plaintiffs against a bank for an accounting on certificates of deposit, where it is evident from the petition that assignments of fractional parts of the separate demands have been made by each plaintiff to his coplaintiffs, and that the interest of each in the total sum is equal to the amount of the certificate originally held by him, and that the purpose of such assignments was to enable them to join in a single action, a demurrer for misjoinder of causes of action

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was properly sustained. *Strawn v. First Nat. Bank of Humboldt*, 77 Neb. 414 (109 N. W. 384).

——Manner of raising objections.

58. (1898.) A demurrer does not reach the commingling of two causes of action in a single count, where they are of such character that they may be joined. *Ponca Mill Co. v. Mikesell*, 55 Neb. 98 (75 N. W. 46).

59. (1902.) An answer setting up facts which go to show a misjoinder of causes of action, but are also material to the merits, no specific objection being made to the misjoinder, will not be taken to raise such defeat. *Leavitt v. Mercer Co.*, 64 Neb. 31 (89 N. W. 426).

60. (1904.) After a demurrer for a misjoinder of causes of action has been sustained, and the plaintiff files a new petition, and again inserts therein allegations relating to the second cause of action, a motion to strike such allegations should be sustained, and the objectionable matter thus eliminated from the pleading. *Reed v. Reed*, 70 Neb. 779 (98 N. W. 73).

——Election or separation.

61. (1890.) When there is a misjoinder of causes of action, the plaintiff should be required either to elect upon which cause of action he will proceed, or file a separate petition for each cause of action. When such petitions are filed, an action should be docketed for each petition. *Alexander v. Thacher*, 30 Neb. 614 (46 N. W. 825).

61*a*. (1895.) Error cannot be predicated on the refusal of a district court to compel the plaintiff to elect on which one of two causes of action set out in his petition he will proceed to trial when the two causes of action are identical. The remedy of a defendant in such a case is to move the court to strike out one of the causes of action as surplusage. *Pollock v. Whipple*, 45 Neb. 844 (64 N. W. 210).

62. (1908.) In case of misjoinder of two causes of action in the same petition, the plaintiff may dismiss one of such causes of action and proceed to trial upon the other. *McCague Savings Bank v. Croft*, 80 Neb. 702 (115 N. W. 315).

——Waiver of objection.

63. (1877.) If there be a misjoinder of distinct causes of action, if the defendant do not object, it is not within the province of the court to do so. *Turner v. Althaus*, 6 Neb. 54.

64. (1893.) Where there is a misjoinder of causes of action which plainly appears on the face of the petition, the adverse party should demur for that cause. If he fails to do so he will waive the defect. *Porter v. Sherman County Banking Co.*, 36 Neb. 271 (54 N. W. 424).

65. (1902.) An objection of misjoinder of causes of action and of parties defendant, must be taken before going to trial or the objection will be deemed waived. *Curran v. Hageman*, 3 Unof. 779 (92 N. W. 1003).

Compelling joinder of causes.

66. (1879.) There is no rule that requires a party to join in one suit several and distinct causes of action, although he may, under certain circumstances, be required to consolidate them. *Beck v. Devereaux*, 9 Neb. 109 (2 N. W. 365).

Splitting causes of action.

67. (1879.) The rule is well settled that an indivisible demand cannot, at the will of the plaintiff, be separated, and collected by several actions. *Beck v. Devereaux*, 9 Neb. 190 (2 N. W. 365).

68. (1900.) A plaintiff cannot divide his demand and prosecute by different actions. But this rule does not require him to consolidate independent actions in a single suit. *Richardson v. Opelt*, 60 Neb. 180 (82 N. W. 377).

IV. COMMENCEMENT.

See, also, *Limitation of Actions*, §§ 101-107.

When action of attachment is commenced, see *Attachment*, §§ 243-245.

What constitutes commencement.

69. (1891.) An action is begun by the filing of a petition and issuing summons. *Bauer v. Deane*, 33 Neb. 487 (50 N. W. 431); *Coffman v. Brandhoeffer*, 33 Neb. 279 (50 N. W. 6).

70. (1891.) An action is commenced so as to authorize issue of attachment, when the petition is filed in proper court and summons issued with *bona fide* intent to serve it. *Coffman v. Brandhoeffer*, 33 Neb. 279 (50 N. W. 6).

71. (1893.) An action is begun in this state by filing a petition in the district court upon which summons is issued which is served on the defendant. *Burlingim v. Cooper*, 36 Neb. 73 (53 N. W. 1025).

72. (1903.) An action is not deemed commenced, within the meaning of the statute of limitations, at the date of the is-

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suance of a summons, unless such summons is served on the defendant. *Reliance Trust Co. v. Atherton*, 67 Neb. 305 (96 N. W. 218).

73. (1907.) A cause is not pending until pleaded. *Hulen v. Chilcoat*, 79 Neb. 595 (113 N. W. 122).

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Accrual of cause of action.

74. (1879.) It is only in the exceptional cases of fraud on the part of the debtor, mentioned in section 237 of the code of civil procedure, that an action can be properly commenced on a claim before it is due. *Green v. Raymond*, 9 Neb. 295 (2 N. W. 881).

75. (1902.) When an action is brought on the same day that the cause of action arose, it is proper to show by competent evidence that the cause of action was complete before the action was begun. *Bank of Miller v. Richmon*, 64 Neb. 111 (89 N. W. 627).

ACT OF GOD.

As relieving common carrier from liability for injury to live stock, see *Carriers*, §§ 139-144.

As defense for delay in transportation of goods, see *Carriers*, §§ 82, 83.

ADEQUATE REMEDY AT LAW.

As bar to relief by injunction, see *Injunction*, §§ 5-19.

Effect on relief in equity, see *Equity*, §§ 39-46.

As relief against judgment, see *Judgments*, X, A.

ADJOINING LANDOWNERS.

CROSS REFERENCES.

See also, *Boundaries; Fences; Party Walls.*

Boundary rights, see *Boundaries.*

Establishment and effect of boundary line, see *Boundaries*, §§ 15-23.

Damage to, as element of compensation for taking property for public purposes, see *Eminent Domain*, §§ 75-78.

Damages recoverable for constructing public improvement, see *Eminent Domain*, §§ 86-126.

Notice to, of street improvement, see *Municipal Corporations*, §§ 353-357.

Rights and liabilities as to sidewalks, see *Municipal Corporations*, §§ 660-665.

Right and liability as to obstructions in streets, see *Municipal Corporations*, §§ 725-729, 731, 739, 740.

Liability for fall of building, see *Negligence*, §§ 26, 27.

Measure of damage to, for construction of railroad, see *Railroads*, §§ 131-146.

Damages from overflow from construction of railroad, see *Railroads*, §§ 73-84.

Duty of railroad to build fence, see *Railroads*, §§ 186-199.

Enjoining leaving gate on railroad fence open, see *Railroads*, § 101.

Liability of railroad for injury to animals, see *Railroads*, VIII, G.

Right to irrigation, see *Water and Watercourses*, VIII, B.

Rights and duties as to waters and streams, see *Water and Watercourses*, §§ 1-74, 146-152.

1. (1895.) A proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor. *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb. 526 (62 N. W. 859).

2. (1896.) The owner of real property in exercising his own tastes and inclinations as to the character of a building he will erect thereon, has no right to build and maintain a structure which, by reason of defects or inherent weakness either in material or construction, is liable to fall and do injury to an adjoining owner or the public. *Kitchen v. Carter*, 47 Neb. 776 (66 N. W. 855).

3. (1896.) If a building falls because of defects in material and workmanship reasonably within the knowledge of the owner thereof, and thereby inflicts injury upon adjoining owners or their property or any person lawfully in its vicinity, the owner is liable for the damages ensuing therefrom. *Kitchen v. Carter*, 47 Neb. 776 (66 N. W. 855).

4. (1896.) Adjoining lot owners may, by grant, impose mutual conditions upon the land owned by each, the mutuality of the covenants being a sufficient consideration for the respective grants; and such mutual covenants should be construed as the grant of reciprocal easements which may be enforced in equity when the remedy at law is insufficient. *Barr v. Lamaster*, 48 Neb. 114 (66 N. W. 1110; 32 L. R. A. 451).

5. (1905.) One who consents to the uncovering of a portion of the roof upon a

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building belonging to him, to allow one of its walls which is a party wall to be built higher, cannot recover from his co-owner for damages from leakage, unless he proves that the injury resulted from the negligence of the defendant. *Riiff v. Garvey*, 74 N. W. 522 (104 N. W. 1143).

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ADJOURNMENT.

See *Continuances*.

Of term of court, see *Courts*, §§ 39-45.

In justice court, see *Justices of Peace*, §§ 129-137.

ADJUTANT GENERAL.

See *States*, § 112.

ADMINISTRATOR.

See *Executors and Administrators*.

ADMISSIONS.

Admissibility in evidence in civil actions, see *Evidence*, §§ 213-259.

In pleading, see *Pleading*, §§ 140-152, 205-211, 259-266.

Admissibility in criminal prosecutions, see *Criminal Law*, §§ 295-299.

By demurrer, see *Pleading*, §§ 259-266.

ADOPTION.

ANALYSIS.

Statutory provisions, § 1.
Right to adopt child, §§ 2, 3.
Effect of decree of adoption, §§ 4, 5.
Modifying or vacating decree, § 6.
Inheritance by adopted child, §§ 7-9.
Enforcement of contract of adoption, §§ 10-14.

CROSS REFERENCES.

Of common law, see *Common Law*, §§ 1-4.

Adoption of illegitimate child, see *Bastards*, §§ 9, 10.

Children, in general, see *Parent and Child*.

Of constitution and amendments, see *Constitutional Law*, §§ 1-20.

Oral agreement to bequeath to adopted child, see *Wills*, §§ 24, 34-37.

Statutory provisions.

1. (1902.) The statute prescribing the procedure in the adoption of children should be liberally construed, to the end that the proceedings had thereunder, and the decree of adoption made pursuant thereto, may be held valid; substantial compliance with the requirements of the statute being sufficient to sustain the validity of the decree of the probate court. *Ferguson v. Herr*, 64 Neb. 659 (94 N. W. 542).

Right to adopt child.

2. (1907.) Our statute of adoption (code, sec. 797) is based primarily on the consent of the parents, if living and accessible, and an adoption without such consent must come clearly within the exceptions contained in the statute. *Tiffany v. Wright*, 79 Neb. 10 (112 N. W. 311).

3. (1907.) To warrant an adoption under the sixth subdivision of section 79 of the code against the objection of a living parent of the child, it must be made clearly to appear that such parent had abandoned the child for a period of at least six months, and that the party consenting to such adoption has had the lawful custody during such period to the exclusion of all other control. *Tiffany v. Wright*, 79 Neb. 10 (112 N. W. 311).

Effect of decree of adoption.

4. (1902.) In rendering the decree provided for in chapter 2, title 25, Revised Statutes, 1866, governing adoption of children, the probate judge acts judicially, and such decree has all the force and effect of a judgment, being subject to collateral attack only for want of jurisdiction. *Ferguson v. Herr*, 64 Neb. 659 (94 N. W. 542).

5. (1902.) The decree rendered by the probate court under the provisions of chapter 2, title 25, Revised Statutes, 1866, fixes the status of the child and its adoptive parents; and when such decree, by failure to prosecute error therefrom, is allowed to become final, it will, if in substantial conformity with the provisions and requirements of the statute, be conclusive upon all persons interested in the proceedings. *Ferguson v. Herr*, 64 Neb. 659 (94 N. W. 542).

Modifying or vacating decree.

6. (1902.) Under the provisions of section 580, chapter 1, title 16, Revised Stat-

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tutes, 1866, a decree of adoption rendered by the probate court under chapter 2, title 25, Revised Statutes, 1866, could be reversed, vacated or modified by the district court at the instance of anyone having an appealable interest therein. *Ferguson v. Herr*, 64 Neb. 659 (94 N. W. 542).

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Inheritance by adopted child.

7. (1902.) The decree of a probate court rendered under chapter 2, title 25, Revised Statutes, 1866, conferring upon a child full rights of inheritance from his adoptive parents, will not, in a collateral proceedings, many years after its rendition, and after the death of the adoptive parents, be held void for want of jurisdiction on the ground that the statement of the adoptive parents filed in the adoption proceedings fails in specific language to bestow upon the adopted child equal rights, privileges and immunities of children born in lawful wedlock, where a fair and reasonable interpretation of such statement is consistent with the intention so to bestow such rights, and it is manifest that the probate judge so understood and construed the statement of the adoptive parents, and the parents acquiesced in the decree throughout their lives. *Ferguson v. Herr*, 64 Neb. 659 (94 N. W. 542).

8. (1902.) A child adopted under General Statutes 1873, chapter 57, title 25, section 797, would not inherit from the adopting parents in the absence of an affirmative statement to that effect in the statement made and filed by them with the county judge, or the use of language which clearly indicated the intention of the foster parents that the child should inherit. *Ferguson v. Herr*, 64 Neb. 649 (90 N. W. 625). [Modified on rehearing, 64 Neb. 659.]

9. (1898.) Under articles of adoption providing that if the infant should remain with her foster parents until her majority she should receive $500, and bestowing on her "equal rights and privileges of children born in lawful wedlock," *held* that on the death of the foster parents intestate, before the child reached her majority, she was entitled to inherit as if their own, the first provision not being exclusive. *Martin v. Long*, 53 Neb. 694 (74 N. W. 43).

Enforcement of contract of adoption.

10. (1894.) An oral agreement of persons adopting a child that any property they might own at their death should be given to the child, it not being stated whether by deed or will, possesses the elements of certainty sufficient to be specifically enforced, where the proof is clear and satisfactory. *Kofka v. Rosicky*, 41 Neb. 328 (59 N. W. 788; 43 Am. St. Rep. 685; 25 L. R. A. 207).

11. (1894.) An adopted child who has performed her part of the contract may enforce by specific performance her rights under an oral agreement of her adopted parents to will her their property. *Kofka v. Rosicky*, 41 Neb. 328 (59 N. W. 788; 43 Am. St. Rep. 685; 25 L. R. A. 207).

12. (1906.) Specific performance of a contract of adoption will be decreed. *Pemberton v. Heirs of Pemberton*, 76 Neb. 669 (107 N. W. 996).

13. (1906.) A written contract of adoption which contains a condition binding the foster parents to make the child "an equal heir to his part of our estate the same as one of our children" may upon a proper showing be specifically enforced against the estate of the deceased foster parent, who has died intestate. *Pemberton v. Heirs of Pemberton*, 76 Neb. 669 (107 N. W. 996).

14. (1906.) A contract in writing for the adoption of a child, although ineffective as a legal, statutory adoption, may upon a proper showing be enforced in equity. *Pemberton v. Heirs of Pemberton*, 76 Neb. 669 (107 N. W. 996).

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ADULTERY.

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ANALYSIS.

Nature and elements of offense, §§ 1-3.
Statutory provisions, § 4.
Indictment, §§ 5-7.
Evidence, §§ 8-10.
——— Presumptions, §§ 11-13.
New trial, §§ 14, 15.

CROSS REFERENCES.

See, also, *Fornication; Seduction.*

Sufficiency of proof of, see *Divorce*, §§ 82, 83.

Criminal conversation, see *Husband and Wife*, X.

Between parent and child, see *Incest.*

Validity of marriage, see *Marriage.*

Competency of spouse to testify against the other, see *Witnesses*, § 155.

Nature and elements of offense.

1. (1899.) By section 208 of the criminal code, it is unlawful for persons not joined together in wedlock to live in a state of adultery, either secretly or openly, whether they profess to live in the marital state or not. *Sweenie v. State*, 59 Neb. 269 (80 N. W. 815).

2. (1900.) Under section 208 of the criminal code a single act of sexual intercourse by a married man with an unmarried woman constitutes the crime of adultery. *State v. Byrum*, 60 Neb. 384 (83 N. W. 207).

3. (1893.) A single act of adultery at a time outside of the period of adulterous cohabitation thus proved is a separate offense, for which the defendant may be punished, although committed within the period of adulterous cohabitation laid in the information. *Bailey v. State*, 36 Neb. 808 (55 N. W. 241).

Statutory provisions.

4. (1900.) The act of 1875 (Session Laws, p. 2) amendatory of certain sections of the criminal code including section 208, relating to adultery, is invalid, since it contained no provision for the repeal of the sections amended. *State v. Byrum*, 60 Neb. 384 (83 N. W. 207).

Indictment.

5. (1885.) An indictment under section 208 of the criminal code, against a husband for deserting his wife and living and cohabiting with another woman in a state of adultery must allege the offense substantially as in the statute. *Lord v. State*, 17 Neb. 526 (23 N. W. 507).

6. (1877.) The statutory offense of wantonly cohabiting with a woman in a state of adultery, is one continued offense, and may be properly charged as having committed between certain points of time alleged will be sufficient to establish the commission of the offense. *State v. Way*, 5 Neb. 283.

7. (1877.) If part of the time charged in a prosecution for adultery is prior to the passage of the act constituting and defining the offense, such prior time may be treated as surplusage, as time is not of the essence of the offense, and the indictment may be held good as charging the offense from the time of the passage of the law, until the last point of time alleged in the indictment. *State v. Way*, 5 Neb. 283.

Evidence.

8. (1877.) Upon a charge of adultery in an indictment, evidence of improper familiarities between the parties, both anterior and subsequent to the time the offense is charged, may be received as corroborating proof, after evidence has been offered tending to prove the offense charged. *State v. Way*, 5 Neb. 283.

9. (1897.) Adultery may, like any other fact, be established by circumstantial evidence. *Smith v. Meyers*, 52 Neb. 70 (71 N. W. 1006).

10. (1893.) Where a defendant is charged with adulterous cohabitation while living with his wife, proof of such adulterous cohabitation during any portion of the period laid in the information is sufficient to sustain the charge. *Bailey v. State*, 36 Neb. 808 (55 N. W. 241).

——— Presumptions.

11. (1899.) No presumption of law, either conclusive or rebuttable, arises from

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the fact that an unmarried man and a married woman had sexual intercourse on one occasion while dwelling together in the acknowledged relation of master and servant. *Sweenie v. State*, 59 Neb. 269 (80 N. W. 815).

12. (1899.) A jury might be authorized in a proper case, to presume the existence of an adulterous relationship from sporadic acts of sexual commerce. *Sweenie v. State*, 59 Neb. 269 (80 N. W. 815).

13. (1899.) An instruction to the effect that if the jury find that the defendant and a married woman, not his wife, had sexual intercourse during any portion of the time alleged in the information, then the rule of law is that it is presumed that the defendant and said woman had sexual intercourse habitually as long thereafter as she was an inmate of defendant's dwelling house, *held* error. *Sweenie v. State*, 59 Neb. 269 (80 N. W. 815).

New trial.

14. (1893.) Newly discovered evidence, consisting of affidavits to the effect of declarations of the complaining witness contradicting her testimony as to mariage, is sufficient to entitle defendant to a new trial. *Bailey v. State*, 36 Neb. 808 (55 N. W. 241).

15. (1905.) Where the woman, with whom a defendant is accused of having committed adultery, is called as a witness in the prosecution therefor and refuses to testify as to the relations between herself and the accused, comments, by the prosecutor, on such refusal to testify, and charging it as an admission of guilt, is such misconduct as amounts to prejudicial error. *Powers v. State*, 75 Neb. 226 (106 N. W. 332).

ADVANCEMENTS.

Deduction of, from heirs' share of estate, see *Descent and Distribution*, §§ 34-40.

Sufficiency of evidence of, to son, see *Descent and Distribution*, §§ 36-40.

Security for future advances as sustaining conveyance as against creditor, see *Fraudulent Conveyances*, § 67.

By tenant, see *Landlord and Tenant*, VII.

See *Parent and Child*, § 37.

By agent for prinicpal, see *Principal and Agent*, § 78.

Right of subrogation for making advances, see *Subrogation*.

As set-off against action for waste, see *Waste*, § 13.

Presumption of trust on payment for another, see *Trusts*, §§ 53-68.

ADVERSE POSSESSION.

ANALYSIS.

I. NATURE AND REQUISITES.
(A) Acquisition of right by prescription.
Statutory provisions, § 1.
Persons who may claim by prescription, §§ 2-4.
Property subject to prescription.
——— Property of non-resident married women, § 5.
——— Public property in general, §§ 6-8.
——— Streets and roads, §§ 9-16.
——— Railroad, right of way, § 17.
Intent to acquire title, §§ 18, 19.
Necessity of claim or color of title, §§ 20-24.
(B) Actual possession.
Sufficiency and necessity.
——— In general, §§ 25-28.
——— Improvement and cultivation of land, §§ 29-32.
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Acquiring right in streams and waterways, see *Water and Watercourses*, §§ 136-161.

I. NATURE AND REQUISITES.

A. Acquisition of Right by Prescription.

Statutory provisions.

1. (1903.) The statute of limitations respecting actions for the recovery of real property, as construed by this court, is not open to the objection that it operates to deprive the owner of his property without due process of law. *Linton v. Heye*, 69 Neb. 450 (95 N. W. 1040; 111 Am. St. Rep. 556).

Persons who may claim by prescription.

2. (1894.) A corporation chartered by an act of congress and incompetent to ac-

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quire title to land in this state may still maintain a possession adverse to all persons except the state. *Myers v. McGavock*, 39 Neb. 843 (58 N. W. 522); *Hanlon v. Union P. R. Co.*, 40 Neb. 52 (58 N. W. 590).

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3. (1901.) Where a public road has been established by proceedings under the statute and opened and traveled by the public for more than ten years, the public thereby acquires an easement therein, and the court will not examine the original proceedings for the laying out of the road and determine whether or not they were valid. *Lydick v. State*, 61 Neb. 309 (85 N. W. 70).

4. (1903.) The husband, while living with his wife, can not gain title to her land by adverse possession. *Hovorka v. Havlik*, 68 Neb. 14 (93 N. W. 990; 110 Am. St. Rep. 387).

Property subject to prescription.

——— Property of non-resident married woman.

5. (1903.) The statute of limitations respecting actions for the recovery of real property runs against married women during coverture, whether residents or nonresidents of this state. *Linton v. Heye*, 69 Neb. 450 (95 N. W. 1040; 111 Am. St. Rep. 556).

——— Public property in general.

6. (1881.) A title by adverse possession cannot be acquired against the state. *Blazier v. Johnson*, 11 Neb. 404 (9 N. W. 543).

7. (1904.) No title by adverse possession can be acquired against the state or general government, nor is land the subject of adverse possession while the title is in the state. *Topping v. Cohn*, 71 Neb. 559 (99 N. W. 372).

8. (1905.) Prior to the passage of chapter 79, laws of 1899, title by adverse possession could be established in lands owned by a muncipal corporation the same as in those owned by a private individual. *City of Wahoo v. Nethaway*, 73 Neb. 54 (102 N. W. 86).

——— Streets and roads.

9. (1891.) The doctrine of adverse possession applies to municipal corporations, and one who occupies a street with shade trees for the necessary period acquires an absolute title thereto. *Meyer v. City of Lincoln*, 33 Neb. 566 (50 N. W. 763; 29 Am. St. Rep. 500; 18 L. R. A. 146*n*).

10, 11. (1891.) When a person has been in the actual, visible, exclusive, and uninterrupted possession of a portion of a street in a city, under a claim of right, for ten years, the title thereto vests absolutely in such occupant. *Meyer v. City of Lincoln*, 33 Neb. 566 (50 N. W. 763; 29 Am. St. Rep. 500; 18 L. R. A. 146*n*); (1894) *Lewis v. Baker*, 39 Neb. 636 (58 N. W. 126).

12. (1898.) By adverse possession one may acquire title to a street. *Webster v. City of Lincoln*, 56 Neb. 502 (76 N. W. 1076).

13. (1904.) As between a city that claims title to land by reason of dedication as a public street, and an individual who shows adverse possession himself and grantor for more than ten years prior to the commencement of the action, the latter is entitled to a decree. *City of South Omaha v. Meehan*, 71 Neb. 230 (98 N. W. 691).

14. (1887.) Rule concerning adverse possession is applicable to public roads in favor of the public so far as it relates to mere easement. *Graham v. Flynn*, 21 Neb. 229 (31 N. W. 742).

15, 16. (1900.) Title to part of country road cannot be acquired by adverse possession. *Krueger v. Jenkins*, 59 Neb. 641 (81 N. W. 844); *Lydick v. State*, 61 Neb. 309 (85 N. W. 70).

——— Railroad, right of way.

17. (1903.) The general public has the same interest in the preservation and maintenance of railroads as it has in the maintenance of other highways, and the title to a part of a railroad's right of way, while such road is being operated as a common carrier, cannot be divested by adverse possession. *McLucas v. St. Joseph & G. I. R. Co.*, 67 Neb. 603 (93 N. W. 928).

Intent to acquire title.

18. (1897.) In order to creat a title by adverse possession it is not necessary that the occupant make a declaration of his intentions. *City of Florence v. White*, 50 Neb. 516 (70 N. W. 50).

19. (1901.) In order to establish title by adverse possession, it is not sufficient to show continued occupancy for ten years, but it must also appear that such occupancy was with intent to claim title against the true owner. *Beer v. Plant*, 1 Unof. 372 (96 N. W. 348).

Necessity of claim or color of title.

20. (1885.) Color of title is not necessary to such right except where it is sought to extend the same beyond the limits ac-

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tually held *possessio pedes*. *Haywood v. Thomas*, 17 Neb. 237 (22 N. W. 460); *Gatling v. Lane*, 17 Neb. 80 (22 N. W. 453).

21. (1890.) Where defendant went onto lots without color of title, and without knowing, or in fact pretending to know, who owned them, but with the intention of acquiring the title by adverse possession, and built a house on them, in which he lived, and knew, or was advised, that ten years' adverse possession would give him the title, he acquired title at the end of ten years of such occupation. *Fitzgerald v. Brewster*, 31 Neb. 51 (47 N. W. 475).

22. (1896.) It is not essential that the claim of right or title to the land by the adverse occupant should be a valid legal claim in order that the statute may run in his favor. The facts of the continuous possession, its adverse character, and the claim of the occupant to be the owner of the premises are the essential things to vest a title to real estate by occupancy thereof. *Lantry v. Wolff*, 49 Neb. 374 (68 N. W. 494).

23. (1899.) To acquire real property by adverse possession it is not essential that entry should have been made under claim of ownership, if the occupancy was with intent to a claim against the true owner. *Cervenna v. Thurston*, 59 Neb. 343 (80 N. W. 1048).

24. (1900.) Color of title is not essential to adverse possession. *Murray v. Romine*, 60 Neb. 94 (82 N. W. 318).

B. Actual Possession.

Sufficiency and necessity.

——In general.

25. (1886.) The holder of title of unoccupied land is presumed to be in possession; land proved to be partly cultivated will not be presumed to be unoccupied. *Real v. Hollister*, 20 Neb. 112 (29 N. W. 189).

26. (1892.) To entitle a party to claim by adverse possession, he must have made an actual entry upon the lands and occupied the same as owner. This occupancy, however, may be continued by his agents and servants. *Omaha & F. L. & T. Co. v. Parker*, 33 Neb. 775 (51 N. W. 139; 29 Am. St. Rep. 506).

27. (1897.) The holder of the legal title to land, of which there is no actual occupancy, is presumed to be in possession. *Troxell v. Johnson*, 52 Neb. 46 (71 N. W. 968).

28. (1902.) The holder of the legal title to vacant lands is deemed to be in possession thereof. *Horbach v. Boyd*, 64 Neb. 129 (89 N. W. 644).

——Improvement and cultivation of land.

29. (1875.) Enclosing land with fences and maintaining the same, and cultivation of the land and the payment of taxes thereon with intent to acquire title, is sufficient to constitute adverse possession. *Horbach v. Miller*, 4 Neb. 31.

30. (1889.) Acts of notoriety, such as building a fence around the land, entering upon it and making improvements thereon, and the payment of taxes on the land, are sufficient to constitute adverse possession. *Tourtelotte v. Pearce*, 27 Neb. 57 (42 N. W. 915).

31. (1893.) Where land is especially adapted to the purposes of grazing and hay growing, and one claiming ownership thereto has every year for a period of more than ten years cut the grass, and harvested and disposed of the hay from such portions of the land as its character permitted, so using the land in connection with, and in the same manner as he used other tracts owned or claimed by him and adjacent thereto, there being at different periods fences or plowed strips not entirely enclosing the whole, but of such a character as to indicate a connection between the tracts, and where the person so using the land paid all the taxes thereon, and at intervals warned off trespassers and distrained cattle thereon found grazing, such acts constituted actual, continuous, notorious, and adverse possession for the statutory period. *Lantry v. Parker*, 37 Neb. 353 (55 N. W. 962).

32. (1890.) Where one claiming title to land, broke it up in 1874, and raised a number of crops of wheat upon it, and set out a large number of trees thereon, and cultivated it, either by himself or a tenant, until the present time, he acquired title by adverse possession. *Crawford v. Galloway*, 29 Neb. 261 (45 N. W. 268).

——Possession by agent.

33. (1893.) The possession of one's agents is, for the purpose of the statute of limitations, the possession of the principal. *Lantry v. Parker*, 37 Neb. 353 (55 N. W. 962); (1892) *Omaha & F. L. & T. Co. v. Parker*, 33 Neb. 775 (51 N. W. 139; 29 Am. St. Rep. 506).

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34. (1893.) One may plead adverse possession and is entitled to the benefit of the statute relating thereto, although he was a non-resident and absent from the state during a portion or all of the period covered by his possession. *Lantry v. Parker*, 37 Neb. 353 (55 N. W. 962).

35. (1899.) One who purchased a soldier's "additional homestead right" and, under proper powers of attorney, located the same and entered into possession of the land, has color of title to the entire tract described in the receiver's receipt. *Draper v. Taylor*, 58 Neb. 787 (79 N. W. 709).

C. Visible, Notorious, Distinct and Exclusive Possession.

Necessity of, in general.

Instructions as to elements, see *Post*, §§ 197-203.

36. (1888.) The statute of limitations will not run in favor of an occupant of real estate, unless the occupancy and possession are adverse to the true owner and with the intent and purpose of the occupant to assert his ownership of the property. His possession must be as owner and adverse to every other person. *Colvin v. Republican Valley Land Ass'n*, 23 Neb. 75 (36 N. W. 361; 8 Am. St. Rep. 114).

37. (1892.) The possession must be actual, notorious, continuous, and exclusive. and may be by fencing and pasturing the land, cultivation, etc., and the payment of taxes. *Omaha & F. L. & T. Co. v. Parker*, 33 Neb. 775 (51 N. W. 139; 29 Am. St. Rep. 506).

38. (1902.) One who claims title to land by adverse possession must show that his occupancy has for a period of ten years been open, notorious, exclusive and adverse, and under claim of title as against the true owner and the world. *Beer v. Dalton*, 3 Unof. 694 (92 N. W. 593).

39. (1893.) To constitute an adverse possession of land, such as, if it continued for ten years, would establish title in the occupant, it is necessary that he should actually hold the land as his own during that period, in opposition to the constructive possession of the legal proprietor. *Smith v. Hitchcock*, 38 Neb. 104 (56 N. W. 791).

40. (1893.) A plaintiff in ejectment, claiming title to the lands sued for by reason of ten years' adverse possession thereof, to prevail, must prove a continuous possession of said property under a claim of ownership in himself, and that such possession was actual, visible, notorious, exclusive, and adverse to the owner of the legal title. *Smith v. Hitchcock*, 38 Neb. 104 (56 N. W. 791).

41. (1894.) In order to create title by adverse possession, the possession, in addition to other elements, must be exclusive for the period of limitations. *Hanlon v. Union P. R. Co.*, 40 Neb. 52 (58 N. W. 590).

Notice to owner.

42. (1903.) An instruction that requires defendant's possession, in order to be adverse, to be such as "will bring to the knowledge of the real owner the fact that the one in possession is claiming ownership" *held* properly refused. *Williams v. Shepherdsn*, 4 Unof. 608 (95 N. W. 827).

43. (1905.) Occupancy, by an individual, of parts of the right of way of a railroad company obtained by condemnation proceedings, with elevators, granaries, coal sheds and similar structures, used in carrying on his business, and by the company, as a common carrier, for convenience in handling his shipments, will not be treated as adverse or under claim of title, unless actual notice of such claim is brought home to the company, or his conduct is such as will as a matter of law constitute such notice. *Roberts v. Sioux City & P. R. Co.*, 73 Neb. 8 (102 N. W. 60; 2 L. R. A. [n. s.] 272).

44. (1905.) The use of a part of a right of way of a railroad, by erecting fences and buildings thereon, is not of itself notice of an adverse claim of title thereto. *Roberts v. Sioux City & P. R. Co.*, 73 Neb. 8 (102 N. W. 60; 2 L. R. A. [n. s.] 272).

D. Duration and Continuity of Possession.

Sufficiency of evidence to prove continuity of possesson, see *post*, §§ 179-182.

Time necessary to acquire title.

45. (1885.) Adverse possession of real estate for ten years carries the title to the premises. *Haywood v. Thomas*, 17 Neb. 237 (22 N. W. 460).

46. (1885.) A party in the actual, open, nortorious, exclusive, adverse possession of real estate for ten years thereby acquires the absolute right to the exclusive possession of the same. *Gatling v. Lane*, 17 Neb. 80 (22 N. W. 453).

47. (1887.) A party in order to acquire title to land by the statute of limitations must not only have a possession adverse to the true owner, but must occupy the same

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as the owner during the entire statutory period. *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb. 371 (32 N. W. 162).

48. (1894.) An easement in real estate may be acquired by open, notorious, peaceable, uninterrupted, adverse possession for the statutory period of ten years. *Omaha & R. V. R. Co. v. Rickards*, 38 Neb. 847 (57 N. W. 739).

49, 50. (1896.) To establish title to real property in this state by virtue of the operation of the statute of limitations there must have been maintained by the party asserting it an actual, continuous, notorious, and adverse possession of the premises, under claim of ownership, during the full period required by the statute. *Twohig v. Leamer*, 48 Neb. 247 (67 N. W. 152); (1898) *Lewon v. Heath*, 53 Neb. 707 (74 N. W. 274); (1898) *Chicago, B. & Q. R. Co. v. Schalkopf*, 54 Neb. 448 (74 N. W. 826).

51, 52. (1902.) An occupant who claims by adverse possession must show that he occupied adversely during the entire period of ten years. *Knight v. Denman*, 64 Neb. 814 (90 N. W. 863).

When statute may begin to run against public land.

53. (1888.) Where a party entering land has complied with the law in all respects to entitle him to a patent therefor, he is the owner of such land, and until the patent issues the title is held by the United States merely as trustee for his use, and the statute of limitations will run against the party entering the land, or his grantee, in favor of one holding adversely, from the date of such entry. *Carroll v. Patrick*, 23 Neb. 834 (37 N. W. 671).

54. (1896.) The statute of limitations will begin to run against the title of a party purchasing lands from the United States from the date of his compliance with all the requisites to entitle him to a patent therefor in favor of one who holds adverse possession of the real estate. *Dolen v. Black*, 48 Neb. 688 (67 N. W. 760).

55. (1902.) As between individuals, possession of land acquired from the federal government may become adverse from the moment the entryman is entitled to his patent. *Baty v. Elrod*, 66 Neb. 735 (92 N. W. 1032).

Tacking possession.

Instructions on tacking possession, see *post*, § 201.

56. (1886.) Possessions may be tacked if one comes in under the other and the possessory estates are connected and continuous. *Stettnische v. Lamb*, 18 Neb. 619 (26 N. W. 374).

57. (1896.) If the adverse possession of the occupant is a continuation of the possession of a prior adverse possessor claiming title, and such occupant claims title from such prior possessor, then the possession of the occupant may be tacked to that of such prior possessor. *Lantry v. Wolff*, 49 Neb. 374 (68 N. W. 494).

58. (1900.) Possession of one occupant may be tacked to that of another, if one acquired possession from the other, and the possessory estates are connected and continuous. *Murray v. Romine*, 60 Neb. 94 (82 N. W. 318).

59. (1901.) If the successive occupants of land in fact receive possession from one another, and successively take and remain in possession against all the world by virtue of such transfers as may have been made among them, it is immaterial to the question of continuity of possession whether any valid titles were in fact created by the transfer. *Oldig v. Fisk*, 1 Unof. 124 (95 N. W. 492).

60. (1903.) A privity must be shown between adverse claimants before the possession of one can be tacked to the possession of the other for the purpose of completing title by prescription. *Zweibel v. Myers*, 69 Neb. 294 (95 N. W. 597).

61. (1904.) Privity must be shown between adverse claimants of real estate before the possession of one can be tacked to the possession of the other for the purpose of completing title by prescription; but this privity may exist by grant, devise, purchase or descent, and the adverse possession of an ancestor may be taken advantage of by his heirs, if their possession has been continuous with his, exclusive, and under the same claim of right as made by him. In such case, the ouster and disseisin made by the ancestor is continued by the heirs and relates back to his original entry. *Montague v. Marunda*, 71 Neb. 805 (99 N. W. 653).

62. (1907.) Privity must be shown between adverse claimants of real estate before the possession of one can be tacked to the possession of the other for the purpose of completing title by prescription. *Holdrege v. Livingston*, 79 Neb. 238 (112 N. W. 341).

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——Particular cases.

63. (1894.) A purchaser at judicial sale, to enforce a lien, cannot tack the lienor's prior possession to his own in order to establish title adverse to another claimant. *Carson v. Dundas*, 39 Neb. 503 (58 N. W. 141).

64. (1900.) Possession cannot be tacked to make out title by adverse possession where the adverse occupant did not come in under another, and the deed under which the last occupant claims title does not include the land in dispute or show any privity between him and his grantor in regard thereto. *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Neb. 364 (83 N. W. 201).

65. (1901.) The possession of a vendee who enters upon land under an executory contract of sale from one having color of title may be taken as that of his vendor, for the purpose of tacking thereto the possession of persons subsequently taking possession under and claiming through such vendor. *Oldig v. Fisk*, 1 Unof. 124 (95 N. W. 492).

66. (1905.) Where the owner of two contiguous lots of land conveys one of such lots to A, and subsequently conveys the other to B, in a contest between A and B concerning the boundary line between the lots, A cannot, for the purpose of establishing title by adverse possession against B, tack his own possession to that of the common grantor. *Sluyter v. Schwab*, 73 Neb. 370 (102 N. W. 757).

67. (1905.) The widow's right to possession is by virtue of the marital relation, and will not be construed to be independent and hostile to that of her husband's heirs, unless by some means she brings to their attention the fact that she claims to own the property in her own right and adversely to any right derived through her husband. *Larson v. Anderson*, 74 Neb. 361 (104 N. W. 925).

68. (1905.) Where during his lifetime a husband took possession of certain real estate, claiming title thereto, and lived upon the same with his wife and family as his home, and before the ten-year period of limitation expired the husband died, leaving his widow who continued to reside upon the same as her home, the possession of the widow may be tacked to that of the husband so as to raise the bar of the statute of limitation. *Larson v. Anderson*, 74 Neb. 361 (104 N. W. 925).

69. (1905.) Where after the death of a person who was holding adverse possession of real property, his widow continued to occupy it, her possession is a continuation of the adverse possession of the husband, and will not be presumed to be adverse to the claims of their children and heirs. *Larson v. Anderson*, 74 Neb. 361 (104 N. W. 925).

70. (1886.) Where the purchaser of a lot upon receiving a deed therefor erects a building thereon, and enters into possession, and afterwards sells and conveys the premises, a number of transfers of the property being thereafter made, and the building at times being vacant, but no interruption by and adverse claim to the title of the occupant, the possession was continuous, and after the expiration of ten years the occupant possessed the fee. *Stettnische v. Lamb*, 18 Neb. 619 (26 N. W. 374).

Interruption of possession.

71. (1886.) The continuity of an adverse possession is not broken by the fact of the property being sold and rented, and at times unoccupied, there being no interruption in the claim of title. *Stettnische v. Lamb*, 18 Neb. 619 (26 N. W. 374).

72. (1888.) In a dispute as to the boundary lines between two tracts, the leasing by defendant of plaintiff's tract, outside that enclosed by defendant, would not prevent the running of the statute as to the strip in dispute, it being enclosed as part of defendant's tract and occupied by him as owner. *Tex. v. Pflug*, 24 Neb. 666 (39 N. W. 839; 8 Am. St. Rep. 231).

73 (1888.) Where occupants of land, claiming title, bring an action to quiet title against an adverse claimant, and when the cause is submitted on the pleadings, judgment of dismissal with prejudice is rendered, such judgment against plaintiffs interrupted the continuity of adverse possession. *Carroll v. Patrick*, 23 Neb. 834 (37 N. W. 671).

74. (1889.) Where defendant, whose inclosed land adjoined land of plaintiff, leased the latter's tract under a verbal lease with the understanding that it was all uninclosed, such leasing does not prevent the running of the statutes against a strip of land belonging to plaintiff and afterwards found to be included in defendant's inclosed tract. *Levy v. Yerga*, 25 Neb. 764 (41 N. W. 773; 13 Am. St. Rep. 525).

75. (1892.) A stranger who neither has

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nor claims an interest in the land, or the possession thereof, cannot, by a mere trespass or surreptitious entry, interrupt the running of the statute in favor of the actual occupant. *Ballard v. Hansen*, 33 Neb. 861 (51 N. W. 295).

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76. (1894.) Where one has been in possession of land, claiming ownership, and permits the land to be sold for taxes, and the grantee in the tax deed, although it was void on its face, enters into possession and remains in possession for a period of more than a year, such possession interrupts that of the prior occupant. *Maxwell v. Higgins*, 38 Neb. 671 (57 N. W. 388).

77. (1902.) An agreement between adjacent landowners to have the existing boundary line resurveyed, is not such an admission of its incorrectness as will interrupt a claim of adverse possession by either. *Baty v. Elrod*, 66 Neb. 735 (92 N. W. 1032).

78. (1904.) One holding adverse possession of land which he has inclosed, does not abandon such possession by his failure to have it occupied by a tenant or otherwise for a reasonable space of time, no other person making claim to the property of taking possession during such nonoccupation, and there being no evidence of any intent on his part to abandon his possession and claim to the land. *Richards v. Haskins*, 72 Neb. 195 (100 N. W. 151).

Recognition of prior title.

Sufficiency of evidence as to recognition of owner's title, see *post*, §§ 191-194.

79. (1882.) A railroad company occupying land as a part of its right of way recognizes the ownership of the person against whom it claims by prescription, where within ten years preceding condemnation proceedings were commenced and condemnation money was deposited, and the running of the statutes is thereby stopped even thought the proceeding were void for want of jurisdiction. *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb. 371 (32 N. W. 162).

80. (1888.) When a railroad company commences condemnation proceedings for a right of way and deposits the condemnation money with the county clerk, this amounts to a recognition of the ownership of the defendant. *Chicago, B. & Q. R. Co. v. Hull*, 24 Neb. 740 (40 N. W. 280).

81. (1892.) A railroad company's possession is not adverse when both prior and subsequent to its entering it attempted to condemn the land. *Nebraska R. Co. v. Culver*, 35 Neb. 143 (52 N. W. 886).

82. (1892.) A railroad company does not hold property adversely when, during the period it commences condemnation proceedings against the owner, thereby recognizing his title. *Nebraska R. Co. v. Culver*, 35 Neb. 143 (52 Neb. 886).

83. (1897.) One who claims under a tax deed or by adverse possession does not, by causing to be recorded the patent from the United States to another, acknowledge title paramount in that other. *Oldig v. Fisk*, 53 Neb. 156 (73 N. W. 661).

84. (1902.) An agreement to survey land and relocate the line is a recognition of title sufficient to prevent the running of the statute. *Baty v. Elrod*, 66 Neb. 744 (97 N. W. 343).

85. (1903.) One claiming title to lands by adverse possession may, before the statute has finally run in his favor, purchase a tax deed to the premises without acknowledging the superior title of the record owner. But if he purchases a tax certificate and accepts payment of the same from the record owner through the county treasurer, such act is a recognition of the superior title. *Zweibel v. Myers*, 69 Neb. 294 (95 N. W. 597).

——— Purchasing outstanding title.

86. (1882.) A title which one has so far recognized as to purchase for his own protection, and under which he holds possession of the land, can in no sense be properly said to be adverse to him. *Vance v. Burlington & M. R. R. Co.*, 12 Neb. 285 (11 N. W. 334).

87. (1889.) One who is in the adverse possession of land does not impair his right to rely on the statute of limitations, by purchasing the land at tax sale and receiving and recording a tax deed, nor is the running of the statute suspended thereby. *Griffith v. Smith*, 27 Neb. 47 (42 N. W. 749).

88. (1890.) Where the purchaser of a tax certificate to land goes into the actual possession, fencing and improving the premises, holding notorious and exclusive possession for more than ten years an offer to purchase a quitclaim deed from one holding under an executor of the original owner is not such a recognition of a superior title as to defeat a title by adverse possession. *Peterson v. Townsend*, 30 Neb. 373 (46 N. W. 526).

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89. (1891.) A person who is in the adverse possession of land does not break the continuity of possession by purchasing the land at tax sale and receiving a tax deed therefor. In such case, where there is no actual break in the possession, the adverse occupant may rely upon his adverse occupation and also his claim or tax lien. In other words, he may combine all the rights possessed by him in defense of his posession. *Omaha & F. L. & T. Co. v. Hansen*, 32 Neb. 449 (49 N. W. 456).

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90. (1897.) The purchase or attempted purchase of an outstanding title by one in adverse possession, and before the expiration of the statutory period, is not alone sufficient to break the continuity of possession or divest it of its adverse character, although the occupant may believe that he is thereby acquiring the true title. *Oldig v. Fisk*, 53 Neb. 156 (73 N. W. 661).

91. (1898.) The purchase, or attempted purchase, of an outstanding title by one in adverse possession is not alone sufficient to break the continuity of the possession or divest it of its adverse character. Especially is this so when the attempt to purchase is not made until after the expiration of the statutory period. *Webb v. Thiele*, 56 Neb. 752 (77 N. W. 56).

92. (1906.) The party in possession of land as owner has a right to protect that possession by the purchase of any outstanding claim or lien against the property. There is not thereby any break in possession, nor does the adverse occupant rely upon his purchase title in preference to the one which he previously possessed. He joins the two together and possesses whatever title both may give him. *Wiese v. Union P. R. Co.*, 77 Neb. 40 (108 N. W. 175). [Appealed to United States supreme court.]

Effect of afterwards paying rent to apparent owner.

93. (1906.) One who has acquired absolute title to land by adverse possession for the statutory period does not impair his title by thereafter paying rent to the owner of the paper title. *Martin v. Martin*, 76 Neb. 335 (107 N. W. 580).

Suspension of statutes.

94. (1891.) Where plaintiffs * * * claim title through their father, deceased, and it appears that the statute of limitations began to run against him during his lifetime, his death and their minority do not arrest it, and if it has run the full statutory period, the possession of the defendant being actual and adverse from the beginning, plaintiffs are barred of their right to recover. *Ballou v. Sherwood*, 32 Neb. 666 (49 N. W. 790; 50 N. W. 1131).

95. (1903.) The statute of limitations as to adverse possession, does not run against persons while under disability, such as minors; and an action brought to recover an interest in real estate within ten years after they arrive at the age of majority, is commenced in time. *Albers v. Kozeluh*, 68 Neb. 529 (97 N. W. 646).

E. Hostile Character of Possession.

Sufficiency of evidence as to character of possession, see *post*, §§ 183-190.

Nature and necessity.

96. (1883.) Where possession is such as admits the existence of a higher title, to which it is subservient, it is not adverse to that title. *Roggencamp v. Converse*, 15 Neb. 105 (17 N. W. 361).

97. (1892.) "Hostile," when applied to the possession of an occupant of real estate holding adversely, is not to be construed as showing ill-will, or that he is an enemy of the person holding the legal title, but means an occupant who holds, and is in possession, as owner, and therefore against all other claimants of the land. *Ballard v. Hansen*, 33 Neb. 861 (51 N. W. 295); (1900) *Hoffine v. Ewings*, 60 Neb. 729 (84 N. W. 93).

98. (1894.) Where a claimant of land acts under a power of attorney from an adverse claimant, and as such attorney leases the land in the name of the adverse claimant, he and his grantees are by such acts estopped from asserting that the possession of the tenant inured to him and not to the adverse claimant. *Maxwell v. Higgins*, 38 Neb. 671 (57 N. W. 388).

99. (1900.) Possession for a period long enough to ripen into a title must be inconsistent with constructive possession of the legal proprietor. *Hoffine v. Ewings*, 60 Neb. 729 (84 N. W. 93).

100. (1906.) "Hostile," in defining adverse possession, means an occupant who holds and is in possession, claiming to hold against all others, not erroneous. *Taylor v. Hover*, 77 Neb. 97 (108 N. W. 149).

Permissive possession.

101. (1893.) Where the owner of the legal title to real estate occupies the same concurrently with one who entered by his permission without color of title, such pos-

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session of the owner negatives any presumption that the other occupied adversely to him. *Smith v. Hitchcock*, 38 Neb. 104 (56 N. W. 791).

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102. (1893.) Where possession of real estate is the result of an entry upon the premises by permission of the legal owner, such possession will not become adverse until some act is committed by the occupant rendering it so, and notice thereof is brought home to the owner of the legal title. *Smith v. Hitchcock*, 38 Neb. 104 (56 N. W. 791).

103. (1894.) A license to a railroad company to occupy certain land with its track will not be implied from the fact of occupancy for a long time, without objection on the part of the claimant of the title, the claimant relying on adverse possession during that period to establish his title. *Hanlon v. Union P. R. Co.*, 40 Neb. 52 (58 N. W. 590).

104. (1895.) Occupancy of land by permission of the true owner, under an agreement to pay the taxes thereon, is not such possession as will establish a title by adverse possession. *Johnson v. Butt*, 46 Neb. 220 (64 N. W. 691).

105. (1896.) A tenant by simply holding over after the expiration of his lease does not hold adversely. *Schields v. Horbach*, 49 Neb. 262 (68 N. W. 524).

106. (1905.) In the absence of notice or conduct of a claim of title, the erection and maintenance of elevators and coal sheds on a right of way of a railroad without express agreement therefor will be regarded as being with the permission, consent or license of the company, and subject to its right to resume possession of the ground whenever necessity requires its use for railroad purposes. *Roberts v. Sioux City & P. R. Co.*, 73 Neb. 8 (102 N. W. 60; 2 L. R. A. [n. s.] 272).

107. (1905.) The use for agricultural purposes, such as grazing and cultivation by adjoining landowners of otherwise unused and unfenced parts of the right of way of a railroad company, is not inconsistent with or adverse to the enjoyment of the easement. *Roberts v. Sioux City & P. R. Co.*, 73 Neb. 8 (102 N. W. 60; 2 L. R. A. [n. s.] 272).

108. (1907.) One who enters into the occupancy of real estate under contract cannot afterwards obtain title thereto by adverse possession, without showing that his occupancy had assumed an adverse character and continued as such during the statutory period. *Lanham v. Bowlby*, 79 Neb. 39 (112 N. W. 324).

——By vendor and purchaser.

109. (1902.) Where a grantor remains in possession after a valid conveyance, his possession is presumed to be permissive and subordinate to the grantee, and it is questioned whether he can claim that his continued possession is adverse without showing actual notice to the grantee. *Horbach v. Boyd*, 64 Neb. 129 (89 N. W. 644).

110. (1902.) The possession of land under an executory contract of purchase is not adverse to the vendor until the purchase price is paid, or until the vendee is entitled to a deed of conveyance from his vendor under the terms of the contract. *Beer v. Dalton*, 3 Unof. 694 (92 N. W. 593).

111. (1902.) If the grantor in a deed with covenant ot warranty subsequently makes an entry upon the possession of the grantee, there is no presumption that the new possession so acquired is permissive or subordinate to the grantee; and a new title may be established by open and notorious adverse possession, as in other cases. *Horbach v. Boyd*, 64 Neb. 129 (89 N. W. 644).

112. (1902.) A grantor in a deed with covenant of warranty may acquire a new title, adverse to that of his grantee, by a subsequent entry and adverse possession, and is not estopped from asserting the same by his deed and covenant. *Horbach v. Boyd*, 64 Neb. 129 (89 N. W. 644).

113. (1905.) A grantee of real estate occupied by a third person acquires no greater rights against the occupier than his grantor had. If the right to bring an action of forcible entry and detention is barred as against the grantor, so likewise is it as against the grantee. *Weatherford v. Union P. R. Co.*, 74 Neb. 229 (104 N. W. 183).

114. (1906.) When one tenant in common conveys the whole estate in fee with covenants of seizin and warranty, and his grantee enters and holds exclusive possession, the entry and holding must be deemed adverse to the title and possession of the cotenant. *Wiese v. Union P. R. Co.*, 77 Neb. 40 (108 N. W. 175). [Appealed to United States supreme court.]

——Mortgagor and mortgagee.

115. (1902.) A mortgee, under a deed absolute in form with a parol defeasance,

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who goes into possession under an agreement that rents and profits shall go for his care and for taxes, can not acquire title by adverse possession. *Decker v. Decker*, 64 Neb. 239 (89 N. W. 795).

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116. (1906.) A mortgagor's possession of the mortgaged premises after foreclosure and sale will not become adverse until notice to the purchaser that he is holding in hostility to his title. *Abrams v. Taintor*, 76 Neb. 109 (107 N. W. 225).

Entry and possession by mistake.

117. (1888.) If one by mistake inclose the land of another and claim it as his own to certain fixed monuments or boundaries, his actual and uninterrupted possession for the statutory period will work a disseizin and his title will be perfect. *Tex. v. Pflug*, 24 Neb. 666 (39 N. W. 839; 8 Am. St. Rep. 231).

118. (1889.) If one by mistake inclose the land of another, and claim it as his own, to certain fixed monuments or boundaries, his actual and uninterrupted possession as owner for the statutory period will work a disseizin, and his title will be perfect. *Levy v. Yerga*, 25 Neb. 764 (41 N. W. 773; 13 Am. St. Rep. 525); *Obernalte v. Edgar*, 28 Neb. 70 (44 N. W. 82).

119. (1902.) In this state, possession may be adverse though the claimant occupies under a mistaken belief that the land is actually part of another tract, and that the true boundary is different than it really is. *Baty v. Elrod*, 66 Neb. 735 (92 N. W. 1032).

120. (1903.) When one by mistake enters upon and takes possession of the land of another, claiming it as his own to a definite and certain boundary, and continues in the open, notorious and exclusive possession thereof under such claim, for ten years or more, he acquires title thereto by adverse possession although the land was not inclosed. *Brownfield v. Bleekman*, 4 Unof. 443 (94 N. W. 714).

Validity and sufficiency of claim or title.

121. (1885.) Where possession of real estate is taken under color and claim of title it is not essential to the claim of adverse possession that such title shall be valid. It is sufficient if the instrument purports to convey the title to the party in possession. *Gatling v. Lane*, 17 Neb. 77 (22 N. W. 227).

122. (1888. Under section 411 of the code of civil procedure, the usual duplicate receipt of the receiver of any land office, or if that be lost or destroyed or beyond the reach of the party, the certificate of such receiver that the books of his office show the sale of a tract of land to a certain individual, is proof of title equivalent to a patent against all but the holder of an actual patent, and is sufficient color of title under which a party may hold adverse possession. *Carroll v. Patrick*, 23 Neb. 834 (37 N. W. 671).

123. (1896.) Where a mortgagee of a mortgage purporting to incumber the fee, bought the premises at foreclosure and a sheriff's deed was executed, and he took immediate possession, such possession was adverse to plaintiffs who were remaindermen after a life estate, and who were not made parties to the original suit; and such even though the proceedings were void as to the life tenants. *Hall v. Hooper*, 47 Neb. 111 (66 N. W. 33).

124. (1903.) Where one tenant in common openly denies the title of his cotenants and is in possession of and claims the entire property himself by deed, such holding is adverse. *Craven v. Craven*, 68 Neb. 459 (94 N. W. 604).

——— Tax titles.

125. (1883.) A tax certificate is not sufficient to constitute color of title to real estate. *McKeighan v. Hopkins*, 14 Neb. 361 (15 N. W. 711).

125*a*. (1884.) The statute of limitations does not begin to run in favor of the holder of a tax deed by merely recording the same. To avail himself of the benefits of the statute his possession must be actual and adverse and continued for the statutory period. *Baldwin v. Merriam*, 16 Neb. 199 (20 N. W. 250).

126. (1885.) A tax deed which purports to convey the title of real estate to the grantee constitutes color of title, although it may be void by reason of the failure to recite therein the place where the tax sale took place. *Gatling v. Lane*, 17 Neb. 80 (22 N. W. 453).

126*a*. (1885.) A tax deed must be valid on its face to entitle the party claiming under it to the benefit of the special limitation of the revenue law. *Housel v. Boggs*, 17 Neb. 94 (22 N. W. 226).

126*b*. (1887.) A tax deed must be valid on its face to entitle the party claiming under it to the benefit of the special limitation

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of the revenue law. *Bendexen v. Fenton*, 21 Neb. 184 (31 N. W. 685).

127. (1888.) The possession of a purchaser under a void foreclosure of a trust deed, is adverse to the maker of the deed. *McKesson v. Hawley*, 22 Neb. 692 (35 N. W. 883).

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128. (1893.) A tax deed purporting on its face to convey title to land, although void for failure to comply with the statute, affords color of title under the general statute of limitations. *Lantry v. Parker*, 37 Neb. 353 (55 N. W. 962.)

129. (1896.) A void tax deed affords color of title in an action of ejectment in which adverse possession of real estate for the statutory period of ten years is relied upon as a defense. *Twohig v. Leamer*, 48 Neb. 247 (67 N. W. 152).

130. (1901.) A tax deed, or a deed based thereon, is sufficient to give color of title. *Beall v. McMenemy*, 63 Neb. 70 (88 N. W. 134; 93 Am. St. Rep. 427).

II. OPERATION AND EFFECT.

A. Extent of Possession.

Possession without claim or color of title.

131. (1894.) Although color of title is not indispensable to adverse possession, yet where a railroad company enters upon and takes possession of the real estate of another for a right of way without color of title, such possession is limited to the land actually occupied; and in such case the corporation will acquire a right of way of the width, and no more, which it has so used and occupied for the full period of limitations. *Omaha & Republican V. R. Co. v. Rickards*, 38 Neb. 847 (57 N. W. 739).

132. (1885.) Color of title is not essential to adverse possession, but where a party does not enter under color of title his possession is limited to the premises actually occupied by him. *Gatling v. Lane*, 17 Neb. 80 (22 N. W. 453); *Haywood v. Thomas*, 17 Neb. 237 (22 N. W. 460).

133. (1904.) Where one goes upon land under no color of title, but as a mere intruder, he can acquire title by adverse possession only to so much of the land as he actually occupies and uses for the period prescribed by statute. *City of South Omaha v. Meehan*, 71 Neb. 230 (98 N. W. 691).

134. (1904.) Where one goes upon land under no color of title, but as a mere intruder, he can acquire title by adverse possession to only so much of the land as he actually occupies and uses for the necessary period of ten years. *City of South Omaha v. Ford*, 5 Unof. 310 (98 N. W. 665).

Possession under color of title.

135. (1890.) Where a party has been in possession of land for less than ten years under a void tax deed, but he and those under whom he claimed had cultivated a portion thereof for more than ten years, the bar of the statute applied alone to the cultivated land. *Lejeune v. Harmon*, 29 Neb. 268 (45 N. W. 630).

136. (1894.) Where a party enters upon and occupies land under color of title, such possession is regarded as co-extensive with the entire tract described in the instrument under which such possession is claimed. *Omaha & Republican V. R. Co. v. Rickards*, 38 Neb. 847 (57 N. W. 739).

B. Title and Right Acquired.

Nature and extent of title acquired.

——— In general.

137. (1875.) The title to land becomes absolute and complete in an adverse occupant when he has maintained an actual, open, notorious, continued, adverse and exclusive possession, claiming title as his own against all persons for the full statutory period. *Horbach v. Miller*, 4 Neb. 31; (1885) *Gatling v. Lane*, 17 Neb. 77 (22 N. W. 227); (1885) *Gatling v. Lane*, 17 Neb. 80 (22 N. W. 453); (1885) *Haywood v. Thomas*, 17 Neb. 237 (22 N. W. 460); (1887) *Parker v. Starr*, 21 Neb. 680 (33 N. W. 424); (1891) *Omaha & F. L. & T. Co. v. Barrett*, 31 Neb. 803 (48 N. W. 967); (1896) *Lantry v. Wolff*, 49 Neb. 374 (68 N. W. 494); (1897) *Fink v. Dawson*, 52 Neb. 647 (72 N. W. 1037); (1897) *City of Florence v. White*, 50 Neb. 516 (70 N. W. 50); (1890) *Peterson v. Townsend*, 30 Neb. 373 (46 N. W. 526).

138. (1886.) Adverse possession of real estate, if continued without interruption for the length of time prescribed by the statute for the enforcement of the right of entry, is evidence of a fee. *Stettnische v. Lamb*, 18 Neb. 619 (26 N. W. 374).

139. (1898.) Evidence showing defendant through his grantor has used a strip of land adjoining his premises for the storage of stoves and iron for more than ten years last past vests absolute title in him. *McAllister v. Beymer*, 54 Neb. 247 (74 N. W. 586).

140. (1899.) One who has been in the actual, continuous, open, notorious, exclu-

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sive, adverse possession of real estate under claim of ownership for ten years, thereby acquires a perfect title to the property, which is not divested by the fact that another person thereafter occupied the premises under claim of right for a period of less than ten years. *Cervenna v. Thurston*, 59 Neb. 343 (80 N. W. 1048).

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141. (1891.) Under our statute of limitations, if a party establish in himself or in connection with those under whom he claims an actual, notorious, continuous, and exclusive possession of land as owner for a period of ten years, he thereby acquires a title to the land, and this irrespective of any question of motive or mistake. *Omaha & F. L. & T. Co. v. Hansen*, 32 Neb. 449 (49 N. W. 456).

142. (1894.) Where a corporation, chartered by an act of congress, and incompetent by reason of our constitution to acquire title to real estate in this state, has been in open, notorious, exclusive, and adverse possession of real estate under a claim of title for ten years, such corporation has a valid title to such real estate, as against all persons, except the state of Nebraska. *Meyers v. McGavock*, 39 Neb. 843 (58 N. W. 522; 42 Am. St. Rep. 627).

143. (1903.) It has for many years been the established doctrine of this court that the statute of limitations, with reference to real property, is neither a a statute of presumptions nor one of repose, but that the continued, exclusive, open, notorious and adverse possession of lands for the period of limitations operates, of itself, as a grant of all adverse titles and interests to the occupant. *Postal v. Martin*, 4 Unof. 534 (95 N. W. 8).

144. (1906.) It is not error to charge the jury that the title to land becomes complete in the adverse occupant when he and his grantors have maintained an actual, continued, notorious and adverse possession thereof, claiming title to the same against all persons, for ten years. *Stryker v. Meagher*, 76 Neb. 616 (107 N. W. 792).

——— **As basis for affirmative relief.**

145. (1889.) A party who has been in actual, open, notorious, exclusive, adverse possession of real estate for ten years thereby acquires an absolute title to such real estate, and may maintain an action to have certain deeds which are clouds upon the title set aside and declared void, and quiet his possession in the premises. *Tourtelotte v. Pearce*, 27 Neb. 57 (42 N. W. 915).

146. (1891.) A party who has been in the open, notorious, exclusive, adverse possession of a portion of a town-site for a period of time sufficient to bar an action against him to recover possession thereof, thereby acquires an absolute title to said land, and may protect his possession by injunction against unlawful acts of the city authorities in attempting to open streets through his land. *Schock v. Falls City*, 31 Neb. 599 (48 N. W. 468).

147. (1891.) Open, notorious, exclusive, adverse possession of real estate by one claiming to be the owner thereof will give a perfect title thereto, as well for the purpose of enforcing the specific performance of a contract for the sale thereof as for all other purposes of ownership. *Ballou v. Sherwood*, 32 Neb. 666 (49 N. W. 790, 50 N. W. 1131).

148. (1893.) The operation of the statute of limitations is to vest an absolute title to real property in one who has held open, notorious possession thereof for the statutory period, and may be made a basis of an affirmative claim for relief as well as interposed as a defense. *Lantry v. Parker*, 37 Neb. 353 (55 N. W. 962).

——— **As against tax titles.**

149. (1889.) Under the revenue law of 1869 one who has been in the open, exclusive, notorious, adverse possession of real estate for a period of ten years, thereby acquires an absolute title, free from liens of any taxes existing thereon prior to the commencement of said period. *D'Gette v. Sheldon*, 27 Neb. 829 (44 N. W. 30).

150. (1890.) Where a person has been in the open, exclusive, notorious, adverse possession of real estate as owner for ten years, he thereby acquires an absolute title to the lands free from the lien created by a tax deed on the property, issued prior to the commencement of such adverse possession. *Alexander v. Wilcox*, 30 Neb. 793 (47 N. W. 81; 9 L. R. A. 735).

151. (1890.) Where a person has been in the actual, open, exclusive, adverse possession of lands as owner for ten years he thereby acquires an absolute title in fee, free from the lien created by a tax deed on the property issued more than ten years prior to the commencement of the action to foreclose such tax deed. *Alexander v. Meadville*, 33 Neb. 219 (49 N. W. 1123).

152. (1892.) An action to foreclose a tax deed, void on its face, was brought more

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than fifteen years after the date of such deed. The defendant and his grantors had been in the actual, open, notorious, continuous, adverse, and exclusive possession of lands as owner for more than ten years prior to the bringing of the suit. *Held*, That the action is barred. *Alexander v. Pitz*, 34 Neb. 361 (51 N. W. 851).

153. (1892.) Where a defendant in an action to foreclose a tax deed has been in the actual, open, exclusive, adverse possession of the land as owner for ten years, he thereby acquires an absolute title to the land, free from the tax deed on the property, issued more than ten years prior to the commencement of the action. *Black v. Leonard*, 33 Neb. 745 (51 N. W. 126).

Right to transfer.

154. (1900.) The right of one person holding possession adversely may be transferred to another verbally. *Murray v. Romine*, 60 Neb. 94 (82 N. W. 318).

155. (1904.) The right of one person holding lands may be transferred to another verbally. *City of South Omaha v Meehan*, 71 Neb. 230 (98 N. W. 691).

III. PLEADING, EVIDENCE AND TRIAL.

Pleading.

156. (1882.) An answer alleging that defendant has been in "actual, open and notorious" possession of property, but which contains no allegation that such possession was adverse and exclusive, is not a sufficient allegation of title by adverse possession. *Pettit v. Black*, 13 Neb. 142 (12 N. W. 841).

157. (1894.) It is not an essential to the validity of a petition to allege that plaintiff claims under color of title, if the claim of absolute owner is otherwise set out. *Lewis v. Baker*, 39 Neb. 636 (58 N. W. 126).

——Amendment.

158. (1906.) In an action for the possession of an alleged abandoned highway, plaintiff should be permitted to amend his petition to allege a possession of ten years in place of such allegation of six years. *Perry v. Staple*, 77 Neb. 656 (110 N. W. 652).

159. (1907.) The failure to allege in the petition that the plaintiff had been in the exclusive adverse possession of the premises for ten years, and of the court to find that fact in the decree, is not material after judgment, where the proof admitted without objection shows the possession to have been of that character. *Agnew v. City of Pawnee City*, 79 Neb. 603 (113 N. W. 236).

Evidence.

——Presumptions and burden of proof.

160. (1888.) When there is nothing to show that the continued possession of an adverse claimant and his grantors was broken or abandoned, *prima facie* continued possession is established. *Hardy v. Riddle*, 24 Neb. 670 (39 N. W. 840).

161. (1887.) In an action of ejectment, where the defendant relies upon the statute of limitations, the burden is on him to show that his possession has been continuous, adverse, hostile and exclusive during the ten years last preceding the commencement of the action. *Weeping Water v. Reed*, 21 Neb. 261 (31 N. W. 797).

162. (1900.) Where a person claims title to real estate by reason of adverse possession, it is necessary to prove that such person for a period of ten years next before the commencement of the action was in actual, continued and notorious possession of the land claimed, claiming the same against all persons. *Hoffine v. Ewings*, 60 Neb. 729 (84 N. W. 93).

163. (1902.) Burden of proof to show that owing to the title of plaintiff's grantor from the United States not having been perfected for some years after he took possession of the land, defendant's possession under claim of ownership would not date from the time his possession became adverse to plaintiff's, is on plaintiff. *Baty v. Elrod*, 66 Neb. 744 (97 N. W. 343).

164. (1903.) A grant of lands may be presumed from acts of exclusive use and continuous occupation for ten years or more, when such use and occupation is accompanied by a claim of ownership. *Flanagan v. Mathiesen*, 70 Neb. 223 (97 N. W. 287).

——Admissibility of evidence.

165. (1882.) Although a will is not admissible as evidence of title, unless probated, in case of open, exclusive, adverse possession for more than ten years, it may be sufficient as a claim of right under the statute. *Pettit v. Black*, 13 Neb. 142 (12 N. W. 841).

166. (1883.) In an action to remove a cloud from title to land, where the title relied on by the plaintiff is that given by the statute of limitations for adverse possession during the statutory time, a deed in fee of the land from the plaintiff to the defendant, given more than ten years before the bring-

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ing of the action, is competent evidence, in connection with a parol lease taken by the plaintiff from the defendant, to show that the possession was not adverse. *Roggencamp v. Converse*, 15 Neb. 105 (17 N. W. 361).

167. (1900.) In ejectment, proof of adverse possession is admissible under a general denial. *Murray v. Romine*, 60 Neb. 94 (82 N. W. 318); *Link v. Campbell*, 72 Neb. 310 (104 N. W. 939).

168. (1902.) Evidence of admissions by an occupant, tending to show that his possession was not adverse, which were not made until after sufficient time had elapsed to vest the title in him by adverse possession, is properly excluded. *Baty v. Elrod*, 66 Neb. 735 (92 N. W. 1032).

——— Weight and sufficiency in general.

169. (1891.) Upon the testimony preserved in the record, *held*, that the defendant had acquired title by adverse possession. *Malcom v. Hanson*, 32 Neb. 50 (48 N. W. 883).

170. (1892). In an action for possession of certain lots, upon the evidence presented in the record, the title of the plaintiff by adverse possession was clearly established. *Ballard v. Hansen*, 33 Neb. 861 (51 N. W. 295).

171. (1893.) The evidence in case stated in opinion *held* not sufficient to show title in defendant by adverse posession. *Sprague v. Fuller*, 36 Neb. 220 (54 N. W. 423).

172. (1894.) Evidence that shows a person had fenced in a portion of a city street and has held possession by such for more than ten years last past sustains a finding of title to such premises in such person. *Lewis v. Baker*, 39 Neb. 636 (58 N. W. 126).

173. (1896.) Evidence examined, and *held* to sustain finding against the defendant upon the issue of adverse possession of property in dispute. *Link v. Connell*, 48 Neb. 574 (67 N. W. 475).

174. (1898.) No definite or fixed rule can be framed in relation to what shall constitute *indicia* of adverse possession; such evidences must necessarily vary and be in accord with the conditions existent in the portion of the political division or subdivision in which the property to which it is claimed applicable is situated in regard to age of settlement, the extent and prevailing manner of cultivation, or use of lands, also the purposes for which the lands are or may be by nature adapted. *Lewon v. Heath*, 53 Neb. 707 (74 N. W. 274).

175. (1903.) Evidence examined, and *held* to support the findings and judgment of the district court, that plaintiff had not acquired title by adverse possession. *Maxwell v. Odell*, 4 Unof. 645 (95 N. W. 840).

176. (1903.) Evidence examined, and *held* insufficient to sustain a claim of title by adverse possession. *Zweible v. Myers*, 69 Neb. 294 (95 N. W. 597).

177. (1906.) Where such occupant entered originally without color of title or claim of right, and the acts relied on to show entry and occupation were consistent with a mere intention to trespass from time to time until interfered with by the true owner, his testimony that he intended to take possession and hold and occupy as owner, uncorroborated by acts necessarily indicating such intention, is not sufficient to require a finding in his favor. *Bush v. Griffin*, 76 Neb. 214 (107 N. W. 247).

178. (1906.) Evidence in an action to restrain defendant from consuming all of a stream of water, that flowed through the lands of both, *held* not to sustain the defense of adverse possession. *Burson v. Percy*, 77 Neb. 654 (110 N. W. 544).

——— Weight and sufficiency to prove continuity of possession.

179. (1896.) Evidence in ejectment showing defendant and his grantors have held open possession of more than twenty years sustains a finding for defendant. *Lantry v. Wolff*, 49 Neb. 374 (68 N. W. 494).

180. (1904.) Evidence that one claiming land by adverse possession held by himself and grantors, who had held actual possession and control for more than the statutory period, sustains a finding for him. *Montague v. Marunda*, 71 Neb. 805 (99 N. W. 653).

181. (1908. Evidence examined, and on the ground of adverse possession for the statutory period, against a municipal corporation where the city claimed title to the land by dedication as a public street, but offered no proof of this allegation, and the plaintiff showed adverse possession in himself and grantor for more than ten years prior to the commencement of his action, plaintiff was entitled to a decree. *City of South Omaha v. Ford*, 5 Unof. 310 (98 N. W. 665).

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181a. (1908.) Evidence examined, and *held* not to sustain the appellant's defense of title of adverse possession. *Jenkins Land & Live Stock Co. v. Atwood*, 80 Neb. 806 (115 N. W. 305).

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182. (1906.) While the fact that one claiming title by adverse possession failed to pay taxes on the land during his occupancy would not of itself necessarily defeat his claim, it is entitled to weight as tending to show that he did not intend to claim title as against the rightful owner. *Bush v. Griffin*, 76 Neb. 214 (107 N. W. 247).

——Weight and sufficiency to prove character of possession.

183. (1889.) Evidence *held* to sustain finding that alleged adverse possession of defendant holding under void execution sale, was not open, notorious, adverse and exclusive. *Gue v. Jones*, 25 Neb. 634 (41 N. W. 555); *Noyce v. Jones*, 25 Neb. 643 (41 N. W. 555); *Noyce v. Jones*, 25 Neb. 643 (41 N. W. 558).

184. (1896.) It is the actual, continuous, open, notorious, exclusive, adverse possession that ripens into an absolute title. Payment of taxes by the occupant for a series of years is a strong circumstance, in connection with others, tending to show the adverse holding and the abandonment of the property by the holder of the title. *Omaha & F. L. & T. Co. v. Barrett*, 31 Neb. 803 (48 N. W. 967).

185. (1894.) Evidence that a roadmaster in charge of the construction of a side track over certain land, when a person claiming to be the owner of the land objected to the construction of the track, promised such person that he would be paid for the land occupied, is insufficient to prove that the company entered under a license from the claimant and in recognition of his title. *Hanlon v. Union P. R. Co.*, 40 Neb. 52 (58 N. W. 590).

186. (1896.) The evidence in this case examined, and *held* to show such acts in respect to a piece of land not suitable to general farming purposes, but fit for grazing, and a portion of which was what is termed "hay land," as constituted actual, continued, notorious, and adverse possession for the time required by statute. *Twohig v. Leamer*, 48 Neb. 247 (67 N. W. 152).

187. (1898.) On an issue of adverse possession, where the proof tends to show a continuous exclusive possession for the statutory period by acts indicating dominion over the land, the fact that there was proof of declarations of the occupant indicating that he did not at first claim ownership does not conclusively rebut the inference of a claim of right derivable from his acts. The issue is for the jury. *Webb v. Theile*, 56 Neb. 752 (77 N. W. 56).

188. (1902.) Where a claimant occupant entered upon land originally without color of title or claim of right, and the acts relied on to show entry and occupation were consistent with an intention to trespass from time to time until interfered with by the true owner, his testimony that he intended to hold and occupy as owner, uncorroborated by acts necessarily indicating such intention, is not sufficient to require a finding in his favor. *Knight v. Denman*, 64 Neb. 814 (90 N. W. 863); *Ritter v. Myers*, 3 Unof. 684 (92 N. W. 638).

189. (1902.) Evidence in an action of ejectment *held* to show that defendant and her grantors originally took possession of the land in dispute as owners, and have ever since so claimed and held it. *Baty v. Elrod*, 66 Neb. 744 (97 N. W. 343).

189a. (1907.) Evidence of ten years' use by the public of a road through cultivated land without substantial variance, with the knowledge and acquiescence of the owner for a period of ten years, raises the presumption of an implied dedication and acceptance of such road as a public highway. *Brandt v. Olson*, 79 Neb. 612 (113 N. W. 151).

190. (1907.) The payment of taxes by the occupant for more than ten years, in connection with the actual use and cultivation of the premises, is a strong circumstance tending to show the adverse holding of such occupant, and insufficient to support a finding by the jury that the party was in possession under a claim of ownership. *Dredla v. Patz*, 78 Neb. 506 (111 N. W. 136).

——Weight and sufficiency to prove recognition of owner's title.

191. (1902.) Evidence offered by plaintiff did not tend to show that an agreement claimed by plaintiff to survey the land and relocate the fence, was made before the lapse of ten years from the time when the ancestor of plaintiff's grantors was entitled to a patent, and was therefore insufficient to authorize a verdict for plaintiff. *Baty v. Elrod*, 66 Neb. 744 (97 N. W. 343).

192. (1902.) Evidence tendered by plaintiff as to an agreement to survey the land

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and relocate the line, if taken as true by the jury, *held* to be sufficient to prevent the further running of the statute of limitations, if such agreement had been shown to have been made before action was barred. *Baty v. Elrod*, 66 Neb. 744 (97 N. W. 343).

193. (1906.) One who buys land at execution and recognizes the owner's right to redeem, with evidence showing that he did not claim title as against the owner, a finding for plaintiff is sustained. *Bush v. Griffin*, 76 Neb. 214 (107 N. W. 247).

194. (1906.) Evidence showing that letters from a claimant to land by adverse possession that were written by his wife, he himself being unable to write, and some of the letters were written unknown to him, in which the plaintiff's title is recognized, is insufficient to disprove adverse possession. *Martin v. Martin*, 76 Neb. 335 (107 N. W. 580).

Question for jury.

195. (1902.) If there is no evidence as to when an entryman became entitled to his patent to government land, it is proper to refuse an instruction which leaves it to the jury to determine when possession of the land became adverse. *Baty v. Elrod*, 66 Neb. 735 (92 N. W. 1032).

196. (1903.) Former conclusion adhered to (64 Neb. 814) as to error in the instructions by which the issue of defendant's adverse possession was submitted to the jury. *Knight v. Denman*, 68 Neb. 383 (94 N. W. 622).

Instructions.

197. (1892.) Instructions bearing on the question of adverse possession examined and approved. *Ballard v. Hansen*, 33 Neb. 861 (51 N. W. 295).

198. (1900.) The use of the word "hostile" in an instruction, as describing the character of the possession of real estate under which title is claimed by adverse possession, while not to be commended, *held* not prejudicial error. *Hoffine v. Ewings*, 60 Neb. 729 (84 N. W. 93).

199. (1902.) An instruction which states that, if the owner of lands does not bring an action against one who wrongfully withholds possession within ten years after his cause of action accrues, he loses his right to bring or maintain such action, without adding that defendant's possession must be continuous, open, notorious, exclusive and adverse during the full period of ten years, is misleading and erroneous. *Knight v. Denman*, 64 Neb. 814 (90 N. W. 863).

200. (1903.) It is not necessary, in telling the jury that a holding under a mistake as to the true boundary may be adverse, to set forth all the necessary elements of adverse possession. *Williams v. Shepherdson*, 4 Unof. 608 (95 N. W. 827).

201. (1903.) It is not necessary to restate all the elements of adverse possession in telling the jury that the period of such possession of defendant may be tacked to that of his grantors to make up the statutory time. *Williams v. Shepherdson*, 4 Unof. 608 (95 N. W. 827).

202. (1904.) In an ejectment case, title by adverse possession may be proved under a general denial, and, when such title is one of the defenses relied upon by the defendant, he is entitled to have the jury instructed with reference to the same, if any competent evidence has been introduced to support that issue, even though the evidence may be contradicted or may be considered insufficient by the jury. *Link v. Campbell*, 72 Neb. 310 (104 N. W. 939).

203. (1906.) An instruction defining adverse possession held not prejudicial to the defendant. *Taylor v. Hover*, 77 Neb. 97 (108 N. W. 149).

ADVICE OF COUNSEL.

As defense for malicious prosecution, see *Malicious Prosecution*, §§ 21-27.

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AFFIDAVITS.

ANALYSIS.

Nature and definition, §§ 1, 2.
Persons who may make, § 3.
Knowledge or information of affiant, §§ 4-6.
Authority to take, §§ 7-11.
Construction of ambiguous language, §§ 12, 13.
Entitling, §§ 14, 15.
Oath, §§ 16.
Venue, § 17.
Jurat or certificate of officer taking, §§ 18-24.
Sufficiency of, §§ 25, 26.
Waiver of defects, § 27.
Use in evidence, §§ 28-35.

CROSS REFERENCES.

Affidavits in particular cases, see specific topics.

Affidavits as part of record in appellate court, see *Appeal and Error*, §§ 827-835.

Filing of, for change of venue as appearance, see *Appearance*, § 28.

In attachment, see *Attachment*, §§ 86-143.

Sufficiency of averment in attachment, see *Attachment*, §§ 92-122.

Effect of affidavit sworn to before attorney in interest, see *Attachment*, §§ 86-88.

In contempt proceedings, see *Contempt*, §§ 53-57.

Affidavit of prejudice of judge as contempt, see *Contempt*, §§ 4-8.

Affidavit for continuance, see *Continuance*, §§ 30-54.

For publication of service in divorce, see *Divorce*, §§ 54-57.

Sufficiency of information in garnishment, see *Garnishment*, §§ 40-45.

Insufficiency of affidavit for arrest as grounds for discharge, see *Habeas Corpus*, §§ 18, 19.

On application for vacation of judgment, see *Judgment*, §§ 309, 310.

For new trial, see *New Trial*, §§ 159-176.

For service of process by publication, see *Process*, §§ 106-137.

In replevin, see *Replevin*, §§ 111-142.

Who may make, for change of venue, see *Venue*, § 31.

Nature and definition.

1. (1895.) An affidavit is simply a declaration on oath, in writing sworn to by a party before some person who has authority to administer oaths. *Bantley v. Finney*, 43 Neb. 794 (62 N. W. 213).

2. (1895.) The essentials of the affidavit required by section 78 of the code of civil procedure, in order that a valid service by publication may be based thereon, are that the affidavit must be in writing, filed in the case where made, and sworn to. *Bantley v. Finney*, 43 Neb. 794 (62 N. W. 113).

Persons who may make.

3. (1893.) An affidavit for attachment is not void, although purporting in its opening clause to be that of a corporation plaintiff, where it sufficiently appears from the whole affidavit that it is that of the agent of the corporation, and that such agent in fact made oath thereto and signed it. *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb. 520 (57 N. W. 161).

Knowledge or information of affiant.

4. (1901.) When the facts required in an affidavit are of such a character that positive knowledge on the part of affiant is impossible, they may be sworn to on information and belief. *Leigh v. Green*, 62 Neb. 344 (86 N. W. 1093; 89 Am. St. Rep. 751).

5. (1902.) Where a showing by affidavit is required as to facts which are necessarily matters of information and belief, an affidavit on information and belief is sufficient. *Leigh v. Green*, 64 Neb. 533 (90 N. W. 255).

6. (1902.) So long as a witness is willing to testify to a fact positively, and does so testify, his affidavit, in which such fact is positively stated, does not become an affidavit on information and belief by the addition of the statement that he verily believes

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all the facts set forth to be true. *Leigh v. Green*, 64 Neb. 533 (90 N. W. 255).

Authority to take.

7. (1884.) Under code of civil procedure, section 371, providing that an affidavit may be made before any person authorized to take depositions, an affidavit taken before an attorney in the case may, on motion, be stricken from the files. *Collins v. Stewart*, 16 Neb. 52 (20 N. W. 11).

8. (1898.) The amendment of 1887 to section 118 of the code, so as to allow a client to verify a pleading before his attorney, notwithstanding its general language, cannot be held to apply to affidavits, other than those verifying pleadings, without giving the amending act a construction which would render it violative of section 11, article III, constitution. *Horkey v. Kendall*, 53 Neb. 522 (73 N. W. 953; 68 Am. St. Rep. 623).

9. (1898.) A notary public who is the attorney of one of the parties to an action is not permitted to take the affidavit of his client for the purpose of procuring an attachment. *Horkey v. Kendall*, 53 Neb. 522 (73 N. W. 953; 68 Am. St. Rep. 623).

10. (1898.) While a notary public may take the affidavit of his client for the purpose of procuring an attachment, the taking of an affidavit as indicated is a mere irregularity, and the affidavit is not a nullity, and its defects may therefore be cured by amendment. *Dobry v. Western Mfg. Co.*, 57 Neb. 228 (77 N. W. 656).

11. (1898.) Validity of affidavit executed before an officer not permitted to take it. *Brownell v. Fuller*, 54 Neb. 586 (74 N. W. 1105).

Construction of ambiguous language.

12. (1897.) Ambiguous language in an affidavit drawn by counsel for a party will be most strongly construed against the latter. *Nebraska Moline Plow Co. v. Fuehring*, 52 Neb. 541 (72 N. W. 1003).

13. (1897.) Where a statement of an affidavit may be read so as to give it a meaning which will make the affidavit defective, but may also be read so as to give it a signification which will support the affidavit, the latter will be adopted, especially where it is a less strained and technical reading than the former. *Hudelson v. First Nat. Bank of Tobias*, 51 Neb. 557 (71 N. W. 304).

Entitling.

14. (1883.) Failure to give a title to the body of an affidavit is a mere technical defect, and not fatal. *Burnham v. Doolittle*, 14 Neb. 214 (15 N. W. 606.)

15. (1893.) A mistake in the title of an affidavit is immaterial after judgment. *Majors v. Edwards*, 36 Neb. 56 (53 N. W. 1041).

Oath.

16. (1895.) Whether or not an attorney swore to an affidavit at the time he made and filed it, is a question of fact to be proved, as any other fact, by any competent evidence. *Bantley v. Finney*, 43 Neb. 794 (62 N. W. 213).

Venue.

Effect of want of venue, see *Attachment*, § 130.

17. (1903). An affidavit for service of summons by publication, void for lack of a venue, cannot be cured or made valid by resorting to extrinsic evidence, when the validity of the decree rendered thereon is assailed. *Albers v. Kozeluh*, 68 Neb. 529 (97 N. W. 646).

Jurat or certificate of officer taking.

18. (1878.) An affidavit should show on its face that it was taken within the officer's jurisdiction. *Blair v. West Point Mfg. Co.*, 7 Neb. 147.

19. (1894. Affidavit for mechanics' lien whose jurat shows the venue to have been a county different from that for which the notary was appointed is insufficient to perfect the lien and renders it incompetent in evidence. *Byrd v. Cochran*, 39 Neb. 109 (58 N. W. 127).

20. (1895.) The certificate of a notary public to an affidavit is presumptive evidence of the facts stated in such certificate, including the statement that affiant signed the affidavit. *Smith v. Johnson*, 43 Neb. 754 (62 N. W. 217).

21. (1895.) The jurat of an officer attached to an affidavit is no part of the affidavit. *Bantley v. Finney*, 43 Neb. 794 (62 N. W. 213).

22. (1895.) An affidavit for a publication of summons actually sworn to does not lose its vitality because the officer who administered the oath failed to attach his jurat. *Bantley v. Finney*, 43 Neb. 794 (62 N. W. 213).

23. (1895.) Where an officer fails to attach his jurat to an affidavit for service by publication, parol evidence in a proper case may be admitted to prove that affiant did in fact swear to the affidavit. *Bantley v. Finney*, 43 Neb. 794 (62 N. W. 213).

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24. (1906.) An affidavit, under our statute, must have attached the certificate of the officer before whom taken that the oath was administered by such officer. *Sebesta v. Supreme Court of Honor*, 77 Neb. 249 (109 N. W. 166).

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Sufficiency of.

25. (1882.) An affidavit must state facts, not mere conclusions of law; the affidavit must state the time and place of performance. *Howard v. Lamaster*, 13 Neb. 221 (13 N. W. 211).

26. (1900.) A general motion to strike certain affidavits from the files, on the ground that they contain certain objectionable statements, is rightly overruled if such affidavits contain material evidence regarding the subject under consideration. *Zimmer v. Fremont Nat. Bank*, 59 Neb. 661 (81 N. W. 849).

Waiver of defects.

27. (1897.) Objection to defects in form or substance of an affidavit are waived if the adverse party answer to the merits and go to trial without making objections. *Hudelson v. First Nat. Bank of Tobias*, 51 Neb. 557 (71 N. W. 304).

Use in evidence.

28. (1880.) Where affidavits filed in another case are erroneously admitted in evidence the party introducing them are bound by the material facts which are established. *Campbell v Crone*, 10 Neb. 571 (7 N. W. 334).

29. (1893.) *Ex parte* affidavit referred to in the opinion *held* inadmissible under the rules of evidence, and that it was properly excluded from the jury. *Barton v. McKay*, 36 Neb. 632 (54 N. W. 968).

30. (1895.) Affidavits by a party purporting to contain statements of jurors made during deliberations by the jury, are admissible in aid of impeaching the verdict, when affidavits of the jurors would not be received. *Peterson v. Skjelver*, 43 Neb. 663 (62 N. W. 43).

31. (1895.) If the officer making the jurat or certificate had authority to administer oaths, the affidavit may be read in evidence as the oath of the party who the officer certifies made the oath. *Bantley v. Finney*, 43 Neb. 794 (62 N. W. 213).

32. (1901.) Affidavits cannot be considered unless made part of bill of exceptions and covered by its certificate. *Newtson v. Walker*, 1 Unof. 118 (95 N. W. 470).

33. (1902.) An affidavit taken before a notary of a sister state or foreign government, is properly received in support of a motion in the courts of this state. *Browne v. Palmer*, 66 Neb. 287 (92 N. W. 315).

34. (1906.) Under the provisions of section 370 of the code, affidavits are admissible in evidence to impeach the return of an officer to the service of a summons in proceedings for revivor. *Johnson v. Carpenter*, 77 Neb. 49 (108 N. W. 161).

35. (1907.) Section 371 of the code, providing that an affidavit may be made before any person authorized to take depositions, cannot inferentially be construed as requiring that objections to affidavits as evidence shall be made in the manner provided by statute for the filing of objections to depositions. *Malcom Savings Bank v. Cronin*, 80 Neb. 231 (116 N. W. 150).

AGE.

See, also, *Infants; Marriage; Seduction.*

Competency of witness to testify as to, see *Witnesses*, §§ 48-52.

As affecting right to serve as juror, see *Jury*, § 62.

AGENCY.

See *Principal and Agent.*

AGISTMENT.

See *Animals.*

AGRICULTURE.

CROSS REFERENCE.

Irrigation of agricultural lands, see *Water and Watercourses*, VIII, B.

Definition.

1. (1892.) Agricultural societies are not corporations within the ordinary meaning of the term, but rather agencies adopted by the state for the purpose of promoting the interests of agriculture and manufacturing. *State, ex rel. Agricultural Society, v. Robinson*, 35 Neb. 401 (53 N. W. 213; 17 L. R. A. 383).

Statutory provisions.

2. (1892.) The provision of section 12, chapter 2, Compiled Statutes, for paying agricultural societies a sum equal to three cents for each inhabitant from the county general fund, does not conflict with the provisions of

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section 15, article III of the constitution. *State, ex rel. Agricultural Society, v. Robinson*, 35 Neb. 401 (53 N. W. 213; 17 L. R. A. 383).

Payments in aid of.

3. (1892.) Mandamus lies to compel board of county supervisors to include in its estimate of expenses the amount payable to an agricultural society under section 12, chapter 2, Compiled Statutes. *State, ex rel. Agricultural Society, v. Robinson*, 35 Neb. 401 (53 N. W. 213; 17 L. R. A. 383).

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AIDER AND ABETTOR.

For assault, see *Assault and Battery*, §§ 7, 8.

Liability for crime, see *Criminal Law*, §§ 42-47.

Of embezzlement, see *Embezzlement*, § 10.

To conversion, see *Trover and Conversion*, §§ 17, 18.

Accessories to crime of murder, see *Homicide*, §§ 25-28.

ALIAS WRITS.

See *Process*, §§ 57-61.

In error proceedings, see *Appeal and Error*, VI, D.

ALIBI.

In larceny, see *Larceny*, § 126.

As defense in criminal prosecution, see *Criminal Law*, § 27.

In bastardy, see *Bastards*, § 91.

ALIENATION.

Of affection, see *Husband and Wife*, IX.

Of Indian lands, see *Indians*, §§ 5-10.

ALIENS.

ANALYSIS.

Right to inherit, §§ 1-3.
Naturalization.
——— Competency of courts, § 4.
——— Time naturalization dates from, §§ 5, 6.
——— Effect of declaration of intention, § 7.
——— Evidence, §§ 8, 9.

CROSS REFERENCES.

See, also, *Citizens*.

Right of resident of Kansas to enforce water right as against resident of this state on upper stream, see *Water and Watercourses*, § 40.

Exemption rights, see *Exemptions*, §§ 23-25a.

Right to inherit.

1. (1901.) A "resident alien," mentioned in section 25 of the bill of rights, is one who resides in the state of Nebraska. *Glynn v. Glynn*, 62 Neb. 872 (87 N. W. 1052).

2. (1901.) 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. *Glynn v. Glynn*, 62 Neb. 872 (87 N. W. 1052).

3. (1903.) Sections 70-73, chapter 73, Compiled Statutes (chapter 58, Session Laws, 1889) regarding the right of an alien to inherit land in this state, as construed in *Glynn v. Glynn, supra*, are not unconstitutional as being broader than the title of the act, nor as special legislation. *Dougherty v. Kubat*, 67 Neb. 269 (93 N. W. 317).

Naturalization.

——— Competency of courts.

4. (1878.) A court without any clerk, distinct from the judge of such court, is not a court "having a clerk" within the meaning of section 2165 of the Revised Statutes of the United States, providing for the naturalization of aliens, and such court is not competent to naturalize aliens. *State, ex rel. Fossler, v. Webster*, 7 Neb. 469.

——— Time naturalization dates from.

5. (1891.) Where an alien is naturalized under the naturalization laws, his citizenship dates from the time the order of the court is made admitting him to citizenship, and does not relate back to the time he made his declaration of intention. *State*,

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ex rel. Thayer, v. Boyd, 31 Neb. 682 (48 N. W. 739).

6. (1891.) The alien inhabitants of the territory of Nebraska at the time of its admission as a state, did not become citizens of the United States by virtue of the acts of congress admitting the state into the Union. *State, ex rel. Thayer, v. Boyd*, 31 Neb. 682 (48 N. W. 739).

——— Effect of declaration of intent.

7. (1897.) Though a declaration of intention to become a citizen may constitute a resident alien an elector, this status does not extend to his son because the declaration was made before the son attained his majority. *Haywood v. Marshall*, 53 Neb. 220 (73 N. W. 449).

——— Evidence.

8. (1891.) The fact that an alien has for many years voted at elections held in this state, and filled important public offices, does not establish the fact that he is a citizen of the United States. *State, ex. rel. Thayer, v. Boyd* 31 Neb. 682 (48 N. W. 739).

9. (1891.) The order of a court admitting an alien to citizenship is a judicial act, in the nature of a judgment. Such proceedings are required to be made a matter of record. The record must be pleaded and proved the same as any other judicial record. Naturalization cannot be established by parol. *State, ex rel. Thayer, v. Boyd*, 31 Neb. 682 (48 N. W. 739).

ALIMONY.

See *Divorce*, §§ 124-210.

ALLOWANCE.

Of appeal or writ of error, see *Appeal and Error*, III.

Of claims against county, see *Counties*, §§ 604-625.

Of claims against estate, see *Executors and Administrators*, §§ 97-174.

Of claims against cities, see *Municipal Corporations*, XII.

To surviving wife and children, see *Executors and Administrators*, III.

ALLONGE.

On promissory note, see *Bills and Notes*, §§ 8, 9.

ALTERATION OF INSTRUMENTS.

ANALYSIS.

Definition, § 1.
Materiality of alteration.
——— Parties, §§ 2-4.
——— Endorsements, §§ 5, 6.
——— Payments, § 7.
——— Consideration, §§ 8-10.
——— Kind of payment, § 11.
——— Removal of conditions and memorandum, §§ 12-15.
——— Place, time, and date, §§ 16-18.
——— Filling blank, § 19.
——— Addition of surety, §§ 20, 21.
Ratification, §§ 22-25.
Effect on rights of parties.
——— As to guarantor, § 26.
——— Promissory notes, §§ 27-31.
——— Note and mortgage, §§ 32-36.
Recovery on original notwithstanding alteration, §§ 37, 38.
——— Alteration by stranger, §§ 39-42.
Assignment of altered note, § 43.
Enjoining collection or transfer, § 44.
Evidence.
——— Presumption, § 45.
——— Burden of proof, §§ 46, 47.
——— Admissibility, §§ 48-56.
——— Sufficiency, §§ 57, 57a.
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Question for the jury, §§ 63-67.

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CROSS REFERENCES.

See, also, *Cancelation of Instruments.*

Alteration of bond of public officer, see *Officers*, §§ 169-171.

Release of surety by alteration of instrument, see *Principal and Surety*, §§ 73-81.

Definition.

1. (1877.) An alteration is an act done upon an instrument by which its meaning or language is changed. *Oliver v. Hawley*, 5 Neb. 439.

Materiality of alteration.

——— Parties.

2. (1892.) An unauthorized alteration of a non-negotiable promissory note by the payee, after the execution thereof, by the insertion of the word "bearer" after the name of the payee, is a material alteration, which will nullify the instrument. *Walton Plow Co. v. Campbell*, 35 Neb. 173 (52 N. W. 883; 16 L. R. A. 468).

3. (1895.) The fraudulent erasure of the name of the original payee of a promissory note, after its execution, by a party to the instrument and the substitution of another, without the consent of the maker, is a material alteration. *Erickson v. First Nat. Bank of Oakland*. 44 Neb. 622 (62 N. W. 1078; 48 Am. St. Rep. 753; 28 L. R. A. 577).

4. (1895.) The fraudulent erasure of the name of the original payee of a note invalidates the paper as to the maker, who has not assented to, or ratified, the change, even in the hands of a *bona fide* holder for value. *Erickson v. First Nat. Bank of Oakland*, 44 Neb. 622 (62 N. W. 1078; 48 Am. St. Rep. 753; 28 L. R. A. 577).

——— Endorsements.

5. (1903.) Writing the words "for value received, we hereby guarantee the payment of the within note, and waive presentment for payment, demand and notice of protest," over an indorsement in blank on the back of a promissory note is a material alteration of the liability of the indorser, and if done without his knowledge or consent releases him from his obligation as such. *Harnett v Holdrege*, 5 Unof. 114 (97 N. W. 443).

6. (1903.) Writing the words "This note to be exchanged for consolidated mortgage bonds of Nebraska and Northwestern Irrigation Company when issued at 90," across the face of a promissory note after it has been indorsed in blank, without the knowledge or consent of the indorsers, is a material change of the note, and releases such indorsers from any liability thereon. *Harnett v. Holdrege*, 5 Unof. 114 (97 N. W. 443).

——— Payments.

7. (1902.) Indorsements of payment entered by mistake or inadvertence on a note do not become a part of the instrument and their erasure does not avoid the note. *Lau v. Blomberg*. 3 Unof. 124 (91 N. W. 206).

——— Consideration.

8. (1879.) Where the payee in a note changed it from $217.36 to $208.12, and transferred it before maturity to an innocent purchaser, such alteration vitiates the note and there can be no recovery thereon. *State Savings Bank v. Schaffer*, 9 Neb. 1 (1 N. W. 980; 31 Am. Rep. 394).

9. (1882.) Where by the terms of a promissory note it was not to draw interest, if the payee, without the consent of the maker, adds the figure "7" to the note to indicate the rate of interest, it is a material alteration, and voids the note. *Davis v. Henry*, 13 Neb. 497 (14 N. W. 523).

10. (1894.) The insertion of the figures "10" in a promissory note, thereby making the instrument draw interest at ten per cent, when no rate of interest was originally specified, is a material alteration. *Hurlbut v. Hall*, 39 Neb. 889 (58 N. W. 538).

——— Kind of payment.

11. (1902.) The unauthorized insertion of the word "gold" before the word "dollars" in an instrument, after its execution and delivery, is a material alteration. *Foxworthy v. Colby*, 64 Neb. 216 (89 N. W. 800; 62 L. R. A. 393).

——— Removal of conditions and memorandum.

12. (1876.) The fraudulent removal of a memorandum, written under a negotiable instrument and qualifying it, vitiates the instrument, even in the hands of a *bona fide* purchaser. *Palmer v. Largent*, 5 Neb. 223 (25 Am. Rep. 479).

13. (1876.) The removal of the words "this note is given upon condition," there being nothing to show what the condition was, does not vitiate the instrument in the hands of a *bona fide* purchaser. *Palmer v. Largent*. 5 Neb. 223 (25 Am. Rep. 479).

14. (1882.) A contract upon the same paper with a negotiable promissory note, which contract modifies and qualifies it, if detached, the note will be invalid even in the hands of an innocent purchaser. *Davis v. Henry*, 13 Neb. 497 (14 N. W. 523).

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15. (1901.) 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. *Edward Thompson Co. v. Baldwin*, 62 Neb. 530 (87 N. W. 307).

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—— Place, time and date.

16. (1877.) After an instrument is completed and delivered, no alteration can be made therein except by consent; an alteration of the date, whether it hasten or delay the time of payment, is a material alteration, and if made without the consent of the party sought to be charged extinguishes his liability. *Brown v. Straw*, 6 Neb. 536 (29 Am. Rep. 369).

17. (1880.) Where a note is altered so as to make it payable at a particular place, when in fact it was payable generally, an indorser is thereby released. *Townsend v. Star Wagon Co.*, 10 Neb. 615 (7 N. W. 274; 35 Am. Rep. 493).

18. (1903.) Merely indorsing by the notary on the back of a contract by husband and wife for the sale of the wife's real estate, of an extension of time for making the first payment, which extension was not authorized by the wife, does not destroy the contract as really made, nor warrant the wife in repudiating it. *Johnson v. Weber*, 70 Neb. 467 (97 N. W. 585).

—— Filing blank.

19. (1904.) The alteration of a negotiable promissory note after delivery, by filling in blanks left therein, where there is nothing on the face of the note to indicate such alteration, will not invalidate the note in the hands of a *bona fide* endorsee, for value, before maturity, and without notice of such change. *Humphrey Hardware Co. v. Herrick*, 72 Neb. 878 (101 N. W. 1016).

—— Addition of surety.

20. (1891.) The addition of the name of a surety to a promissory note, after its delivery to the payee, without the knowledge or consent of the maker, is not such an alteration of the instrument as will discharge the maker. *Barnes v. Van Keuren & Floyd*, 31 Neb. 165 (47 N. W. 848).

21. (1896.) The addition of the name of a surety to a note after delivery to payee without the knowledge of the maker, is not such an alteration as will release the latter. *Royse v. State Nat. Bank of St. Joseph*, 50 Neb. 16 (69 N. W. 301).

Ratification.

22. (1895.) The maker's ratification of a note after a material alteration must be pleaded when relied upon by the holder of the note. *Erickson v. First Nat. Bank of Oakland*, 4 Neb. 622 (62 N. W. 1078; 48 Am. St. Rep. 753; 28 L. R. A. 577).

23. (1898.) When the holder of a note had notice that it had been altered by changing the amount, and with such notice sued upon it in its altered condition, and endeavored to recover thereon, *held*, that he thereby ratified the act of alteration, and that the court did not err in refusing to permit him, after trial, to amend by counting on the note as originally made. *Perkins Windmill & Ax Co. v. Tillman*, 55 Neb. 652 (75 N. W. 1098).

24. (1902.) It seems that ratification of an altered instrument does not require a new consideration, but it must be made intentionally with respect to the very alteration relied on as a defense. *State v. Paxton*, 65 Neb. 110 (90 N. W. 983).

25. (1902.) A material alteration already made, may be ratified and adopted subsequently; and in such case the instrument as altered will be binding. *State v. Paxton*, 65 Neb. 110 (90 N. W. 983).

Effect on rights of parties.

—— As to guarantor.

26. (1902.) In an action for money paid by plaintiff as a guarantor of a note, where defendant claims that the note had been altered, and that he was only surety thereon, an instruction that a material alteration of the note, if shown, would be available to the defendant only in case the jury found that he was surety, and that the plaintiff, when making the alteration, knew that fact, *held* erroneous, but binding upon the jury. *Ball v. Beaumont*, 66 Neb. 56 (92 N. W. 170).

—— Promissory notes.

27. (1877.) An alteration of a promissory note in any material part renders it invalid as against a party not consenting thereto, even in the hands of an innocent

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purchaser. *Brown v. Straw*, 6 Neb. 536 (29 Am. Rep. 369).

28. (1880.) Every alteration of a note by the maker, in respect to the place of payment, or any alteration of the contract of the indorser in a part which may, in any event, become material, without his approbation, discharges his liability. *Townsend v. Star Wagon Co.*, 10 Neb. 615 (7 N. W. 274; 35 Am. Rep. 493).

29. (1890.) Where two persons jointly purchase a feed store and the fixtures therein, and notes are given in part payment, part of the printed form being crossed out before the notes were signed, leaving the word "maturity" as indicating when interest would begin to run, and the holder calls the attention of one of the makers to that fact and he erases the word "maturity," the other maker is not thereby released as the relation of partnership existed and the act bound the firm. *Mace v. Heath*, 30 Neb. 620 (46 N. W. 918).

30. (1892.) Where a promissory note has been altered by the payee in a material matter and with a fraudulent purpose, no recovery can be had upon the instrument, or upon the original consideration for which it was given. *Walton Plow Co. v. Campbell*, 35 Neb. 173 (52 N. W. 883; 16 L. R. A. 468).

31. (1894.) Where a promissory note has been altered in a material part after its delivery to the payee, without the knowledge or consent of the maker, it is invalid, even in the hands of an innocent purchaser. *Hurlbut v. Hall*, 39 Neb. 889 (58 N. W. 538).

——— **Note and mortgage.**

32. (1885.) Where the description of mortgaged premises was altered without the assent of the mortgagor, after the execution of the mortgage, the mortgage is void even in the hands of a *bona fide* holder. *Pereau v. Frederick*, 17 Neb. 117 (22 N. W. 235).

33. (1892.) The fraudulent alteration of a promissory note secured by a mortgage cancels the debt which it evidenced and discharges the mortgage. *Walton Plow Co. v. Campbell*, 35 Neb. 173 (52 N. W. 883; 16 L. R. A. 468*n*).

34. (1897.) The material alteration of a mortgage by which it is avoided does not avoid a note or evidence of the debt for the payment of which it is the security. *Kime v. Jessee*, 52 Neb. 606 (72 N. W. 1050).

35. (1897.) A material alteration of a mortgage without the consent of the mortgagor renders it void. *Kime v. Jesse*, 52 Neb. 606 (72 N. W. 1050).

36. (1897.) Where a mortgagee discovers a mistake in the description of a mortgage after recording and filing, and takes it to the attorney who drew it up and who claimed to be the agent for both parties and corrects it, such alteration is such as will render it void as against the mortgagor. *Kime v. Jesse*, 52 Neb. 606 (72 N. W. 1050).

Recovery on original notwithstanding alteration.

37. (1879.) Where an alteration is made under an honest mistake of right, and not fraudulently and with a view to obtain an improper advantage, a recovery may be had upon the original consideration of the note. And it is the duty of the court, upon payment of costs, to permit the plaintiff to amend his petition setting up the original consideration. *State Savings Bank v. Shaffer*, 9 Neb. 1 (1 N. W. 980; 31 Am. Rep. 394).

38. (1901). 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. *Edward Thompson Co. v. Baldwin*, 62 Neb. 530 (87 N. W. 307).

——— **Alteration by stranger.**

39. (1895.) Where a written instrument is altered by one not claiming under it, the party claiming under it may still enforce it so long as its original character is susceptible of proof. *Bingham v. Shadle*, 45 Neb. 82 (63 N. W. 143).

40. (1895.) An alteration of a written instrument after its execution by one party thereto, without the knowledge or consent of the other, which neither varies its meaning nor changes its legal effect, is an immaterial alteration, and will not invalidate the instrument. *Fisherdick v. Hutton*, 44 Neb. 122 (62 N. W. 488).

41. (1898.) A change made in a written instrument by a stranger is an act of spoliation merely and recovery may still be had, but the instrument must be pleaded according to its original terms and not according to its terms as altered. *Perkins Windmill & Ax Co. v. Tillman*, 55 Neb. 652 (75 N. W. 1098).

42. (1904.) The alteration of a written contract by a stranger, without the privity

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or consent of the parties interested, will not avoid the contract, where the contents of the same, as it originally stood, can be ascertained. *Colby v. Foxworthy*, 72 Neb. 378 (100 N. W. 798).

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Assignment of altered note.

43. (1879.) The assignment by the payee of an altered note transfers to the assignee all the rights of the assignor to the original consideration. *State Savings Bank v. Shaffer*, 9 Neb. 1 (1 N. W. 980; 31 Am. Rep. 394).

Enjoining collection or transfer.

44. (1895.) The collection or transfer of a note materially altered without the consent of the maker should not be enjoined by a court of equity. *Erickson v. First Nat. Bank of Oakland*, 44 Neb. 622 (62 N. W. 1078; 48 Am. St. Rep. 753; 28 L. R. A. 577).

Evidence.

—— Presumptions.

45. (1896.) Where a written instrument shows upon its face a material and obvious alteration, the presumption of law is that such alteration was made before the instrument was finally executed and delivered. *Dorsey v. Conrad*, 49 Neb. 443 (68 N. W. 645).

—— Burden of proof.

46. (1897.) Where material alteration is the defense to a note not disclosing on its face any evidence of having been changed, the burden is on defendant to establish the alteration by a preponderance of the evidence. *McClintock v. State Bank of Table Rock*, 52 Neb. 130 (71 N. W. 978).

47. (1901.) When in an action on a note and mortgage it is sought to defend on the ground of an alleged alteration, and there is nothing on the face of the instruments, taken together, to indicate that the change complained of was made after execution and delivery, but the contrary inference may more readily be drawn therefrom, it is incumbent on the defendant to establish, both by pleading and proof, that the alleged alteration was made without his consent. *Hodge v. Scott*, 1 Unof. 619 (95 N. W. 837).

47*a*. (1907.) The burden is upon the party alleging the material alteration of an instrument to prove that it was altered by the holder thereof after the execution and delivery of the same. *Colby v. Foxworthy*, 80 Neb. 239 (114 N. W. 174).

—— Admissibility.

48. (1876.) Evidence of removal of immaterial words from a promissory note should be excluded from the jury as immaterial. *Palmer v. Largent*, 5 Neb. 223 (25 Am. St. Rep. 479).

49. (1890.) Where the holder of a chattel mortgage in the form of a bill of sale, with a defeasance clause, through ignorance and good faith, without intent to defraud, tore the same into two parts, thus separating the granting from the defeasance clause, and upon the trial presented the two parts as an entire instrument, it was receivable in evidence. *Russell v. Longmoor*, 29 Neb. 209 (45 N. W. 624).

50. (1890.) In an action on a note that shows on its face an endorsement thereon that was first written with a lead pencil and dated "Oct. 1, 1887," which writing was partially erased and rewritten in ink and dated "Oct. 15, '87," and afterwards the figure 7 was changed to 6, the note was wrongfully admitted in evidence. *Johnson v. Bank of Plum Creek*, 28 Neb. 792 (45 N. W. 616). [Overruled. *Dorsey v. Conrad*, 49 Neb. 443.]

51. (1892). Evidence that a note has been materially altered after execution is admissible on foreclosure of mortgage securing it under a general denial. *Walton Plow Co. v. Campbell*, 35 Neb. 173 (52 N. W. 883; 16 L. R. A. 468*n*).

52. (1894.) Where a note was introduced in evidence which disclosed upon its face that it had been altered from a note to bear interest at "10" per cent per annum from "maturity" to one to draw "7" per cent per annum from date, the number "10" and word "maturity" in the original having been crossed out by a line or lines drawn over each with pen and ink, and the number "7" and word "date" interlined or written above the number and word crossed out, *held*, that it was error to render judgment or grant decree upon such note, as testimony of the amount due, without some evidence explaining such alteration. *Courcamp v. Weber*, 39 Neb. 533 (58 N. W. 187). [Overruled. *Dorsey v. Conrad*, 49 Neb. 443.]

53. (1896.) Where a promissory note is offered in evidence, and it is apparent from an inspection that there has been a material alteration thereof it may generally be admitted. *Goodin v. Plugge*, 47 Neb. 284 (66 N. W. 407).

54. (1896.) An instrument showing on its face an alteration may go in evidence in the first instance, leaving the parties to such explanation of the alteration as they may choose to offer. *Dorsey v. Conrad*, 49 Neb. 443 (68 N. W. 645).

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55. (1903.) An attachment undertaking in the body of which defendants' names appear as obligors although at the bottom appears the name of a banking company of which they were respectively president and cashier, with a penmark erasure through it and the appearance that "by" had originally been written before each of their names, and "Pres." after one and "cashier" after the other, is admissible in evidence in the first instance, leaving the parties to such explanations as they choose to offer. *Waller v. Deranleau*, 4 Unof. 497 (94 N. W. 1038).

56. (1904.) A fraudulent alteration of the note sued upon may be shown under the general issue, and, when the whole evidence fairly raises the question, testimony tending to show that no such indebtedness as the one sued upon ever existed is competent upon the issue of alteration. *Gandy v. Estate of Bissell*, 72 Neb. 356 (100 N. W. 803).

——— **Sufficiency.**

57. (1895.) In an action by the indorsee of a note secured by a chattel mortgage to recover the chattels the evidence was *held* sufficient to sustain the defense that the note was materially altered without the knowledge or consent of the defendant. *Davis v. Snyder*, 45 Neb. 415 (63 N. W. 789).

57*a*. (1907.) Evidence examined, and *held* insufficient to prove that the instruments in controversy had been altered after their execution by defendant. *Colby v. Foxworthy*, 80 Neb. 239 (114 N. W. 174).

Question for the court.

58. (1876.) It is error to submit the question of materiality of an alteration to the jury. *Palmer v. Largent*, 5 Neb. 223 (25 Am. Rep. 479).

59. (1877.) It is the duty of the court to determine as a question of law whether an alteration is material; and it is error to submit such question to the jury. *Oliver v. Hawley*, 5 Neb. 439.

60. (1895.) Whether an alteration is material or immaterial, is a question of law for the court. *Fisherdick v. Hutton*, 44 Neb. 122 (62 N. W. 488).

61. (1895.) It is error to submit the question of alteration to the jury, where the alteration is immaterial. *Fisherdick v. Hutton*, 44 Neb. 122 (62 N. W. 488).

62. (1896.) Whether an alteration or erasure appearing in a written instrument is a material one, is a question of law for the court; but when, by whom, and with what motive, such alteration was made, is a question of fact for the jury or trial court, to be determined like any other question of fact. *Dorsey v. Conrad*, 49 Neb. 443 (68 N. W. 645).

Question for the jury.

63. (1885.) Where a material alteration is apparent on the face of a written instrument offered in evidence, the question whether the alteration was made before or after execution and delivery is for the jury. *Bank of Cass County v. Morrison*, 17 Neb. 341 (22 N. W. 782; 52 Am. Rep, 417).

64. (1894.) When an altered note has been received in evidence either with or without testimony explanatory of such change, it then becomes the province of the court or jury, if tried by jury, to decide from the evidence, as a question of fact, whether such alteration was made before or after the execution of the note, and it is error for the trial court to exclude testimony offered which is competent upon such question. *Courcamp v. Weber*, 39 Neb. 533 (58 N. W. 187). [Overruled. *Dorsey v. Conrad*, 49 Neb. 433.]

65. (1896.) Whether an alteration apparent upon the face of a note was made at, or subsequent to, the time of its execution is a question of fact for the jury. *Stough v. Ogden*, 49 Neb. 291 (68 N. W. 516).

66. (1896.) Whether a note was altered prior or subsequent to its execution and delivery, is a question, finally, for the determination of the trial court or the jury, as is any controverted fact in the case, from a consideration of all the competent evidence adduced by the parties explanatory or tending to settle the disputed point. *Goodin v. Plugge*, 47 Neb. 284 (66 N. W. 407).

67. (1901.) There being no evidence supporting the allegations of a fraudulent alteration of a contract after its execution and delivery, it is error to submit that question to the jury. *Holdrege v. Watson*, 1 Unof. 687 (96 N. W. 67).

AMENDMENT.

Of appeal bond, see *Appeal and Error*, §§ 610-615.

Of petition in error, see *Appeal and Error*, §§ 593-595.

Affidavit in attachment, see *Attachment*, §§ 123-129.

As ground for continuance, see *Continuance*, § 5.

Of court records, see *Courts*, §§ 116-117.

Of constitution, see *Constitutional Law*, §§ 4-20.

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Of bill of exceptions in supreme court, see *Exceptions, Bill of*, §§ 229-243.

Submission of bill of exceptions for amendments, see *Exceptions, Bill of*, §§ 94-100.

Proposed amendments of bill of exceptions, see *Exceptions, Bill of*, §§ 101-107.

Of stay bond, see *Execution*, §§ 109, 110.

Of appeal bond in location of highway, see *Highways*, § 125.

Of indictment and information, see *Indictment and Information*, §§ 115-120.

Of judgment, see *Judgments*, §§ 203-218.

Of pleadings, see *Pleading*, §§ 274-382.

Of process, see *Process*, §§ 214-228.

Of affidavit in replevin, see *Replevin*, §§ 134-142.

Of pleading in replevin, see *Replevin*, §§ 223-230.

Of statutes, see *Statutes*, §§ 11-16, 203-252.

Of verdict, see *Trial*, §§ 262-268.

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——— Right to castrate, § 87.
——— Arbitration of claim for damage, §§ 88-93.
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——— Actions for damages, nature of, § 99.
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CROSS REFERENCES.

Game, see *Game*.

Transportation of, see *Carriers*, III.

Shipment of, and care and liability of carrier, see *Carriers*, §§ 126-177.

Description of, in mortgages, see *Chattel Mortgages*, §§ 62-77.

Exemptions of, see *Exemptions*, §§ 34-36.

Restraining standing of stallion in public places, see *Injunction*, § 57.

Injuries to, by railroads, see *Railroads*, VIII, G.

Warranties in sale of, see *Sales*, VI.

Collision of street cars with, see *Street Railroads*, § 37.

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Marks and brands.

1. (1903.) Money received by the secretary of state for recording brands and marks, under the provisions of the act of 1899, was not received by virtue of his office, but under color of his office. *State v. Porter*, 69 Neb. 203 (95 N. W. 769).

2. (1903.) The legislature intended that the secretary of state should retain for his services, as a member of the brand and mark committee, twenty per cent. of all the fees received for recording brands and marks. *State v. Porter*, 69 Neb. 203 (95 N. W. 769).

3. (1903.) The state has no legal title to any part of the fees received by the secretary of state for recording brands and marks under the provisions of the act of 1899; but that officer having, in collecting such fees, assumed to act in an official capacity, the law does not permit him, when called to account by the state, to deny that he so acted. *State v. Porter*, 69 Neb. 203 (95 N. W. 769).

4. (1903.) Chapter 50, laws of 1899, entitled "An act creating a state registry of brands and marks, a state brand and mark committee, providing for brands and marks upon live stock, and repealing chapter fifty-one (51) of the Compiled Statutes of 1897," is in conflict with the constitution and wholly void. *State v. Porter*, 69 Neb. 203 (95 N. W. 769).

5. (1903.) It was not the intention of the legislature by Laws 1899, section 2 of chapter 50, to create a new office to be filled by the secretary of state; but the provision in said section, authorizing the governor to appoint three persons to act as members of a brand and mark commitee, was an abortive attempt to add to the number of executive state offices created by the constitution. *State v. Porter*, 69 Neb. 203 (95 N. W. 769).

Breeding; liens and liability.

6. (1899.) The law that the owners of jacks, stallions and bulls shall have a lien for the get of such animals (laws 1887, ch. 3, amending Comp. St., ch. 4, art. I, sec. 40) is unconstitutional and void. *Weis v. Ashley*, 59 Neb. 494 (81 N. W. 318; 80 Am. St. Rep. 704).

7. (1902.) The petition charged in effect, that through the negligence of the defendant, a stallion belonging to him, and to which defendant had undertaken to breed plaintiff's mare, in pursuance of an agreement between the parties, killed the mare. *Held*, That a motion to require the plaintiff to state the manner in which the mare was killed should have been sustained. *Tooles v. Meyers*, 65 Neb. 704 (91 N. W. 505).

Agistment, keeping and care.

——— Duties in general.

8. (1905.) An agreement by an agister to take good care of a herd of cattle entrusted to his charge is equivalent to a contract to take such care of them as an ordinarily skillful and prudent man would take of his own animals under like circumstances. *Darr v. Donovan*, 73 Neb. 424 (102 N. W. 1012).

9. (1905.) Under a contract whereby one party thereto agrees to herd and care for certain cattle for an equal share of the increase during a period of three years he is required to use reasonable and ordinary care to care for, feed and protect the cattle specified therein, and to make him liable for negligence. *Mattern v. McCarthy*, 73 Neb. 228 (102 N. W. 468).

10. (1905.) When a contract requires an agister to care for cattle "in all respects as he would for similar property of his own," the legal presumption is that he would give his own cattle such care as an ordinarily prudent man would under like circumstances, and this is the measure of the diligence required of him under the contract. *Mattern v. McCarthy*, 73 Neb. 228 (102 N. W. 468).

——— Liability of bailee to third person.

11. (1893.) Under the herd law (Comp. St., ch. 2, art. 3) a person having the custody of cattle for the purpose of depasturing the same, although without compensation from the general owner, is liable for damage done by them upon the cultivated lands of another. *Laflin v. Svoboda*, 37 Neb. 368 (55 N. W. 1049).

——— Liability for loss of or injuries to animals.

12. (1905.) Where one agrees to herd and care for cattle during a period of three years and agrees to pay the other a "just remuneration" for all cattle lost from neglect on his part, such term means the remuneration which the plaintiff would be justly entitled to under the law for the loss of his cattle by the defendant's negligence, and this is the value of the cattle lost. *Mattern v. McCarthy*, 73 Neb. 228 (102 N. W. 468).

13. (1890.) Where there is no express contract as to the kind of feed and degree of care to be given by one who takes cattle to keep through the winter, he is bound to

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provide reasonable and ordinary feed for such stock and to use reasonable and ordinary care to protect them from injury; but where a number of such cattle die while in charge of the bailee and the bailee states that fact to the owner, thereby accounting for the cattle, the burden of proof of negligence is upon the owner. *Calland v. Nichols*, 30 Neb. 532 (46 N. W. 631).

14. (1895.) In an action to recover for the pasturage of cattle, where defendant claims damages caused by improper care of the cattle, failure to provide sufficient water supply, instructions given *held* to properly state the law. *Shafer v. Briggs*, 46 Neb. 445 (64 N. W. 1079).

—— Actions for loss.

15. (1890.) Where one contracts to winter 125 head of cattle, and 49 head die and the others become very thin and weak, and there is other evidence of neglect, a finding of want of proper care is sustained. *Calland v. Nichols*, 30 Neb. 532 (46 N. W. 631).

16. (1893.) In a suit for balance due on account of pasturing cattle, the defendant pleaded (*a*) settlement; (*b*) counter-claim for damages sustained by loss of and injury to cattle on account of plaintiff's negligence. The instructions of the court to the jury on the subject of the defenses of setlement and counter-claim approved and set out at length in the opinion. *Loomer v. Thomas*, 38 Neb. 277 (56 N. W. 973).

17. (1905.) When the contract of an agister is for the care and feeding of a particular herd of cattle, evidence descriptive of the herd is admissible without special reference to the subject in the pleading. *Darr v. Donovan*, 73 Neb. 424 (102 N. W. 1012).

—— Liens.

Priority of lien of mortgage over agister's lien, see *Chattel Mortgages*, §§ 126-128.

18. (1887.) The act of the council and house of representatives of the late territory of Nebraska, entitled "An act to provide for liens upon live stock for their keeping," approved February 18, 1867, examined, and *held* not to give a lien upon live stock for their keeping superior to the lien of a previously executed, delivered, and recorded mortgage thereon. *State Bank of Nebraska v. Lowe*, 22 Neb. 68 (33 N. W. 482).

19. (1891.) When a person furnishes feed and takes care of live stock under a contract with the owner thereof, such person has a lien upon such stock for their keeping, and the owner cannot lawfully obtain possession of the same by legal process until he has paid or tendered the amount due for their feed and care. *Gates v. Parrott*, 31 Neb. 581 (48 N. W. 387); (1892) *Kroll v. Ernest*, 34 Neb. 482 (51 N. W. 1032); (1897) *Weber Bros. v. Whetstone*, 53 Neb. 371 (73 N. W. 695).

20. (1891.) A lien for the keeping of cattle does not attach by virtue of a contract with an agent of mortgagee of cattle, where the mortgage is invalid. *Gates v. Parrott*, 31 Neb. 581 (48 N. W. 387).

21. (1892.) The voluntary surrender of the possession of the stock by the agister releases the lien. *Kroll v. Ernst*, 34 Neb. 482 (51 N. W. 1032).

22. (1892.) While the lien of an agister may be waived, *held*, that a finding that defendant did not surrender the stock was sustained by the evidence. *Kroll v. Ernst*, 34 Neb. 482 (51 N. W. 1032).

23. (1797.) The taking by the owner of live stock from the possession of his agister without the latter's consent does not divest his lien. *Weber Bros. v. Whetstone*, 53 Neb. 371 (73 N. W. 695).

24 (1897.) If a lien exists against live stock for its feed and care a purchaser of such stock is charged with notice of such lien. That he purchased such stock for value without actual notice of such lien affords him not protection against the same. *Weber Bros. v. Whetstone*, 53 Neb. 371 (73 N. W. 695).

25. (1897.) One feeding and caring for live stock pursuant to a contract with the owner has a lien on the stock to secure the claim for feed and care *Weber v. Whetstone*, 53 Neb. 371 (73 N. W. 695).

26. (1901.) One who receives a flock of sheep for care or pasturage under an agreement whereby he is to receive a share of the wool and of the increase as his compensation, is within the provisions of section 28, article 1, chapter 4, Compiled Statutes, creating an agister's lien for the "contract price." *Schrandt v. Young*, 62 Neb. 254 (86 N. W. 1085).

27. (1902.) Whether a bailor of cattle has acquiesced in an agister proceeding to foreclose his lien by other than statutory methods is a question for the jury. *Dale v. Council Bluffs Savings Bank*, 65 Neb. 692, 694 (94 N. W. 983).

28. (1902.) The statute creating the agister's lien, is remedial in its nature, and should be liberally construed for the pur-

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pose of effectuating its object. *Becker v. Brown*, 65 Neb. 264 (91 N. W. 178).

29. (1902.) Evidence examined, and *held* to uphold the agister's liens contended for by the defendants in error in his action. *Becker v. Brown*, 65 Neb. 264 (91 N. W. 178).

30. (1902.) An agister's lien will not, as between the parties, or as to third persons having notice, be lost by change of possession not inconsistent with it, and not under such circumstances as to indicate an intent to waive, relinquish or abandon it. *Becker v. Brown*, 65 Neb. 264 (91 N. W. 178).

31. (1902.) Under the statute of this state, an agister's lien is inferior to that of a prior valid chattel mortgage, properly of record, but is superior to a mortgage executed after it has attached and while the property is in the possession of the agister. *Becker v. Brown*, 65 Neb. 264 (91 N. W. 178).

32. (1902.) An agister may, under circumstances having no tendency to injure any third person, adopt, with the consent or acquiescence of his bailor, other means than statutory foreclosure for the satisfaction of his lien. In such a case a junior lienholder has no ground for complaint if the means adopted do not injure or imperil his interests. *Dale v. Council Bluffs Savings Bank*, 65 Neb. 692, 694 (94 N. W. 983).

33. (1902.) Although, in ordinary cases, an agister's remedy is exclusively that which is provided by statute, there is no reason why this method may not be departed from, with the preference and consent of the parties interested; and in the case at bar it is held that the question whether such consent was given was one of fact, which should have been left to the determination of the jury. *Dale v. Council Bluffs Savings Bank*, 65 Neb. 692 (91 N. W. 526).

Hire and use.

34. (1888.) In an action to recover from a bailee of a team of horses, hired from plaintiff, for injuries to the team by reason of driving the same into a barb wire fence, there being no evidence connecting plaintiff with the existence of the fence, an instruction tending to excuse or justify defendant because of the existence of the fence in the road, properly refused. *Floaten v. Ferrell*, 24 Neb. 347 (38 N. W. 732).

35. (1888). Upon the trial of an action to recover for injuries to a team hired by defendant, it is within the discretion of the court to give or withhold from the jury questions or special findings of fact. *Floaten v. Ferrell*, 24 Neb. 347 (38 N. W. 732).

36. (1896.) The hirer of a team is liable to the owner for want of ordinary care in the use of the team. *Prunell v. Minor*, 49 Neb. 555 (68 N. W. 942).

37. (1896.) Evidence showing that defendant hired a team of horses of plaintiff to work on a farm, that the team was in good condition when taken, but for want of care became greatly run down and very poor, sustains a finding awarded by the jury. *Prunell v. Minor*, 49 Neb. 555 (68 N. W. 942).

Running at large.

——— What constitutes.

38. (1892.) When a dog leaves the owner's premises or goes upon the public road, no one having control of him being near, he is running at large within the meaning of the statute. *Nehr v. State*, 35 Neb. 638 (53 N. W. 573; 17 L. R. A. 771).

38*a*. (1907.) A dog is not running at large within the meaning of section 20, art. 1, Comp. St. 1905, when he is within calling distance and sight of the owner's family and under their control. *Brown v. Graham*, 80 Neb. 281 (114 N. W. 153).

39. (1895.) A bull which has escaped from the premises of his owner, and broken into the pasture of another person who consents that he may remain there over night, during which time he killed the horse of a third person, was running at large in the night-time within the meaning of section 14, article 3, chapter 2, Compiled Statutes, 1893; *Duggan v. Housen*, 43 Neb. 277 (61 N. W. 622).

——— Duty and liability of owner.

40. (1892.) It is the duty of the owner to place upon the neck of his dog "a good and sufficient collar with a metallic plate thereon, on which shall be plainly inscribed the name of the owner." If a dog is found running at large without such collar, no action can be maintained for killing the dog. *Nehr v. State*, 35 Neb. 638 (53 N. W. 589; 17 L. R. A. 771).

41. (1902.) An action will not lie in this state for damages done by cattle, mules, swine or sheep ranging at large upon uncultivated land. But the driving of such animals upon wild land is an actionable wrong. *Meyers v. Menter*, 63 Neb. 427 (88 N. W. 662).

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—— Frightening horses.

42. (1904.) One whose sole fault is the permitting of young hogs of 60 to 100 pounds weight to go at large upon his own premises, so that they wander across the highway to a neighbor's cornfield, and in running back frighten a passer's horse, is not liable for injuries to the passer's equipage and person produced by such fright. *Heist v. Jacoby*, 71 Neb. 395 (98 N. W. 1058).

43. (1904.) Act of February 25, laws 1875, page 190, entitled "An act to restrain sheep and swine from running at large in the state of Nebraska," *held* to have no relation to the protection of users of highways against unconfined hogs. *Heist v. Jacoby*, 71 Neb. 395 (98 N. W. 1058).

—— Killing animals at large.

44. (1892.) A dog that persistently assails people passing along a public road in a threatening manner is a nuisance, and may be killed by any person so assailed *Nehr v. State*, 35 Neb. 638 (53 N. W. 589; 17 L. R. A. 771).

45. (1892.) In this state a dog has a money value which the owner may recover from one who wrongfully and unlawfully kills his dog. *Nehr v. State*, 35 Neb. 638 (53 N. W. 589; 17 L. R. A. 771).

45a. (1907.) Where a jury is instructed that the burden of proof was upon the plaintiff to show that defendant wrongfully killed the plaintiff's dog, the word "wrongful" is presumed to be used in its legal, and not its ethical, sense. *Brown v. Graham*, 80 Neb. 281 (114 N. W. 153).

45b. (1907.) Evidence examined, and found to support the instruction of the court that no person has a right to kill a dog for past and finished misconduct of the dog so killed. *Brown v. Graham*, 80 Neb. 281 (114 N. W. 153).

Personal injuries.

Liability of employer for injuries to employe by vicious horse, see *Master and Servant*, §§ 91, 92.

46. (1883.) It is negligence and want of ordinary care for a person to keep a vicious bull or other dangerous animal insecurely fastened, upon his own premises at a place where other persons are known to go, whether they have a right to go there or not. *Glidden v. Moore*, 14 Neb. 84 (15 N. W. 326; 45 Am. Rep. 98).

47. (1883.) Where the owner of a bull, that is known to be vicious, caused it to be lariated upon a tract of uninclosed land near a neighborhood road, not a highway, and the bull attacks and kills an old man who is passing along the road, the owner of the bull is liable for the death, in an action by an administrator. *Glidden v. Moore*, 14 Neb. 84 (15 N. W. 326; 45 Am. Rep. 98).

48. (1890.) Evidence in an action to recover for injuries sustained by reason of a bite by a wolf harbored by defendants, *held* to sustain a verdict for plaintiff. *Manger v. Shipman*, 30 Neb. 352 (46 N. W. 527).

49. (1891.) Where an action is brought for mischief done to the person or personal property of another by animals *mansuetæ naturæ*, such as horses, oxen, cows, sheep, swine, and the like, the owner must be shown to have had notice of their viciousness before he can be charged, because such animals are not by nature fierce or dangerous, and such notice must be alleged in the declaration. *Durrell v. Johnson*, 31 Neb. 796 (48 N. W. 890).

50. (1893.) Where a master, a corporation, furnished a horse for the use of its servant in the line of his employment, wherein said horse injured the servant, the jury were properly instructed that even if they should find the horse was vicious and dangerous, still that the plaintiff could not recover unless the jury further found from the testimony that the master, through its managers or officers, knew, or by the exercise of proper care and diligence *might have known* of the vicious and dangerous character of the horse. *Hammond Company v. Johnson*, 38 Neb. 244 (56 N. W. 967).

51. (1896.) In a suit against the owner of a runaway team which collided with plaintiff's carriage, a finding that defendant was not guilty of negligence was sustained by the evidence. *Miller v. Strivens*, 48 Neb. 458 (67 N. W. 458).

52. (1903.) An employer's act of unbridling, in connection with the driver, a mare theretofore always gentle and tractable, and putting on her a halter, and then leaving her ordinary driver to lead her to a feed-box to eat, and doing this in front of a tent on the state fair grounds without unhitching her from a wagon, to which she was attached, there being nothing in the surroundings apparently calculated to frighten the mare, was not negligent nor creating any liability of the employer, although immediately after she became unmanageable, and ran over the driver and fatally injured him. *Fifer v. Burch*, 68 Neb. 217 (94 N. W. 107).

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Injuries to other animals.

53. (1886.) Where the owner of horses is negligent through his servant, a herder, and the horses escape and run upon another's land where they are injured by being run by dogs, the owner of the dogs is not liable for the damage; the owner of the horses being negligent in permitting them to escape from his control. *Cook v. Pickrel*, 20 Neb. 433 (30 N. W. 421).

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54. (1895.) Where a bull has escaped from his owner and broken into the pasture of another person who consents that he remain there over night, the negligence of the owner of the pasture in so permitting the bull to remain there is no defense, for the owner of the animal, to an action by a third person for the value of a horse killed while rightfully in the pasture. *Duggan v. Hansen*, 43 Neb. 277 (61 N. W. 622).

55. (1903.) In an action based on the provisions of section 18, article 1 of chapter 4 of the Compiled Statutes, against a county to recover damages alleged to have been sustained by reason of the loss of sheep killed by dogs, the plaintiff must allege that the county board, by resolution spread at large upon the records of its proceedings, imposed the proper tax, and provided the manner and conditions of payment to persons making claims against the fund created thereby. *McCullough v. Colfax County*, 4 Unof. 543 (95 N. W. 29).

55*a*. (1904.) Incompetent questions as to effect of dogs worrying hogs not prejudicial error where evidence tends to show death from a broken shoulder and bruises to internal organs. *Kemp v. Briard*, 5 Unof. 499 (98 N. W. 1048).

56. (1907.) Section 4 of the act of 1877 (Comp. St., ch. 4, art. I, sec. 20) was intended to give protection to sheep and those domestic animals which are ordinarily the prey of dogs; and not to give the owner of one of the participants in a dog fight the right to kill the other dog. *Brown v. Graham*, 80 Neb. 281 (114 N. W. 153).

Estrays and trespassing animals.

Liability of railroads for injuries to trespassers, see *Railroads*, §§ 331-374.

Priority of mortgage over lien for damages for trespass, see *Chattel Mortgages*, §§ 129, 130.

——— Statutory provisions, and effect as to remedy.

57. (1898.) The remedy afforded by the herd law (Comp. St., ch. 2, art. 3) to one injured by trespassing animals is not an exclusive one. *Lorance v. Hillyer*, 57 Neb. 266 (77 N. W. 755).

58. (1898.) The herd law (Comp. St., 1897, ch. 2, art. 3) was not enacted to do away with the common-law liability of the owners of stock for damages and trespasses committed by them. *Lorance v. Hillyer*, 57 Neb. 266 (77 N. W. 755); (1903) *Randall v. Gross*, 67 Neb. 255 (93 N. W. 223).

59. (1898.) If the common-law rule has been modified by the herd law at all, the extent of the modification is to limit the liability of the owner of trespassing animals to damages committed by them upon cultivated lands. *Lorance v. Hillyer*, 57 Neb. 266 (77 N. W. 755).

60. (1898.) The object of the herd law (Comp. St., ch. 2, art. 3) was to give one injured by animals trespassing upon his cultivated lands the right to take possession of such animals, invest him with a lien thereon, and the right to hold such animals until his damages were adjusted. *Lorance v. Hillyer*, 57 Neb. 266 (77 N. W. 755).

——— Liability for trespassers in general.

61. (1880.) The common law fixing a liability for trespass of animal upon lands of another is not applicable to wild and uncultivated lands of this state. *Delaney v. Errickson*, 10 Neb. 492 (6 N. W. 600; 35 Am. St. Rep. 487).

62. (1880.) An action in the nature of trespass for damages committed by the sheep and cattle of defendant, by pasturing on the uninclosed uncultivated prairie land, of which the plaintiff was lessee of the owner, cannot be maintained. *Delaney v. Erickson*, 10 Neb. 492 (6 N. W. 600; 35 Am. Rep. 487. [Limited, 12 Neb. 271; 37 Neb. 368.]

63. (1881.) While the owner of domestic animals may lawfully permit them to *wander* upon and depasture the uninclosed, uncultivated lands of others, he has not right to drive them there without the owner's permission, and if he do so he is answerable for whatever damages they may do while there. *Delaney v. Errickson*, 11 Neb. 533 (10 N. W. 451).

64. (1885.) Where A purchased of B an enclosed pasture, paying therefor an extra price, the consideration for such extra price being that A might turn his stock into such pasture and thereby avoid the expense and trouble of having to herd his stock, which was fully understood by B, and where the stock were turned into the field, and con-

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tinued to run there until the pasturage was eaten up, B residing upon the premises and in a position where he could know of any damage being done by the stock, and where he had cribbed his corn on the premises and within the inclosure in which the stock were permitted to run, but A had no knowledge of the existence of the crib of corn, and where A's stock, without his knowledge, ate and destroyed the corn, *held*, that A would not be liable for such damages and that there was no question of negligence on his part to submit to a trial jury. *Holmes v. Irwin*, 18 Neb. 313 (25 N. W. 334).

65. (1886.) There is no statutory provision for adding damages claimed after the service of notice on the owner of stock taken up under the herd law. *Allen v. Van Ostrand*, 19 Neb. 578 (27 N. W. 642).

66. (1893.) Where there is no actual enclosure and it is sought to bring lands within the provisions of sections 8, chapter 2, article 3, of the Compiled Statutes, there must be a strip plowed around such land at least one rod in width; and two furrows plowed a rod from each other is not a compliance with the statute. *Brown v. Sylvester*, 37 Neb. 870 (56 N. W. 709).

67. (1893.) Where cattle trespass upon the unenclosed land of another party and destroy the hay stacked thereon, the owner may recover the value of the property destroyed but will have no lien on the stock which destroyed the same. *Brown v. Sylvester* 37 Neb. 870 (56 N. W. 709).

68. (1893.) *Quære*, Whether cattle which have strayed between the 20th of October and the 1st day of April are not subject to the provisions of the estray law. *Brown v. Sylvester*, 37 Neb. 870 (56 N. W. 709).

69. (1895.) The herd law (Comp. St., ch. 2, art. 3) is applicable to cultivated lands within the limits of cities of the metropolitan class, notwithstanding the charter of such cities granting power to the mayor and council by ordinance to provide for impounding animals running at large. *Lingonner v. Ambler*, 44 Neb. 316 (62 N. W. 486).

70. (1898.) A city lot on which are planted fruit trees is cultivated land, within the meaning of section 8 of the herd law. *Lorance v. Hillyer*, 57 Neb. 266 (77 N. W. 755).

71. (1898.) At common law every one was liable for injuries committed by his cattle while trespassing upon the lands of others. *Lorance v. Hillyer*, 57 Neb. 266 (77 N. W. 755).

72. (1903.) The owner of a ranch is not in possession of an estray running with the cattle of his lessee upon the ranch, when such cattle are in the immediate charge of the lessee's servant. *Palmer v. State*, 70 Neb. 136 (97 N. W. 235).

73. (1906.) Several owners of animals who have constituted of them a common or joint herd are jointly liable for trespasses committed by such herd. *Wilson v. White*, 77 Neb. 351 (108 N. W. 367).

——— Nature of remedy of taker-up.

74. (1822.) The remedy for trespass by live stock upon cultivated lands, by impounding, notice to the owner, arbitration, etc., as provided by the act of March 8, 1871, is a cumulative and not an exclusive remedy. *Keith v. Tilford*, 12 Neb. 271 (11 N. W. 315).

——— Lien of taker-up.

75. (1882.) A person taking up stock for trespass upon cultivated lands under the provisions of the herd law of 1871, acquires no lien upon such stock unless he comply substantially with the provisions of the act by serving notice and selecting an arbitrator. *Bucher v. Wagoner*, 13 Neb. 424 (14 N. W. 160); (1885) *Deirks v. Wielage* 18 Neb. 176 (24 N. W. 728); (1892) *Hanscom v. Burmood*, 35 Neb. 504 (53 N. W. 371); (1896) *Sloan v. Bain*, 47 Neb. 914 (66 N. W. 1013).

76. (1887). The act of the council and house of representatives of the late territory of Nebraska, entitled "An act to provide for liens upon live stock for their keeping," approved February 18, 1867, does not give a lien upon live stock for their keep superior to the lien of a previously executed, delivered, and recorded mortgage thereon. *State Bank of Nebraska v. Lowe*, 22 Neb. 68 (33 N. W. 482).

77. (1893.) The owner of land upon which growing crops are destroyed by trespassing cattle that are in the custody of a depasturer is not confined to the lien provided by statute, but may maintain an action for damages. *Laflin v. Svoboda*, 37 Neb. 368 (55 N. W. 1049).

78. (1885.) Where the taker-up of trespassing stock, upon the application of the owner to do so, refuses to appoint an arbitrator for the purpose of ascertaining the damage done, after an arbitrator has been selected upon the part of the owner, but demands the payment of a specific sum of

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money, he thereby loses his right to the possession of the stock, and the owner may maintain replevin therefor. *Deirks v. Wielage*, 18 Neb. 176 (24 N. W. 728).

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——— Notice to owner.

79. (1877.) It is the duty of a party taking up stock, under the provisions of an act for a general herd law to protect cultivated lands from trespass of stock, to give notice to the owner of such stock within a reasonable time after taking up the same. As to what is a reasonable time must be determined by the circumstances of each case. *Haggard v. Wallen*, 6 Neb. 271.

80. (1881.) An agreement to arbitrate a claim for damages done by a hog to a corn crop, is a waiver of notice of such claim. *Shroaf v. Allen*, 12 Neb. 109 (10 N. W. 551).

81. (1881.) Where it is shown that the owner of a hog, that is held by another for damages done by it to a crop of corn, had actual notice of the claim for damages, and, also, that the parties had agreed to arbitrate the same, the taker-up is not required to give notice that he has the hog and holds it for the damage done to him. *Shroaf v. Allen*, 12 Neb. 109 (10 N. W. 551).

82. (1886.) Where stock is taken up under the herd law and notice served on the owner, he has forty-eight hours after receiving the notice to pay the damages and costs and take the stock away. *Allen v. Van Ostrand*, 19 Neb. 578 (27 N. W. 642).

83. (1892.) The party taking up stock must give notice to the owner thereof within a reasonable time after the same is taken up. *Hanscom v. Burmood*, 35 Neb. 504 (53 N. W. 371).

84. (1896.) The question of the reasonableness of the notice required to be given the owner of stock taken up, if known, is generally one of fact depending upon the circumstances of the particular case. *Sloan v. Bain*, 47 Neb. 914 (66 N. W. 1013).

——— Duty and liability of taker-up.

85. (1895.) A person who takes up trespassing animals and holds possession under the herd law is liable for damages resulting from negligence in caring for them. *Richardson v. Halstead*, 44 Neb. 606 (62 N. W. 1077).

86. (1895.) A person who takes up trespassing animals and holds possession under the herd law must feed, water, and care for them; but he is only required to exercise such care as would be exercised by a person of ordinary prudence under the circumstances. *Richardson v. Halstead*, 44 Neb. (62 N. W. 1077).

——— Right to castrate.

87. (1882.) The title of an act regulating the herding and driving of stock is not sufficient to include a provision authorizing recovery of damages for castration of animals. *Ives v. Norris*, 13 Neb. 252 (13 N. W. 276).

——— Arbitration of claim for damages.

88. (1877.) The object of the provision for arbitration is to afford a speedy and inexpensive mode of ascertaining the damage sustained by trespass of stock upon cultivated lands. Courts construe proceedings of this kind with great liberality in all matters except as to the jurisdiction. *Haggard v. Wallen*, 6 Neb. 271.

89. (1894.) The provisions of sections 991-995 of the code of civil procedure are not applicable to awards made under article 3, chapter 2, Compiled Statutes, 1893. *Holub v. Mitchell*, 42 Neb. 389 (60 N. W. 596).

90. (1895.) The authority of arbitrators appointed under the herd law is merely to appraise the damages and costs sustained by the land-owner, and, therefore, any right of action which may accrue to the owner of the stock by reason of the former's negligence in keeping the same is not barred by the fact that the statutory arbitration was had and damages assessed and paid. *Richardson v. Halstead*, 44 Neb. 606 (62 N. W. 1077).

91. (1903.) A mortgagee of cattle cannot, in a proceeding under the herd law, be bound by an award made without giving him a hearing or an opportunity to be heard. Notice to the owner of cattle in such a proceeding is not notice to the mortgagee. *Goff v. Byers Bros. & Co.*, 70 Neb. 1 (96 N. W. 1037).

92. (1903.) The remedy by distress under article 3, chapter 2, Compiled Statutes, is given to enforce, in a summary manner, a claim for damages against the owner of cattle who is charged with the duty of keeping them off the cultivated lands of others. A mortgagee, without possession, is not an owner within the meaning of the statute. *Goff v. Byers Bros. & Co.*, 70 Neb. 1 (96 N. W. 1037).

93. (1903.) Under the provisions of the herd law, "the object of the provision for arbitrating is to afford a speedy and inexpensive mode of ascertaining the damages sustained by trespass of stock upon cultivated lands. Courts construe proceedings of this kind with great liberality in all matters

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except as to the jurisdiction." *Randall v. Gross*, 67 Neb. 255 (93 N. W. 223).

—— Replevin of animals by owner.

94. (1881.) A tender of the amount claimed for animals taken up under the herd law must be made before an action of replevin to recover possession of the animal may be brought. *Shroaf v. Allen*, 12 Neb. 109 (10 N. W. 551).

95. (1881.) In an action of replevin of a hog that was taken up by defendant as trespassing in his corn field, the defendant may introduce evidence to show that the parties had agreed to arbitrate, and that on the appointed day defendant's arbitrator came but plaintiff's did not. *Shroaf v. Allen*, 12 Neb. 109 (10 N. W. 551).

96. (1886.) When one takes up stock under the herd law and serves the required notice and the damages claimed, but twenty-four hours later demands additional damages, which is refused, he does not wrongfully detain the stock when, before replevin is brought, he notifies the owner to take the stock at the damages first claimed. *Allen v. Van Ostrand*, 19 Neb. 578 (27 N. W. 642).

97. (1903.) The owner of trespassing animals which have been taken up under the provisions of Compiled Statutes, chapter 2, article 3, section 3, in determining the amount of the tender, acts at his peril. For, if the damages are shown to exceed the amount tendered he will fail in his action. *McAllister v. Wrede*, 5 Unof. 82 (97 N. W. 318).

98. (1903.) Where the taker-up of trespassing stock under the provisions of section 3, article 3, chapter 2, of the Compiled Statutes, commonly called the "Herd Law," by his notice makes an illegal demand on the owner as a condition for its delivery, the owner may refuse to comply with such illegal demand, tender payment of the amount of damages done by such stock, and maintain replevin to recover its possession. *McAllister v. Wrede*, 5 Unof. 82 (97 N. W. 318).

—— Actions for damages, nature of.

99. (1903.) Sections 3, 4, 5, and 6, article 3, chapter 2, Compiled Statutes, entitled the "Herd Law" provide a reasonable method of procedure in the nature of an action *in rem* against tresspassing stock, and that proceedings under these sections are not in conflict with constitutional guaranties. *Randall v. Gross*, 67 Neb. 255 (93 N. W. 223).

—— Actions, jurisdiction.

100. (1885.) Under the provisions of the herd law of Nebraska, when proof of damage and the service of notice as provided by that law is filed with a justice of the peace, by the taker-up of stock, the issuance and service of summons are not necessary to give the justice jurisdiction to issue execution. *Holmes v. Irwin*, 17 Neb. 99 (22 N. W. 124, 347).

101. (1885.) When jurisdiction under the herd law is acquired, the fact that the justice of the peace renders an illegal and void "judgment" will not destroy such jurisdiction, and the issuance of the execution and sale of the property will not be held to be void. *Holmes v. Irwin*, 17 Neb. 99 (22 N. W. 124, 347).

102. (1903.) In proceedings under the herd law, the filing of a notice and proof of damages with a justice of the peace is sufficient to give him jurisdiction, without the issuance and service of a summons. *Randall v. Gross*, 67 Neb. 255 (93 N. W. 223).

—— Actions, petition.

103. (1902.) A petition which states that the defendant, with his cattle, broke and entered upon plaintiff's premises, and injured and destroyed property thereon, charges a willful trespass, and is good against a general demurrer. *Meyers v. Menter*, 63 Neb. 427 (88 N. W. 662).

—— Actions, damages.

104. (1898.) An instruction in an action for damages to a growing crop of corn by trespassing animals, that charges the jury the measure of damages is the market value at the time the damage was done, less an amount claimed by defendant, is erroneous as ambiguous. *Stewart v. Demming*, 54 Neb. 7 (74 N. W. 265).

—— Actions, evidence.

105. (1880.) In an action for damages from trespassing cattle on open and wild land, brought by a lessee, it is error to admit as evidence a letterpress copy of letter written by an agent of the lessor to his principal, concerning the leasing of the lands to plaintiff. *Delaney v. Errickson*, 10 Neb. 492 (6 N. W. 600; 35 Am. Rep. 487).

105*a*. (1881.) In an action to recover damages for grain in the field destroyed by defendant's hogs, where there was evidence that other hogs than those of defendant committed a portion of the injury, but no proof

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as to the proportion thereof committed by defendant's hogs, a verdict for only 25 cents cannot be said to be against the weight of the evidence. *Blanchard v. Loges*, 11 Neb. 460 (9 N. W. 568).

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105*b*. (1882.) Where, in an action for trespass, evidence of the destruction of a field of corn by a herd of about six hundred cattle, witnesses recognized the brand and ear marks of the defendants on about two hundred of the cattle of the herd, it is *prima facie* evidence for plaintiff. *Keith & Barton v. Tilford*, 12 Neb. 271 (11 N. W. 315).

106. (1883.) Where the evidence only shows a threat by defendant to shoot plaintiff's stock if not kept at home, and plaintiff's colt was found injured on defendant's premises, a finding for defendant will not be set aside. *Bolar v. Williams*, 14 Neb. 386 (15 N. W. 716).

Exhibition of a nuisance.

107. (1907.) The exhibition of a stallion on the public streets of a city or village may be declared a nuisance by the municipal authorities and punished as such. *State v. Iams*, 78 Neb. 678 (111 N. W. 604).

Pounds.

108. (1898.) Where a village ordinance provides for impounding animals found running at large, and fixes certain fees which must be paid before the animal will be released, no lien is created for any fees or charges not included within those specified. *Martin v. Foltz*, 54 Neb. 162 (74 N. W. 418).

Sale of diseased animals.

109. (1891.) A sale of hogs to come within section 76 of the criminal code, making it unlawful to sell diseased animals, must be made with knowledge, or such notice as to impute knowledge of the fact of an infection of the hogs. *Stryker v. Crane*, 33 Neb. 690 (50 N. W. 1132).

110. (1891.) Under section 76 of the criminal code, Compiled Statutes, the use of the words "contagious or infectious" in the statute is believed to have been intended to describe one disease, and not distinctive diseases. *Stryker v. Crane*, 33 Neb. 690 (50 N. W. 1132).

111. (1906.) Section 13, chapter 4, article 1, Compiled Statutes, enacting a penalty for selling glandered horses or permitting them to run at large, was not superseded or repealed by a subsequent act to prevent the importation, selling or permitting to run at large of any domestic animal afflicted with a contagious disease, being sections 3174 to 3177 of said statutes, the latter being general in its terms, while the former has a special and particular object. *Canham v. Bruegman*, 77 Neb. 436 (109 N. W. 733).

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APPEAL AND ERROR.

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I. NATURE AND FORM OF REMEDY.

Right of review.

1. (1877.) A petition for rehearing of a cause upon the ground of accident or mistake occuring at the trial is somewhat in the nature of a writ of error in fact, and lies only to the same court in which the judgment was given to examine its own record and rectify error, if any exist. *Morrill v. Taylor*, 6 Neb. 236.

2. (1885.) Under the constitution of 1875, a party may as a right have a cause reviewed either by appeal or on error in the court of last resort, and the legislature has no authority to impose a penalty of five per cent. upon the affirmance of the judgment. *Moore & Cozine v. Herron*, 17 Neb. 703 (24 N. W. 451).

3. (1896.) The right of review, either by error or appeal, is granted by the constitution, and the legislature has no authority to impose a penalty of five per cent upon the

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affirmance of a judgment, *Coburn v. Watson*, 48 Neb. 257 (67 N. W. 171).

Statutory provisions.

4. (1876.) The act of March 3, 1873, granting the right of appeal in equity causes, is not retrospective in its operations. *White v. Blum*, 4 Neb. 555; *Wilcox v. Saunders* 4 Neb. 569.

5. (1882.) Appeal act (Comp. St. ch. 20, sec. 42) is constitutional. *Casey v. Peebles*, 13 Neb. 7 (12 N. W. 840).

Cross-appeals.

6. (1906.) Under our former practice a party might take a cross-appeal, after the filing of the transcript by the appellant, by filing a brief in due season assailing the decree so far as it affected his interest. *Meade Plumbing, Heating & Lighting Co. v. Irwin*, 77 Neb. 385 (109 N. W. 381).

7. (1906.) In appeals in equity cases one may prosecute a cross-appeal by filing his brief in due season assailing the decree appealed from. *Meade Plumbing, Heating & Lighting Co. v. Irwin*, 77 Neb. 391.

Proper mode of review.

Dismissal for mistake in form of remedy, see *post*, § 1417.

Election between remedies, see *post*, §§ 43-54.

Mode of remedy as dependent on errors to be reviewed, see *post*, §§ 1490-1494.

8. (1872.) Since the passage of the act of 1867, abolishing distinctions between actions at law and suits in equity, and repealing title 24 of the code of 1866, entitled "Chancery," no appeal lies to the supreme court. The only remedy for obtaining a review of judgments rendered in the district court, whether in actions legal or equitable, is by petition in error. *Irwin v. Calhoun*, 3 Neb. 453.

9. (1876.) An appeal from a judgment sustaining a demurrer to a petition, on the ground of misjoinder of causes of action, does not lie to the supreme court. The remedy is by petition in error. *Stewart v. Carter*, 4 Neb. 564.

10. (1877.) The only mode of reviewing in the supreme court the judgment of inferior courts, and tribunals exercising judicial power, in civil cases, is by appeal or petition in error. *Furnas v. Nemaha County*, 5 Neb. 367.

11. (1877.) An appeal is exclusively a statutory right, and must be regulated by the statute granting it. *Nebraska S. Co. v. Van Dusen*, 6 Neb. 160.

12. (1879.) The right to review by appeal was unknown to the common law. It is regulated entirely by statute. *State Bank v. Green*, 8 Neb. 297.

13. (1897.) A distinction exists between an appeal and a proceeding in error. *Western Cornice & Mfg. Works v. Leavenworth*, 52 Neb. 418 (72 N. W. 592).

14. (1894.) The right of appeal did not exist at common law. This right is purely a statutory one, and unless expressly conferred does not exist. *Wilcox v. Saunders*, 4 Neb. 569, and *State v. Ensign*, 11 Neb. 529, followed. *State v. Bethea*, 43 Neb. 451 (61 Neb. 578).

15. (1903.) The question whether a party is entitled to a jury trial upon an issue presented by his pleading cannot be determined upon appeal, but must be presented by petition in error. *Day & Frees Lumber Co. v. Bixby*, 4 Unof. 154 (93 N. W. 688).

16. (1904.) A final order by a district court rendered upon appeal from an order of a village board, granting or refusing a license to sell intoxicating liquors, is not reviewable upon appeal by this court. *Halverstadt v. Berger*, 72 Neb. 462 (100 N. W. 394).

——— Legal actions.

17. (1872.) A judgment rendered in an action at law, during the prosecution of which in the district court no exception was taken to any ruling, cannot be brought to the supreme court by appeal, and there tried *de novo*. *Robertson v. Hall*, 2 Neb. 17.

18. (1879.) The supreme court can review an action at law only by proceedings in error. *Roade v. Dunbar*, 9 Neb. 95 (1 N. W. 345); (1882) *State, ex rel. Miller, v. Lancaster County*, 13 Neb. 223 (13 N. W. 212); (1894) *Prentice Brownstone Co. v. King*, 39 Neb. 816 (58 N. W. 277); (1895) *State, ex rel. McMullen, v. Affholder*, 44 Neb. 497 (62 N. W. 871); (1896) *Campbell v. F. & M. Bank of Elk Creek*, 49 Neb. 143 (68 N. W. 344); (1898) *Nebraska Wesleyan University v. Craig*, 54 Neb. 173 (74 N. W. 605); (1898) *Lowe v. Riley*, 57 Neb. 252 (77 N. W. 758); (1899) *Cary v. Kearney Nat Bank*, 59 Neb. 169 (80 N. W. 484); (1902) *Van Doren v. Empkie-Shugart Co.*, 2 Unof. 818 (90 N. W. 220).

19. (1898.) Plaintiff cannot appeal to the supreme court from a dismissal of his petition for false imprisonment rendered because of a failure to state a cause of action, the

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remedy being by petition in error. *Collins v. City of Omaha*, 55 Neb. 208 (75 N. W. 557).

20. (1899.) An appeal from an order or judgment of the district court in a law action does not invest the supreme court with jurisdiction of the cause. *Hayden v. Hale*, 57 Neb. 349 (77 N. W. 733); (1899) *Cary v. Kearney Nat. Bank*, 59 Neb. 169 (80 N. W. 484); (1901) *Uecker v. Magdanz*, 62 Neb. 618 (87 N. W. 344); (1903) *Ewings v. Hoffine*, 67 Neb. 26 (93 N. W. 186).

21. (1901.) Where a judgment has been rendered in the district court in a suit brought by a depositor against the receiver of a state bank, such judgment cannot be reviewed in the supreme court on appeal. Error proceedings is the exclusive remedy. *State v. Bloomfield State Bank*, 1 Unof. 524 (95 N. W. 790).

——— Equitable actions.

Effect of failure to file petition in error within time for perfecting appeal, see *post*, § 606.

22. Appeal is not an exclusive remedy in equity cases. In such cases the decree of the district court may be reviewed by the supreme court, either upon error or by appeal. (1876) *White v. Blum*, 4 Neb. 555; (1889) *Smith v. Gibson*, 25 Neb. 511 (41 N. W. 360); (1902) *Bannard v. Duncan*, 65 Neb. 179 (90 N. W. 947).

23. (1877.) Where a demurrer to a petition in a suit in equity is sustained in the district court, the cause may be taken by appeal to the supreme court. *Arnold v. Baker*, 6 Neb. 134. (*Stewart v. Carter*, 4 Neb. 564; distinguished.)

24. (1877.) An appeal will lie to the supreme court from the final judgment of the district court, in an action brought to set aside a judgment of a justice of the peace, and to obtain a new trial. *Horn v. Queen*, 5 Neb. 472.

25. (1882.) Appeal lies from judgment making injunction perpetual that subjects securities for payment of a debt not due. *Crowell v. Horacek*, 12 Neb. 622 (12 N. W. 99).

26. (1889.) An action at law, or a final order in any special proceeding therein, can be reviewed only on error; but an action in equity, or any special proceeding therein in the nature of a final order, may be reviewed on appeal. *Morse & Co. v. Engle*, 26 Neb. 247 (41 N. W. 1098).

27. (1904.) Where the wife of an attachment debtor is allowed to intervene in the attachment suit, and asks to have the attachment dissolved as to the homestead, as constituting a cloud thereon, the relief prayed for is equitable and hence appeal lies from an order refusing it. *National Bank of Commerce v. Chamberlain*, 72 Neb. 469 (100 N. W. 943).

28. (1905.) Under the statute allowing appeals "in actions in equity," any order or proceeding in such action that may be brought to the supreme court for review may be brought by appeal. *Williams v. Miles*, 73 Neb. 193 (102 N. W. 482, 105 N. W. 181, 106 N. W. 769).

——— Probate proceedings.

Jurisdiction to review judgment of district court, see *post*, §60.

29. (1898.) An order of the district court disallowing a claim against a decedent's estate, on appeal from the county court, is not reviewable by appeal. *Nebraska Wesleyan University v. Craig's Estate*, 54 Neb. 173 (74 N. W. 605).

30. (1901.) Section 675 of the code does not give the right to have reviewed by the supreme court on "appeal" decisions by a county court in the settlement of a decedent's estate. *Whalen v. Kitchen*, 61 Neb. 329 (85 N. W. 278); (1904) *Huffman v. Rhodes*, 72 Neb. 57 (100 N. W. 159).

31. (1901.) Judgments of the district court rendered on appeal from the probate side of the county court are reviewable only by petition in error and cannot be reviewed on appeal by consent of the parties. *Boales v. Ferguson*, 2 Unof. 172 (96 N. W. 337).

32. (1902.) An application to a district court by an executor or administrator for license to sell real property is not an "action in equity" within the purview of section 675, code of civil procedure. Hence a final order made in such a proceeding is reviewable only by petition in error. *Poessnecker v. Entermann*, 64 Neb. 409 (89 N. W. 1033).

33. (1902.) An action was brought in the county court, after the time allowed for an appeal from an order probating a will had elapsed, for the purpose of having such order set aside and for leave to present for probate an alleged subsequent will of the decedent. *Held* to be an equitable action under section 675 of the code of civil procedure, and therefore appealable. *Williams v. Miles*, 63 Neb. 859 (89 N. W. 451).

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——— Eminent domain proceedings.

34. (1897.) The method of bringing to the supreme court for review judgments of the district court in proceedings by railroads for the exercise of the right of eminent domain is by petition in error and not by appeal. *Nebraska Loan & Trust Co. v. Lincoln & B. H. R. Co.*, 53 Neb. 246 (73 N. W. 546).

——— Habeas corpus proceeding.

35. (1894.) The proceedings in a hearing on habeas corpus may be reviewed on error; but being in its nature a civil proceeding, such review must be by petition in error. *In re Van Sciever*, 42 Neb. 772 (60 N. W. 1037).

36. (1904.) The judgment of a district court in a proceeding in habeas corpus will not be reviewed by the supreme court on appeal. *In re Greaser*, 72 Neb. 612 (101 N. W. 235).

37. (1906.) The procedure to obtain a review in this court of a final order made by a district court or judge in a proceeding in habeas corpus must be such as is required to be followed for a like purpose in civil actions. Sections 483 and 515 of the criminal code are not applicable thereto. *State v. Decker*, 77 Neb. 33 (108 N. W. 157).

——— Mandamus proceeding.

38. (1882.) A mandamus is an action at law, and is reviewable only on error, and not by appeal. *State, ex rel. Miller, v. Lancaster County*, 13 Neb. 223 (13 N. W. 212).

39. (1895.) A judgment in a mandamus proceeding can only be reviewed on error. *State, ex rel. McMullen, v. Affholder*, 44 Neb. 497 (62 N. W. 871).

——— Proceedings to vacate judgments.

40. (1876.) The power conferred to vacate or modify a court's own judgments is only that of further proceedings, for the causes enumerated, in an action after judgment, and are therefore merely special proceedings in an action, and are not an original action, and therefore not appealable, but should be brought up by petition in error, under section 584 of the civil code. *Iler v. Darnell*, 5 Neb. 192.

41. (1880.) Error will lie for alleged errors of the district court for granting a new trial on a petition after the adjournment of the term, on the ground of newly discovered evidence. *Kruger v. Adams Harvester Co.*, 9 Neb. 526 (4 N. W. 252).

42. (1902.) A final order by a district court made in a statutory proceeding, under section 602 *et seq.* of the code to obtain a new trial in an action in equity, is not reviewable by this court upon appeal. *Browne v. Croft*, 3 Unof. 133 (91 N. W. 177).

Election between remedies.

43. (1897.) If the judgment which a litigant seeks to have reviewed in this court is appealable he may have it reviewed on appeal or error at his election. He may make such election at any time before the final submission of the case in this court. He may dismiss his appeal and stand on his petition in error, or *vice versa*. *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369 (70 N. W. 955).

44. (1904.) After serving and filing his brief in the supreme court, in which he presents only questions not reviewable upon appeal, a party will not, ordinarily, be allowed to delay the hearing, by abandoning his proceedings in error and submitting the cause as upon appeal. Nor will he be allowed to make such change, except upon just terms, when his opponent will be required to rebrief the case, or is otherwise put to cost or expense thereby. *Jones v. Danforth*, 71 Neb. 130 (98 N. W. 668).

——— Necessity.

45. (1892.) The filing of assignments of error on an appeal does not change the character of the proceeding, nor constitute an independent proceeding, and hence the appellant will not be compelled to elect between the appeal and proceeding in error. *Shickle H. & H. Iron Co. v. Kent*, 34 Neb. 568 (52 N. W. 286).

46. (1896.) Where the judgment below is appealable, the party aggrieved may have it reviewed by petition in error or appeal, but cannot pursue both remedies. *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900 (65 N. W. 1059).

47. (1904.) A litigant, who brings to the supreme court an appealable case, cannot have it considered both as an appeal and as a proceeding in error. *Jones v. Danforth*, 71 Neb. 130 (98 N. W. 668).

——— Effect of filing transcript.

48. (1904.) If, in an appealable case, a transcript of the proceedings in the district court is duly filed in the supreme court, and all proceedings taken necessary to a review upon proceedings in error as well as upon appeal, the party bringing the cause here may submit the same either as an appeal, or as upon proceedings in error. If he makes no choice, it will be considered as

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upon proceedings in error. *Jones v. Danforth*, 71 Neb. 130 (98 N. W. 668).

49. (1895.) The filing with a transcript of the record of a paper containing assignments of error will not alone require the court to treat the proceeding as one in error and not as an appeal. To have such effect the instrument filed should possess the essential elements of a petition in error. *Chadron Banking Co. v. Mahoney*, 43 Neb. 214 (61 N. W. 594).

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——— **Effect of filing petition in error.**

50. (1895.) When a case is, in its nature, appealable, and the party seeking a review files in connection with the transcript a petition in error, he will be deemed to have elected to proceed in error and not by appeal. *Woodward v. Baird*, 43 Neb. 310 (61 N. W. 612); (1895) *Monroe v. Reid*, 46 Neb. 316 (64 N. W. 983); (1896) *Thomas v. Churchill*, 48 Neb. 226 (67 N. W. 182); (1896) *Childerson v. Childerson*, 47 Neb. 162 (66 N. W. 281); (1897) *Nebraska Land, Stock-Growing & Inv. Co. v. McKinley-Lanning Loan & Trust Co.*, 52 Neb. 410 (72 N. W. 357).

51. (1897.) When a case, in its nature appealable, is brought into this court for review, the filing of a petition in error will be construed as an abandonment of an attempted appeal from the same judgment or decree. *Shaw & Co. v. Robinson & Stokes Co.*, 51 Neb. 164 (70 N. W. 953).

52. (1897.) If no election is made, the supreme court will review the judgment of the district court on error only when there is filed with the transcript a petition in error. *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369 (70 N. W. 955).

——— **Taking writ of error on dismissal of apeal.**

53. (1882.) Where an appeal is dismissed, and it is necessary to file an amended transcript in order to show the judgment sought to be reviewed, leave will not be granted to file a petition in error. *State, ex rel. Miller, v. Lancaster County*, 13 Neb. 223 (13 N. W. 212).

54. (1894.) The appellant will be permitted to file a petition in error in the supreme court upon the dismissal of his appeal in order to secure a review of the decree appealed from upon exception, provided such proceeding be commenced within one year from the date of such order or decree. *Omaha Loan & Trust Co. v. Ayer*, 38 Neb. 891 (57 N. W. 567).

II. DECISION REVIEWABLE.

A. Courts and Other Tribunals Subject to Review.

Secretary of state.

55. (1896.) An appeal or proceeding in error will not lie directly to the supreme court to review the decisions of the secretary of state under the Australian ballot law, *State, ex rel. Dahlman, v. Piper*, 50 Neb. 25, 39 (69 N. W. 378).

County board.

56. (1897.) A question of fact determined by a county board cannot be reviewed on error in absence of a statute providing a method for preserving the evidence. *Keens v. Buffalo County*, 53 Neb. 1 (73 N. W. 214).

57. (1906.) The right of appeal in this state is purely statutory, and, unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist. *Whedon v. Lancaster County*, 76 Neb. 761 (107 N. W. 1092).

District judge at chambers.

58. (1900.) The determination of a civil matter by a judge at chambers is not final; it may be reviewed by an appellate court in the proper proceeding. *Porter v. Flick*, 60 Neb. 773 (84 N. W. 262).

County court.

59. (1902.) The supreme court cannot review the rulings of a county court directly, but can only review the judgment of a district court rendered on error or appeal therefrom. *Kingman v. Davis*, 63 Neb. 578 (88 N. W. 777).

B. Nature of Subject-Matter.

Jurisdiction of trial court.

59*a*. (1907.) The jurisdiction of an appellate court is dependent upon that of the tribunal from which the appeal is taken. *Redell v. City of Omaha*, 80 Neb. 178 (113 N. W. 1054).

Probate proceedings.

60. (1885.) The supreme court has jurisdiction to review upon error the judgments and decisions of the district court made upon appeal from the county court in matters pertaining to the settlement of assigned estates. *Stout v. Rapp*, 17 Neb. 462 (23 N. W. 351, 364).

Divorce actions.

61. (1881.) Appeal lies from decree of district court granting divorce. *Brotherton v. Brotherton*, 12 Neb. 72 (10 N. W. 543).

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Orders in receivership.

62. (1899.) An order directing a receiver of a banking corporation to sell its real estate, is appealable. *State, ex rel. German Savings Bank, v. Fawcett*, 58 Neb. 371 (78 N. W. 636).

Smallness of damages in tort actions.

63. (1871.) In an action for assault and battery, a new trial will not be granted on account of the smallness of damages awarded by the verdict. *Shoff v. Wells*, 1 Neb. 168.

64. (1899.) In an action by a passenger for damages for ejection from a train, where the jury's assessment of damages is inadequate, a judgment on the verdict may be reversed. *Spirk v. Chicago, B. & Q. R. Co.*, 57 Neb. 565 (78 N. W. 272).

65. (1902.) Whether, in an action for injuries to the person, a new trial may not be granted on account of the "smallness of damages," where the testimony clearly shows that the damages awarded are grossly inadequate as compensation for the pecuniary injuries actually sustained, *quære*. *Carpenter v. City of Red Cloud*, 64 Neb. 126 (89 N. W. 637).

66. (1903.) In an action for personal injuries, a new trial will not be granted on account of smallness of damages. *O'Reilly v. Hoover*, 70 Neb. 357 (97 N. W. 470).

C. Finality of Determination.

Dismissal for want of final judgment, see *post*, § 1418.

Necessity of final determination.

67. (1876.) To obtain the review of a case in the supreme court there must be a final judgment upon the merits of the case, in the court below. *Nichols, Shepard & Co. v. Hall*, 5 Neb. 194; (1884) *Daniels v. Tibbets*, 16 Neb. 666 (21 N. W. 454); (1896) *Sims v. Davis*, 48 Neb. 720 (67 N. W. 765); (1896) *Reynolds v. City of Tecumseh*, 48 Neb. 785 (67 N. W. 792); (1896) *Hall County v. Smith*, 49 Neb. 274 (68 N. W. 481); (1898) *Bartels v. Sonnenschein*, 54 Neb. 68 (74 N. W. 417); (1901) *McLucas v. St. Joseph & G. I. R. Co.*, 2 Unof. 154 (96 N. W. 115); (1902) *Creamery Package Mfg. Co. v. Magill*, 2 Unof. 414 (89 N. W. 170); *Bock v. Grooms*, 2 Unof. 802 (90 N. W. 204).

68. (1878.) An appeal to the supreme court will only lie upon a final order or decree. *Normand v. Otoe County*, 7 Neb. 261; (1897) *Marrow v. Gilbert*, 52 Neb. 195 (71 N. W. 1014).

69. (1893.) The rulings of the district court cannot be reviewed in the supreme court before final judgment has been entered upon the merits of the case in the court below. *Smith v. Johnson*, 37 Neb. 675 (56 N. W. 323); (1895) *Seven Valleys Bank v. Smith*, 43 Neb. 237 (61 N. W. 606); *Einspahr v. Smith*, 46 Neb. 138 (64 N. W. 689).

70. (1901.) Rulings and orders of an interlocutory character cannot be reviewed by appeal. *Walsh v. Walsh*, 1 Unof. 719 (95 N. W. 1024); (1902) *Coleridge Creamery Co. v. Jenkins*, 66 Neb. 129 (92 N. W. 123); (1905) *Swift & Co. v. Koutsky*, 73 Neb. 730 (103 N. W. 436).

What are final orders or judgments.

71. (1871.) An order to be final and subject to review in an appellate court upon appeal or petition in error, must dispose of the whole merits of the case, and leave nothing for the further determination of the court. It must affect a substantial right and determine the action. *Smith v. Sahler*, 1 Neb. 310; (1896) *Bartram v. Sherman*, 46 Neb. 713 (65 N. W. 789; (1906) *Continental Trust Co. v. Peterson*, 76 Neb. 417 (107 N. W. 786).

72. (1871.) An order or decree which leaves the law or equity of the case, or some material question connected with the merits of the controversy, for future determination, is interlocutory, and is not subject to review in any appellate court on appeal or petition in error. *Smith v. Sahler*, 1 Neb. 310.

73. (1900.) A decree is not final, if anything remains to be done by the court before it can be executed. *Parmele v. Schroeder*, 59 Neb. 553 (81 N. W. 506).

74. (1901.) A decree is not final and appealable until nothing remains to be done but to execute its provisions. *Parmele v. Schroeder*, 61 Neb. 553 (85 N. W. 562; 87 Am St. Rep. 466).

75. (1904.) An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. In such a case, the order is interlocutory. When no further action of the court is required to dispose of the cause pending, the order becomes final and from which an appeal or proceedings in error will lie. *Huffman v. Rhodes*, 72 Neb. 57 (100 N. W. 159).

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——— Interlocutory orders in general.

76. (1886.) An order overruling a motion for an order of arrest is not a final order and cannot be reviewed on error until after judgment. *Whiteley v. Davis*, 20 Neb. 504 (31 N. W. 74).

77. (1890.) The overruling by the district court of an objection made to its jurisdiction is not a final order, and a petition in error cannot be prosecuted therefrom before final judgment in the action. *School District No. 49 v. Cooper*, 29 Neb. 433 (45 N. W. 618).

78. (1894.) Where a counter-claim is stricken out for the reason that it is foreign to the subject of the action, an order denying the defendant's motion to docket it as a separate cause of action, under the provision of section 126 of the code, is not a final order and will not be reviewed in the supreme court by petition in error. *Yager v. Lemp*, 39 Neb. 93 (58 N. W. 285).

79. (1895.) An order of a district court which, in effect, determines that an appeal from an inferior court had been perfected in due time allowed by law for such purpose and places the case upon its docket for adjudication, *held*, not a final order and not subject to review upon error to the supreme court. *Edgar v Keller*, 43 Neb. 263 (61 N. W. 587).

80. (1898.) An order that after exhausting the remedy against the principal debtor the creditor may apply for and obtain a judgment against a guarantor of collection is not final, and therefore not appealable. *Millard v. Parsell*, 57 Neb. 178 (77 N. W. 390).

——— Judgment for costs.

81. (1896.) A judgment for costs is not one from which appeal or error will lie. *Barnhouse v. Village of Adams*, 47 Neb. 756 (66 N. W. 821); (1896) *Reynolds v. City of Tecumeh*, 48 Neb. 785 (67 N. W. 792); (1901) *Welch v. Tippery*, 1 Unof. 163 (95 N. W. 491); (1902) *Solack v. Ganson*, 2 Unof. 276 (96 N. W. 633); (1903) *Thompson v. Nelson*, 4 Unof. 687 (96 N. W. 194); (1903) *Jarvis v. County of Chase*, 5 Unof. 215 (97 N. W. 831).

82. (1876.) A judgment upon the verdict of a jury finding for defendant, for costs only, is not a final judgment. *Nichols, Shepard & Co. v. Hail*, 5 Neb. 794.

83. (1874.) A judgment: "It is considered, ordered, and adjudged by the court that said defendants do have and recover judgment in this action against said plaintiffs, and that said defendants have and recover of and from said plaintiffs their costs, and that execution issue therefor," is a mere judgment for costs; it is not a final judgment from which error will lie to an appellate court. *Sprick v. Washington County*, 3 Neb. 253.

84. (1878.) An entry that on the hearing it was considered that a demurrer to the petition be sustained and that, plaintiff having elected to stand on the petition, defendant moved for judgment and "it is considered, adjudged and decreed that defendants have and recover of plaintiffs their costs," etc., is a mere judgment for costs, and not a final decree from which an appeal would lie. *Normand v. Otoe County*, 7 Neb. 261.

85. (1896.) A mere judgment for costs in favor of the defendant, in whose favor a verdict had been returned, without a final disposition of the cause in the district court, cannot be reviewed in the supreme court. *Little, Maxwell & Co. v. Gamble*, 47 Neb. 827 (66 N. W. 849).

86. (1901.) In an action for conversion, a judgment for costs only is not a final judgment, and not reviewable on error. *Carlson v. Jordon*, 1 Unof. 418 (95 N. W. 671).

——— Taxation of costs.

87. (1886.) A party complaining of the taxation of costs in the district court must file a motion in that court to retax the same. The ruling on the motion to retax is subject to review. *Whitall v. Cressman*, 18 Neb. 508 (26 N. W. 245).

88. (1897.) An order of the district court taxing costs as directed by a mandate of the supreme court *held* not reviewable. *Oliver v. Lansing*, 51 Neb. 818 (71 N. W. 735).

——— Injunction.

89. (1882.) A decree enjoining a sale of real estate is a final judgment, and may be revived on error or appeal. *Rickards v. Coon*, 13 Neb. 419 (14 N. W. 162).

——— Dissolving or modifying injunction.

90. (1878.) An order of a judge of a district court dissolving a temporary injunction is not final, but interlocutory merely, and insufficient to support a petition in error before final judgment in the action. *Scofield v. State Nat. Bank*, 8 Neb. 16; (1897) *Meng v. Coffee*, 52 Neb. 44 (71 N. W. 975); (1902)

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Stansbury v. Storer & Ellis, 3 Unof. 100 (91 N. W. 197).

91. (1896.) No provision of the code makes an order dissolving or modifying a temporary injunction reviewable except in connection with the final judgment rendered in the action of which the temporary injunction is an incident. *Bartram v. Sherman*, 46 Neb. 713 (65 N. W. 789); (1904) *Horst v. Board of Supervisors of Dodge County* 5 Unof. 410 (98 N. W. 822).

92. (1871.) An order dissolving an injunction when the same is an incident of the action, and the substantial rights of the parties remain undetermined, is interlocutory and not appealable. *Smith v. Sahler*, 1 Neb. 310.

93. (1880.) An order vacating a temporary injunction granted at the commencement of an action by a school board to enjoin the continuance of alleged acts of trespass, the record failing to show a final disposition of the case, is not a final order from which appeal will lie. *School District No. 15 v. Brown*, 10 Neb. 440 (6 N. W. 770).

94. (1886.) An order before judgment dissolving a temporary injunction is not a final order and not appealable; but an order overruling an application to set aside a default and for leave to answer may be appealed or reviewed on error. *Steele v. Haynes*, 20 Neb. 316 (30 N. W. 63).

95. (1891.) An order of a judge of a district court, overruling a motion to vacate a temporary injunction granted at the commencement of the action, is not a final order, and cannot be reviewed until the final determination of the cause in the district court. *Clark v. Fitch*, 32 Neb. 511 (49 N. W. 374).

96. (1895.) An order continuing in force, during the pleasure of the court, a temporary injunction theretofore issued is not final, and is, therefore, not appealable. *Einspahr v. Smith*, 46 Neb. 138 (64 N. W. 698).

97. (1896.) An order dissolving a temporary restraining order and denying a temporary injunction is not a final order, and is not appealable. *Manning v. Connell*, 47 Neb. 83 (66 N. W. 17).

98. (1901.) 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 superseded pending review, as in the case of a temporary order of injunction. *State, ex rel. Plattsmouth Telephone Co., v Baker*, 62 Neb. 840 (88 N. W. 124).

99. (1906.) An order dissolving a temporary injunction, and which does not determine or make some final disposition of the case in which the injunction was issued, is not final, and is not alone, or until after a final judgment in the action, reviewable on error or appeal in the supreme court. *Meng v. Coffee*, 52 Neb. 44, followed and approved. *Young v. City of Albion*, 77 Neb. 678 (110 N. W. 706).

——— **Discharging or denying attachment.**

100. (1877.) Refusal to allow a writ of attachment is reviewable on error. *Seidentopf v. Annabil*, 6 Neb. 524.

101. (1883.) An order overruling a motion to discharge an attachment is not a final order, as it is subject to review up to the time judgment is rendered. *Wilson v. Sheppard*, 15 Neb. 15 (16 N. W. 826); (1890) *Root v. State Bank*, 30 Neb. 772 (47 N. W. 82).

102. (1889.) Where a motion to discharge an attachment is sustained, and the plaintiff fails to file an undertaking for the retention of the attached property, while he thereby loses his attachment, it is a final order, he may have it reviewed on error. *Adams County Bank v. Morgan*, 26 Neb. 148 (41 N. W. 993).

——— **Quashing service of process.**

103. (1890.) A ruling of the court sustaining the defendant's motion to quash the service against him by publication, without a judgment of record, is not such a final order determining the plaintiff's rights of action as will be reviewed on error. *Brown v. Rice*, 30 Neb. 236 (46 N. W. 489); (1904) *Goldie v. Stewart*, 5 Unof. 523 (99 N. W. 255).

104. (1892.) An order of the district court quashing the service of a summons cannot be reviewed by the supreme court before final judgment is rendered in the action. *Standard Distilling Co. v. Freyhan*, 34 Neb. 434 (51 N. W. 976); (1892) *Persinger v. Tinkle*, 34 Neb. 5 (51 N. W. 299).

104*a*. (1896.) An order sustaining a motion to quash a summons is not reviewable until followed by a final judgment of dismissal. *Lewis v. Barker*, 46 Neb. 662 (65 N. W. 778).

105. (1907.) Where the service of summons is erroneously quashed, and the cause

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dismissed without prejudice for want of service, such order is a final judgment and appealable. *Davis v. Jennings*, 78 Neb. 462 (111 N. W. 128),

——— Opening or vacating judgment.

106. (1879.) An order setting aside a judgment dismissing a cause, may be reviewed on error. *Hansen v. Bergquist*, 9 Neb. 269 (2 N. W. 858). [Corrected in *Roh v. Vitera*, 38 Neb. 333 (56 N. W. 977) to read "an order setting aside an execution."]

106*a*. (1883.) An order of a district court vacating its own judgment during the term at which it was rendered is not a final order, and therefore is not reviewable by proceedings in error. *Brown v. Edgerton*, 14 Neb. 453 (16 N. W. 474).

106*b*. (1888.) An order of the district court setting aside a decree and permitting a defendant to plead to an answer filed by a co-defendant, by leave of court, but of which said defendant had no notice, is not a final order. *Spencer v Thistle*, 13 Neb. 227, distinguished. *Cockle Separator Mfg. Co. v. Clark*, 23 Neb. 702 (37 N. W. 628).

106*c*. (1892). An order setting aside a judgment under the provisions of section 318 of the code and allowing a new trial, on grounds discovered subsequent to the adjournment of the term at which such judgment was rendered, is a final order and may be reviewed on petition in error. *Johnson v. Parrotte*, 34 Neb. 26 (51 N. W. 290).

106*d*. (1893.) An order of the district court vacating its own judgment rendered by default, and permitting the defendant to answer at the same term at which the judgment is rendered, is not a final order. *Roh v. Vitera*, 38 Neb. 333 (56 N. W. 977).

106*e*. (1902.) An order vacating a decree rendered at a former term, on the ground that the court had no jurisdiction of the subject-matter, is a final order, within the meaning of section 581 of the code of civil procedure. *Bannard v. Duncan*, 65 Neb. 179 (90 N. W. 947).

106*f*. (1903.) An order setting aside a judgment or decree, fixing the time for filing pleadings and setting the cause down for a new trial, under section 602 of the code, is not a final order from which appeal or error will lie before trial and a final judgment. *Rose v. Dempster Mill Mfg. Co.*, 69 Neb. 27 (94 N. W. 964).

107. (1896.) There cannot be a review of an order of the district court opening a judgment and permitting an answer to be filed in the case until there has been a further order or judgment in its nature final. *Merle & Heaney Mfg. Co. v. Wallace*, 48 Neb. 886 (67 N. W. 883); (1902) *Browne v. Croft*, 3 Unof. 134 (93 N. W. 406).

108. (1906.) An order setting aside a judgment under the provisions of section 602 of the code is an interlocutory and not a final order, and cannot be reviewed by this court on appeal. *Continental Trust Co. v. Peterson*, 76 Neb. 411 (107 N. W. 786).

——— Setting aside execution.

109. (1879.) An order setting aside an execution, where it affects a substantial right, may be reviewed on error. *Hansen v. Bergquist*, 9 Neb. 269, as corrected in *Roh v. Vitera*, 38 Neb. 333 (56 N. W. 977).

——— Confirming or setting aside sale.

110. (1879.) An order confirming a sale of real estate made by a judge of the district court in vacation, is a final order, from which an appeal will lie to the supreme court. *State Bank v Green*, 8 Neb. 297.

111. (1879.) That an order confirming or setting aside a sale is a final order will not be denied, and under our code may be reviewed by appeal or petition in error. *Berkley v. Lamb*, 8 Neb. 392.

112. (1906.) An order overruling a motion to deny confirmation of a judicial sale and to set the sale aside is not final or appealable. *Hall v. Moore*, 75 Neb. 693 (106 N. W. 785).

——— Motions to dismiss.

113. (1881.) A judgment dismissing action and for costs in favor of defendant is final and may be appealed from. *Rogers v. Russell*, 11 Neb. 361 (9 N. W. 547).

114. (1889.) An order of the district court refusing to dismiss a cause upon the motion of a defendant is not a final order which can be reviewed upon error to the supreme court. *Grimes v. Chamberlain*, 27 Neb. 605 (43 N. W. 395); (1899) *Troup v. Horbach*, 57 Neb. 644 (78 N. W. 286).

115. (1898.) In an action of replevin the court determined that the writ was, in its inception, unauthorized and the court without jurisdiction, and rendered a judgment of dismissal of the plaintiff's action, coupled with an order to impanel a jury to inquire of the right of property and possession of defendants and their damages. *Held*, A final judgment in the action as to plaintiff. *Swain v. Savage*, 55 Neb. 687 (77 N. W. 362).

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——— Motions for default.

116. (1887.) The overruling a motion to take a default against the defendant is not a final order, and not reviewable in the supreme court until after final judgment. *Shedenhelm v. Shedenhelm*, 21 Neb. 387 (32 N. W. 170).

117. (1884.) A finding by the district court that the allegations of a petition are confessed to be true by a defendant who is in default for want of an answer is not a final order or judgment. *Daniels v. Tibbets*, 16 Neb. 666 (21 N. W. 454).

——— Rulings on pleadings.

118. (1887.) An order of a district court sustaining a motion to strike an amended petition from the files is not a final order from which error may be taken to the supreme court, in the absence of a judgment. *Welch v. Calhoun*, 22 Neb. 166 (34 N. W. 348).

119. (1894.) The sustaining of a demurrer to a petition or answer is not such a final order as will be reviewed by petition in error in this court. *Yager v. Lemp*, 39 Neb. 93 (58 N. W. 285).

120. (1898.) An order overruling a plea in abatement is not a final order, hence not reviewable. *Bartels v. Sonnenschein*, 54 Neb. 68 (74 N. W. 417).

121. (1902.) Rulings upon demurrer for misjoinder of causes of action, will not be reviewed on appeal. *Leavitt v. Mercer Co.*, 64 Neb. 31 (89 N. W. 426).

122. (1906.) An order sustaining a general demurrer to a petition not followed by a judgment of dismissal or other final disposition of the case, is not a final order or judgment, and is not reviewable in the supreme court. *Larson v. Sloan*, 77 Neb. 438 (109 N. W. 725).

123. (1907.) If a plaintiff is denied an opportunity to prove his cause of action upon a sufficient pleading, it matters not whether such denial be upon motion or demurrer, he is entitled, if he has not waived his right, to have an adverse judgment reviewed in the supreme court. *Walters v. Village of Exeter*, 78 Neb. 222 (110 N. W. 631).

——— Approval of bonds.

124. (1895.) An order refusing to require the clerk of the district court to approve a supersedeas bond is a final order. *State, ex rel. Lion Ins. Co., v. Baker*, 45 Neb. 39 (63 N. W. 139).

——— Granting new trial.

125. (1884.) An order of a district court setting aside the verdict of a jury and granting a new trial during the term at which the verdict is returned, and before judgment, is not a final order, and therefore not reviewable by proceedings in error. *Artman v. West Point Mfg. Co.*, 16 Neb. 572 (20 N. W. 873); (1895) *Johnson v. Parrotte*, 46 Neb. 51 (64 N. W. 363).

126. (1892.) Where neither party offers any evidence on a new trial granted to defendant, and the court dismisses the cause the supreme court will not review the action of the lower court in granting a new trial since such an order is not a final one. *Snow v. Vandeveer*, 33 Neb. 735 (51 N. W. 127).

——— Appointment of receiver.

127. (1890.) The appointment of a receiver to take charge of property *pendente lite* is an interlocutory order, and no appeal therefrom can be taken until after final judgment. *McCord, Brady & Co. v. Weil*, 29 Neb. 682 (45 N. W. 1103; 46 N. W. 153). [Overruled. 33 Neb. 868; 57 Neb. 214.]

128. (1892.) Order appointing a receiver for an insolvent, is a final order which may be reviewed in advance of the main case. *McCord v. Weil*, 33 Neb. 868 (51 N. W. 300).

129. (1898.) An order appointing a receiver is appealable in advance of the final disposition of the cause. *Seeds Dry-Plate Co. v. Heyn Photo-Supply Co.*, 57 Neb. 214 (77 N. W. 660).

——— Intervention.

130. (1886.) An order overruling a petition to intervene in an action is, so far as the proposed intervener is concerned, a final order, and reviewable on error. *Harman v. Barhydt*, 20 Neb. 625 (31 N. W. 488).

131. (1897.) An order striking a petition of intervention from the record, on the ground that it was not filed within the time allowed, is not such a final order as will be reviewed upon petition in error. *Whitney v. Spearman* 50 Neb. 617 (70 N. W. 240).

132. (1898.) A third person filed a petition of intervention in a replevin case in the county court. He obtained leave to do so, but at the time of judgment his petition was dismissed, after a finding for plaintiff. *Held*, That this was an adjudication of the merits against him, and he might appeal

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from the judgment. *Moline, M. & S. Co. v. Hamilton*, 56 Neb. 132 (76 N. W. 455).

——— **Order for payment of money into court.**

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133. (1883.) An order of a district court requiring an attorney in an action to pay money alleged to have been collected by him into court "for the use of the plaintiff—and in default that execution issue therefor," is a final order and may be reviewed by proceedings in error. *Baldwin v. Foss*, 14 Neb. 455 (16 N. W. 480).

——— **Alimony allowance.**

134. (1885.) An order in an action for divorce awarding the wife alimony and suit money *pendente lite* to be paid by the husband, cannot be taken by appeal or error to the supreme court before judgment or decree granting or denying a divorce. *Aspinwall v. Aspinwall*, 18 Neb. 463 (25 N. W. 623).

135. (1897.) An order made on application to modify a decree for permanent alimony is apealable. *State, ex rel. Beard, v. Cook*, 51 Neb. 822 (71 N. W. 732).

——— **Reversal of justice of the peace or county court.**

136. (1876.) Where the judgment of a justice of the peace is taken on error to the district court and reversed, and the original case retained for trial in that court, such judgment of reversal is a final judgment, and may be reviewed by the supreme court without waiting for the final disposition of the original case. *Banks v. Uhl*, 5 Neb. 240.

137. (1886.) Where a judgment of a justice of the peace or county judge is taken on error to the district court and reversed, and the original case retained for trial in that court, such judgment of reversal is a final judgment and may be reviewed by the supreme court without waiting for the final disposition of the original case in the district court. *Tootle, Hosea & Co. v. Jones*, 19 Neb. 588 (27 N. W. 635).

138. (1896.) An order of a district court, made in an error proceeding setting aside the judgment of a county court, is a final order which may be reviewed on error by the supreme court before the final disposition of the original case by the district court. *Dane County Bank v. Garrett*, 48 Neb. 916 (67 N. W. 884).

139. (1903.) A judgment of the district court on appeal from an inferior tribunal, which is a complete adjudication so far as the district court is concerned, so as to leave nothing further to be done in that court, is a final order within the purview of section 582 of the code, although the cause is remanded for further proceedings below. *Ribble v. Furmin*, 69 Neb. 38 (94 N. W. 967).

——— **Probate proceedings.**

140. (1901.) An order denying a petition for distribution on the ground that the petitioner is not an heir is appealable. *Estate of Morton v. Morton*, 62 Neb. 420 (87 N. W. 182).

141. (1904.) An order of a county court refusing an application to file a claim against an estate, because presented after the expiration of the time allowed for presenting claims, is a final order from which an appeal to the district court will lie. *Ribble v. Furmin*, 71 Neb. 108 (98 N. W. 420).

142. (1904.) A ruling of the district court on appeal from an order of the county court disallowing a claim against an estate, that the action as a claim against the estate ought to be dismissed for want of jurisdiction, which was followed by an agreement of the parties to allow claimant to file a petition in equity to enforce the claim, is not a final order. *Huffman v. Rhodes*, 72 Neb. 57 (100 N. W. 159).

——— **Foreclosure proceedings.**

143. (1894.) The ruling of a district court, in recalling an order of sale and permitting defendant to file a stay in a foreclosure suit after twenty days from rendition of decree is a final order affecting a substantial right, and may be reviewed on error. *State, ex rel. Harris v. Laflin*, 40 Neb. 441 (58 N. W. 936).

144. (1894.) The ruling of the district court denying plaintiff's application for the appointment of a special master commissioner to make the sale of the mortgaged premises is not reviewable in the supreme court prior to the rendition of a final decree of foreclosure. *American Investment Co. v. Nye*, 40 Neb. 720 (59 N. W. 355; 42 Am. St. Rep. 692).

145. (1897.) In a foreclosure proceeding, an order adjudging the mortgage void in continuing the case for a hearing on defendant's liability for the debt, is appealable. *France v. Bell*, 52 Neb. 57 (71 N. W. 984).

146. (1900.) A decree foreclosing a real estate mortgage, with provisions for sale, is a final order. *Schuyler Building & Loan Ass'n v. Fulmer*, 61 Neb. 68 (84 N. W. 609).

147. (1901.) A decree in a foreclosure

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that if the sale of the property was insufficient to pay the indebtedness the sheriff should specify the deficiency and upon confirmation of his report execution issue therefore against appellants, is not appealable as a final order. *Parmele v. Schroeder*, 61 Neb. 553 (85 N. W. 562; 87 Am. St. Rep. 466).

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—— Proceedings in aid of execution.

148. (1896.) In a proceeding in aid of execution, a judgment defendant who is aggrieved by an *ex parte* order requiring him to appear and submit to an examination may move to vacate the order and prosecute error from a judgment overruling his motion. *Clarke v. Nebraska Nat. Bank*, 49 Neb. 800 (69 N. W. 104).

—— Partition proceedings.

149. (1872.) A judgment in partition made upon report of referees that the property cannot be divided, and directing a sale, and a report of the referees in making the sale, but reserving the confirmation and making of deeds to the purchaser until the coming in of the report, is not so far final as to support an appeal to the supreme court. *Mills v. Miller*, 2 Neb. 299.

—— Writ of assistance.

150. (1905.) An appeal will lie from an order awarding a writ of assistance in a foreclosure proceeding after the sale has been confirmed and deed ordered, subject to the conditions of an appeal from an order confirming the sale. *Escritt v. Michaelson*, 73 Neb. 634 (103 N. W. 300).

D. Nature, Scope and Effect of Decision.

Discretionary matters.

151. (1880.) Although there is no statute entitling a party to a supersedeas, or stay of proceedings on a judgment of ouster from office, yet it is within the province of the trial court, in its discretion, to grant it. But the refusal of that court to do so cannot be reviewed by proceedings in error. *Gandy v. State*, 10 Neb. 243 (4 N. W. 1019).

Affecting substantial rights.

152. (1882.) An order discharging garnishees is an order affecting a substantial right, in a special proceeding, that may be reviewed on error before final judgment in the action. *Turpin v. Coates*, 12 Neb. 321 (11 N. W. 300).

153. (1899.) An appeal will not lie from an order fixing the amount of a supersedeas bond in an application for, and in response to which there has been allowed, a writ of assistance to gain possession of real property purchased at judicial sale since such order did not affect a substantial right. *Green v. Morse*, 57 Neb. 798 (78 N. W. 395).

Ministerial duties.

154. (1904.) The refusal of the district court to fix the amount of a supersedeas for an appeal, involves merely a minsterial duty, and the remedy is by mandamus. *McBride v. Whitaker*, 5 Unof. 399 (98 N. W. 847).

Matters of procedure.

155. (1879.) On a motion to confirm a sale of mortgaged premises under a decree formally journalized, it was objected, in substance, that such entry differed materially from the judgment actually pronounced, but the sale was confirmed notwithstanding the objection. *Held*, That the court thereby decided that the journal was correct, and that such decision was not subject to review, although the decree itself would be. *Findley v. Bowers*, 9 Neb. 72 (2 N. W. 349).

156. (1902.) Alleged errors in matters of procedure, occuring at or before trial, are not reviewable by appeal. *President & Directors of the Ins. Co. of North America v. Parker*, 64 Neb. 411 (89 N. W. 1040).

Relating to costs.

157. (1891.) One H. was permitted to file an amended petition upon payment of costs. He paid a large amount of costs and filed an amended petition on which the case was tried and a decree rendered. *Held*, That as the court below had deemed the order of the court as to payment of costs satisfied by trying the cause and rendering a decree, if more costs were still due, the remedy of the defendant was a motion to retax, and that should additional costs still be due from the plaintiff it would not be cause for the reversal of the judgment. *Hoagland v. Van Etten*, 31 Neb. 292 (47 N. W. 920).

E. Mode of Rendition, Form, and Entry of Judgment or Order.

Necessity of formal judgment.

158. (1878.) Where a demurrer to a petition is sustained in the court below, to authorize a review of the case by the supreme court, there must be a final judgment dismissing the case. *Miller v. Burlington & M. R. Co.*, 7 Neb. 227.

159. (1894.) The supreme court will not review on appeal or error a decree rendered by the district court, prior to the formal entry of such decree upon the journal of

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the trial court. *Ward v. Urmson*, 40 Neb. 695 (59 N. W. 97); (1896) 47 Neb. 826 (66 N. W. 867).

160. (1895.) A motion for judgment *non obstante veredicto* presents no question for review where the record fails to show that is was ruled on below. *Barr v. Kimball*, 43 Neb. 766 (62 N. W. 196).

161. (1900.) An appeal from a decree of foreclosure by a defendant who objects only to the entry of a deficiency judgment against him is premature, if taken before the rendition of such judgment. *Parmele v. Schroeder*, 59 Neb. 553 (81 N. W. 506).

162. (1900.) Where a writ of mandamus has been refused, but no order dismissing the proceedings has been entered, there is no final order from which an appeal will lie. *State, ex rel. Yeiser, v. Higby*, 60 Neb. 765 (84 N. W. 261).

Sufficiency of entry.

163. (1892.) An order that "'judgment be rendered on the verdict" is a mere recital, and a petition in error cannot be predicated thereon. *Stone v. Neely*, 34 Neb. 81 (51 N. W. 314).

164. (1895.) Where plaintiff in his petition prays for partition of land, or for a sale thereof in case it cannot be divided, a record showing that a demurrer to the answer was sustained, and merely reciting "judgment of partition as prayed for in the petition," does not disclose a final judgment. *Atwood v. Atwood*, 45 Neb. 201 (63 N. W. 362).

165. (1897.) An order setting aside a verdict that recites "The court finds that the order granting a new trial was made contrary to, and in violation of, the rules of this court, * * * was prejudicial error, and erroneously granted, * * * and the court would set aside said order granting said new trial had this court jurisdiction to do so," is not a final order. *Marrow v. Gilbert*, 52 Neb. 195 (71 N. W. 1014).

——— Finding or memorandum.

166. (1878.) The recitals in the record were as follows: "This cause coming on to be heard on the demurrer to the plaintiff's petition heretofore filed, the court, after hearing the argument of counsel thereon, and after due consideration, sustained said demurrer and rendered judgment for the defendant, and against the plaintiff, for the costs of this action taxed at $11.20." *Held*. Not a judgment, but a mere recital that one had been rendered for costs. *Miller v. Burlington & M. R. R. Co.*, 7 Neb. 227.

167. (1883.) A journal entry in an ejectment suit that "the cause came on for hearing, and a jury being waived, and after hearing the evidence the court finds the defendant should have judgment entered and stand against plaintiff," is not a final order from which appeal will lie. *Meglemere v. Bell*, 14 Neb. 377 (15 N. W. 703).

168. (1894.) A memorandum for a decree made by a judge of the district court upon his calendar will not authorize a revied of the case in this court before such decree is extended in due form and apt language upon the court journal. *Ward v. Urmson*, 40 Neb. 695 (59 N. W. 97).

169. (1896.) A memorandum of a judgment made by a judge of the district court upon his trial docket will not authorize a review thereof in the supreme court before the extension of such judgment upon the journal of the district court, in apt language and in due form. *Hornick, Hess & Moore, v. Maguire*, 47 Neb. 826 (66 N. W. 867).

170. (1897.) A finding without a judgment in a summary prosecution for contempt of court will not reviewed by means of proceedings in error. *Blodgett v. State*, 50 Neb. 121 (69 N. W. 751).

III. RIGHT OF REVIEW.

A. Persons Entitled.

Parties of record, or privies.

Persons entitled to alleged error, see *post*, §§ 1504-1551.

171. (1896.) Only parties to a judgment, or their privies, can prosecute error or appeal. *Burlington & M. R. R. Co. v. Martin*, 47 Neb. 56 (66 N. W. 15); (1900) *Peterson v. Martin*, 60 Neb. 577 (83 N. W. 831); (1901) *Large & Amsden Co. v. Nott & Son*, 1 Unof. 147 (95 N. W. 484).

172. (1896.) Where plaintiffs in error are not parties to a judgment, or their privies, the petition in error may be dismissed. *Burlington & M. R. R. Co. v. Martin*, 47 Neb. 56 (66 N. W. 15).

173. (1898.) Where a party dies after judgment, the administrator may prosecute error without procuring an order of reviving the action in his name. *Webster v. City of Hastings*, 56 Neb. 245 (76 N. W. 565).

174. (1899.) A judgment cannot be reviewed by one not a party thereto, or who is not affected thereby. *Pennsylvania Co. v. Kennard Glass & Paint Co.*, 59 Neb. 435 (81 N. W. 372).

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175. (1900.) An order confirming sale of realty by receiver of a bank is appealable and may be superseded by the bank. *State v. Fawcett*, 60 Neb. 393 (83 N. W. 176).

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176. (1900.) Any party prejudiced by a judgment rendered against him may, by taking the proper steps, have the same reviewed. *Horton v. State, ex rel. Hayden*, 60 Neb. 701 (84 N. W. 87).

177. (1901.) The right of review on appeal is confined to those who are parties to the suit in the court below. *State v. Bloomfield State Bank*, 1 Unof. 526 (95 N. W. 791).

Parties not prejudiced.

178. (1899.) One not prejudiced by a judgment cannot obtain a review thereof. *Sturtevant Co. v. Bohn Sash & Door Co.*, 59 Neb. 82 (80 N. W. 273); (1900) *First Nat. Bank v. Gibson*, 60 Neb. 767 (84 N. W. 259).

179. (1905.) A defendant who has disclaimed in the district court, and against whom no judgment has been rendered except to bar him of the subject of the action, is not entitled to a review on error or appeal. *Rock v. Huff*, 73 Neb. 162 (102 N. W. 267).

Interest in subject-matter.

180. (1896.) A judgment debtor disclaiming any interest in the money garnished cannot predicate error upon an order requiring the garnishee to pay the money into court, or upon the refusal to vacate such order. *Burnham v. Ramge*, 47 Neb. 175 (66 N. W. 277).

181. (1897.) An appealable interest exists when the judgment or decree so affects a party or privy to the record that he would derive a substantial benefit from its modification or reversal. *Penn Mutual Life Ins. Co. v. Creighton Theatre Building Co.*, 51 Neb. 659 (71 N. W. 279).

182. (1897.) A bidder at a judicial sale whose bid has been accepted may appeal from an order setting the sale aside. *Penn Mutual Life Ins. Co. v. Creighton Theatre Building Co.*, 51 Neb. 659 (71 N. W. 279).

183. (1898.) Where, in an action by a surety to foreclose an indemnity mortgage, it appears from the pleadings that the proceeds of the sale of the mortgaged property are to go to the creditor, who is also a party to the action, such creditor is so interested in the controversy that he may, for his own benefit, prosecute an appeal from a judgment adverse to the surety. *Blair State Bank v. Stewart*, 57 Neb. 58 (77 N. W. 370).

184. (1906.) The purchaser of an equity of redemption has an interest that will support the right to appeal a foreclosure. *Street v. Smith*, 75 Neb. 434 (106 N. W. 472).

——— Sureties of parties.

185. (1905.) When there has been a trial and judgment in replevin after the death of the plaintiff and without revivor or suggestion of death upon the record, the sureties in the replevin bond have such an interest as entitles them to have the error corrected by direct proceedings under the statute. *McBrayer v. Jordan*, 73 Neb. 483 (103 N. W. 50.)

——— Attorneys of parties.

186. (1903.) Attorneys who have undertaken to establish, for a contingent fee, a client's right to a fund in court, and who, after rendering valuable services, have been defeated in the district court, and who have furnished a supersedeas bond to retain the fund, and are taking steps to have the decision against their client reviewed on error, are entitled, when their client under these circumstances refuses to pay them and instructs them to proceed no further on her behalf, to prosecute error proceedings in her name, on their own behalf, in order to collect their contingent fee out of the fund still in court, if they can establish their client's right to it. *Counsman v. Modern Woodmen of America*, 69 Neb. 713 (98 N. W. 414).

B. Estoppel, Waiver or Agreements Affecting Right.

Estopped to allege errors, see *post*, §§ 1509-1551.

Inconsistent position or action in general.

187. (1876.) The taking of a stay of execution, prior to the act of February 23, 1875, is not a waiver of the right to prosecute proceedings in error in the supreme court. *White v. Blum*, 4 Neb. 555; (1876) *Seymour v. Street*, 5 Neb. 85. [Overruled. 11 Neb. 474; 20 Neb. 315.]

188. (1879.) If a stay of the order of sale under a decree of foreclosure be taken, no proceedings on appeal from each decree can afterwards be had. *McCreary v. Pratt*, 9 Neb. 122 (2 N. W. 352).

189. (1882.) After a party has a stay of order of sale, he cannot have the judgment reviewed on error or appeal. *Sullivan Saving Inst. v. Clark*, 12 Neb. 578 (12 N. W. 103).

190. (1893.) Where, in an equitable proceeding, the unsuccessful party secures a re-

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examination by the district court of the questions at issue, upon an application in the nature of a bill of review, although by motion, instead of a petition, he will be held to have waived his right to appeal from such decree. *Wilson v. Roberts*, 38 Neb. 206 (56 N. W. 787).

191. (1900.) An appeal from a judgment claimed to have been irregularly obtained estops the party appealing from afterwards relying on the alleged irregularities antecedent to the judgment appealed from. *Dredla v. Baache*, 60 Neb. 655 (83 N. W. 916).

191*a*. (1907.) In an action for personal injuries as a result of negligence, the fact that the jury has, at the request of one of the parties, inspected the scene of the injury, does not necessarily preclude such party from complaining that the verdict is not supported by the evidence. *Forbes v. City of Omaha*, 79 Neb. 6 (112 N. W. 326).

Acquiescence in decision.

192. (1883.) Taking an order for leave to plead in the district court after an erroneous reversal of the judgment of a justice of the peace, the order being afterwards vacated, is not a waiver of the error, nor does it estop a party from prosecuting error to the supreme court on the judgment of reversal. *Raymond v. Strine*, 14 Neb. 236 (15 N. W. 350).

193. (1884.) If a defendant, after the overruling of a demurrer, answer to the merits, he thereby waives his exception to the ruling of the court on such demurrer. *Dorrington v. Minnick*, 15 Neb. 397 (19 N. W. 456).

194. (1897.) An order striking from the files an amended petition as being substantially the same as the original, to which a demurrer had been sustained, may be reviewed by a proceeding in error, the right not being waived by filing the amended petition. *Wheeler v. Barker*, 51 Neb. 846 (71 N. W. 750).

195. (1901.) The filing of a motion, which is overruled, to vacate a decree and dismiss the action in which it is rendered, because of findings of fact made by the court in the same action, does not waive an appeal from the decree thus vainly attacked. *Anderson v. Hendrickson*, 1 Unof. 610 (95 N. W. 844).

196. (1901.) A party who has acquiesced in an adverse finding of fact by making it the basis of subsequent proceedings in the cause, is precluded from obtaining review of such finding on appeal. *Walsh v. Walsh*, 1 Unof. 719 (95 N. W. 1024).

197. (1902.) At a term subsequent to that at which the motion for a new trial was overruled the unsuccessful party asked the court to render judgment on the verdict. *Held*, That such party was not thereby precluded from obtaining a review of errors in the supreme court. *Carlson v. Benton*, 66 Neb. 486 (92 N. W. 600).

Compliance with judgment.

198. (1895.) A motion of an appellee to dismiss an appeal because of the payment by appellant of the judgment from which an appeal had been taken must be overruled when it is shown that such payment was not voluntary, but was made to avoid a sale of appellant's property on an execution issued for the satisfaction of the aforesaid judgment. *Green v. Hall*, 43 Neb. 275 (61 N. W. 605; 47 Am. St. Rep. 761).

199. (1899.) The mere payment of the costs by an unsuccessful litigant is not a waiver of the right to appeal or prosecute error from the judgment rendered on the merits. *Woodward v. State, ex rel. Thomssen*, 58 Neb. 598 (79 N. W. 164).

Acceptance of benefits.

200. (1885.) A party who accepts the amount of an order or judgment cannot afterwards prosecute an appeal from the same. *Gray v. Smith*, 17 Neb. 682 (24 N. W. 340).

201. (1894.) A party who, after appealing from a decree in his favor, voluntarily accepts the benefits, or receives the advantage, of the decree is thereby precluded from afterwards prosecuting his appeal. *Harte v. Castetter*, 38 Neb. 571 (57 N. W. 381).

202. (1906.) A party is not estopped to prosecute his appeal by the fact that he accepts the amount of a judgment which the appellee concedes to be due him; the appeal in such case involving only his right to a further recovery. *Meade Plumbing, Heating & Lighting Co. v. Irwin*, 77 Neb. 385 (109 N. W. 391).

Agreements and stipulations.

203. (1880.) Where a judgment debtor, by an agreement secures a settlement of the entire controversy, he cannot thereafter prosecute a petition in error to reverse the decree directed against him. *Treischke v. Western Grain Co.*, 10 Neb. 358 (6 N. W. 427).

204. (1883.) Where a party enters into a stipulation to pay all costs in case no

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appeal is taken, and fails to pay the costs, he cannot insist upon the stipulation to prevent an appeal. *Clark v. Strong*, 14 Neb. 229 (15 N. W. 236).

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205. (1898.) A judgment on the agreement of parties thereto is binding and will not be reversed on appeal. *Andersen v. Carson*, 54 Neb. 678 (74 N. W. 1072).

206. (1901.) A stipulation in an action pending in a district court that the property which is the subject of the controversy shall be sold and the proceeds deposited with the clerk until it shall be determined which party to the action is entitled to them, and that, if the sale shall be made before the matter shall be fully litigated, the funds shall be paid out when the court shall have made an order that one or the other party is entitled to them, is not effectual as a release of errors and a waiver of the right of review in the supreme court. An intent by the parties to bar themselves from the right of access to the courts must be manifested by express words or by the strongest implication. *Ryan v. Donley*, 2 Unof. 6 (96 N. W. 49).

207. (1903.) A stipulation in an action that the property which is the subject of the controversy shall be sold and the proceeds deposited with the clerk to be paid out when the court shall have made an order that one or the other party is entitled to them, is not effectual as a release of errors and a waiver of the right of review in the supreme court. An intent by the parties to bar themselves from the right of access to the courts must be manifested by express words or by the strongest implication. *Ryan v. Donley*, 69 Neb. 623 (96 N. W. 231).

IV. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

Dismissal for failure to preserve question for review, see *post*, §§ 1419-1424.

A. Issues and Questions in Lower Court. Necessity of presentation in general.

208. (1876.) To obtain a review of a case in the supreme court, the party must first have fully and fairly presented, in the proper mode, the questions of law to the court below. *Gibson v. Arnold*, 5 Neb. 186.

209. (1881.) Cases are to be tried on the same issue in the appellate court as in the court of original jurisdiction, with the exception that matter arising after the trial, such as payment, compromise, release, etc., may be pleaded as a defense to the action. *O'Leary v. Iskey*, 12 Neb. 136 (10 N. W. 576); (1896) *Cobbey v. Buchanan*, 48 Neb. 391 (67 N. W. 176); (1897) *Morrill v. Crawford*, 51 Neb. 284 (70 N. W. 954); (1902) *Carnahan v. Brewster*, 2 Unof. 366 (96 N. W. 590); (1903) *McCook Irrigation & Water Power Co. v. Crews*, 70 Neb. 115 (102 N. W. 249); (1904) *Banking House of A. Castetter v. Stewart*, 70 Neb. 815 (98 N. W. 94).

210. (1881.) In its appellate jurisdiction, the province of the supreme court is, generally, to review the rulings of the inferior tribunals, duly expected to at the time of being made, and to correct such of them as are found to be erroneous; not the consideration of questions first raised after the case is brought here, unless they be those of jurisdiction. *Courtnay v. Price*, 12 Neb. 188 (10 N. W. 698).

211. (1884.) In a proceeding on error to a district court the supreme court can only consider such points as have been brought to the attention of the district court and a ruling had or demanded thereon, and it is such ruling or refusal to rule by the district court upon which this court can act. *Chicago, St. P., M. & O. R. Co. v. Lundstorm*, 16 Neb. 254 (20 N. W. 198; 49 Am. Rep. 718).

212. (1894.) Where a case is brought to the supreme court on petition in error, to review the decision of the lower court on a motion of a purchaser to vacate the confirmation and set aside a judicial sale of real estate, only such questions as were presented in the lower court, or to which its attention was called and its ruling taken or requested, will be reviewed or considered in the supreme court. *Norton v. Nebraska Loan & Trust Co.*, 40 Neb., 394 (58 N. W. 953).

213. (1895.) The supreme court as an appellate tribunal can pass upon no question which was not presented to and passed on by the district courts; and will not, for the purpose of determining whether a district court came to a correct conclusion, examine any evidence which was not presented to that court. *Omaha Fire Ins. Co. v. Dierks & White*, 43 Neb. 473 (61 N. W. 740).

214. (1895.) An issue not presented by the pleadings will be disregarded on appeal. *Chapman v. Brewer*, 43 Neb. 890 (62 N. W. 320; 47 Am. St. Rep. 779).

215. (1895.) A stipulation of the facts filed in the district court after its judgment has been rendered cannot be considered upon

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proceedings for the review of such judgment in the supreme court. *Bowen v. State*, 46 Neb. 23 (64 N. W. 353).

216. (1888.) A question which was not presented to the trial court, but is raised for the first time in the supreme court, need not be considered. *Dunham v. Courtnay*, 24 Neb. 627 (39 N. W 784); (1896) *Dayton Spice-Mills Co. v. Sloan*, 49 Neb. 622 (68 N. W. 1040); (1896) *Fuller v. Cunningham*, 48 Neb. 857 (67 N. W. 879); (1899) *Broadwater v. Foxworthy*, 57 Neb. 406 (77 N. W. 1103); (1899) *Bankers Life Ins. Co. v. Robbins*, 59 Neb. 170 (80 N. W. 484); (1899) *Arlington State Bank v. Paulsen*, 59 Neb. 94 (80 N. W. 263); (1900) *Hyde v. Hyde*, 60 Neb. 502 (83 N. W. 673); (1903) *Batty v. City of Hastings*, 69 Neb. 511 (95 N. W. 866).

217. (1901.) When the defendant in an action to foreclose a tax lien files no pleading in the district court except a motion to strike plaintiff's petition from the files, the action of the trial court in overruling such motion cannot be reviewed on appeal. *Seaman v. Atkinson*, 2 Unof. 197 (96 N. W. 149).

218. (1905.) The failure of the clerk, in recording a judgment, to certify that certain of the defendants are sureties, where such is the fact, is reversible error, though not presented to the trial court. *Escritt v. Michaelson*, 73 Neb. 634 (103 N. W. 300).

219. (1906.) Questions not raised by the pleadings in the court of original jurisdiction cannot be considered by the supreme court on appeal. *Bankers Union of the World v. Landis*, 75 Neb. 625 (106 N. W. 973).

220. (1906.) The failure of the appellees to answer in the court below does not deprive them of the right to review the judgment of that tribunal. *Lancaster County v. Whedon*, 76 Neb. 753 (108 N. W. 127).

Theory of cause.

221. (1897.) Parties will, as a rule, be restricted to the theory upon which the cause was tried below. *Shaw & Co. v. Robinson & Stokes Co.*, 51 Neb. 164 (70 N. W. 953); (1903) *Parker v. Knights Templars & Masons Life Indemnity Co.*, 70 Neb. 268 (97 N. W. 281).

222. (1895.) A case will in general be reviewed in the supreme court, only with reference to the theory adopted by the parties in the district court. *Woodward v. Baird*, 43 Neb. 310 (61 N. W. 612); (1896) *Omaha Brewing Ass'n v. Wuethrick*, 47 Neb. 920 (66 N. W. 990).

223. (1897.) In an action by a receiver of a bank against one who had held some of its unpaid stock, and his transferee thereof, for the amount of an assessment thereon, in which it was sought to obtain judgment against one defendant if certain allegations of fraud against him should be sustained by the proofs to be adduced, and if not so sustained then against the other defendant, the cause must be tried on appeal as one for alternative relief; and the evidence not being found sufficient to charge the original holder of the stock on the theory proceeded on against him in the district court, he cannot be held liable in the supreme court on a different theory. *Morrill v. Crawford*, 51 Neb. 284 (70 N. W. 954).

224. (1899.) Where parties rest the priorities of liens on the determination of a definitely stated question, the reviewing court will not settle them in accordance with other conditions or facts existing in the case. *Woolworth v. Parker*, 57 Neb. 417 (77 N. W. 1090).

225. (1901.) As a general rule, the supreme court will review a case only with reference to the theory adopted by the parties in the trial court. This rule is particularly applicable where a party who has procured a decree upon one theory, seeks a modification thereof in the supreme court upon a different theory. *Commercial State Bank v. Ketchum*, 1 Unof. 454 (96 N. W. 614).

Grounds of action or relief.

226. (1895.) In reviewing the action of the district court in refusing to set aside a sale the supreme court can consider only whether the district court erred in refusing to set aside the sale on the specific grounds assigned for that purpose in the motion filed in the court below. *Hooper v. Castetter*, 45 Neb. 67 (63 N. W. 135).

227. (1903.) In an equitable action for a new trial, evidence offered for the purpose of proving the plaintiff had a substantial and meritorious defense in the prior action was objected to an excluded on the ground of irrelevancy and immateriality, and a ruling of the trial court procured limiting the evidence to the alleged ground of fraud, and the suit was tried upon that theory. *Held*, on appeal from a judgment dismissing the suit, that it is proper to adopt the same theory in determining whether the plaintiff is entitled to a new trial and that, for the purpose of the case, it will be assumed that

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a valid and meritorious defense existed in his favor in the original action. *Klabunde v. Byron Reed Co.*, 69 Neb. 126 (98 N. W. 182).

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Grounds of defense.

228. (1881.) If a defendant in the trial court omit a defense upon the merits which he might have made, he will, in the supreme court, be bound by the case made by the pleadings and evidence, as exhibited by the records. *Courtnay v. Price*, 12 Neb. 188 (10 N. W. 698); (1894) *Chamberlain v. Grimes*, 42 Neb. 701 (60 N. W. 948).

229. (1894.) A subcontractor brought a suit to foreclose a mechanic's lien. The owner, the original contractor, and a material-man were made defendants. The material-man filed an answer, in the nature of a cross-bill, claiming a lien upon the premises of the owner for material furnished in the erection of the improvement. To this cross-bill the owner filed no answer. *Held*, That the owner could not be heard to object, on appeal, to the correctness of the finding and decree of the district court in favor of the material-man. *Zarrs v. Keck*, 40 Neb. 456 (58 N. W. 933).

230. (1895.) Where the answer in the district court was a general denial of the averments of the petition, the defendant, having urged in that court but one ground for the avoidance of the effect of his alleged indorsement of a promissory note, will not be permitted, for the first time by brief in the supreme court, to urge that he should be held not liable on a radically different ground. *Greaves v. Norfolk Nat. Bank*, 45 Neb. 840 (64 N. W. 225).

231. (1898.) In a suit against a railroad company by an employe who was injured through negligence of a co-employe, the defense that the employes were fellow-servants cannot be considered on review unless presented to the trial court by a pleading, an instruction, or in some other manner. *Union P. R. Co. v. Elliott*, 54 Neb. 299 (74 N. W. 627).

232. (1903.) Defenses not interposed in the court below and not complained of in the petition in error, will not be reviewed on error proceedings in the supreme court, unless they go to the jurisdiction of the subject-matter. *Houser v. McCrystal*, 5 Unof. 217 (97 N. W. 828).

——Invalidity of statute.

233. (1895.) Where a statute is claimed to be invalid on the ground that it was not enacted in the constitutional mode, such invalidity must be presented by the pleadings or in some other form in the trial court to be of any avail here. Such objection cannot be raised for the first time in the appellate court. *Clearwater Bank v. Kurkonski*, 45 Neb. 1 (63 N. W. 133).

——Capacity or right to sue.

234. (1890.) The objection that the plaintiff, which sought to establish a lien upon certain personal property in the hands of D. as the property of C., a judgment debtor of the plaintiff, was, as to the property, only a general creditor of C., it not having attached the same, the question not having been raised in the trial court; *held*, that it would not be heard when raised for the first time, in the supreme court on appeal. *South Omaha Nat. Bank v. Chase*, 30 Neb. 444 (46 N. W. 513).

235. (1903.) The question of legal capacity of plaintiff to maintain an action cannot be successfully urged for the first time in the supreme court. *Taylor v. Weckerly*, 69 Neb. 739 (96 N. W. 618).

——Defect of parties.

236. (1899.) Defense of defect of parties defendant is waived unless raised by answer or demurrer and cannot be first raised on appeal. *Ayres v. Duggan*, 57 Neb. 750 (78 N. W. 296).

237. (1903.) The question of a defect of parties cannot be successfully urged for the first time in the supreme court. *Taylor v. Weckerly*, 69 Neb. 739 (96 N. W. 618).

——Statute of limitations.

238. (1897.) The defense of the statute of limitations, will be waived if not raised in the trial court. *Bell v. Rice*, 50 Neb. 547 (70 N. W. 25); (1902) *Omaha Carpet Co. v. Clapp*, 2 Unof. 406 (89 N. W. 246).

Construction of pleadings.

239. (1890.) When there is no answer in the record brought to this court, but it appears that the cause was tried by both parties without objection, as though an answer had been filed denying the allegations of the petition, the supreme court will treat the case in the same way. *Schuster v. Carson*, 28 Neb. 612 (44 N. W. 734).

240. (1902.) Where pleadings are not marked filed by the clerk, but are treated by the trial court as though they were actually filed, they will be so treated on appeal. *Jolliffe v. Maxwell*, 8 Unof. 244 (91 N. W. 563).

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241. (1903.) If, after the issues are made up in the lower court by petition, answer, and reply, an amended answer is filed containing allegations not denied by the reply, and the cause is tried in the lower court, and presented in the supreme court, on the theory that the reply stands as a reply to the amended answer, it will be so considered by this court. *Palmer v. Mizner*, 70 Neb. 200 (97 N. W. 334).

242. (1905.) A reviewing court will not only liberally construe a petition assailed for the first time in that court, in order to uphold it if possible, but will view it in the light of the entire record; and where, from the nature of the answer and the testimony adduced, it appears that both parties have placed the same construction on such petition, the court will not ignore such construction in ruling on the sufficiency of the petition, even though the petition standing alone might not admit of such construction. *Chicago, R. I. & P. R. Co. v. Kerr*, 74 Neb. 1 (104 N. W. 49).

243. (1905.) Where the court and the parties to the action proceed in the trial of a case on the theory that the pleadings present a certain material issue not jurisdictional in its nature, the supreme court will not on appeal examine the pleadings to determine their sufficiency to clearly make the issue. *Morrill v. McNeill*, 74 Neb. 291 (104 N. W. 195).

244. (1902.) Where the parties to an action enter upon a trial and treat the allegations of new matter alleged in the answer as denied, this court will also treat it so notwithstanding no reply appears in the record. *Loan & Trust Savings Bank v. Stoddard*, 2 Unof. 486 (89 N. W. 301).

Construction of contract.

245. (1895.) In an action on a contract, where both parties in the district court adopt a particular construction, neither will be permitted to urge a different one in the reviewing court. *Woodward v. Baird*, 43 Neb. 310 (61 N. W. 612).

Facts admitted or not denied.

246. (1902.) Facts not put in issue by the pleadings form no basis for an assignment of error on the ground of the insufficiency of the evidence to sustain a finding as to the existence of such facts. *Clements v. Eiseley*, 63 Neb. 651 (88 N. W. 871).

Evidence considered without offer.

247. (1901.) Writings present at the trial below and made the basis of examination of witnesses, without objection, and treated by the court and both parties as in evidence, will be so regarded in this court, although there was no formal offer of the same in evidence. *Peterson v. Wolf*, 1 Unof. 242 (95 N. W. 332).

Questions in intermediate court.

248. (1894.) Assignments of error not presented to the district court on error from a justice of the peace will not be considered in the supreme court in reviewing a judgment of affirmance. *Weeks v. Wheeler*, 41 Neb. 200 (59 N. W. 554).

249. (1898.) The validity of an order of a county board allowing a claim cannot be raised for the first time in the supreme court on error or appeal. *State, ex rel. Seth Thomas Clock Co., v. County Com'rs*, 53 Neb. 767 (74 N. W. 254).

B. Objections, Motions and Requests, and Rulings Thereon.

Necessity in general.

250. (1881.) In all cases of error, not of a jurisdictional character, before the aggrieved party can be heard in a court of error, he should first seek relief at the hands of the court where the error has occurred. *Griggs v. Le Poidevin*, 11 Neb. 385 (9 N. W. 557).

251. (1894.) An alleged error in accepting an insufficient receiver's bond, not brought to the attention of the trial court will not be considered by the supreme court on a review of the case by petition in error. *Ecklund v. Willis*, 42 Neb. 737 (60 N. W. 1026).

252. (1902.) Objections argued in the briefs which were not presented to the trial court will not be considered. *Moore v. Jacobs*, 64 Neb. 72 (89 N. W. 1134).

Sufficiency in general.

253. (1879.) Objections and exceptions should present distinctly and specifically the ruling objected to. *Tomer v. Densmore*, 8 Neb. 384.

Nature and form of remedy.

254. (1894.) Objection to the jurisdiction of a court of equity on the ground that the plaintiff has an adequate remedy at law must be made before judgment on the merits of the cause, and will not be entertained when made for the first time in the supreme court on the appeal of the objecting party. *Sherwin v. Gaghagen*, 39 Neb. 238 (57 N. W. 1005); (1895) *Dorsey v. Nichols*, 43 Neb. 214 (61 N. W. 584).

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255. (1892.) No objection to the procedure to obtain a modification of a decree of foreclosure and sale being made in the district court, the objection will be unavailing if made for the first time in the supreme court. *Richardson v. Smith*, 34 Neb. 595 (52 N. W. 279).

256. (1897.) An objection to an equitable proceeding on the ground that there is an adequate remedy by garnishment cannot be first raised on appeal. *Raymond v. Leinberger*, 50 Neb. 815 (70 N. W. 400).

257. (1895.) A defendant who has answered to the merits and submits to the jurisdiction of a court of equity cannot object for the first time on appeal in the supreme court, on the ground that the plaintiff had an adequate remedy at law. *Dorsey v. Nichols*, 43 Neb. 241 (61 N. W. 584); (1897) *Stahlhut v. Bauer*, 51 Neb. 64 (70 N. W. 496).

258. (1899.) An objection that an application for revivor of a judgment should have been made by motion supported by affidavit, and not by petition, cannot be first raised in the reviewing court. *Broadwater v. Foxworthy*, 57 Neb. 406 (77 N. W. 1103).

259. (1903.) Where issues have been made and trial had on the merits, the defeated party should not be heard to complain for the first time on appeal in the supreme court, that the form of action should have been by petition under section 602 of the code instead of by petition in equity. *MacCall v. Looney*, 4 Unof. 715 (96 N. W. 238).

Trial in absence of counsel or witnesses or reporter.

260. (1882.) An objection that a case was called and a jury impaneled in the absence of the attorneys for one of the parties must be made in the trial court, and cannot be made for the first time in the supreme court. *Wasson v. Palmer*, 13 Neb. 376 (14 N. W. 171).

261. (1896.) An objection to proceeding with a trial on account of the absence of witnesses should be made when the case is called. *Kreamer v. Irwin*, 46 Neb. 827 (65 N. W. 885).

262. (1905.) If a party desires to complain of the absence of the official reporter, he should call the attention of the trial court thereto, obtain a ruling, and if forced to trial without the reporter preserve his exceptions. *Tootle-Weakley Millinery Co. v. Billingsley*, 74 Neb. 531 (105 N. W. 85).

Qualification and selection of jurors.

263. (1876.) An objection that a juror was disqualified by reason of his non-residence within the county for a sufficient length of time, should be made by way of challenge before the trial. Or if the disqualification were not known then, the record should show that an effort was made to ascertain the fact by an examination of the juror on his *voir dire;* otherwise, a new trial will not be granted. *Wilcox v. Saunders*, 4 Neb. 569.

264. (1891.) Objections to jurors not made in the trial court, will not be considered. *Van Etten v. Butt*, 32 Neb. 285 (49 N. W. 365).

265. (1892.) Where the clerk of the court and deputy sheriff are interested in the result of an action, and hence in drawing the jury and talesmen, the party complaining should make objections before the trial, otherwise they cannot be considered in the supreme court. *Leavitt v. Sizer*, 35 Neb. 80 (52 N. W. 832).

Trial without jury.

266. (1893.) In a cause tried to the court without a jury, in order to raise objection in supreme court that no waiver of jury is shown it must appear that the objection was made and overruled in trial court; objection made for first time in supreme court is unavailing. *Shoning v. Coburn*, 36 Neb. 76 (54 N. W. 84).

267. (1895.) Where the record does not show a demand for a jury trial or an objection to a trial to the court, it will be presumed that a jury was waived. *Davis v. Snyder*, 45 Neb. 415 (63 N. W. 789).

Process.

268. (1879.) Mere irregularities in a summons, not at all prejudicial to the party, and of which no advantage was sought to be taken in the court issuing it, furnish no sufficient grounds for reversing a judgment. *Roggencamp v. Moore*, 9 Neb. 105 (2 N. W. 227).

——— Sufficiency of objection.

269. (1884.) A defendant who appears in a case to object to the jurisdiction of the court over him by reason of defective service of summons must point out specifically the defects complained of, and an objection "that no certified copy of the summons therein has been served on the defendant as required by law" is too general to be available. *Freeman v. Burks*, 16 Neb. 328 (20 N. W. 207); (1890) *Brown v. Goodyear*, 29 Neb. 376 (45 N. W. 618).

Parties.

270. (1895.) Where one asks to intervene, files a pleading, and is examined by an

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adverse party, the latter cannot for the first time, upon appeal from a decree adjudicating the rights of intervenor, urge that the intervenor had not by an order been made a party below. *Chadron Banking Co. v. Mahoney*, 43 Neb. 214 (61 N. W. 594).

271. (1899.) An objection that one of the defendants was not joined in an application to revive a judgment cannot be urged for the first time in the reviewing court. *Broadwater v. Foxworthy*, 57 Neb. 406 (77 N. W. 1103).

272. (1902.) The objection that there was a misjoinder of parties plaintiff cannot be urged for the first time on appeal. *Thompson v. Rush*, 66 Neb. 758 (92 N. W. 1060).

Pleadings.

273. (1892.) Objections to the form of the pleadings must be made in the trial court to be available in the supreme court. *Clay v. Greenwood*, 35 Neb. 736 (53 N. W. 659).

274. (1893.) A new cause of action should not be presented in the reply, but when no objection is made on that ground in the district court and the issues presented are submitted on their merits, the objection that the cause of action was first stated in the reply will be *held* to have been waived. *Gregory v. Kaar*, 36 Neb. 533 (54 N. W. 859).

275. (1899.) The authority of counsel to file a pleading for one of the parties to an action cannot be first raised in the supreme court. *German Nat. Bank of Hastings v. First Nat. Bank of Hastings*, 59 Neb. 7 (80 N. W. 48).

276. (1901.) An objection that a pleading is indefinite must be raised in the trial court by a motion to make more definite and certain. *Sanford v. Litchenberger*, 62 Neb. 501 (87 N. W. 305); (1902) *Iodence v. Peters*, 64 Neb. 425 (89 N. W. 1041).

277. (1902.) Where objection that the petition is not verified, is first raised on appeal, the appellee will be permitted to amend to conform to the proofs after submission of the cause in the supreme court, and upon amendment the decree will be affirmed. *Ure v. Bunn*, 3 Unof. 61 (90 N. W. 904).

278. (1905.) If the evidence in an action in equity for a new trial shows that a motion for a new trial was in fact filed, and evidence was received without objection, and the case tried in all respects as though the petition contained such allegation, the petition will be treated as sufficient in that respect. *Parker v. Parker*, 73 Neb. 4 (102 N. W. 85).

——— **Failure to state cause of action or defense.**

279. (1888.) Where answer fails to constitute a defense to the action, but no objection was made thereto in the court below, nor error on that ground assigned in the supreme court, the question will not be considered. *Dunham v. Courtnay*, 24 Neb. 627 (39 N. W. 784).

280. (1895.) Objection that a pleading does not state a cause of action or defense should be made in the trial court and assigned in the petition in error. *Pearce v. McKay*, 45 Neb. 296 (63 N. W. 851).

281. (1896.) The sufficiency of a petition to state a cause of action may be challenged in the appellate court. *Sage v. City of Plattsmouth*, 48 Neb. 558 (67 N. W. 455).

282. (1899.) Insufficiency of a petition to state a cause of action may be raised for the first time in the appellate court. *Kemper v. Renshaw*, 58 Neb. 513 (78 N. W. 1071).

283. (1903). The question of whether a petition states a cause of action or discloses grounds sufficient for the granting of equitable relief, may be raised at any stage of the proceedings in the appellate court, up to and including the filing of a motion for a rehearing. *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.*, 68 Neb. 233 (97 N. W. 613).

284. (1907.) A pleading which is attacked for the first time in the supreme court on the ground that it does not state a cause of action, will be liberally construed. *Omaha Nat. Bank v. Kiper*, 60 Neb. 33, followed and approved. *Nelson v. Modern Brotherhood of America*, 78 Neb. 429 (110 N. W. 1008).

——— **Joinder of causes.**

285. (1892.) The supreme court will not notice an objection to a petition on the ground that two causes of action are improperly joined, unless such objection was made in the trial court. *First Nat. Bank v. Miltonberger*, 33 Neb. 847 (51 N. W. 232).

——— **Construction of pleading not objected to.**

286. (1902.) A petition when assailed for the first time in the supreme court will be liberally construed. *First Nat. Bank of Madison v. Tompkins*, 3 Unof. 334 (94 N. W. 717).

287. (1905.) Where a petition is for the

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first time assailed in the supreme court because of its alleged failure to state a cause of action, its allegations will receive a liberal construction, with a view of giving effect to the pleader's purpose, and, if possible, sustaining the petition. *Chicago, R. I. & P. R. Co. v. Kerr*, 74 Neb. 1 (104 N. W. 49).

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——— Variance.

288. (1897.) Where the claim of an agent for compensation was for finding a purchaser for the land of the defendant ready and willing to purchase, and, without objection, proof was made of the ability to purchase, as well as of the alleged readiness and willingness, the variance cannot be urged as error for the first time in the supreme court. *Hoefer v. Langhorst*, 53 Neb. 364 (73 N. W. 692).

289. (1905.) Where a party relies upon a variance between the pleadings and the proof to defeat a recovery, that question should be raised at some time during the progress of the trial, and, unless it is so raised and suggested to the trial court, it will not be considered on error in the supreme court. *Spencer v. Wilson*, 74 Neb. 459 (104 N. W. 930).

Admission of evidence.

290. (1879.) Where testimony is introduced without objection, error will not lie upon the ground that the testimony was improperly admitted. *Catron v. Shephard*, 8 Neb. 308; (1889) *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb. 542 (41 N. W. 297); (1891) *Western Union Tel. Co. v. Lowrey*, 32 Neb. 732 (49 N. W. 707); (1892) *Rupert v. Penner*, 35 Neb. 587 (53 N. W. 598; 17 L. R. A. 824); (1892) *Wohlenberg v. Melchert*, 35 Neb. 803 (53 N. W. 982); (1896) *Graham v. Frazier*, 49 Neb. 90 (68 N. W. 367); (1899) *Willits v. Arena Fruit Co.*, 58 Neb. 659 (79 N. W. 624); (1899) *Palmer v. First Bank of Ulysses*, 59 Neb. 412 (81 N. W. 303); (1900) *Fulton v. Ryan*, 60 Neb. 9 (82 N. W. 105); (1901) *Clark v. Folkers*, 1 Unof. 96 (95 N. W. 328); (1904) *Goken v. Dallugge*, 72 Neb. 22 (101 N. W. 244).

291. (1882.) Where no objection was made in the court below to direct proof showing the amount of damages sustained by a landowner by reason of the location of a railroad across his land, the objection is not available on error. *Republican V. R. Co. v. Hayes*, 13 Neb. 489 (14 N. W. 521).

292. (1884.) When the testimony of an incompetent witness is certified to this court the same as any other witness who testified on the trial, and the record shows no objection made on the trial to the testimony of the witness, the presumption follows that the objection was waived. *Bartlett v. Bartlett*, 15 Neb. 593 (19 N. W. 691).

293. (1884.) Where oral proof of the terms of a warranty is received without objection, a party cannot allege error in the admission of such testimony, even if the record shows a written warranty. *McCormick v. Laughran*, 16 Neb. 87 (20 N. W. 107).

294. (1886.) Where evidence showing contradictory statements of a witness is introduced without first calling his attention to the time, place, and person involved in the supposed contradiction, and no objection is made to such evidence, the jury may consider it, and, if sufficient, base their verdict thereon. *Coal v. Roche*, 20 Neb. 550 (31 N. W. 367).

295. (1889.) Error cannot be successfully assigned upon the admission of evidence by a trial court, which was admitted by the consent of the complaining party, no objection having been made thereto. *Omaha Belt Railway v. McDermott*, 25 Neb. 714 (41 N. W. 648).

296. (1889.) When upon a trial, evidence, incompetent or illegal but which tends to prove the case of the side offering it, is admitted without objection, and considered by the jury in agreeing upon their verdict, the incompetency or illegality of such evidence will not be considered on error or appeal. *Missouri P. R. Co. v. Vandeventer*, 26 Neb. 222 (41 N. W. 998; 3 L. R. A. 129).

297. (1893.) Where a witness volunteers testimony not responsive to any questions, and which is immaterial under the issues, the complaining party should object thereto or move to strike it out of the record. A new trial will not be allowed on account of such volunteer evidence when no objection is made to it at the time of the trial. *Omaha S. R. Co. v. Beeson*, 36 Neb. 361 (54 N. W. 557).

298. (1895.) In order to render an alleged error in the admission of testimony available in a review of a case the record must disclose an objection made in the trial court to the introduction of the particular piece of testimony, a ruling obtained thereon, and, if adverse, an exception taken. *Gran v. Houston*, 45 Neb. 813 (64 N. W. 245).

299. (1896.) Allegations of error as to admitting evidence not objected to will be disregarded. *Denise v. City of Omaha*, 49

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Neb. 750 (69 N. W. 119); (1871) *Morgan v. Lorsh*, 1 Neb. 361.

300. (1897.) Where the record does not disclose by whom certain evidence was offered or that anyone objected thereto, it will not be assumed in the supreme court that such evidence was improperly considered. *Morgan v. Mitchell*, 52 Neb. 667 (72 N. W. 1055).

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301. (1902.) Where evidence of facts tending to impeach the validity of a judgment is presented to the trial court by affidavits, and no objection is made in the court below to the consideration of the affidavits because the judgment creditor has not had an opportunnity to cross-examine witnesses, it is too late to interpose this objection after the case has been removed to the supreme court upon appeal. *Baldwin v. Burt*, 2 Unof. 383 (96 N. W. 401).

302. (1902.) Where evidence tending to establish facts not directly put in issue by the pleading, has been admitted without objection, a party cannot, on appeal to the supreme court, be heard to complain that such facts were not an issue in the case. *Pres. & Directors of Ins. Co. of North America v. Buckstaff*, 3 Unof. 632 (92 N. W. 755).

303. (1903.) Where an objection to a question is overruled—the answer not being given—and the question is afterwards put in another form and is answered without objection, error cannot be predicated thereon. *Draper v. Tucker*, 69 Neb. 434 (95 N. W. 1026).

——— **Form of question.**

304. (1902.) An objection to the form of an hypothetical question asked of a medical expert on the ground that it permitted the witness to consider the subjective conditions in giving his opinion should be made at the trial or it will be unavailing. *Western Union Tel. Co. v. Church*, 3 Unof. 22 (90 N. W. 1026).

——— **Sufficiency of objection.**

305. (1872.) Objections to evidence tendered at a trial not supported by reasons therefor are not usually considered; but, if the testimony be directed to a point already indisputably established, refusing to receive it is not ground for awarding a new trial. *Pyle v. Warren*, 2 Neb. 241.

306. (1874). When an objection is made to the admission of any particular testimony, the ground of the objection should be stated, together with the ruling of the court, and both preserved by bill of exceptions; otherwise they will not be considered in the supreme court. *Michel v. Ware*, 3 Neb. 229; (1881) *Stevenson v. Anderson*, 12 Neb. 83 (10 N. W. 552).

307. (1874.) Where objection is made to the admission or rejection of testimony, the reason should be given. *Tierney v. Cornell*, 3 Neb. 267; (1881) *Stevenson v. Anderson*, 12 Neb. 83 (10 N. W. 552).

308. (1878.) In order to make an objection to testimony available it is necessary that the grounds of the objection be stated; otherwise it is impossible for the reviewing court to know whether the court below was in fault or not. *Wright v. Greenwood Warehouse* Co., 7 Neb. 435.

309. (1878.) Even where it is apparent that a valid objection to testimony could have been made, still the court is not at liberty to assume that this was the one relied on; in the absence of an affirmative showing to the contrary all presumptions are favorable to the court whose judgment is under review. *Wright v. Greenwood Warehouse Co.*, 7 Neb. 435.

310. (1882.) Where to a question put to a witness the objection was made "Plaintiff objects as before," and no previous objection had been made during the examination of this witness, although there had been many, and for various reasons, during the examination of others, the objection was bad for indefiniteness. *Dunbier v. Day*, 12 Neb. 596 (12 N. W. 109).

311. (1889). Objections to a transcript of a judgment of another state, that it contains no certificate of the presiding judge "that the attestation is in due form of law," must be specific. *Dvorak v. More*, 25 Neb. 735 (41 N. W. 777).

312. (1892.) An objection to the admission of a deed as incompetent, immaterial, and irrelevant, is not specific enough to reach a defect in the execution of the instrument. *Rupert v. Penner*, 35 Neb. 537 (53 N. W. 598; 17 L. R. A. 824*n*).

313. (1894.) Generally, in order to predicate error on the overruling of an objection to testimony, specific ground of objection must have been brought to the attention of the trial court prior to the ruling; but where a general objection to evidence is sustained, the party against whom the ruling was made cannot urge, as a ground of reversal, that the objection was not specific. *Hurlburt v. Hall*, 39 Neb. 889 (58 N. W. 538).

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314. (1896.) An objection to a hypothetical question put to an expect witness, that it is "incompetent, immaterial and irrelevant," is too general to raise the point that the question involves erroneous statements of evidence. *Chicago, R. I. & P. R. Co. v. Archer*, 46 Neb. 907 (65 N. W. 1043).

315. (1898.) An objection to the admission of a deed of assignment in evidence that it was not executed or acknowledged in the manner in which a conveyance is required to be executed and acknowledged is too general and not sufficiently specific to reach defects in the form of execution and acknowledgement of the instrument. *Maul v. Drexel*, 55 Neb. 446 (76 N. W. 163).

316. (1890.) Objection to testimony on the ground that it is "incompetent, irrelevant, and immaterial," is specific enough to apprise the trial court of the real grounds of objection to the testimony. *First Nat. Bank v. Carson*, 30 Neb. 104 (46 N. W. 276); (1899) *Bennett v. McDonald*, 59 Neb. 234 (80 N. W. 826).

317. (1896.) An objection that a question is "incompetent, irrelevant, and immaterial" is held sufficient generally to appraise the court of any ground of complaint falling within the meaning of those terms. *Chicago, R. I. & P. R. Co. v. Archer*, 46 Neb. 907 (65 N. W. 1043).

318. (1893.) An objection interposed to a question not answered by a witness does not present for review the propriety of a similar question asked at a later stage of the examination and answered without objection. *Wheeler v. Van Sickle*, 37 Neb. 651 (56 N. W. 196).

319. (1901.) A party cannot justly complain of an adverse ruling upon an objection to the introduction of evidence which is so indefinite as to be unintelligible. *McPherson v. Commercial Nat. Bank*, 61 Neb. 695 (85 N. W. 895).

320. (1901.) 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 are sufficient to present for review the admissibility of such evidence. *Bee Publishing Co. v. World Publishing Co.*, 62 Neb. 732 (87 N. W. 945.) [Overruling *Bee Publishing Co. v. World Publishing Co.*. 59 Neb. 713.]

321. (1902.) An objection to an entire question put to a witness calling for testimony, part of which is admissible and part inadmissible, is properly overruled, and error cannot be predicated on such ruling. *Western Union Telegraph Co. v. Church*. 3 Unof. 22 (90 N. W. 878).

322. (1902.) It is the duty of one objecting to a question asked a witness to state the grounds upon which he relies for the exclusion of the proffered testimony, so that the trial court may rule with such criticism in mind; and an objection based upon grounds not disclosed at the time such objection is made will be disregarded on appeal. *Western Union Telegraph Co. v. Church*, 3 Unof. 22 (90 N. W. 878).

323. (1902.) An objection to an exhibit as a whole is properly overruled where a part of it is admissible. *Skow v. Loche*, 3 Unof. 176 (91 N. W. 204).

324. (1904.) Objections to the introduction of evidence must be sufficiently specific to challenge the attention of the trial court to the ground upon which the objection is based, or they will be unavailing. *Weatherford v. Union P. R. Co.*, 5 Unof. 464 (98 N. W. 1089).

325. (1905.) An insufficient objection to the competency of a witness cannot be availed of as an objection to the competency or relevancy of his testimony. *Lincoln Supply Co. v. Graves*, 73 Neb. 214 (102 N. W. 457).

——— Motion to strike out answer.

326. (1893.) Where the admissibility of evidence is for the first time called in question by a motion to strike it out of the record, it is very questionable whether, under any circumstances, a review can be had of the ruling of the district court upon such motion. *Lee v. Brugmann*, 37 Neb. 232 (55 N. W. 1053).

327. (1894.) Consideration will not be given in the supreme court to an assignment of error based upon the admission in evidence of a statement by a witness not responsive to the question he was answering, although such question was objected to, unless by a motion to strike out that portion of his answer, or otherwise, the trial judge was given an opportunity to rule upon the particular testimony, the admission of which is assigned as error. *Violet v. Rose*, 39 Neb. 660 (58 N. W. 216).

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328. (1894.) In order to predicate error upon the admission of an answer not responsive to the question put a witness a motion should be made to strike out the answer for that reason. *German Nat. Bank of Hastings v. Leonard*, 40 Neb. 676 (59 N. W. 107).

329. (1895.) Error in admitting evidence given before objection has been made to its introduction cannot be shown in absence of a ruling on a motion to strike it out. *Kissinger v. Staley*, 44 Neb. 783 (63 N. W. 55).

330. (1896.) Where in response to a question proper in itself, inadmissible matter is introduced, the admissibility of testimony contained in the answer is properly presented for review by a motion to strike out the answer and an exception to an order overruling such motion. *Malm v. Thelin*, 47 Neb. 686 (66 N. W. 650).

Offer of proof on exclusion of evidence.

330*a*. (1884.) The supreme court cannot say that the district court erred in sustaining an objection to a question in the examination in chief of a witness when no statement or offer was made to the court. *Fosbinder v. Svitak*, 16 Neb. 499 (20 N. W. 866).

331. (1886.) In order that a party may avail himself of an error in rejecting the testimony of a witness he must make an offer to prove the facts he expected to show by such testimony. *Lipscomb v. Lyon*, 19 Neb. 511 (27 N. W. 731); (1886) *Masters v. Marsh*, 19 Neb. 458 (27 N. W. 438); (1887) *Connelly v. Edgerton*, 22 Neb. 82 (34 N. W. 76); (1888) *Hamilton v. Ross*, 23 Neb. 630 (37 N. W. 467); (1888) *Yates v. Kinney*, 25 Neb. 120 (41 N. W. 128); (1890) *Mordhorst v. Nebraska Telephone Co.* 28 Neb. 610 (44 N. W. 649); (1890) *Burns v. City of Lincoln*, 28 Neb. 866 (45 N. W. 175); (1890) *Coombs v. Brenklander*, 29 Neb. 586 (45 N. W. 929); (1890) *Salisbury v. Iddings*, 29 Neb. 736 (46 N. W. 267); (1891) *Hammond v. City of Harvard*, 31 Neb. 635 (48 N. W. 462); (1891) *Lincoln Nat. Bank v. Davis*, 32 Neb. 1 (48 N. W. 892); (1892) *Brecker v. Treitschke*, 33 Neb. 699 (50 N. W. 1041); (1892) *Burk v. Dempster*, 34 Neb. 426 (51 N. W. 976); (1892) *Rooch v. Hawkinson*, 34 Neb. 658 (52 N. W. 373); (1892) *German Ins Co. v. Hyman*, 34 Neb. 704 (52 N. W. 401); (1893) *Dukehart v. Coughman*, 36 Neb. 412 (54 N. W. 680); (1893) *Smith v. Hitchcock*, 38 Neb. 104 (56 N. W. 791); (1894) *Barr v. City of Omaha*, 42 Neb. 341 (60 N. W. 591); (1895) *Omaha Fire Ins. Co. v. Berg*, 44 Neb. 522 (62 N. W. 862); (1896) *Murry v. Hennessey*, 48 Neb. 608 (67 N. W. 470); (1896) *Denise v. City of Omaha*, 49 Neb. 750 (69 N. W. 119); (1895) *Alter v. Covey*, 45 Neb. 508 (63 N. W. 863); (1897) *Morsch v. Besack*, 52 Neb. 502 (72 N. W. 953); (1899) *Spirk v. Chicago, B. & Q. R. Co.*, 57 Neb. 565 (78 N. W. 272); (1899) *Union P. R. Co. v. Vincent*, 58 Neb. 171 (78 N. W. 457); (1899) *Hambleton v. Fort*, 58 Neb. 282 (78 N. W. 498); (1899) *Johnson v. Opfer*, 58 Neb. 631 (79 N. W. 547); (1900) *Nebraska Telephone Co. v. Jones*, 60 Neb. 396 (83 N. W. 197); (1900) *Wittenberg v. Mollyneaux*, 60 Neb. 583 (83 N. W. 842); (1901) *Farmers & Merchants Ins. Co. v. Dobney*, 62 Neb. 213 (86 N. W. 1070; 97 Am. St. Rep. 624); (1901) *Brennan-Love Co. v. McIntosh*, 62 Neb. 522 (87 N. W. 327); (1901) *Green v. Tierney*, 62 Neb. 561 (87 N. W. 331); (1901) *Likens v. State*, 63 Neb. 249 (88 N. W. 505); (1901) *Boughn v. Security State Bank of Randolph*, 1 Unof. 490 (95 N. W. 680); (1902) *Lusk v. Riggs*, 65 Neb. 258 (91 N. W. 243); (1902) *City of Crete v. Hendricks*, 2 Unof. 847 (90 N. W. 215); (1902) *City of South Omaha v. Burke*, 3 Unof. 309 (91 N. W. 562); (1903) *Riley v. Missouri P. R. Co.*, 69 Neb. 83 (95 N. W. 20); (1908) *Blondel v. Bolander*, 80 Neb. 531 (114 N. W. 574.

332. (1888.) A party who has examined a witness in part, and the witness is excused on the ground that the matter testified to was confidential, must show either by the questions asked the witness and overruled, or by an offer of proof, that he desired the witness to testify further; otherwise the objection will be unavailing. *Welton v. Baltezore*, 25 Neb. 190 (41 N. W. 146).

333. (1889.) To entitle a plaintiff in error to a review of the ruling of the court below on the rejection of testimony it is required that the party complaining shall have made an offer of the testimony, clearly indicating what he expects to prove by the witness in response to the question propounded and overruled by the court. *Sellars v. Foster*, 27 Neb. 118 (42 N. W. 907).

334. (1893.) The rulings of the trial court, in not permitting the defendant to answer certain questions propounded to him by his counsel on direct examination, cannot be reviewed by this court, for the reason no offer was made in the trial court to prove the facts which the party complaining assumes the questions would have elicited. *Barton v. McKay*, 36 Neb. 632 (54 N. W. 968).

335. (1895.) Upon an offer to prove certain facts if a pending question is permitted

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to be answered, such question should be so clearly pertinent that a favorable relevant answer thereto must obviously tend to establish the existence of some fact material to the issues being tried. If these essentials are lacking in the question propounded they cannot be supplied by mere offers to make proofs foreign to the scope of such question. *Cutting v. Baker*, 43 Neb. 470 (61 N. W. 726).

336. (1898.) An offer to prove, to lay the foundation for the proper presentment of error in the exclusion of proposed testimony as answer to a question to which an objection is sustained, must be of matter which would have been admitted as relevant, responsive, and pertinent in answer to the rejected interrogatory. *Perkins v. Tilton*, 53 Neb. 440 (73 N. W. 930).

337. (1898.) It is not error to reject an offer of proof not within the limits of the question on which the offer is based. *Barr v. Post*, 56 Neb. 698 (77 N. W. 123).

338. (1900.) Where an objection to a question as improper rebuttal testimony is properly sustained, and the testimony is desired as a part of the main case, it is required that it should be offered as such, and a ruling thereon obtained, before error can be predicated on the exclusion of such testimony. *McLain v. Maricle*, 60 Neb. 359 (83 N. W. 829).

339. (1902.) Where the trial court rejects all the evidence offered by a party, in determining its admissibility, the complaining party will be given the benefit of every inference that might be reasonably drawn from the testimony received. *Horbach v. Boyd*, 64 Neb. 129 (89 N. W. 644).

340. (1902.) An offer of proof, not put in a deceptive manner, nor in language calculated to mislead, which is fairly susceptible of a construction rendering the evidence admissible, should be so construed, although a different construction might be put upon it, where it clearly appears from the record that the trial court did not proceed upon a correct theory in rejecting it. *Horbach v. Boyd*, 64 Neb. 129 (89 N. W. 644).

341. (1903.) No formal offer to prove is required, to obtain a review of a ruling of the trial court excluding the answer of a witness to a question, where the question itself clearly indicates what the party expected to prove by the witness. *Williams v. Fuller*, 68 Neb. 354 (94 N. W. 118).

342. (1904.) Where the evidence on a vital proposition is erroneously excluded, it is not necessary for the party offering it to proceed to establish other propositions in his case in order to predicate error on such ruling. *Gartner v. Chicago, R. I. & P. R. Co.*, 71 Neb. 444 (98 N. W. 1052).

Qualification of witnesses.

343. (1899.) Where an irregularity in the manner of administering an oath to a witness is known at the time, objection must then be made, or it will be waived. *City of O'Neill v. Clark*, 57 Neb. 760 (78 N. W. 256).

Stipulation.

344. (1889.) Where, in an action to foreclose a mortgage, it is stipulated that if a certain witness were present he would testify that the entire consideration for the note and mortgage was usurious interest on a loan of money, and no contradictory evidence is offered, objections to the stipulation as the statement of a conclusion and not of facts cannot be made for the first time in the supreme court. *Richardson v. Stone*, 28 Neb. 137 (44 N. W. 105).

Misconduct of counsel.

345. (1895.) Where it is assigned for error that there was misconduct of an attorney for the prevailing party during the course of argument to the jury, consisting of language used or statements made prejudicial to the rights of the adverse party, the attention of the trial court must be called to the language or statements by an objection, and, if overruled, an exception taken, and this portion of the proceedings incorporated in the bill of exceptions. It will then be reviewed by this court; otherwise not. *Gran v. Houston*, 45 Neb. 813 (64 N. W. 245); (1896) *Bankers Life Ass'n v. Lisco*, 47 Neb. 340 (66 N. W. 412); (1898) *Chicago, B. & Q. R. Co. v. Kellogg*, 54 Neb. 127 (74 N. W. 454); (1899) *Summers v. Simms*, 58 Neb. 579 (79 N. W. 155).

346. (1879.) Where no objection or ruling of the trial court is made to appear in the record, the supreme court will not consider, as one ground of error, the misconduct of counsel in his argument to the jury. *Cropsey v. Averill*, 8 Neb. 151.

347. (1884.) An objection to the conduct of opposing counsel in the argument to the jury, to be availing, must be first made to the trial court at the time, and if the ruling of the court is adverse to the party making the objection, such ruling will be reviewed

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by this court. *Fitzgerald v. Fitzgerald*, 16 Neb. 413 (20 N. W. 269).

348. (1897.) In order to preserve for review error in permitting improper remarks by counsel, objection must be made at the time, a ruling obtained and exception taken. *Golder v. Lund*, 50 Neb. 867 (70 N. W. 379); (1903) *Lansing v. Wessell*, 5 Unof. 199 (97 N. W. 815).

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349. (1898.) A party desiring to review misconduct of counsel in argument should make an objection, and except to any adverse ruling; but where misconduct is so flagrant, and of such a character, that neither a complete retraction nor an admonition from the court can entirely destroy its sinister influence, a new trial should be awarded regardless of the want of an objection and exception. *Chicago, B. & Q. R. Co. v. Kellogg*, 55 Neb. 748 (74 N. W. 462).

350. (1904.) Alleged misconduct of counsel in addressing the jury must be objected to when the language is used, and a ruling of the trial court procured on such objection available in this court. *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 70 Neb. 766 (98 N. W. 44).

351. (1907.) An objection at the close of an argument, "to the manner and style" of the argument, without a ruling of the court thereon, presents nothing for review in the supreme court. *Home Savings Bank v. Stewart*, 78 Neb. 624 (110 N. W. 947).

Instructions.

352. (1871.) If the charge to the jury contain more than one proposition, and any portion of it be correct, each specific point deemed erroneous must be pointed out, and separately objected to. *McReady v. Rogers*, 1 Neb. 124 (93 Am. Dec. 333).

353. (1889.) Objections to instructions, or to the want thereof, not made to the district court, cannot be entertained by the supreme court. *Downing v. Glenn*, 26 Neb. 323 (41 N. W. 1119).

354. (1889.) When not objected or excepted to at trial, instructions will not be considered in the supreme court on review. *Gibbons v. Sherwin*, 28 Neb. 146 (44 N. W. 99).

355. (1896.) An objection that the court erred in giving or refusing instructions cannot be raised for the first time in the appellate court. *Keens v. Robertson*, 46 Neb. 837 (65 N. W. 897).

356. (1900.) Rulings on instructions cannot be considered, unless the objections were first presented to the trial court. *Missouri P. R. Co. v. Tipton*, 61 Neb. 49 (84 N. W. 416).

Verdict and findings.

357. (1883.) An objection that the findings of the jury are inconsistent, and do not sustain the judgment rendered thereon, will not be considered where raised for the first time in the petition in error. *Laughlin v. Kavanaugh*, 15 Neb. 39 (16 N. W. 754).

358. (1893.) In a verdict, the omission from the title of the cause of the name of a defendant who had been made a party after the commencement of the suit, is not a fatal defect, where no objection was made in the trial court, and the verdict was returned and filed in the proper action. *Parrish v. McNeal*, 36 Neb. 727 (55 N. W. 222).

359. (1894.) Objections to form or terms of a verdict should be made at the time it is rendered. *Roggencamp v. Hargreaves*, 39 Neb. 540 (58 N. W. 162); (1896) *Yankton, N. & S. W. R. Co. v. State*, 49 Neb. 272 (68 N. W. 487); (1895) *Brumback v. German Nat. Bank of Beatrice*, 46 Neb. 540 (65 N. W. 198); (1899) *Cervenna v. Thurston*, 59 Neb. 343 (80 N. W. 1048); (1903) *Whiting v. Carpenter*, 4 Unof. 342 (93 N. W. 296).

360. (1901.) An alleged error in the size of the verdict, not brought to the attention of the trial court will not be considered by the supreme court on a review of the case by petition in error. *Farmers & Merchants Ins. Co. v. Dobney*, 62 Neb. 213 (86 N. W. 1070; 97 Am. St. Rep. 624).

361. (1901.) Objections to a verdict which go to its form only should be made at the time of its rendition. *Parsons Band Cutter & Self-Feeder Co. v. Gadeke*, 1 Unof. 605 (95 N. W. 850).

362. (1902.) Objections to the form of a verdict must be made when it is rendered, and before the jury is discharged. Objections not made and exceptions not taken to it until a motion for a new trial is filed will be deemed to have been waived. *Kingman Implement Co. v. Strong*, 2 Unof. 729 (89 N. W. 993).

Dismissal.

363. (1889). The supreme court, in the exercise of its appellate jurisdiction, has no authority to reinstate a cause in the district court which has been there voluntarily dismissed by the plaintiff. Where it is claimed that a dismissal was obtained by fraud, an application to reinstate must be made in the court where the cause was pending at the

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time the dismissal was entered. *Grimes v. Chamberlain*, 27 Neb. 605 (43 N. W. 395).

Judgment.

364. (1872.) An objection that judgment was entered on the pleadings without taking the necessary proof must be pointed out to the court entering the same. *Mills v. Miller*, 2 Neb. 299.

365. (1879.) Where a creditor's bill was filed against a husband and wife, and the decree, in favor of the wife, was taken for too large a sum, the plaintiff should have filed a motion in the court below to correct it. *First Nat. Bank of Omaha v. Bartlett*, 8 Neb. 329.

366. (1891.) Errors in entering a judgment in foreclosure, on demurrer, which judgment recites that it is rendered on the pleadings and evidence, must be corrected in the trial court. *Townsend v. Case Threshing Machine Co.*, 31 Neb. 836 (48 N. W. 899).

Vacation or modification of judgment.

367. (1898.) M. obtained a verdict in her favor, which was set aside without service upon her of notice as required by the rules of the court. She made no complaint during the term, nor until after there had been another trial and an adverse verdict and judgment rendered against her. *Held*, That she had waived her right to complain of the irregularity. *Gilbert v. Marrow*, 54 Neb. 77 (74 N. W. 420).

Judicial sale.

368. (1890.) An objection to a confirmation of sale that was not made in the lower court will not be considered in the supreme court. *Runge v. Brown*, 29 Neb. 116 (45 N. W. 271); (1896) *Creighton University v. Mulvihill*, 49 Neb. 577 (68 N. W. 931); (1898) *Toscan v. Devries*, 57 Neb. 276 (77 N. W. 669); (1900) *Mandell v. Weldin*, 59 Neb. 699 (82 N. W. 6); (1900) *Pearson v. Badger Lumber Co.*, 60 Neb. 167 (82 N. W. 374); (1900) *Ashpole v. Hallgren*, 60 Neb. 196 (82 N. W. 623); (1903) *Walker v. Fitzgerald*, 69 Neb. 52 (95 N. W. 32).

369. (1897.) Grounds for setting aside a judicial sale are unavailing on review unless they were presented in the court below. *Creighton University v. Riley*, 50 Neb. 341 (69 N. W. 943).

370. (1897.) The supreme court will not review the appraisement made of real estate sold on execution, for the purpose of determining whether such appraisement is too high or too low, unless objections on that ground be made and filed in the court from which the execution issued, before the sale occurred, and such objections be ruled upon by said court. *McMurtry v. Columbia Nat. Bank*, 53 Neb. 21 (73 N. W. 212).

371. (1901.) Where the court, having jurisdiction of the subject-matter and of the parties, upon trial and without objection vacates a sale because the property sold was exempt, the execution creditor cannot be heard to complain for the first time in the supreme court that the question of exemptions cannot properly be tried on confirmation of sale. *Jackett v. Bower*, 62 Neb. 232 (86 N. W. 1075).

372. (1901.) A ground for setting aside a judicial sale is unavailing on review, unless the same was presented to the court below. *Hawver v. Parkway Real Estate Co.*, 62 Neb. 504 (87 N. W. 312).

373. (1903.) Objections to a sale not raised by objection to the confirmation in the trial court will not be considered on appeal. *Nebraska Loan & Trust Co. v. Corning*, 4 Unof. 364 (94 N. W. 1135).

Motion to retax costs.

Review on error from final judgment, see *post*, § 1498.

374. (1886.) A party complaining of the taxation of costs in the district court must file a motion in that court to retax the same. The ruling on the motion to retax is subject to review. *Whitall v. Cressman*, 18 Neb. 508 (26 N. W. 245); (1892) *Railsback, Mitchell & Co. v. Patton*, 34 Neb. 490 (52 N. W. 277).

375. In order to review the question of taxation of costs, a motion to retax the costs must be made in the trial court, and a ruling obtained thereon by that court. (1887) *Wilkinson v. Carter*, 22 Neb. 186 (34 N. W. 351); (1894) *Real v. Honey*, 39 Neb. 516 (58 N. W. 136); (1894) *Richards v. Borowsky*, 39 Neb. 774 (58 N. W. 277); (1894) *Cahn v. Lipson*, 39 Neb. 776 (58 N. W. 280); (1894) *Haskell v. Valley County*, 41 Neb. 254 (59 N. W. 680); (1894) *Roberts v. Drehmer*, 41 Neb. 306 (59 N. W. 911); (1894) *Shields v. Gamble*, 42 Neb. 850 (61 N. W. 101); (1895) *Ins. Co. of North America v. Bachler*, 44 Neb. 549 (62 N. W. 911); (1896) *Yankton, N. & S. R. Co. v. State*, 49 Neb. 272 (68 N. W. 487).

376. (1897.) A motion to retax costs is essential to obtain a review of a mistake, neglect, or omission of the clerk of the trial court in the taxation of costs, but such mo-

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tion is unnecessary where the court has determined that a party is liable for certain costs and rendered judgment against him therefor. *Hartford Fire Ins. Co v. Corey*, 53 Neb. 209 (73 N. W. 674).

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377. (1898.) Where the question as to liability for costs was directly considered by the trial court, the party against whom they were taxed may have the ruling reviewed without having filed a motion to retax. *Lamaster v. Elliott*, 53 Neb. 424 (73 N. W. 925).

Objections in intermediate court.

378. (1883.) Upon a hearing in the supreme court in a case originating before a justice of the peace, and taken to the district court by petition in error, an objection as to the sufficiency of the bill of exceptions taken before the justice, not made in the district court, but raised for the first time in the supreme court, will not be considered. *Hawley v. Robeson*, 14 Neb. 435 (16 N. W. 438).

379. (1885.) An objection that a cause appealed to the district court is not based on the same cause of action as in the justice court comes too late, it should have been made in the district court. *Sawyer v. Brown*, 17 Neb. 171 (22 N. W. 355).

380. (1888.) Where a cause is tried before a justice of the peace, and on appeal in the district court without objection to the jurisdiction of the court, and the want of jurisdiction does not apear on the face of the papers, the objection will not be considered in the supreme court. *McClure v. Campbell*, 25 Neb. 57 (40 N. W. 595).

381. (1891.) An objection that the judgment of a justice of the peace was not in the proper form cannot be first urged in the supreme court. *Gapen v. Bretternitz*, 31 Neb. 302 (47 N. W. 918).

382. (1891.) The objection that there was no ordinance in force authorizing the granting of a saloon license, cannot be raised for the first time in the supreme court. *Livingston v. Corey*, 33 Neb. 366 (50 N. W. 263).

383. (1894.) An objection that a petition filed in the district court introduced a new cause of action will not be considered by the supreme court, where it appears that no objection was made or exception taken on that ground until after the trial in the lower court. *Levi v. Fred*, 38 Neb. 564 (57 N. W. 386).

384. (1897.) An objection that a cause was tried in the district court on appeal upon different issues from those involved in the court whence the appeal was taken, is unavailing in the supreme court, unless seasonably raised in the court below, a ruling obtained thereon, and an exception thereto preserved in the record. *Stichter v. Cox*, 52 Neb. 532 (72 N. W. 848).

Request for instructions.

385. (1883.) The objection to an instruction that it is not sufficiently explicit, especially in civil cases, will not be regarded unless the matter were brought to the attention of the trial court by a request for one that was satisfactory. *B. & M. R. R. Co. v. Schluntz*, 14 Neb. 421 (16 N. W. 439); (1882) *Sioux City R. Co. v. Brown*, 13 Neb. 317 (14 N. W. 407); (1884) *Republican V. R. Co. v. Fellers*, 16 Neb. 169 (20 N. W. 217); (1884) *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578 (20 N. W. 860; 49 Am. St. Rep. 724); (1885) *Republican V. R. Co. v. Fink*, 18 Neb. 89 (24 N. W. 691); (1889) *Klosterman v. Olcott*, 25 Neb. 382 (41 N. W. 250); (1894) *Barr v. City of Omaha*, 42 Neb. 341 (60 N. W. 591); (1897) *Stewart v. Smith*, 50 Neb. 631 (70 N. W. 235); (1899) *Wittenberg v. Mollyneaux*, 59 Neb. 203 (80 N. W. 824); (1901) *Wickham v. Wolcott*, 1 Unof. 160 (95 N. W. 366); (1902) *O'Donnell v. Chicago, R. I. & P. Co.*, 65 Neb. 612 (91 N. W. 566); (1903) *Riley v. Missouri P. R. Co.*, 69 Neb. 82 (95 N. W. 20); (1903) *Parkins v. Missouri P. R. Co.*, 4 Unof. 1 (93 N. W. 197).

386. (1896.) In order to present for review the failure of the trial court to instruct the jury upon particular issues or evidence in a case, the party complaining must have requested instructions on the omitted topics. *Carter White Lead Co. v. Kinlin*, 47 Neb. 409 (66 N. W. 536); (1886) *Post v. Garrow*, 18 Neb. 682 (26 N. W. 580); (1889) *Woodruff v. White*, 25 Neb. 745 (41 N. W. 781); (1893) *Barton v. McKay*, 36 Neb. 632 (54 N. W. 968); (1893) *Barney v. Pinkham*, 37 Neb. 664 (56 N. W. 323); (1894) *Laing v. Nelson*, 40 Neb. 252 (58 N. W. 846); (1894) *German Nat. Bank of Hastings v. Leonard*, 40 Neb. 676 (59 N. W. 107); (1897) *Sanford v. Craig*, 52 Neb. 483 (72 N. W. 864); (1897) *Weber Bros. v. Whetstone*, 53 Neb. 371 (73 N. W. 695); (1901) *Peterson v. State*, 63 Neb. 251 (88 N. W. 549).

387. (1890.) Instructions to the jury must be requested before error can be predicated upon refusal to submit. *Davis v. Giddings*, 30 Neb. 209 (46 N. W. 425); (1897)

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Everett v. Hobleman, 51 Neb. 376 (19 N. W. 452).

388. (1897.) Where a jury is directed to find upon particular questions of fact, if any further than those submitted are desired by a party to the action, a request must be made for the submission of the further questions. If no request is made, error cannot be predicated upon the failure of the court to include such questions in the list of those directed to be answered. *Town v. Missouri P. R. Co.*, 50 Neb. 768 (70 N. W. 402).

389. (1899.) A party cannot predicate error upon the giving of a vague instruction, unless he has requested a proper one. *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1 (78 N. W. 359).

390. (1899.) The jury should be charged by the court to base the verdict solely upon the evidence; but a failure in this regard is a non-direction simply. If the defeated party wishes to predicate error thereon, he should prepare and ask an instruction to that effect. *Burr v. McCallum*, 59 Neb. 326 (80 N. W. 1040; 80 Am. St. Rep. 677).

391. (1902.) Where an instruction assumes to define the whole law of the case, and omits a material element from the definition given, it is reversible error, which may be relied on although no proper instruction has been requested by the party seeking to take advantage of the defect. *City of South Omaha v. Hager*, 66 Neb. 803 (92 N. W. 1017).

392. (1902.) Where the trial court undertakes to instruct the jury as to the issues involved in a cause on trial before them, he should state the issues fully, accurately and fairly; but where such instruction is incomplete, vague or uncertain, counsel should tender an instruction free from the defect urged and obtain a ruling thereon, in order to lay the basis for complaint upon review; otherwise the error, if any, will be deemed to have been waived. *City of South Omaha v. Meyers*, 3 Unof. 699 (92 N. W. 743).

393. (1903.) If the trial judge substantially misstates the testimony in giving his recollection thereof under section 287 of the code, it is error; but if he merely fails to make a complete statement, the party who desires that a further or fuller statement be made, being present at the time, should make a request to that effect, and, if he makes no request, a mere general exception to the statement of the trial judge will not suffice. *Barton v. Shull*, 70 Neb. 324 (97 N. W. 292).

Request for findings.

394. (1901.) Error cannot be predicated on the failure of the courts to make special findings of fact where none were asked. *Sheibley v. Dixon County*, 61 Neb. 409 (85 N. W. 399).

Request for judgment.

395. (1890.) Before error can be predicated upon the failure of a district court to render a deficiency judgment, it must appear that the court refused to render one when requested to do so. *Brownlee v. Davidson*, 28 Neb. 785 (45 N. W. 51).

396. (1900.) The failure of a trial court to make a complete and final disposition of a cause cannot be reviewed until it has been asked to so proceed in the case. *McClave v. McClave*, 60 Neb. 464 (83 N. W. 668).

C. Exceptions.

Failure to except as ground for dismissal of appeal, see *post*, §§ 1419-1424.

Necessity that record show exceptions, §§ 860-870.

Necessity in general.

397. (1877.) When no exceptions are taken in the court below, in an action at law, where a trial on the merits has been had, the case cannot be reviewed in the supreme court. *Hosford v. Stone*, 6 Neb. 378.

398. (1879.) Where it appears from the record that no exceptions were taken to the ruling of the court below, and no steps taken to call the attention of the court to the alleged errors, they will not be reviewed by this court. *Roode v. Dunbar*, 9 Neb. 95 (2 N. W. 345).

Sufficiency in general.

399. (1874.) To make exceptions to the charge of the court to the jury available to the party excepting, or to the ruling of the court in the refusal to give instructions asked for, the exceptions must be reduced to writing during the same term at which the trial took place. *Heady v. Fishburn*, 3 Neb. 263.

400. (1876.) An exception taken in the court below must not be so indefinite as to leave it uncertain as to what it is intended to apply. *Gibson v. Arnold*, 5 Neb. 186.

Discretionary matters.

401. (1901.) An alleged abuse of discretion on the part of the trial court is unavailing unless excepted to. *Guthrie v. State*, 2 Unof. 28 (96 N. W. 243).

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Motions and rulings thereon in general.

402. (1898.) A ruling on a motion to which no exception was taken cannot be reviewed in the supreme court, especially if such review is sought upon appeal as distinguished from error proceedings. *Frenzer v. Phillips*, 57 Neb. 229 (77 N. W. 668).

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403. (1899.) An interlocutory order to which no exception has been taken cannot be reviewed. *Estep v. Schlesinger*, 58 Neb. 62 (78 N. W. 383).

404. (1902.) Where a motion has been sustained in part and overruled in part, the maker of it, who has taken no exceptions, cannot complain of error in its overruling. *Curran v. Hageman*, 3 Unof. 779 (92 N. W. 1003).

405. (1903.) To authorize the supreme court to review the rulings of the trial court on motions and other matters of procedure, the party complaining must except to such rulings, file a motion for a new trial, and present the questions by a petition in error. *Danforth v Fowler*, 68 Neb. 452 (94 N. W. 637).

Rulings as to parties.

406. (1898.) Where no exception is taken to an order substituting a party plaintiff, such order cannot be reviewed. *Maul v. Drexel*, 55 Neb. 446 (76 N. W. 163).

Rulings as to pleadings.

407. (1877.) An order of court, in making up the pleadings, to which no exception is taken, will not be reviewed on error. *Healy v. Aultman Co.*, 6 Neb. 349.

408. (1894.) A ruling on an application for leave to file an amended answer cannot be reviewed where the record fails to show that an exception was taken thereto. *Hiatt v. Kinkaid*, 40 Neb. 178 (58 N. W. 700).

409. (1899.) A ruling on an application to amend a pleading will be disregarded on review in absence of an exception below. *Troup v. Horbach*, 57 Neb. 644 (78 N. W. 286).

410. (1896.) To secure a review of alleged error in sustaining a demurrer to a petition, an exception is indispensably necessary, even though the action is solely for equitable relief. *Abbott v. Barton*, 47 Neb. 822 (66 N. W. 838).

411. (1901.) Where no exception is taken to a ruling sustaining a demurrer but leave to amend is given, error is waived. *Robertson v. Hamilton*, 61 Neb. 791 (86 N. W. 493).

412. (1902.) An order overruling a special demurrer will not be reviewed where no exception to such order is saved. *Holway v. American Exchange Nat. Bank*, 64 Neb. 67 (89 N. W. 382).

413. (1903.) A party is not in a position to complain of a ruling of the trial court, requiring certain defendants to file answers, instanter, as of date when the judgment was rendered, when no exception is taken to such ruling and it is made in response to a motion, filed many months after the rendition of the judgment, asking that such parties be required to answer. *Norbury v. Harper*, 70 Neb. 389 (97 N. W. 438).

Continuance granted or denied.

414. (1891.) To predicate error upon order denying a continuance it must be excepted to at trial. *Coad v. Home Cattle Co.*, 32 Neb. 761 (49 N. W. 757; 29 Am. St. Rep. 465); (1898) *Staples v. Arlington State Bank*, 54 Neb. 760 (74 N. W. 1066).

Evidence admitted or excluded.

415. (1882.) Alleged error in the admission of evidence cannot be considered, in the absence of an exception to the ruling. *Dunbier v. Day*, 12 Neb. 596 (12 N. W. 109); (1882) *Republican V. R. Co. v. Arnold*, 13 Neb. 485 (14 N. W. 478); (1887) *Singer Mfg. Co. v. McAllister Bros.*, 22 Neb. 359 (35 N. W. 181); (1901) *Pope v. Klingerman & Co.*, 2 Unof. 184 (96 N. W. 519).

416. (1882.) Unless exceptions have been taken in the trial court to the admission or refusal to admit testimony, no error can be predicated thereon. *Pettit v. Black*, 13 Neb. 142 (12 N. W. 841); (1880) *Stanton County v Canfield*, 10 Neb. 389 (6 N. W. 466); (1892) *Johnson v. Swayze*, 35 Neb. 117 (52 N. W. 835); (1894) *Hurlburt v. Hall*, 39 Neb. 889 (58 N. W. 538); (1897) *Bennett v. McDonald*, 52 Neb. 278 (72 N. W. 268).

417. (1883.) In order to lay the foundation for reviewing a ruling of the trial court on the admission of evidence, an exception is necessary. *Republican V. R Co. v. Boyse*, 14 Neb. 130 (15 N. W. 364).

——— Sufficiency of exceptions.

418. (1881.) When exceptions are taken to the admission or rejection of testimony in an action tried to a jury, such exceptions must be reduced to writing at the term at which the verdict is rendered, or within the time fixed by statute thereafter. *Scott v. Waldeck*, 11 Neb. 525 (10 N. W. 409).

419. (1897.) An exception, well taken,

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to the exclusion of evidence is not waived by a failure to present the same grounds of objection by an exception to an instruction given or refused. *Rosenthal v. Ogden*, 50 Neb. 218 (69 N. W. 779).

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Report of referee.

420. (1892.) Where exceptions to the report of a referee are withdrawn, objection cannot be made in the supreme court that certain findings are not sustained by the evidence. *Whalen v. Brennan*, 34 Neb. 129 (51 N. W. 759).

Submission of issues and special findings.

421. (1896.) A party aggrieved by the form of submitting an issue of fact to a jury in an equity case should take an exception. *Hay v. Miller*, 48 Neb. 156 (66 N. W. 1115).

422. (1902.) The submission of special findings to the jury upon matters claimed to be irrelevant and immaterial will not be reviewed unless excepted to at the time and assigned as error in the motion for a new trial. *Livingston v. Moore*, 2 Unof. 498 (89 N. W. 289).

Direction of verdict.

423. (1901.) An exception is indispensable to secure a review of the action of the trial court in directing a verdict. *Startzer v. Clarke*, 1 Unof. 91 (95 N. W. 509).

Instructions given or refused.

424. Objections to instructions to a trial jury will not be noticed by the supreme court, unless the attention of the trial court is first called to them by the proper exceptions taken at the time the instructions were given. (1874) *Brown v. Hurst*, 3 Neb. 353; (1885) *Warrick v. Rounds*, 17 Neb. 411 (23 N. W. 785); (1886) *Nyce v. Shaffer*, 20 Neb. 507 (30 N. W. 943); (1887) *Billings v. Filley*, 21 Neb. 511 (32 N. W. 567); (1888) *Schroeder v. Rinehard*, 25 Neb. 75 (40 N. W. 593); (1890) *Watson v. Roode*, 30 Neb. 264 (46 N. W. 491); (1892) *Rooch v. Hawkinson*, 34 Neb. 658 (52 N. W. 375); (1892) *Darner v. Daggett*, 35 Neb. 695 (53 N. W. 608); (1893) *Levi v. Fred*, 38 Neb. 564 (57 N. W. 386); (1894) *American B. & L. Ass'n v. Mordock*, 39 Neb. 413 (58 N. W. 107); (1894) *Glaze v. Parcel*, 40 Neb. 732 (59 N. W. 382); (1894) *Bouvier v. Stricklett*, 40 Neb. 792 (59 N. W. 550); (1894) *Bloedel v. Zimmerman*, 41 Neb. 695 (60 N. W. 6); (1895) *Sigler v. McConnell*, 45 Neb. 598 (63 N. W. 870); (1896) *Romberg v. Hediger*, 47 Neb. 201 (66 N. W. 283); (1897) *Hodgin v. Whitcomb*, 51 Neb. 617 (71 N. W. 314); (1897) *Anderson v. Beeman*, 52 Neb. 387 (72 N. W. 361); (1897) *Morsch v. Besach*, 52 Neb. 502 (72 N. W. 953); (1898) *State, ex rel. Vale, v. School District*, 55 Neb. 317 (75 N. W. 855); (1898) *Burnet v. Cavanagh*, 56 Neb. 190 (76 N. W. 578); (1899) *Omaha Brewing Ass'n v. Bullnheimer*, 58 Neb. 387 (78 N. W. 728); (1899) *Walker v. Allen*, 58 Neb. 537 (78 N. W. 1070); (1899) *Humpert v. McGavock*, 59 Neb. 346 (80 N. W. 1038); (1901) *Elkhorn Valley Bank v. Marley*, 61 Neb. 583 (85 N. W. 846); (1902) *Engel v. Dado*, 66 Neb. 400 (92 N. W. 629); (1902) *Livingston v. Moore*, 2 Unof. 498 (89 N. W. 289); (1903) *First Nat. Bank of Wayne v. Tolerton & Stetson Co.*, 5 Unof. 43 (97 N. W. 248); (1906) *Union P. R. Co. v. Meyer*, 76 Neb. 549 (107 N. W. 793).

425. In civil cases, instructions by the court to a jury, the giving or refusal of which was not excepted to upon the trial in the court below, will not be considered in the supreme court. (1877) *Black v. Winterstein*, 6 Neb. 224; (1889) *Holloway v. Schooley*, 27 Neb. 553 (43 N. W. 346); (1889) *Chicago, B & Q. R. Co. v. Starmer*, 26 Neb. 630 (42 N. W. 706); (1893) *Richardson & Boynton Co. v. Winter*, 38 Neb. 288 (56 N. W. 886); (1894) *Rector v. Canfield*, 40 Neb. 595 (58 N. W. 1131); (1894) *Wiseman v. Ziegler*, 41 Neb. 886 (60 N. W. 320); (1897) *Costello v. Kottas*, 52 Neb. 15 (71 N. W. 950); (1901) *Darrah v. Juel*, 1 Unof. 834 (96 N. W. 166); (1901) *Ish v. Marsh*, 1 Unof. 864 (96 N. W. 58).

426. (1896.) The refusal of an instruction must be excepted to in the trial court, in order to lay the foundation for its review in the supreme court. *City of Omaha v. McGavock*, 47 Neb. 313 (66 N. W. 415); (1897) *Sanford v. Craig*, 52 Neb. 483 (72 N. W. 864); (1897) *Brinckle v. Stitts*, 53 Neb. 10 (73 N. W. 223).

427. (1875.) All alleged errors, occurring during the trial of a cause, must be excepted to, and complained of in the motion for a new trial, in order to obtain a review of the same in the supreme court; and error committed by the giving of an oral charge to the jury, instead of reducing such charge to writing, as required by Gen. Stat., 262, is no exception to the rule. *Horbach v. Miller*, 4 Neb. 31.

428. (1882.) Oral statements made by the judge to the jury as to the law of the case must be excepted to, to be reviewed on error. *Republican V. R. Co. v. Arnold*, 13 Neb. 485 (14 N. W. 478).

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429. (1896.) A ruling which modifies an instruction requested will not be reviewed in absence of an exception to the modification. *Denise v. City of Omaha*, 49 Neb. 750 (69 N. W. 119).

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430. (1898.) Error in giving an oral instruction is not available in the supreme court where no exception was specially taken at the time. *Elkhorn Valley Lodge v.* the time the instruction was given. *Elliott v. Carter White Lead Co.*, 53 Neb. 458 (73 N. W. 948).

431. (1899.) The charge of a trial court should be filed with the clerk before read to the jury; but that it was not done is not available error, unless the complainant excepted to such omission at the time. *Minzer v. Willman Mercantile Co.*, 59 Neb. 410 (81 N. W. 307).

432. (1900.) Error cannot be predicated upon an instruction in regard to the computation of interest, unless exception is taken at the time. *Elkhorn Valley Lodge v. Hudson*, 59 Neb. 672 (81 N. W. 859).

——— Numbering and indorsement and filing of instructions.

433. (1881.) Instructions should be filed with the clerk before being read by the court to the jury. And the word "given" or "refused" should be written on the margin of each instruction given or requested. But a failure to comply with the statute is not ground of error, unless excepted to. *Fry v. Tilton*, 11 Neb. 456 (9 N. W. 638).

434. (1886.) The provision of Comp. St., chapter 19, section 54, directing the charge of the court to the jury to be written in consecutively numbered paragraphs, is a right which the supreme court will regard as waived if no objection is made or exception is taken to a particular clause only. *Gibson v. Sullivan*, 18 Neb. 558 (26 N. W. 368).

435. (1891.) Where the court fails to write the word "given" on the margin of each instruction as required by the statute, exception must be specially taken on that ground, as the objection does not go to the substance of the instruction. *Omaha & Florence L. & T. Co. v. Hansen*, 32 Neb. 449 (49 N. W. 456).

436. (1895.) The failure to mark an instruction "given" or "refused" unless excepted to on that ground cannot be reviewed. *City of Chadron v. Glover*, 43 Neb. 732 (62 N. W. 62).

437. (1896.) In order to present for review the failure of the district court to properly number instructions, exception must at the trial have been taken on that especial ground. *Herzog v. Campbell*, 47 Neb. 370 (66 N. W. 424).

438. (1899.) Failure to file instructions before they are read to the jury is not reversible error, where a specific exception was not taken on that ground before they were read. *Fire Ass'n of Philadelphia v. Ruby*, 58 Neb. 730 (79 N. W. 723).

——— Sufficiency of exception.

439. (1871.) To make exceptions to the charge of the court to the jury available to the party excepting, the exception must be reduced to writing, together with so much of the charge as is necessary to explain it. *Monroe v. Elburt*, 1 Neb. 174; (1874) *Heady v. Fishburn*, 3 Neb. 263.

440. (1872.) A general exception to the whole of a charge of the court to the jury, composed of several distinct propositions of law, will not avail the party making it, even though some of the propositions be not tenable. *Strader v. White*, 2 Neb. 348; (1895) *Redman v. Voss*, 46 Neb. 512 (64 N. W. 1094); (1896) *Union P. R. Co. v. Montgomery*, 49 Neb. 429 (68 N. W. 619).

441 (1888.) A general exception to instructions given is insufficient. Each specific instruction which is claimed to be erroneous must be distinctly pointed out and specifically excepted to. *Brooks v. Dutcher*, 22 Neb. 644 (36 N. W. 128) [overruled, 24 Neb. 300]; 49 Neb. 103; 49 Neb. 2441]; (1889) *Walker v. Turner*, 27 Neb. 103 (42 N. W. 918); (1894) *Hedrick v. Strauss*, 42 Neb. 485 (60 N. W. 928); (1896) *City of Omaha v. McGavock*, 47 Neb. 313 (66 N. W. 415); (1896) *Valley Lumber Co. v. Smith*, 48 Neb. 293 (67 N. W. 159); (1898) *American Fire Ins. Co. v. Landfare*, 56 Neb. 482 (76 N. W. 1068).

442. (1888.) An exception to "each and every one of the above instructions separately" is not sufficient to permit an examination of instructions of ten paragraphs. *Brooks v. Dutcher*, 24 Neb. 300 (38 N. W. 780). [Overruled. 49 Neb. 106; 49 Neb. 244.]

443. (1895.) The notation of the words "given" or "refused," as required by statute, on the margin of the instructions is also a portion of the record, indicating the court's ruling on the instruction, and an exception is properly noted by a memorandum on the margin of the instructions. *Blumer v. Bennett*, 44 Neb. 873 (63 N. W. 14); (1897)

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Bennett v. McDonald, 52 Neb. 278 (72 N. W. 268).

444. (1895.) Where counsel, when instructions were given, indicated in open court their desire to except thereto, and afterwards themselves noted their exceptions by a memorandum on the margin of the instructions, the court, in overruling a motion to strike from the record such memorandum adopted and ratified the notation, and such notation being in accordance with the facts, there was no error in the court's ruling. *Blumer v. Bennett*, 44 Neb. 873 (63 N. W. 14).

445. (1897.) An exception to all of the instructions is unavailing if any one of them is correct. *City of South Omaha v. Powell*, 50 Neb. 798 (70 N. W. 391); (1897) *Home Fire Ins. Co. v. Phelps*, 51 Neb. 623 (71 N. W. 303); (1897) *Adams-Smith Co. v. Hayward*, 52 Neb. 79 (71 N. W. 949); (1897) *Bennett v. McDonald*, 52 Neb. 278 (72 N. W. 268).

446. (1893.) A general exception to instructions, as "to the giving of the above instructions the plaintiff then and there excepted," is insufficient to lay the foundation for their review in the supreme court. Exception should be specifically taken to each paragraph of the charge claimed to be erroneous. *First Nat. Bank of Denver v. Lowrey*, 36 Neb. 290. (54 N. W. 568).

447. (1896.) An exception to instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, and 9, given by the court on its own motion, is in effect a general exception to the whole charge consisting of nine paragraphs, and is not available on review, if any one of the instuctions was correct and free from criticism. *Blue Valley Lumber Co. v. Smith*, 48 Neb. 293 (67 N. W. 159).

448. (1896.) An exception to the "giving of instructions 3, 4, 5, 6, 7, 8, and 9, contained in the general charge of the court, and to the giving of each of said instructions," is a separate and specific exception to each of said paragraphs, and is, therefore, sufficient. *City of Omaha v. Richards*, 49 Neb. 244 (68 N. W. 528).

449. (1897.) Where several distinct requests to charge are denied, an exception to the refusal of all of them is insufficient, unless it appears that each should have been given. *City of South Omaha v. Powell*, 50 Neb. 798 (70 N. W. 391).

450. (1898.) Exceptions to rulings in giving and in refusing instructions came too late when noted two days after the rulings were made. *Smith v. Kennard*, 54 Neb. 523 (74 N. W. 859).

451. (1898.) The exception to a portion of the instructions as a "paragraph" held entirely proper, and the portion to which reference was made to clearly come within the meaning of the word used. *McClellan v. Heim*, 56 Neb. 600 (77 N. W. 120).

452. (1898.) A prepared statement in writing of the exceptions to the giving specifically designated instructions, also to refusals to give requested ones duly filed at the proper time, indorsed by the trial judge "allowed," and authenticated as a part of the proceedings, furnish evidence of the exception having been made and is not an improper manner of notation; also properly of the record. *State v. Bartley*, 56 Neb. 810 (77 N. W. 438).

453. (1903.) Where one of several instructions asked by a party fails to correctly state the law, error can not be predicated upon an exception taken to the refusal of the court to give the instruction as a whole. *Strong v. Combs*, 68 Neb. 315 (94 N. W. 149).

Misconduct of counsel.

454. (1885.) When it is alleged that an attorney, in the argument of a cause on trial to a jury, went outside of the record and appealed to the passions and prejudices of the jury, the attention of the court should be called to the language and conduct of the attorney by the proper objection and a ruling had thereon by the court. If the objection is overruled and an exception taken to the ruling the questions may be reviewed in the supreme court upon the decision of the trial court. Without such ruling and exception there is nothing for the reviewing court to consider. *Bohanan v. State*, 18 Neb. 57 (24 N. W. 390; 54 Am. Rep. 791).

455. In order to preserve for review error in permitting improper remarks by counsel, objection must be made at the time, a ruling obtained from the court and an exception taken. (1897) *Golden v. Lund*, 50 Neb. 867 (70 N. W. 379); (1903) *Lansing v. Wessell*, 5 Unof. 199 (97 N. W. 815).

456. (1899.) Alleged misconduct of counsel consisting of statements during argument to the jury, to be available on review must be made the subject of an objection at the time, a ruling obtained, and exception taken thereto, and the portion of the proceedings incorporated in the bill of excep-

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tions. *Summers v. Simms*, 58 Neb. 579 (79 N. W. 155).

Judgment or findings.

457. (1877.) It is not necessary that exception be taken to a final judgment to entitle a party to have it reviewed. *Black v. Winterstein*, 6 Neb. 224; (1879) *Jones v. Null*, 9 Neb. 254 (2 N. W. 350); (1885) *Welton v. Beltezore*, 17 Neb. 399 (23 N. W. 1); (1890) *Cheney v. Wagner*, 30 Neb. 267 (46 N. W. 427); (1895) *Erck v. First Nat. Bank*, 43 Neb. 613 (62 N. W. 67); (1898) *State v. Bartley*, 56 Neb. 810 (77 N. W. 438).

458. (1878.) Where the court is requested under the statute to state its findings of fact and law separately, and omits to do so, if no exception be taken, this will be considered as a waiver of the demand, and an acquiescence in a general finding upon the issues. *Lowrie v. France*, 7 Neb. 191.

Ruling on motion for new trial.

459. (1878.) When errors of law and irregularities occuring at the trial are the grounds on which a new trial is moved in order to entitle a party to a review of the decision of the court on the motion, an exception is necessary. *Lowrie v. France*, 7 Neb. 191.

460. (1881.) Exeptions to granting or overruling of a motion for new trial should be taken to obtain review of such motion. *Murray v. School Dist. No. 3*, 11 Neb. 436, 438 (9 N. W. 573).

461. (1898.) An exception in the trial court to an order overruling a motion for a new trial is necessary to obtain a review in the appellate court of questions properly included in the motion. *Van Etten v. Medland*, 53 Neb. 569 (74 N. W. 33); (1898) *Devries v. Squire*, 55 Neb. 438 (76 N. W. 16); (1898) *State v. Bartley*, 56 Neb. 810 (77 N. W. 438); (1900) *State, ex rel. Saunders, v. Clark*, 59 Neb. 702 (82 N. W. 8).

Decisions of intermediate courts.

462. (1876.) Error alleged to have been committed by the district court, in the reversal of a judgment rendered in favor of the plaintiff before a justice of the peace, is waived where no exception was taken and plaintiff filed a petition as provided by the code. *Lash v. Christie*, 4 Neb. 262.

463. (1876.) The failure to except to a judgment of reversal, and to take steps to set it aside until after the original case has proceeded to final judgment, will be deemed a waiver of all errors committed in its rendition. *Banks v. Uhl*, 5 Neb. 240.

464. (1876.) To obtain a review of a judgment of the district court, dismissing an appeal taken from a justice of the peace, no exception need by taken or made part of the record by a formal bill of exceptions. *Morrow v. Sullender*, 4 Neb. 374; (1896) *Claflin v. American Nat. Bank of Omaha*, 46 Neb. 884 (65 N. W. 1056).

D. Motion for New Trial.

Necessity for motion for new trial in appeal in habeas corpus, see *Habeas Corpus*, §§ 53-55.

Defect in motion as ground for dismissal of appeal, see *post*, §§ 1419-1424.

Effect as extending time for taking proceedings for review, see *post*, §§ 626-630.

Necessity for exception to ruling on motion, see *ante*, §§ 459-461.

Necessity that record show motion and ruling thereon, see *post*, §§ 860-873.

Necessity in general.

465. (1876.) The supreme court will not review upon petition in error, alleged errors occurring during the trial of a cause in the district court, unless a motion for a new trial was made in the trial court and a ruling obtained thereon. *Singleton v. Boyle*, 4 Neb. 414; (1877) *Hull v. Miller*, 6 Neb. 128; (1886) *Cruts v. Wray*, 19 Neb. 581 (27 N. W. 634); (1886) *Joiner v Van Alstyne*, 20 Neb. 578 (30 N. W. 944); (1888) *Harrington v. Latta*, 23 Neb. 84 (36 N. W. 364); (1892) *Smith v. Spaulding*, 34 Neb. 128 (51 N. W. 469); (1893) *Jones v Hayes*, 36 Neb. 526 (54 N. W. 858; (1894) *Shrimpton v. King*, 39 Neb. 779 (58 N. W. 286); (1894) *Zehr v. Miller*, 40 Neb. 791 (59 N. W. 384); (1899) *Broadwater v Foxworthy*, 57 Neb. 406 (77 N. W. 1103); (1901) *Aultman, Miller & Co. v. Moline Co.*, 1 Unof. 106 (95 N. W. 369); (1901) *Woodard v. Cutter*, 2 Unof. 84 (96 N. W. 54); (1902) *Marsh v State*, 2 Unof. 372 (96 N. W. 520; (1902) *Cedar County v. Goetz*, 3 Unof. 172 (91 N. W. 177); (1903) *Norbury v. Harper*, 70 Neb. 389 (97 N. W. 438); (1904) *State, ex rel. Holm, v. Ellsworth*, 72 Neb. 277 (100 N. W. 314); (1905) *Hanson v. Nathan*, 74 Neb. 288 (104 N. W. 173).

466. (1876.) To obtain the review of a case in the supreme court a party dissatisfied with either the verdict or judgment in such case, must file the proper motion and in this way present the questions of law fairly and fully to the court below. *Creighton v. Newton*, 5 Neb. 100.

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467. (1876.) Where no motion for a new trial has been made to a hearing before a referee, the alleged errors will not be considered. *Simpson v. Gregg*, 5 Neb. 237.

468. (1880.) In all cases of the trial of issues of fact in actions at law in the district court, a motion for a new trial must be filed and a ruling had thereon, to obtain a review in the supreme court. *Lichty v. Clark*, 10 Neb. 472 (6 N. W. 760); (1902) *Lau v. Lindsey*, 3 Unof. 681 (92 N W. 642).

469. (1885.) No point of error not brought to the attention of the trial court for its ruling nor necessary to be considered and passed upon by it in order to reach the judgment rendered will be considered by this court in a proceeding in error. *Hurford v. Baker*, 17 Neb. 443 (23 N. W. 339).

470. (1893.) The supreme court will not review alleged errors of law occurring in a trial to the district court unless a motion for a new trial is made there and a ruling had on such motion. *Withnell v. City of Omaha*, 37 Neb. 621 (56 N. W. 381); (1894) *Ward v. Western Horse & Cattle Ins. Co.*, 42 Neb. 374 (60 N. W. 574); (1901) *Cobb v. Hadley Co.*, 1 Unof. 294 (95 N. W. 482); (1903) *Toozer v. State*, 5 Unof. 182 (97 N. W. 584).

471. (1894.) Allegations of error as to rulings of trial court and verdict of jury will not be reviewed where the party aggrieved failed to present the questions below by a motion for a new trial. *Brown v. Ritner*, 41 Neb. 52 (59 N. W. 360).

472. (1895.) Allegations that there were errors in the trial below will not be considered in absence of a motion for a new trial. *Zimmerman v. State*, 46 Neb. 13 (64 N. W. 375).

473. (1895.) In order to secure a review of errors committed during a trial in proceedings for contempt such errors must first be submitted to the court wherein such proceedings were had by a motion for a new trial. *Zimmerman v. State*, 46 Neb. 13 (64 N. W. 375).

474. (1902.) When a motion for a new trial is overruled, because not filed within the time required by statute, all matters necessarily included therein as grounds for a new trial are unavailing on review by proceedings in error. *Harris v. Jennings*, 64 Neb. 80 (89 N. W. 625; 97 Am. St. Rep. 635).

475. (1902.) Where the correction of the errors complained of involves the reexamination of no issue of fact, a motion for a new trial is not a prerequisite to a review of a final order or judgment on error. *Bannard v. Duncan*, 65 Neb. 179 (90 N. W. 947).

476. (1902.) An error not going to the jurisdiction of the trial court, and not called to its attention in any way, by motion for new trial or otherwise, will not be regarded in the supreme court. *Jenkins v. Myatt*, 2 Unof. 592 (89 N. W. 599).

477. (1906.) The change made by the act of 1905 in the procedure to obtain a review of a judgment at law in a civil case leaves the rule with respect to the necessity of a motion for a new trial unchanged. *Carmack v. Erdenberger*, 77 Neb. 592 (110 N. W. 315).

Sufficiency in general.

478. (1890.) An oral motion for a new trial is insufficient to bring a cause to the supreme court for review. *Phœnix Ins. Co. v. Readinger*, 28 Neb. 587 (44 N. W. 864).

479. (1906.) A motion for a new trial, filed out of the time and not coming within any of the exceptions of the statute, is of no avail for the purposes of a review of errors in the supreme court. *Carmack v. Erdenberger*, 77 Neb. 592 (110 N. W. 315).

Necessity for review on appeal.

480. (1881.) Motion for a new trial below is necessary in all cases brought up on error, but not in equity causes brought up on appeal. *Swansen v. Swansen*, 12 Neb. 210 (10 N. W. 713)

481. (1888.) Where plaintiff filed his petition in equity in the district court, to which defendant presented a demurrer, on the ground that the petition did not state the facts sufficient to constitute a cause of action, and such demurrer was sustained, neither a motion for a new trial nor bill of exceptions was necessary in order to obtain a review in the supreme court by appeal. *Hays v. Mercier*, 22 Neb. 656 (35 N. W. 894).

482. (1891.) An election contest brought to the supreme court on petition in error, which is in fact an appeal, will not be remanded for want of a motion for a new trial. *Barnd v. Hunt*, 32 Neb. 116 (49 N. W. 222).

483. (1899.) A motion for a new trial is not essential to a review of an equity cause on appeal. *Smith v. Silver*, 58 Neb. 429 (78 N. W. 725).

Summary proceedings.

484. (1905.) A judgment in a summary proceeding for contempt *in facie curiæ*, where no complaint is filed, no evidence is

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taken, and no trial had, may be reviewed on the record made therein without the filing of a motion for a new trial. *Crites v. State*, 74 Neb. 687 (105 N. W. 469).

Equitable actions.

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Necessity for review on appeal, see *ante*, §§ 480-483.

485. (1878.) In order to review an action in equity on error, the errors complained of must be brought before the district court by a motion for a new trial, or they will be considered as waived. *Cutler v. Roberts*, 7 Neb. 4 (29 Am. Rep. 371).

486. (1890.) In order to review the proceedings in the trial of an equity cause by a petition in error, a motion for a new trial must be filed as in an action at law. *Carlow v. Aultman Co.*, 28 Neb. 672 (44 N. W. 873); (1891) *Gaughran v. Crosby*, 33 Neb. 33 (49 N. W. 776); (1893) *Gray v. Disbrow & Co.*, 36 Neb. 857 (55 N. W. 255); (1894) *Scroggin v. Nat. Lumber Co.*, 41 Neb. 195 (59 N. W. 548); (1894) *Appelget v. McWhinney*, 41 Neb. 253 (59 N. W. 918); (1894) *Farmers Loan & Trust Co. v. Davis*, 42 Neb. 46 (60 N. W. 321); (1902) *Miles v. Deming*, 2 Unof. 626 (89 N. W. 599); (1902) *Curran v. Hageman*, 3 Unof. 779 (92 N. W. 1003).

487. (1898.) A review by petition in error of the proceedings during the trial in the district court of an equity cause cannot be obtained in the supreme court if no motion for a new trial was filed in the trial court; and in a case so presented here, the record will be examined no further than to ascertain whether the pleadings state a cause of action or defense and support the judgment or decree. *Storey v. Burns*, 53 Neb. 535 (74 N W. 39).

Review of sufficiency of pleadings.

Sufficiency of assignment in motion, see *post*, §§ 543, 544.

488. (1881.) The motion for a new trial, is to correct error in the proceedings, and it is not necessary to raise an objection to a vital defect in a petition, like a failure to state a cause of action. *Swansen v. Swansen*, 12 Neb. 210 (10 N. W. 713).

489. (1882.) A motion for a new trial is necessary only in those cases where a trial has been had. If the court has merely construed the pleadings or some of them, as in sustaining or overruling a demurrer to a petition, answer or reply, no motion for a new trial is necessary. *O'Donohue v. Hendrix*, 13 Neb. 255 (13 N. W. 215).

490. (1893.) To obtain a review upon error of matters occurring upon a trial in the district court, a motion for a new trial must have been made in that court, but, in the absence of such a motion, the supreme court will examine the question as to whether the petition states a cause of action. *Schmid v. Schmid*, 37 Neb. 629 (56 N. W. 207).

491. (1895.) Where it is sought to review on error in the supreme court the judgment of a district court, no motion for a new trial having been filed, this court will look into the record to ascertain if the pleadings state a cause of action or defense and support the judgment or decree rendered; but will not go back of the verdict rendered by the jury or the findings of fact made by the trial court to review anything done or any proceeding had. *Hansen v. Kinney*, 46 Neb. 207 (64 N. W. 710); (1901) *Farmers' & Merchants' Nat. Bank v. Mosher*, 63 Neb. 130 (88 N. W. 552); (1905) *Johnson v. Songster*, 73 Neb. 724 (103 N. W. 274).

492. (1896.) In error proceedings the supreme court will, on proper assignments of error, review a record to ascertain whether the pleadings suport the judgment rendered by the district court, although there was in that court no motion for a new trial. *Farris v State, ex rel. Murphy*, 46 Neb. 857 (65 N. W. 890); (1901) *Ames v. Parrott*, 61 Neb. 847 (86 N. W. 503; 87 Am. St. Rep. 536).

493. (1896.) A motion for a new trial is unnecessary to present to this court the question whether the petition states a cause of action. *Scarborough v. Myrick*, 47 Neb. 794 (66 N. W. 867).

494. (1899.) Where there was filed in the district court a motion for a new trial, the supreme court will only look into the record to ascertain if the pleadings support the judgment sought to be reversed by error proceedings. *Holmes v. Lincoln Salt Lake Co.*, 58 Neb. 74 (78 N. W. 379); (1901) *Gillispie v. Morsman*, 1 Unof. 586 (95 N. W. 774).

495. (1900.) A final judgment based upon a pleading defective in substance may be reviewed without a motion for a new trial having been filed and ruled upon. *Horton v. State, ex rel. Hayden*, 60 Neb. 701 (84 N. W. 87).

496. (1902.) Where no motion for a new trial is filed and the case is brought to the supreme court by a petition in error, the judgment of the lower court will be affirmed

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if sustained by the pleadings. *Lau v. Lindsey*, 3 Unof. 681 (92 N. W. 642).

497. (1904.) In a statutory proceeding for a license to sell real estate by an administrator or executor, where no motion for a new trial is filed in the court below, the supreme court will, on error proceedings, examine the sufficiency of the pleadings to sustain the judgment. *Bixby v. Jewell*, 72 Neb. 755 (101 N. W. 1026).

498. (1906.) Where a judgment at law is rendered on the pleadings alone, a motion for a new trial is not necessary to obtain a review in the supreme court. *First Nat. Bank of Sutton v Sutton Mercantile Co.*, 77 Neb. 596 (110 N. W. 306).

Review of rulings on motions.

499. (1894.) An order overruling a motion to dismiss a petition in an action to recover on an insurance policy, the ground of the motion being that the action was not commenced within the time limited by the policy, is conclusive when presented for review neither by a motion for a new trial nor a petition in error. *Home Fire Ins. Co. v. Murray*, 40 Neb. 597 (59 N. W. 102).

500. (1899.) A ruling of the district court on motion to require its clerk to pay out moneys in his hands may be reviewed, though there was no motion for a new trial. *Slobodisky v. Curtis*, 58 Neb. 211 (78 N. W. 522).

501. (1903.) To authorize the supreme court to review the rulings of the trial court on motions and other matters of procedure, the party complaining must except to such rulings, file a motion for a new trial, and present the questions by a petition in error. *Danforth v. Fowler*, 68 Neb. 452 (94 N. W. 637).

Review of rulings as to admission of evidence.

Sufficiency of assignment in motion, see *post*, §§ 546-550.

502. (1881.) To entitle a defendant in error to a review in the supreme court of errors in the admission of evidence against his objection, it is not enough that he excepted to the overruling of his objection, but he should have moved for a new trial on that ground, and if still unsuccessful, have prosecuted a petition in error. The rule in this particular is the same, whether the party complaining of such errors be a plaintiff or a defendant. *Johnson v. Ghost*, 11 Neb. 414 (8 N. W. 391).

503. (1888.) To obtain review of the action of a trial court in rejecting an affidavit offered in evidence, the party aggrieved must have made a motion for a new trial in that court. *Durham v. Courtnay*, 24 Neb. 627 (39 N. W. 784).

504. (1892.) A motion for a new trial is necessary to obtain a review by petition in error of the rulings of the trial court on admission or exclusion of testimony, or to secure a review of the evidence for the purpose of determining whether it is sufficient to sustain the finding and judgment. *Miller v. Antelope County*, 35 Neb. 237 (52 N. W. 1116).

505. (1901.) Rulings upon the admission of testimony cannot be reviewed unless raised by a motion for a new trial and a petition in error. *Pioneer Savings & Loan Co. v. Eyer*, 62 Neb. 810 (87 N. W. 1058).

506. (1903.) Alleged errors of a trial court in the admission and exclusion of testimony can only be reviewed in the supreme court when they have first been called to the attention of the trial court by a motion for a new trial. *State, ex rel. Douglas, v. Alstadt*, 4 Unof. 211 (93 N. W. 696); (1903) *Saling v. Estate of Saling*, 4 Unof. 507 (94 N. W. 963).

Review of sufficiency of evidence.

507. (1895.) An objection that the findings and judgment are not supported by sufficient evidence is unavailing in an error proceeding where the record fails to show that a motion for a new trial was filed and ruled on below. *Losure v. Miller*, 45 Neb. 465 (63 N. W. 863); *Losure v. Thompson*, 45 Neb. 466; (1897) *Gretna State Bank v. Grabow*, 52 Neb. 354 (72 N. W. 361); (1901) *Westervelt v. Baker*, 1 Unof. 635 (95 N. W. 793); (1901) *Quigley v. Mulford*, 1 Unof. 265 (95 N. W. 490).

508. (1897.) Objection that the judgment is unsupported by the evidence will not be considered on petition in error unless presented below by motion for a new trial. *Shaw & Co. v. Robinson & Stokes Co.*, 51 Neb. 164 (70 N. W. 953); (1898) *Wollam v. Brandt*, 56 Neb. 527 (76 N. W. 1081); (1904) *Cassiday v. Collier*, 72 Neb. 376 (100 N. W. 802).

509. (1907.) Whether the evidence in an action at law is sufficient to sustain the verdict, or special findings of the jury, must be brought to the attention of the trial court by motion for a new trial, and a ruling had thereon, before a review thereof can be had

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in this court *Kafka v. Union Stock Yards Co.*, 78 Neb. 140 (110 N. W. 672).

Review of ruling on petition of intervention.

510. (1896.) A motion for a new trial is not necessary to obtain a review, on error, of an order refusing to permit a third person to intervene in an action. *Deere, Wells & Co. v. Eagle Mfg. Co.*, 49 Neb. 385 (68 N. W. 504)

Review of instructions given or refused.

Sufficiency of assignment in motion, see *post*, §§ 551-563.

511. (1886.) Where objection is made to the ruling of a trial court in the giving or refusing to give instructions to the jury hearing the cause, the instructions given or refused must be pointed out in the motion for a new trial in some way, either by number or other means of identifying the same. *Weir v. Burlington & M. R. R. Co.*, 19 Neb. 212 (26 N. W. 627); (1886) *Nyce v. Shaffer*, 20 Neb. 507 (30 N. W. 943); (1893) *Riverside Coal Co. v. Holmes*, 36 Neb. 858 (55 N. W. 255); (1894) *Hedrick v. Strauss*, 42 Neb. 485 (60 N. W. 928).

512. (1909.) To review alleged errors in refusing instructions they must be called to the attention of the trial court by a motion for a new trial. *Schmitt & Bro. Co. v. Mahoney*, 60 Neb. 20 (82 N. W. 99); (1907) *Tarpenning v. Knapp*, 79 Neb. 62 (112 N. W. 290).

Review of sufficiency of findings of court or referee.

513. (1881.) To obtain a review of the decision of a referee a motion for a new trial is necessary. *Light v. Kennard*, 11 Neb. 129 (7 N. W. 539).

514. (1881.) Exceptions to the report of a referee although proper practice in certain cases, as where it fails to cover all the issues submitted, or the conclusion drawn from the facts found is unwarranted, and the like, cannot supply the place of a motion for a new trial for matters proper to be included therein. *Murray v. School District No 3*, 11 Neb. 438 (9 N. W. 573).

515. (1903.) On a complaint in the supreme court, that a decree is contrary to law, the question as to whether or not it is supported by the findings of fact in the lower court may be examined on error in the absence of a motion for a new trial, but the decree will not be set aside unless the findings as a whole show it clearly wrong. *Bemis v. McCloud*, 4 Unof. 731 (97 N. W. 828).

Review or ruling on motion to vacate confirmation of sale.

516. (1903.) In order to obtain a review of the ruling of the trial court in overruling a motion to vacate an order of confirmation, it is not necessary that a motion for a new trial alleging such ruling as error be first addressed to the trial court, and a rulings had thereon. *Linton v. Cathers*, 4 Unof. 641 (95 N. W. 1044).

Review of decisions of intermediate courts or bodies.

517. (1880.) Where the judgment of a justice of the peace is taken on error to the district court and affirmed, no motion for a new trial is necessary in that court in order to have the judgment reviewed in the supreme court. *Newlove v. Woodward*, 9 Neb. 502 (4 N. W. 237).

518. (1881.) A motion for a new trial is unnecessary in cases brought to the district court on error from the justice of the peace, where no retrial of the issues of fact is to be had. *Leach v. Sutphen*, 11 Neb. 527 (10 N. W. 409).

519. (1888.) If the appellant desire to vacate the judgment of the district court and for leave to answer or other relief, he must apply to that court. Otherwise he cannot allege error in the failure to try the cause. *Slaven v. Hellman*, 24 Neb. 646 (39 N. W. 843).

520. (1895.) No motion for a new trial is necessary in a cause taken from a justice court by a proceeding in error, in order to have the judgment reviewed in the supreme court. *Dryfus v. Moline, Milburn & Stoddard Co.*, 43 Neb. 233 (61 N. W. 599).

521. (1896.) A judgment of the district court dismissing an appeal may be reviewed without a motion for a new trial or an exception to the ruling. *Claflin v. American Nat. Bank of Omaha*, 46 Neb. 884 (65 N. W. 1056).

522. (1896.) A motion for a new trial is not necessary to a review of the decision of the district court in reversing, in an error proceeding, a judgment of the county court. *Weitz v. Wood Reaping & Mowing Machine Co.*, 49 Neb. 434 (68 N. W. 613).

523. (1900.) A motion for a new trial is not essential to a review of a decision of the district court affirming a cause taken to that court by proceedings in error. *Biart v. Myers*, 59 Neb. 711 (82 N. W. 7); (1903) *Bastian v. Adams*, 5 Unof. 32 (97 N. W. 231).

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524. (1903.) A motion for a new trial is not necessary in order to obtain a review of the judgment of the district court entered on the hearing of an appeal taken from the order of a license board granting or refusing a license to sell intoxicating liquors. *Bennett v. Otto*, 68 Neb. 652 (94 N. W. 807); (1904) *In re Application of Krug*, 72 Neb. 576 (101 N. W. 242); (1905) *Lee v. Brittain*, 74 Neb. 591 (104 N. W. 1076).

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Necessity of timely motion.

525. (1893.) Unless a motion for a new trial is made within three days after the verdict or decision, the supreme court cannot examine any of the errors which it is alleged occurred at the trial. *Fitzgerald v. Brandt*, 36 Neb. 683 (54 N. W. 992).

526. (1902.) When a motion for a new trial is overruled, because not filed within the time required by statute, all matters necessarily included therein as grounds for a new trial are unavailing on review by proceedings in error. *Harris v. Jennings*, 64 Neb. 80 (89 N. W. 625; 97 Am. St. Rep. 635).

Joint motion.

527. (1884.) In an action against two defendants in which a verdict against both, was sustained by the evidence as to one but not as to the other, and the one against whom there was but insufficient evidence made no motion for a new trial as to himself alone, and judgment was rendered against both, it will not be disturbed. *Long & Smith v. Clapp*, 15 Neb. 417 (19 N. W. 467); (1886) *Boldt v. Budwig*, 19 Neb. 739 (28 N. W. 280); (1887) *Hoke v. Halverstadt*, 22 Neb. 421 (35 N. W. 204).

528. (1893.) In an action of ejectment against twenty-three different defendants, Z., and eight others united in an answer signed by W. their attorney, while G., with twelve others by their attorney F. filed an answer alleging a defense different from that stated in the answer of Z. After a finding and judgment for the plaintiff against all of the defendants, a motion for a new trial was filed alleging errors of law occurring at the trial and signed "E. A. F., attorney for defendants." *Held*, In the absence of evidence that F. appeared in the district court for the defendants who joined in the answer of Z., the latter have no standing in this court, and are not entitled to have the judgment reviewed. *Gage v. Bloomington Town Co.*, 37 Neb. 699 (56 N. W. 491).

529. (1897.) Where two or more plaintiffs or defendants join in a motion for a new trial or in a petition in error, an assignment of error which is not good as to all who join must be overruled as to all. *Minneapolis Threshing-Machine Co. v. Regier*, 51 Neb. 402 (70 N. W. 934).

530. (1903.) Where a verdict is returned against plaintiff and in favor of several defendants on separate defenses, and a single motion for a new trial is overruled, the supreme court will examine the record only far enough to ascertain if the verdict is good as to any one of the defendants. *Lydick v. Gill*, 68 Neb. 273 (94 N. W. 109).

531. (1905.) The rule that a motion for a new trial is indivisible cannot be invoked to defeat a review of a meritorious petition in error filed by a minor defendant, whose guardian ad litem has inadvertently joined her with a mere nominal defendant who has no rights involved in the controversy. *Godfrey v. Smith*, 73 Neb. 756 (103 N. W. 450).

Separate motions by coparties.

532. (1904.) When it appears from a fair interpretation of the record that separate motions for a new trial were ruled upon by the district court, the supreme court will not decline to consider separate petitions in error, merely because of a slight verbal inaccuracy in the order on the motions. *Goken v. Dallugge*, 72 Neb. 16 (99 N. W. 818).

Statement of grounds and assignments of more error.

533. (1873.) To entitle a party to a review of any alleged errors transpiring upon the trial of a cause, a motion for a new trial must be made, distinctly setting forth the errors complained of. *Cropsey v. Wiggenhorn*, 3 Neb. 108; (1874) *Wells, Fargo & Co. v. Preston*, 3 Neb. 444.

534. (1874.) No errors will be considered upon the trial of a cause in the supreme court, except such as are assigned in the motion for a new trial. *Tierney v. Cornell*, 3 Neb. 267.

535. (1879.) To lay the foundation for a review by the supreme court of questions raised and decided on the trial in the court below, it is necessary that the particular errors relied on be first assigned in the motion for a new trial. *Lyman v. McMillan*, 8 Neb. 135; (1879) *McCormick v. Drummett*, 9 Neb. 384 (2 N. W. 729); (1884) *Dolen v. State*, 15 Neb. 405 (19 N. W. 627); (1887) *Manning v. Cunningham*, 21 Neb. 288 (31

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N. W. 933); (1889) *Planck v. Bishop*, 26 Neb. 589 (42 N. W. 723); (1890) *Weitz v. Wolfe*, 28 Neb. 500 (44 N. W. 485); (1802) *Becker v. Simonds*, 33 Neb. 680 (50 N. W. 1129); (1893) *Upton v. Cady*, 38 Neb. 209 (56 N. W. 881); (1894) *Kohler v. Summers*, 42 Neb. 330 (60 N. W. 567); (1901) *Green v. Tierney*, 62 Neb. 561 (87 N. W. 331); (1902) *Engel v. Dado*, 66 Neb. 400 (92 N. W. 629); (1903) *Lincoln Traction Co. v. Moore*, 70 Neb. 422 (97 N. W. 605); (1904) *County of Lancaster v. Lincoln Packing Co.*, 5 Unof. 521 (99 N. W. 265).

536. (1880.) Errors not assigned in the motion for a new trial are waived. *Stanton County v. Canfield*, 10 Neb. 389 (6 N. W. 466).

537. (1880.) Only such errors as were assigned in the motion for a new trial are proper to be assigned in the petition in error. *Staton County v. Canfield*, 10 Neb. 389 (6 N. W. 466).

538. (1890.) A motion for a new trial must specify causes therefore, which are sufficient in law to authorize the granting of the same. An oral motion, or one in writing, in which no cause or causes for a new trial are assigned, will not justify the granting of a new trial, nor will the overruling of such a motion be sufficient to present errors of law to either the trial or reviewing court. *Phœnix Ins. Co. v. Readinger*, 28 Neb. 587 (44 N. W. 864).

539. (1896.) Rulings, except such as are made during the trial of a cause, to be available in an error proceeding, should be specially assigned in the motion for a new trial. *Andres v. Kridler*, 49 Neb. 535 (68 N. W. 938).

540. (1898.) Rulings of the court below during the trial, instructions given and refused, and the sufficiency of the evidence to sustain the verdict, to be available in the supreme court, must have been raised by the motion for a new trial. *Hake v. Woolner*, 55 471 (75 N. W. 1087).

541. (1901.) A general assignment in a motion for a new trial that the court erred in overruling the objections made by the defendant will be disregarded where any one of such objections was properly overruled. *Startzer v. Clarke*, 1 Unof. 91 (95 N. W. 509).

——— **Competency and selection of jurors.**

542. (1883.) Objections to the competency of jurors must be assigned in the motion for a new trial to be available in the supreme court. *Hastings & G. I. R. R. Co. v. Ingalls*, 15 Neb. 123 (16 N. W. 762); (1896) *Mengedoht v. Van Dorn*, 48 Neb. 880 (67 N. W. 858).

542*a*. (1902.) Alleged irregularities in the issuance of a special venire after the quashing of the regular panel of jurors, which have in nowise been called to the attention of the trial court, nor mentioned in the motion for a new trial cannot be considered in the appellate court on review by proceedings in error. *Randolph v. State*, 65 Neb. 520 (91 N. W. 356).

——— **Rulings on pleadings.**

543. (1893.) The statutory assignment in a motion for a new trial of "errors of law occurring at the trial and duly excepted to," is sufficient to present for review the ruling of the court upon a demurrer on terms interposed before the introduction of any evidence. *Riverside Coal Co. v. Holmes*, 36 Neb. 858 (55 N. W. 255).

544. (1906.) An order overruling a motion to strike from a petition will not be reviewed on appeal when not assigned as error in the motion for a new trial. *Caproon v. Mitchell*, 77 Neb. 562 (110 N. W. 378).

——— **Admission or exclusion of evidence.**

545. (1871.) Errors in the admission or refusal of testimony on the trial will be considered as waived unless complaint thereof be made in the motion for a new trial. *Midland P. R. Co. v. McCartney*, 1 Neb. 398; (1878) *Heard v. Dubuque Bank*, 8 Neb. 10 (30 Am. Rep. 811); (1888) *Yates v. Kinney*, 25 Neb. 120 (41 N. W. 128).

546. (1878.) To entitle a party to a review of the ruling of the court below on the admission or rejection of testimony it is necessary that the alleged error should be specifically pointed out, not only in the petition in error, but also in the motion for a new trial in the court below. *Scofield v. Brown*, 7 Neb. 221; (1879) *Burlington & M. R. R. Co. v. Harris*, 8 Neb. 140 [changed by statute, *Labaree v. Klosterman*, 33 Neb. 150]; (1879) *Shaffer v. Maddox*, 9 Neb. 205 (2 N. W. 464).

547. (1881.) Error in the admission of evidence is not available on appeal, unless presented in the motion for a new trial. *Birdsall v. Carter*, 11 Neb. 143 (7 N. W. 751); (1882) *Republican V. R. Co. v. Hayes*, 13 Neb. 489 (14 N. W. 521); (1895) *Viergutz v. Aultman*, 46 Neb. 141 (64 N. W.

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693); (1898) *Flower v. Nichols*, 55 Neb. 314 (75 N. W. 864).

548. (1891.) The assignment in a motion for a new trial, of errors of law occurring at the trial, is sufficient to entitle a party to review the rulings of the district court on the admission or rejection of testimony. *Labaree v. Klostermann*, 33 Neb. 150 (49 N. W. 1102); (1895) *Risse v. Gasch*, 43 Neb. 287 (61 N. W. 616); (1895) *Houston v. City of Omaha*, 44 Neb. 63 (62 N. W. 251).

549. (1896.) An assignment that the court erred in admitting or excluding certain evidence may be disregarded where no complaint of the rulings on evidence is made in the motion for a new trial. *Burke v. Brown*, 49 Neb. 723 (68 N. W. 1026); (1899) *Humpert v. McGavock*, 59 Neb. 346 (80 N. W. 1038); (1901) *Keller v. Van Brunt*, 1 Unof. 301 (95 N. W. 668).

550. (1899.) An assignment in a motion for a new trial, of "errors of law occurring at the trial, and duly excepted to," is sufficient to entitle a party to review the rulings of the trial court on the admission of evidence. *Albright v. Peters*, 58 Neb. 534 (78 N. W. 1063).

——Instructions.

551. (1871.) Errors in the giving or refusal of instructions to the jury will be considered as waived unless complaint thereof be made in the motion for a new trial. *Midland P. R. Co. v. McCartney*, 1 Neb. 398 [modified by statute, *Labaree v. Klosterman*, 33 Neb. 150]; (1893) *Barton v. McKay*, 36 Neb. 632 (54 N. W. 968); (1894) *Barr v. City of Omaha*, 42 Neb. 341 (60 N. W. 591); (1896) *Hickman v. Layne*, 47 Neb. 177 (66 N. W. 298); (1897) *Phœnix Ins. Co. of Hartford v. King*, 52 Neb. 562 (72 N. W. 855).

552. (1875.) All alleged errors, occurring during the trial of a cause, must be excepted to, and complained of in the motion for a new trial, in order to obtain a review of the same in the supreme court; and error committed by the giving of an oral charge to the jury, instead of reducing such charge to writing, as required by Gen. Stat., 262, is no exception to the rule. *Horbach v. Miller*, 4 Neb. 31.

553. (1883.) Under the general assignment, in the motion for a new trial, of "errors of law occurring at the trial," only such errors as appear in the bill of exceptions can be considered. If objection is made to any of the instructions it must be specifically assigned. *Cleveland Paper Co. v. Banks*, 15 Neb. 20 (16 N. W. 833; 48 Am. Rep. 334); (1897) *Phœnix Ins. Co. of Hartford v. King*, 52 Neb. 562 (72 N. W. 855).

554. (1884.) Where no objections were made to the instructions in the motion for a new trial they cannot be considered by the supreme court. *Schreckengast v. Ealy*, 16 Neb. 510 (20 N. W. 853); (1887) *Omaha, N. & B. H. R. Co. v. O'Donnell*, 22 Neb. 475 (35 N. W. 235); (1889) *Sherwin v. O'Conner*, 24 Neb. 603 (39 N. W. 620); (1890) *Walker v. Haggerty*, 30 Neb. 120 (46 N. W. 221); (1892) *Hanover Ins. Co. v. Schellak*, 35 Neb. 701 (53 N. W. 605); (1894) *Peaks v. Lord*, 42 Neb. 15 (60 N. W. 349); (1895) *Hamilton v. Goff*, 45 Neb. 339 (63 N. W. 807); (1896) *Denise v. City of Omaha*, 49 Neb. 750 (69 N. W. 119); (1897) *Union P. R. Co. v. Thorne*, 51 Neb. 472 (70 N. W. 1119); (1897) *Hodgin v. Whitcomb*, 51 Neb. 617 (71 N. W. 314); (1897) *Farwell v. Chicago, R. I. & P. R. Co.*, 52 Neb. 614 (72 N. W. 1036); (1898) *Flower v. Nichols*, 55 Neb. 314 (75 N. W. 864); (1903) *First Nat. Bank of Wayne v. Tolerton & Stetson Co.*, 5 Unof. 43 (97 N. W. 248); (1904) *Davis v. Hall*, 70 Neb. 678 (97 N. W. 1023).

555. (1888.) In a motion for a new trial a general assignment that the court erred in giving each of the instructions given to the jury is too general, and such an assignment will not be considered in the supreme court. *Russell v. Rosenbaum*, 24 Neb. 769 (40 N. W. 287). [Overruled. *Aultman v. Martin*, 49 Neb. 103.]

556. (1894.) Instructions not complained of in the motion for a new trial cannot be reviewed in the supreme court, even though their correctness is challenged by the petition in error and in argument of counsel. *Dunphy v. Bartenbach*, 40 Neb. 143 (58 N. W. 856).

557. (1896.) The neglect of the district court to file with the clerk instructions given, in order to be available as ground for reversal, must be called to the attention of that court by means of the motion for a new trial. *Chicago, B. & Q. R. Co. v. Shafer*, 49 Neb. 25 (68 N. W. 342).

558. (1896.) Errors in respect to giving or refusing to give instructions must be separately assigned in the motion for new trial. If assigned in group, and any one of the group against which this assignment is directed is without error, the assignment must be overruled. *Johnston v. Milwaukee & Wyoming Inv. Co.*,

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49 Neb. 68 (68 N. W. 383); (1897) *Hanover Fire Ins. Co. v. Stoddard*, 52 Neb. 745 (73 N. W. 291); (1896) *Graham v. Frazier*, 49 Neb. 90 (68 N. W. 367); (1897) *Peck v. Tingley*, 53 Neb. 171 (73 N. W. 450); (1896) *Union P. R. Co. v. Montgomery*, 49 Neb. 129 (68 N. W. 619); (1896) *Fremont, E. & M. V. R. Co. v. Root*, 49 Neb. 900 (69 N. W. 397); (1896) *Stough v. Ogden*, 49 Neb. 291 (68 N. W. 516); (1897) *Kliment v. Corcoran*, 51 Neb. 142 (70 N. W. 910); (1897) *Home Fire Ins. Co. v. Phelps*, 51 Neb. 623 (71 N. W. 303); (1897) *City of South Omaha v. Powell*, 50 Neb. 798 (70 N. W. 391); (1898) *McCormick Harvesting Machine Co. v. Courtright*, 54 Neb. 18 (74 N. W. 418); (1898) *Globe Oil Co. v. Powell*, 56 Neb. 463 (76 N. W. 1081); (1898) *American Fire Ins. Co. v. Landfare*, 56 Neb. 482 (76 N. W. 1068); (1901) *Ledwith v. Campbell*, 1 Unof. 695 (95 N. W. 838).

559. (1896.) In a motion for a new trial an assignment that "the court erred in giving instructions 2, 3, 5, 6, 7, and 8, and each of them asked for by plaintiff," is sufficiently specific for review of each of the instructions. *Aultman v. Martin*, 49 Neb. 103 (68 N. W. 340).

560. (1897.) An assignment of error in a motion for a new trial that "the court erred in giving paragraphs 3, 5, 7, 8, 9, 10, 11, 12, and 13 of the instructions, and in giving each of them, given by the court on its own motion," is sufficiently specific, and so is a similar assignment in regard to the refusal to give several enumerated instructions. *Kirchman v. Kratky*, 51 Neb. 191 (70 N. W. 916); (1897) *Meyer v. Shamp*, 51 Neb. 424 (71 N. W. 57).

561. (1897.) Where the refusal of an instruction is not excepted to or assigned as error in the motion for a new trial, objections to the ruling are waived. *Sanford v. Craig*, 52 Neb. 483 (72 N. W. 864).

562. (1898.) Errors in respect to refusing instructions must be separately assigned in the motion for a new trial. *Langhorst v. Coon*, 53 Neb. 765 (74 N. W. 257).

563. (1898.) An assignment of error in the motion for a new trial relative to giving instructions must be specific as to each. *McIntyre v. Union P. R. Co.*, 56 Neb. 587 (77 N. W. 57).

——— **Directing or refusing to direct verdict.**

564. (1897.) An objection that the court refused to direct a verdict will be disregarded if it was not raised below in the motion for a new trial. *Home Fire Ins. Co. v. Phelps*, 51 Neb. 623 (71 N. W. 303); (1899) *Albright v. Peters*, 58 Neb. 534 (78 N. W. 1063); (1902) *Link v. Reeves*, 3 Unof. 383 (91 N. W. 506).

565. (1902.) When a party requests a peremptory instruction in his favor and afterwards requests and obtains the submission of specific inquiries of fact to the jury covering all essential matters in issue and the jury returns a verdict for his adversary, a motion for a new trial on the ground of insufficiency of evidence raises the same questions as that raised by the request and only one of such rulings need be determined in the disposition of the case in this court. *St. Joseph & G. I. R. Co. v. McCarty* 3 Unof. 626 (92 N. W. 750).

——— **Assessment of damages.**

566. (1889.) Errors alleged to have occurred in the assessment of damages must be assigned in the motion for a new trial. *Volker v. First Nat. Bank*, 26 Neb. 602 (42 N. W. 732).

567. (1893.) The failure of a jury, in assessing the amount of recovery, to allow interest upon a sum due upon contract is not presented for review by the assignment, in a motion for a new trial, that the verdict is not supported by sufficient evidence. *Riverside Coal Co. v. Holmes*, 33 Neb. 858 (55 N. W. 255).

568. (1896.) The assignment in a motion for a new trial that the finding is not sustained by the evidence does not, in an action on contract, raise the question of error in the assessment of the amount of recovery. *Wachsmuth v. Orient Ins. Co.*, 49 Neb. 590 (68 N. W. 935).

569. (1898.) Error in the assessment of the amount due will not be reviewed under an assignment in the motion for a new trial that the verdict is not sustained by sufficient evidence. *Hammond v. Edwards*, 56 Neb. 631 (77 N. W. 75).

570. (1900.) In an error proceeding to review a decree sustaining a mechanic's lien, the supreme court will not examine the record to ascertain whether the amount of recovery was excessive, where the point was not raised in the trial court on the motion for a new trial. *Miller v. Neely & Westover*, 59 Neb. 539 (81 N. W. 443).

571. (1904.) Error in the assessment of the amount due will not be reviewed under an assignment in the motion for a new trial

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that the verdict is not sustained by sufficient evidence. *Dickenson v. Columbus State Bank*, 71 Neb. 260 (98 N. W. 813).

——— Verdict.

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572. (1888.) Where no objection is made in a motion for a new trial that the verdict is excessive, but there is an assignment that the verdict is not supported by sufficient evidence, this, liberally construed, will cover the point that the verdict is excessive. *Burkholder v. Burkholder*, 25 Neb. 270 (41 N. W. 145).

573. (1891.) In an action to recover the balance of an account where in the prayer it is sought to recover "the amount of said bill," no definite sum being named therein, and no objection has been made in the motion for a new trial that the judgment is excessive, the question of such excess will not be considered by the supreme court, it being a court of review. *Flannagan v. Heath*, 31 Neb. 776 (48 N. W. 904).

574. (1892.) Where no objection is made in the motion for a new trial that the verdict is excessive, the objection cannot be considered for the first time in the supreme court. *Everett v. Tidball & Fuller*, 34 Neb. 803 (52 N. W. 816).

575. (1893.) The failure of a jury, in assessing the amount of recovery, to allow interest upon a sum due upon contract is not presented for review by the assignment, in a motion for a new trial, that the verdict is not supported by sufficient evidence. *Riverside Coal Co. v. Holmes*, 36 Neb. 858 (55 N. W. 255).

576. (1894.) Objection to the form of a verdict will be of no avail in this court, where the same was not made in the motion for a new trial or petition in error. *Crooker v. Stover*, 41 Neb. 693 (60 N. W. 10).

577. (1896.) An objection that the verdict is for a sum greater than that prayed for will be deemed waived unless by motion for a new trial. *Fox v. Graves*, 46 Neb. 812 (65 N. W. 887).

578. (1899.) Alleged error in the verdict will not be considered on review when not raised either in the motion for a new trial or petition in error. *Hart v. Weber*, 57 Neb. 442 (77 N. W. 1085).

579. (1899.) An assignment of error that the verdict is contrary to an instruction, if not presented by the motion for a new trial, is not available on error to this court. *Palmer v. First Bank of Ulysses*, 59 Neb. 412 (81 N. W. 303).

Necessity of ruling on motion.

580. (1898.) Errors in the trial or in the rendition of judgment cannot be considered on petition in error, in absence of a ruling below on the motion for a new trial. *Geneva Nat. Bank v. Donovan*, 53 Neb. 613 (74 N. W. 33).

Affidavits supporting motion.

581. (1895.) Affidavits supporting a motion for a new trial on the ground of accident or surprise will not be considered unless filed in and called to the attention of the trial court and incorporated in the bill of exceptions. *Omaha Fire Ins. Co. v. Dierks & White*, 43 Neb. 473 (61 N. W. 740).

V. PARTIES.

Death of party pending appeal, see *Appeal and Error*, §§ 599-601.

Designation in petitions in error, see *post*, § 650.

Dismissal for defect of parties, see *post*, §§ 1425, 1426.

Necessary parties in general.

582. (1896.) One of several defendants having separate and distinct defenses may prosecute an appeal to the district court without joining his co-defendants. *Claflin v. American Nat. Bank of Omaha*, 46 Neb. 884 (65 N. W. 1056).

583. (1902.) Where a judgment is entered in the district court in favor of a party to the proceedings, and error from such judgment is prosecuted to this court without making such party a party to the error proceedings, this court has no jurisdiction to determine the correctness of the judgment. *Willits v. Harlan County*, 2 Unof. 865 (90 N. W. 656).

584. (1903.) One made a party defendant in an action but who was dismissed from the case, or against whom no judgment was rendered, is not a necessary party to an appeal taken from a judgment entered against other parties defendent. *Halstead v. Olson*, 5 Unof. 112 (97 N. W. 442).

——— Review of joint judgment.

585. (1887.) All the parties in a joint judgment are necessary parties to a petition filed by one of their number to reverse it, and may be made so as plaintiffs or defendants, in conformity with the provisions of the code as to parties to civil actions. *Wolf v. Murphy*, 21 Neb. 472 (32 N. W. 302);

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(1890) *Curten v. Atkinson*, 29 Neb. 612 (46 N. W. 91.

586. (1890.) If all defendants to a joint judgment are not made parties to the petition in error, within one year from the rendition of judgment, the reviewing court has no jurisdiction over the subject-matter as will authorize it to reverse or modify any part of it. *Curten v. Atkinson*, 29 Neb. 612 (46 N. W. 91). [Overruled. *Curten v. Atkinson*, 36 Neb. 110.]

587. (1894.) Where only a part of several defendants, against all of whom a joint judgment has been rendered, file a petition in error for the purpose of procuring the vacation of such judgment, and the judgment defendants who have not joined in the petition in error are not made defendants in error, there exists such defect of parties that the judgment complained of cannot be reviewed. *Andres v. Kridler*, 42 Neb. 784 (60 N. W. 1014).

588. (1895.) In order to secure review of a joint judgment by petition in error, all persons interested must be made parties to the proceeding as plaintiffs or defendants. *Polk v. Covell*, 43 Neb. 884 (62 N. W. 240).

589. (1895.) All parties to a joint judgment are necessary parties to a petition in error filed here by one of their number to reverse it; but this rule does not require that all the parties to a suit in which a judgment has been rendered should be made parties to the error proceedings instituted here for a review of such judgment. Only the parties who are liable on, or bound by, the judgment are necessary parties to the proceeding in error here. *Kuhl v. Pierce County*, 44 Neb. 584 (62 N. W. 1066).

590. (1898.) All parties to a joint judgment must be made parties to a petition in error, and a failure to do so is ground for dismissal. *Farncy v. Hamilton County*, 54 Neb. 797 (75 N. W. 44).

591. (1898.) In error proceedings for the review of a final order by which the inseparable interests of several defendants are affected, all persons interested must be made parties to such proceedings as plaintiffs or defendants. *Collins Mfg. Co. v. Seeds Dry Plate Co.*, 55 Neb. 576 (75 N. W. 1099).

592. (1899.) All parties to a joint judgment, or those who may be affected by the modification or reversal thereof, must be made parties in the supreme court upon proceeding in error; and a failure to do so is a ground for dismissal, if the objection is seasonably made. *Richardson v. Thompson*, 59 Neb. 299 (80 N. W. 909).

593. (1904.) All parties against whom a joint judgment has been rendered must be made parties to a proceeding in error. But this rule has no application where the judgment complained of is several, and in favor of the defendant in error alone. *Eccles v. United States Fidelity & Guaranty Co.*, 72 Neb. 439 (100 N. W. 942).

Appellants or plaintiffs in error.

594. (1898.) After a transcript for appeal has been filed in the supreme court, any party may assume the attitude of an appellant by the filing of a brief assailing the decree. *Goos v. Goos*, 57 Neb. 294 (77 N. W. 687).

595. (1902.) Where a cause of action is pending in the supreme court, on error, the right of action, within the meaning of section 456 of the code of civil procedure, is the right to have the judgment of the district court set aside. *Jameson v. Bartlett*, 63 Neb. 638, (88 N. W. 860).

——— Separate proceeding by one or more coparties.

596. (1888.) An appeal by the principal, in an action on a promissory note against him and sureties, as joint makers thereof, brings the case before the appellate court as to all the defendants, and the court has jurisdiction to render judgment against all the defendants. *Wilcox v. Raben*, 24 Neb. 368 (38 N. W. 844; 8 Am. St. Rep. 207).

597. (1895.) When the interests of the several defendants are inseparably connected, an appeal by one defendant brings up the whole case. *Polk v. Covell*, 43 Neb. 884 (62 N. W. 240).

Intervention or addition of new parties.

598. (1894.) Judgment defendants, who, within the time allowed by statute for the institution of error proceedings, have not been made parties to such proceedings pending in this court, cannot become plaintiffs in error; they may, however, with their consent, be made defendants in error to obviate a defect of parties. *Andres v. Kridler*, 42 Neb. 784 (60 N. W. 1014).

Death.

599. (1898.) Where a party dies after judgment has been rendered against him, the administrator of his estate may prosecute error without procuring an order reviving the action in his name. *Webster v.*

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City of Hastings, 56 Neb. 245 (76 N. W. 565).

600. (1902.) When a party to an appellate proceeding dies, and his interest in the litigation passes to his heirs, the heirs are necessary parties to the proceeding. *Urlau v. Ruhe*, 63 Neb. 883 (89 N. W. 431).

601. (1905.) A proceeding in error may be prosecuted in this court against the personal representative of the deceased party, whether plaintiff or defendant to the judgment attacked. *Ritchey v. Seeley*, 73 Neb. 164 (102 N. W. 256).

Defects and objections and waiver.

602. (1892.) While all the parties to a joint judgment that is sought to be reviewed by the supreme court by a petition in error should be made parties therein, yet, where the cause is submitted on its merits, and no objection is interposed, that there is a defect of parties, until after such submission, it will be taken to constitute a waiver of the absence of proper parties. *Consaul v. Sheldon*, 35 Neb. 247 (52 N. W. 1104); (1898) *Bates-Smith Investment Co. v. Scott*, 56 Neb. 475 (76 N. W. 1063).

603. (1893.) Submission of error proceeding on merits is waiver of defect of parties. *Curtin v. Atkinson*, 36 Neb. 110 (54 N. W. 131).

604. (1898.) The mere acceptance of service of briefs by a defendant to an error proceeding is not a waiver of the objection that there is a defect of parties. *Farney v. Hamilton County*, 54 Neb. 797 (75 N. W. 44).

605. (1900.) When a defendant in error has filed a cross-assignment of errors without bringing in new parties, he is thereby precluded from urging the dismissal of the petition in error of his adversary on the ground of defective parties. *Biart v. Myers*, 59 Neb. 711 (82 N. W. 7).

VI. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

A. Time of Taking Proceedings.

Time to appeal from imprisonment for non-payment of fine, see *Fines*, § 4.

Dismissal for failure to take proceedings in time, see *post*, §§ 1427-1433.

Time for filing appeal bond, see *post*, § 670.

Time for issuance of summons in error, see *post*, § 685.

Time for serving and settling bill of exceptions, see *post*, §§ 989-1024, 1059-1078.

Taking appeal.

606. (1881.) Where more than six months has elapsed from the rendition of a judgment before the petition in error is filed, the errors assigned cannot be considered an appeal. *Swansen v. Swansen*, 12 Neb. 210 (10 N. W. 13).

607. (1893.) To give the supreme court jurisdiction to review a case on appeal the transcript of the proceedings must be filed within six months after the rendition of the decree sought to be reviewed. *Wistedt v. Beckman*, 37 Neb. 499 (55 N. W. 1061); (1893) *Withnell v. City of Omaha*, 37 Neb. 621 (56 N. W. 381); (1898) *Albers v. City of Omaha*, 56 Neb. 357 (76 N. W. 911); (1899) *Smith v. Silver*, 58 Neb. 429 (78 N. W. 725); (1899) *Dufrene v. Smeaton*, 59 Neb. 67 (80 N. W. 267).

608. (1894.) The provision of section 675 of the code, for the taking of appeals within six months after the date of the decree of final order apealed from, is mandatory, and a compliance therewith essential in order to confer jurisdiction upon the supreme court, unless the failure is in nowise attributable to the laches of the appellant. *Omaha Loan & Trust Co. v. Ayer*, 38 Neb. 891 (57 N. W. 567).

609. (1900.) The supreme court cannot review a decree of foreclosure when the same was rendered more than two years prior to the perfecting of the appeal. *Cox v. Parrotte*, 59 Neb. 701 (82 N. W. 7).

610. (1903.) To give the supreme court jurisdiction to review an order of the district court appointing a receiver, the appeal must be perfected within six months from the entry of the order. *First Nat. Bank of Sutton v. Ashley*, 4 Unof. 185 (93 N. W. 685).

——— Review on error when appeal taken too late.

611. (1886.) Where the same relief can be given either by an appeal or proceedings in error, a transcript filed in the supreme court for an appeal, more than six months but less than one year from the rendition of the decree in the court below, will not be stricken from the files, but the appellant will have leave upon such terms as may be just to file a petition in error. *Steele v. Haynes*, 20 Neb. 316 (30 N. W. 63); (1890) *Cheney v. Wagner*, 30 Neb. 262 (46 N. W. 427).

612. (1890.) The transcript of the judgment of the district court was filed with the

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clerk of the supreme court more than six months after the rendition of the judgment. A notice of appeal was issued and service accepted by the defendants, who made no general appearance. Sixteen months after the date of the judgment a petition in error was filed, and summons issued thereon, which was served on the defendants. *Held*, to be too late. *Benson v. Michael*, 29 Neb. 131 (45 N. W. 276).

Bringing proceedings in error.

613. (1878.) A petition in error filed December 13, to reverse a judgment entered May 17, is too late, and should be dismissed, since act of February 15, 1877, extending the time to one year had not gone into effect when the judgment was rendered. *French v. English*, 7 Neb. 124.

614. (1879.) By the act approved February 15, 1877 (laws 1877, p. 14), one year is given from the rendition of a judgment, or the making of a final order complained of, within which to commence proceedings in error, and such act applies to all judgments or final orders entered after such act took effect. *Roesink v. Barnett*, 8 Neb. 146.

615. (1882.) An *alias* summons in proceedings in error, issued more than one year from the date of the final order sought to be reviewed, is of no effect, being issued after the bar of the statute is complete. *Baker v. Sloss*, 13 Neb. 230 (13 N. W. 212); (1882) *Republican Valley R. Co. v. Sayre*, 13 Neb. 280 (13 N. W. 404).

616. (1896.) Proceedings in error may be commenced in the supreme court at any time within one year from the rendition of the judgment or decree, or final order sought to be reviewed. *Scarborough v. Myrick*, 47 Neb. 794 (66 N. W. 867).

617. (1896.) To invest the supreme court with jurisdiction to review on error a judgment of the district court, a petition in error must be filed with the clerk of the supreme court within one year after the date of the rendition of the judgment sought to be reversed. *Campbell v. F. & M. Bank of Elk Creek*, 49 Neb. 143 (68 N. W. 344); (1897) *Hogue v. Ogle*, 51 Neb. 223 (70 N. W. 940); (1898) *Forbes v. Morearty*, 54 Neb. 505 (74 N. W. 822); (1898) *Dixon Nat. Bank v. Omaha Nat. Bank*, 54 Neb. 796 (75 N. W. 55); (1898) *Collins v. City of Omaha*, 55 Neb. 208 (75 N. W. 557); (1899) *Clark v. McDowell*, 58 Neb. 593 (79 N. W. 158).

618. (1898.) One seeking review by a proceeding in error must file a transcript and petition in error within a year after rendition of the judgment assailed, but amendments to the transcript may be filed afterward. *Moss v. Robertson* 56 Neb. 774 (77 N. W. 403).

619. (1903.) Under section 592 of the code of civil procedure, as amended in 1901, to obtain a review of a judgment of the district court rendered subsequent to the passage and taking effect of the act, the transcript must be filed in the supreme court before the expiration of six months after the rendition of the judgment, or the supreme court will be without jurisdiction to consider the assignments of error. *Snell v. State*, 5 Unof. 94 (97 N. W. 329); (1904) *Chicago, R. I. & P. R. Co. v. Sporer*, 72 Neb. 372 (100 N. W. 813).

620. (1904.) The act of 1901, amending section 592 of the code, limiting the time for commencing proceedings to reverse, judgments or final orders, to six months, is not unconstitutional. *Chicago, R. I. & P. R. Co. v. Sporer*, 72 Neb. 372 (100 N. W. 813).

Commencement of period of limitation.

621. (1886.) The time within which to perfect appeal begins to run at the date of rendition of judgment or decree, and not the date in which the clerk in vacation enters the same on the journal. *Horn v. Miller*, 20 Neb. 98 (29 N. W. 260). [Overruled. 35 Neb. 761 (53 N. W. 633); 35 Neb. 822.]

622. (1892.) The time within which an appeal may be taken from a decree of the district court does not begin to run until such decree has been entered of record, so that it is within the power of the appellant to comply with the statute regulating appeals, by filing in the supreme court a certified transcript of the proceedings of the district court. *Bickel v. Dutcher*, 35 Neb. 761 (53 N. W. 663); (1906) *Morrison v. Gosnell*, 76 Neb. 539 (107 N. W. 753).

623. (1893.) Where a decree of foreclosure was rendered April 18, 1892, without objection, and a sale had thereunder also without objection and deficiency judgment rendered June 26, 1893, it is then too late to take a bill of exceptions to the original decree. *State, ex rel. Coffman, v. Walton*, 38 Neb. 496 (57 N. W. 18).

624. (1902.) The time for perfecting an appeal in equitable actions begins to run at the date on which the final decree is entered of record. *Hall v. Moore*, 3 Unof. 574 (92 N. W. 294).

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625. (1903.) Where no summons in error issues, the date of voluntary appearance is to be taken as the date of commencement of proceedings in error within the meaning of section 592 of the code. *Estate of James v. O'Neill*, 70 Neb. 132 (97 N. W. 22).

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——Effect of motion for new trial.

626. Proceedings in error in the supreme court must be commenced within one year from the date of the rendition of the judgment complained of, without regard to the time when the motion for a new trial was decided. (1883) *Hollenbeck v. Tarkington*, 14 Neb. 430 (16 N. W. 472); (1891) *Phœnix Ins. Co. v. Swantkowski*, 31 Neb. 245 (47 N. W. 917). [Overruled. 34 Neb. 406; 64 Neb. 725.]

627. (1884.) Where a trial is had and verdict returned, a party excepting must reduce his exceptions to writing within the time fixed by law after the close of the term at which the trial was had, and the continuance of the hearing of the motion for a new trial to a subsequent term will not extend the time in which to prepare a bill of exceptions. *Donovan v. Sherwin*, 16 Neb. 129 (20 N. W. 26).

628. (1892.) Proceedings in error in the supreme court may be commenced within one year from the time the motion for a new trial is overruled. *Sharp v. Brown*, 34 Neb. 406 (51 N. W. 1030).

629. (1899.) The filing of a motion for a new trial will not extend the time for prosecuting an appeal. The time for taking an appeal begins to run from the date of the entry of the decree or final order, and not from the overruling of the motion for a new trial, since a motion for a new trial is not necessary in an equity case. *Smith v. Silver*, 58 Neb. 429 (78 N. W. 725).

630. (1902.) In a law action, which can be reviewed only by proceedings in error, where a motion for a new trial on the ground of alleged errors occurring during the trial is seasonably presented, and not ruled upon until after rendition of the judgment, the time in which error proceedings may be begun will not begin to run until a ruling is made on the motion for a new trial. *City of Lincoln v. First Nat. Bank*, 64 Neb. 725 (90 N. W. 874).

Computation of time limited.

631. (1875.) An appeal taken on the 22d of August, from a judgment rendered February 21, is not within the six months prescribed by the act of March 3, 1873. *Glore v. Hare*, 4 Neb. 131.

632. (1891.) Where a final judgment was rendered on the 8th day of July, 1890, and transcript and petition in error filed in the supreme court on the 9th day of July, 1891, the proceedings in error were not commenced in time. *Chapman v. Allen*, 33 Neb. 129 (49 N. W. 926).

Excuses for delay.

633. (1878.) Where a party has been prevented from complying with the legal requisites to obtain an appeal, by the default or absence of the justice or judge of the court in which the cause is pending, and not by any default or laches on his part, the appeal may be taken and perfected after the expiration of the time limited by statute, and such appeal must be treated in the appellate court as though it had been taken within the time prescribed by law. *Dobson v. Dobson*, 7 Neb. 296; (1882) *Republican Valley R. Co. v. McPherson* 12 Neb. 480 (11 N. W. 739); (1886) *Horn v. Miller*, 20 Neb. 98 (29 N. W. 260).

634. (1880.) Mere imbecility or weakness of mind, however great is not unsoundness of mind sufficient to excuse delay in filing a petition in error. *Witte v. Gilbert*, 10 Neb. 539 (7 N. W. 288).

635. (1890.) Where the judge, after signing a bill of exceptions, mislaid it, so that it could not be found for some time, the time during which it was lost, will be added to the statutory time for filing the transcript. *Allis v. Newman*, 29 Neb. 207 (45 N. W. 621). [Overruled. *Stull v. Cass County*, 51 Neb. 760 (71 N. W. 777.]

636. (1894.) The fact that the appellant, through no fault or negligence of his own, is unable to procure the allowance of a bill of exceptions within the time allowed for taking an appeal, will not excuse the filing of the transcript required by law within six months after the date of the decree or order appealed from. *Omaha Loan & Trust Co. v. Ayer*, 38 Neb. 891 (57 N. W. 567).

637. (1895.) Where a party free from fault or laches is prevented from having his appeal docketed in the appellate court within the statutory period solely through the neglect or failure of the proper officer to prepare the transcript of the proceedings, the law will not permit him thereby to be deprived of his appeal. *Continental Build-*

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ing & Loan Association v. Mills, 44 Neb. 136 (62 N. W. 478).

638. (1897.) Omission to file a transcript for review within the statutory period is not excused by the fact that plaintiff in error was unable to obtain a bill of exceptions in time. *Stull v. Cass County*, 51 Neb. 760 (71 N. W. 777).

639. (1904.) The fact that the attorney for the defeated party relied on the clerk of the district court to inform him of the time when his transcript must be filed in the supreme court is no excuse, for failure to file such transcript within the time required by law. *Chicago, R. I. & P. R. Co. v. Sporer*, 72 Neb. 372 (100 N. W. 813).

Extension of time.

——— Judicial authority.

640. (1871.) Courts do not possess any power to enlarge the time within which the transcript of the record of the district court shall be filed in the supreme court, in order to perfect an appeal from the decree of the former court, when the legislature has limited the time within which it shall be filed, and provided as a consequence of failure to do so, that the decree shall stand and be proceeded on, as if no appeal had been taken. *Verges v. Roush*, 1 Neb. 113.

641. (1879.) The court may fix a time not to exceed twenty days, in which to file a petition in error to review a discharge of an attachment. *State, ex rel. Rieschick, v. Cunningham*, 9 Neb. 146 (1 N. W. 1011).

642. (1884.) Where a transcript was duly filed within the time required by law for an appeal, and the defendant had entered an appearance, the court in further ance of justice may upon terms permit the appellant to file a petition in error after the expiration of a year from the date of the rendition of the judgment. *Bazzo v. Wallace*, 16 Neb. 290 (20 N. W. 315).

643. (1886.) The court has no power to extend time to which appeal may be taken. *Horn v. Miller*, 20 Neb. 98 (29 N. W. 260).

644. (1893.) The time fixed by section 675 of the code for perfecting appeals in equity cases is jurisdictional, and the supreme court cannot extend it unless it clearly appears that the failure to perfect the appeal is in nowise attributable to the laches of appellants. *Fitzgerald v. Brandt*, 36 Neb. 683 (54 N. W. 992).

——— Consent of Parties.

645. (1887.) Prior to the expiration of the time within which a proceeding in error might be instituted in the supreme court, the defendant in error stipulated with plaintiff in error waiving the issuance and service of summons in error, and agreeing that the cause might be heard at a term then in session. It was held that such waiver and stipulation did not give authority to plaintiff in error to commence the action after the expiration of the time fixed by statute, and after the final adjournment of the term at which it was agreed the cause should be submitted. *Clark v. Morgan & Co.*, 21 Neb. 673 (33 N. W. 245).

646. (1897.) The statute is mandatory as regards the time for taking appeals and proceedings in error, and the time for doing so cannot be extended by agreement of the parties. *Stull v. Cass County*, 51 Neb. 760 (71 N. W. 777).

647. (1897.) The supreme court does not acquire jurisdiction of an error proceeding commenced more than a year after rendition of the judgment below, and the time cannot be extended by stipulation of the parties. *Tootle, Hosea & Co. v. Shirey*, 52 Neb. 674 (72 N. W. 1045).

B. Petition in Error.

Filing petition in error as election as to mode of review, see *ante*, §§ 50-52.

Necessity and sufficiency of assignments of error in petition, see *post*, §§ 1285-1383.

Time for filing petition in error, see *ante*, §§ 613-620.

Necessity.

648. (1871.) A petition in error must be filed with the transcript of the record of the district court, and before the summons in error is issued, in order to give the supreme court jurisdiction. *City of Brownville v. Middleton*, 1 Neb. 10.

649. (1893.) A judgment cannot be reviewed on error by the supreme court unless a petition in error has been filed in said court therefor. *Wistedt v. Beckman*, 37 Neb. 499 (55 N. W. 1061); (1903) *Jarvis v. County of Chase*, 5 Unof. 215 (97 N. W. 831).

Designation of parties.

650. (1902.) The words "et al." following the names of parties to a petition in error are not a sufficient designation of any persons not expressly named in the petition, even though such persons were parties before the inferior tribunal. *Brabham v. Custer County*, 3 Unof. 801 (92 N. W. 989).

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Signature and verification.

651. (1880.) It is unnecessary to add a verification to a petition in error, it not being a pleading of fact within the meaning of the code. *Newlove v. Woodward*, 9 Neb. 502 (4 N. W. 237).

652. (1902.) A petition in error cannot be treated as a nullity and entirely disregarded because authenticated in the name of plaintiff in error by her attorney, giving his name, each appearing only in typewriting. *Moore v. Moran*, 64 Neb. 84 (89 N. W. 629).

Amendment.

653. (1882.) A petition in error may be amended by leave of court where the amendment will be in furtherance of justice upon such terms as to costs as may be proper. *Spencer v. Thistle*, 13 Neb. 201 (13 N. W. 208).

654. (1882.) Where a transcript and petition in error are filed within one year from the rendition of the judgment, it may, on leave granted, be amended after the expiration of the year, to include new assignments. *Hastings & G. I. R. R. Co. v. Ingalls*, 13 Neb. 279 (13 N. W. 403).

655. (1897.) A party may be permitted to amend his petition in error to cover a point presented below. *Robinson v. Kilpatrick-Koch Dry Goods Co.*, 50 Neb. 795 (70 N. W. 378).

C. Bonds or Other Securities.

Dismissal for defects in appeal bond, see *post*, §§ 1434, 1435.

Liabilities on bonds, see *post*, §§ 2193-2239.

Necessity and sufficiency to stay proceedings, see *post*, §§ 713-735.

Refusal to compel approval of bond, as final order, see *ante*, § 124.

Necessity.

656. (1885.) Ordinarily the filing of a supersedeas bond is not essential to secure a review of a cause upon error. Such bond is only necessary if a stay of proceedings is desired pending the review of a judgment or final order. *Welton v. Beltezore*, 17 Neb. 399 (23 N. W. 1).

657. (1891.) Provisions of section 36, chapter 13, Compiled Statutes, that no appeal bond shall be required of a city is not unconstitutional as being ununiform in its operation. *McClay v. City of Lincoln*, 32 Neb. 412 (49 N. W. 282).

658. (1895.) The constitutional right of appeal does not prevent the legislature from requiring the appellant to give an appeal bond. *School District v. Traver*, 43 Neb. 524 (61 N. W. 720).

659. (1897.) While a supersedeas bond is not essential to obtain a review of a decree in an equity cause, such bond is indispensable to a stay of the enforcement of such decree pending the review. *Creighton v. Keith*, 50 Neb. 810 (70 N. W. 406).

Amount or penalty.

660. (1879.) Upon the confirmation of the sale of certain real estate under a decree of foreclosure, and an order awarding execution for the deficiency amounting to $9,944.33, the case comes within the provisions of the third subdivision of the third section of the act in relation to appeals in actions in equity, and that the amount of the supersedeas bond was discretionary with the court. *State Bank v. Green*, 8 Neb. 297.

661. (1896.) The penalty of a supersedeas bond for appeal from a decree awarding alimony must be double the amount of the decree, and the bond must be conditioned according to subdivision 1, section 677, of the code. *State, ex rel. Walton, v. Cornish*, 48 Neb. 614 (67 N. W. 481).

662. (1899.) An appeal undertaking must be in double the amount of the judgment and costs. *Deere, Wells & Co. v. Hodges*, 59 Neb. 288 (80 N. W. 897).

——— Fixing of amount.

663. (1886.) Where a writ of mandamus has been granted against a street railway company to compel it to run cars over a certain line, in an appeal by the company, there is no statutory provision requiring the district court to fix the amount of the supersedeas bond. *State, ex rel. Omaha Horse R. Co., v. The Judges*, 19 Neb. 149 (26 N. W. 723).

664. (1896.) Neither the district court, nor the judge thereof, has the power to fix the amount of the penalty of the bond to be given on appeal from a decree awarding alimoney since the amount is prescribed by statute. *State, ex rel. Walton, v. Cornish*, 48 Neb. 614 (67 N. W. 481).

665. (1900.) Mandamus will lie in a proper case to compel fixing the amount of the penalty of a supersedeas bond to be given on appeal from an order confirming a sale of real estate. *State, ex rel. German Savings Bank, v. Fawcett*, 60 Neb. 393 (83 N. W. 176).

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Sureties.

666. (1882.) Although a bond on appeal contains but one surety, it will be sufficient unless objected to on that ground. *Casey v. Peebles*, 13 Neb. 7 (12 N. W. 840).

667. (1898.) A practicing attorney is not a proper surety on an appeal undertaking, but if he execute the same, the bond is not thereby rendered invalid. *Chase v. Omaha Loan & Trust Co.*, 56 Neb. 358 (76 N. W. 896).

668. (1907.) The word "Cashier" appended to the signature of a surety on an appeal bond is merely *descriptio personæ*. *Northrup v. Bathrick*, 78 Neb. 62 (110 N. W. 658).

Execution.

669. (1883.) In an appeal in a contested election suit it is error to dismiss because the appeal bond was not signed by the appellant. *Clark v. Strong*, 14 Neb. 229 (15 N. W. 236).

Time for furnishing.

670. (1899.) Where the time for furnishing an appeal bond on the tenth day from the date of the judgment expires on a Sunday, ordinarily the approval may be of the following day, or Monday. *Deere, Wells & Co. v. Hodges*, 59 Neb. 288 (80 N. W. 897).

Amendment.

671. (1873.) Steps taken by filing an appeal bond to obtain a review of an award made by appraisers, of damages on account of the laying out of a public highway, is a proceeding in an action, and clearly within the statutory meaning of that term; and if such bond be found to be defective it may be amended in the appellate court, by consent of sureties, or a new bond may be filed. *O'Shea v. Washington County*, 3 Neb. 118.

672. (1882.) Where the statute requires two sureties upon a bond for an appeal, and a bond containing but one is duly approved, it is not void, but may be amended. *Casey v. Peebles*, 13 Neb. 7 (12 N. W. 840).

673. (1886.) The filing of a supersedeas bond is a proceeding within the meaning of section 144 of the civil code, and may be amended. *State, ex rel. Lucas, v. Theile*, 19 Neb. 220 (27 N. W. 109).

674. (1892.) The appeal of a taxpayer from the allowance of a claim against a county will not be dismissed on account of informalities or omissions in the undertaking, but an opportunity will be given to file a proper bond in the district court. *Rube v. Cedar County*, 38 Neb. 896 (53 N. W. 1009).

675. (1899.) If the appeal undertaking is insufficient in amount, it may be amended. *Deere, Wells & Co. v. Hodges*, 59 Neb. 288 (80 N. W. 897).

676. (1905.) It is not error for the district court to allow an appellant to file an amended appeal bond within a specified time, to take the place of a bond irregular and defective in form. *McGinnis v. R. K. Johnson Co.*, 74 Neb. 356 (104 N. W. 869).

Effect of insufficiency.

677. (1898.) A county judge has no authority to eliminate from the files an appeal undertaking which he has approved, because the bond was signed by a practicing attorney. *Chase v. Omaha Loan & Trust Co.*, 56 Neb. 358 (76 N. W. 896).

678. (1898.) When an insufficient appeal bond is filed, the appropriate practice is to move in the appellate court for an order requiring a renewal of the bond by a time to be designated by the court, and in default thereof that the appeal be dismissed. *Chase v. Omaha Loan & Trust Co.*, 56 Neb. 358 (76 N. W. 896).

D. Notice of Appeal, and Summons.

Necessity and sufficiency of notice.

679. (1871.) If notice of appeal from a judgment be served upon the successful party and the clerk not until thirty days have expired from the rendition of the judgment, they are ineffectual to give the supreme court jurisdiction. *Redgrave v. Baptist Church*, 1 Neb. 345.

680. (1879.) The right to appeal in equity cases is regulated entirely by statute. No notice is necessary by the appellant on taking the appeal other than that derived from filing the supersedeas bond. The appellant has six months from the date of the rendition of the judgment, order, or decree, in which to file the transcript in the supreme court. *State Bank v. Green*, 8 Neb. 297.

681. (1890.) Notice of appeal is not necessary in order to confer jurisdiction on supreme court. *Schuyler v. Hanna*, 28 Neb. 601 (44 N. W. 731; 11 L. R. A. 321).

Necessity of summons.

682. (1879.) A proceeding in error is not to be deemed "commenced" within the meaning of section 592 of the code of civil procedure, when personal service can be obtained, until a summons is issued which

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shall be duly served, as the statute directs. *Bemis v. Rogers*, 8 Neb. 149.

683. (1880.) Where a party files a petition in error in the supreme court, he must request the clerk either orally or in writing to issue summons in error thereon. *Rogers v. Redick*, 10 Neb. 332 (6 N. W. 413).

684. (1888.) Jurisdiction is acquired only by the issuance and service of summons in error or general appearance of defendant in error. *Wiley v. Neal*, 24 Neb. 141 (37 N. W. 926).

Time for issuance of summons.

685. (1880.) A summons in error must be issued within one year from the date of the judgment or final order sought to be reviewed, although it may be served afterwards. *Rogers v. Redick*, 10 Neb. 332 (6 N. W. 413).

Authority to serve.

686. (1882.) Where a summons in error is directed to the sheriff of a particular county, it cannot be served by a private person unless appointed for that purpose by such sheriff. *Republican V. R. Co. v. Sayer*, 13 Neb. 280 (13 N. W. 404).

687. (1882.) A court or judge may, for cause shown, appoint a person to serve a particular process, but a justice of the peace has no authority to appoint a person to serve a summons issued out of the supreme court. *Republican V. R. Co. v. Sayre*, 13 Neb. 280 (13 N. W. 404).

Sufficiency of service.

688. (1888). Service of summons in error upon attorney of record in court below sufficient to give court jurisdiction, although attorney may not appear in the supreme court. *Kinney v. Hickox*, 24 Neb. 167 (38 N. W. 816).

689. (1889.) Where there are two attorneys of record who appear for one of the parties on the trial of a cause, the service of a summons in error on one of such attorneys will be sufficient. *Comstock v. Cole*, 28 Neb. 470 (44 N. W. 487).

690. (1890.) It is not necessary that a summons in error should be served within one year from the date of the rendition of the judgment sought to be reversed. If the summons that is served is issued within the year it is sufficient. *Hendrickson v. Sullivan*, 28 Neb. 790 (44 N. W. 1135).

691. (1902.) A summons in error may properly be served upon the attorney of record in the trial court in the original case, though at the time of such service the defendant in error should be dead. *Link v. Reeves*, 63 Neb. 424 (88 N. W. 670).

——— Publication.

692. (1882.) When a petition in error is filed in the supreme court, and it is necessary to obtain service upon the defendant in error by publication, such publication must be made four successive weeks in a newspaper published in the county, in which the petition is filed. *Flint v. Gurrell*, 12 Neb. 341 (11 N. W. 431).

Effect of failure to serve.

693. (1905.) An attorney for a plaintiff in error proceedings may presume that an officer has properly served summons placed in his hands for that purpose, and he is not guilty of negligence in failing to further investigate the manner of service in the absence of circumstances suggesting a doubt as to its validity. *Parker v. Parker*, 73 Neb. 4 (102 N. W. 85).

694. (1905.) When summons in error from the supreme court is duly issued and placed in the hands of the proper officer for service, who informs the plaintiff's attorney upon inquiry that he has served the same, and the clerk of the supreme court also informs plaintiff's attorney that the summons has been served and returned, the plaintiff's attorney may rely upon the presumption that the officer has done his duty. He is not guilty of negligence in failing to further investigate the manner of the service, there being no circumstances tending to suggest a doubt as to its validity. *Parker v. Parker*, 73 Neb. 4 (102 N. W. 85).

Waiver of summons or defects therein.

695. (1890.) Oral agreements of attorneys in regard to a case—as that the attorney for the defendant will waive the issuing and service of a summons in error—if made out of court will not be enforced, as they lack the certainty necessary to justify action thereon by the court, while agreements, if made publicly in open court, or in writing duly signed, will be sustained. *Haylen v. Missouri P. R. Co.*, 28 Neb. 660 (44 N. W. 873).

696. (1905.) A motion to dismiss a petition in error because of failure to file a motion for a new trial in the lower court is a waiver of objections to the sufficiency of the summons in error. *State, ex rel. Gardner, v. Shrader*, 73 Neb. 618 (103 N. W. 276).

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——— Authority of attorney.

697. (1871.) An attorney of record in a cause in the district court, may, when the cause is removed into the supreme court, enter therein the voluntary appearance of his clients, without the issue or service of summons in error. *McDonald v. Pennis-ton*, 1 Neb. 324.

698. (1889.) Waiver of service, by one of the two attorneys or record for the party, will be sufficient. *Comstock v. Cole*, 28 Neb. 470 (44 N. W. 487).

699. (1903.) A county attorney has authority to waive issuance and service of summons in error in a case against a county in which he has appeared for it at the trial. *Dakota County v. Bartlett*, 67 Neb. 62 (93 N. W. 192).

700. (1903.) Seeley obtained a judgment in the district court, and after his death a petition in error making Seeley the sole party defendant was filed and attorneys who were attorneys of record for Seeley in the district court, filed with said petition in error a written statement, signed by them, as attorneys for Seeley, purporting to waive the issuing of summons in error and to enter the voluntary appearance of Seeley in the supreme court. *Held*, That the supreme court acquired no jurisdiction. *Ritchey v. Seeley*, 68 Neb. 127 (97 N. W. 818).

701. (1905.) Where a person obtains a judgment in the district court, and after his death error proceedings are begun seeking to reverse the same, an acceptance of service of summons in error by his attorneys of record in the district court is not sufficient to give the supreme court jurisdiction of the error proceedings. *Omaha Nat. Bank v. Robinson*, 73 Neb. 351 (102 N. W. 613; 104 N. W. 1070).

E. Appearance.

As waiver of summons in error, see *ante*, §§ 695, 696.

Effect of appearance.

702. (1889.) Where a transcript and petition in error are filed in the supreme court within a year from the date of the rendition of the judgment, and the adverse party voluntarily enters an appearance therein, after the expiration of the year, the case will not be dismissed for want of jurisdiction. *Lloyd v. Reynolds*, 26 Neb. 63 (41 N. W. 1072).

VII. EFFECT OF TRANSFER OF CAUSE, OR PROCEEDINGS THEREFOR.

Appeal as waiver of new trial, see *New Trial*, § 14.

Jurisdiction acquired by appellate court. ——— Over person of appellant or plaintiff in error.

703. An appeal from a judgment of the county court in a personal action, gives the appellate court jurisdiction of appellant regardless of whether the lower court had acquired jurisdiction over him or not. (1883) *Pearson v. Kansas Mfg. Co.*, 14 Neb. 211 (14 N. W. 346); (1883) *Brondberg v. Babbott*, 14 Neb. 517 (16 N. W. 845). [Overruled. 39 Neb. 158; 54 Neb. 437; 5 Unof. 36.]

704. (1883.) A party taking an appeal from, or filing a petition in error to, the district court thereby submits himself to the jurisdiction of said court, and waives any errors which have intervened in the service or return of process necessary to bring him within such jurisdiction. *Shawang v. Love*, 15 Neb. 142 (17 N. W. 264). [Overruled. 39 Neb. 158; 54 Neb. 437; and in part, 17 Neb. 560; 5 Unof. 36.]

705. (1885.) By bringing a cause to the supreme court on error, a defendant in the court below waives all questions of the jurisdiction of such court over his person. *Hurford v. Baker*, 17 Neb. 443 (23 N. W. 339). [Overruled. 17 Neb. 560; 39 Neb. 158; 54 Neb. 434.]

706. (1885.) A defendant who resides in a different county from that in which the action is brought, and denies the jurisdiction of the court over his person, should have the ruling of the court on his objection thereto reviewed on error and not by appeal. By appealing he enters a general appearance. *Dunn v. Haines*, 17 Neb. 560 (23 N. W. 501).

707. (1888.) Where a decree entered by agreement, in a foreclosure proceeding, finding a portion of the land covered by the mortgage, owned by one of the defendants, was not subject to the mortgage, was, more than a year after its entry, set aside by agreement of all parties except said defendant, and a new decree entered which was void as to such defendant for want of notice, and another party appealed from the second decree but no notice thereof was given to said defendant, and she made no appearance in the supreme court, having no knowledge of the last decree by the district court, nor of the appeal therefrom to the supreme court, the supreme court acquired no jurisdiction over her, and could make no decree prejudicially affecting her rights. *Blake v. McMurtry*, 25 Neb. 290 (41 N. W. 172).

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708. (1894.) When the district court has not otherwise obtained jurisdiction of the person of a defendant, he does not submit himself to its jurisdiction by appealing or prosecuting error to this court, and the case of *Shawang v. Love*, 15 Neb. 142, holding the contrary doctrine, is overruled, as in contravention of the provisions of section 24, article 1, of the constitution of this state. *Hurlburt v. Palmer*, 39 Neb. 158 (57 N. W. 1019).

709. (1898.) Objections to jurisdiction of the person, not appearing on the face of the record, may be raised by answer, and the prosecution of appeal or error is not a waiver of such jurisdictional defense. *Mayer v. Nelson*, 54 Neb. 434 (74 N. W. 841).

——Over subject-matter.

710. (1883.) Want of jurisdiction of the subject-matter cannot be waived by consent of the parties, and an appeal from the judgment in such a case confers no jurisdiction on the appellate court. *Brondberg v. Babbott*, 14 Neb. 517 (16 N. W. 845); (1895) *Keeshan v. State*, 46 Neb. 155 (64 N. W. 695); (1896) *Sternberg v. State, ex rel. Keller*, 48 Neb. 299 (48 N. W. 299); (1897) *Anderson v. Story*, 53 Neb. 259 (73 N. W. 735).

711. (1900.) The supreme court has jurisdiction to review by proceeding in error a judgment rendered by the district court without jurisdiction of the subject-matter. *Armstrong v. Mayer*, 60 Neb. 423 (83 N. W. 401).

712. (1905.) During the pendency of an appeal from a judgment of the district court confirming a judicial sale, the supreme court is vested with jurisdiction to entertain an application to redeem and to determine the amount of redemption money required for that purpose, and where such jurisdiction is exercised the adjudication of the appellate court incident thereto becomes *res judicata*. *Thesing v. Westergren*, 75 Neb. 387 (106 N. W. 438).

VIII. SUPERSEDEAS OR STAY OF PROCEEDINGS.

Allowance of supersedeas bond in mandamus, see *Mandamus*, §§ 313-315.

Judgments which may be superseded.

713. (1896.) An order appointing a receiver *pendente lite* cannot be superseded as a matter of right during the pendency of an appeal therefrom to the supreme court. *State, ex rel. Heinzelman, v. Stull*, 49 Neb. 739 (69 N. W. 101).

714. (1905.) An order granting a writ of assistance in a foreclosure suit, after decree, sale, confirmation thereof and the execution of a sheriff's deed, directing the sheriff to put the purchaser in possession of the premises, is a final order and is appealable; but is not such an order, within the meaning of the third subdivision of section 677 of the code, as may be superseded by giving the waste bond therein provided for. *Escritt v. Michaelson*, 73 Neb. 640 (106 N. W. 1016).

Operation of appeal or writ of error in general.

715. (1896.) An appeal does not operate as a supersedeas except as provided by statute. *Home Fire Ins. Co. v. Dutcher*, 48 Neb. 755 (67 N. W. 766).

716. (1900.) An appeal does not operate as a stay proceeding unless the appellant should execute a supersedeas bond within twenty days from the entry of such decree, conditioned as required by section 677 of the code. *Dovey v. McCullough*, 60 Neb. 376 (83 N. W. 171).

717. (1897.) A supersedeas bond is not essential to a review of a final order, but is indispensable to a stay of proceedings pending review. *State, ex rel. Morrissey, v. Ramsey*, 50 Neb. 166 (69 N. W. 758).

718. (1897.) While a supersedeas bond is not essential to obtain a review of a decree in an equity cause, such bond is indispensable to a stay of the enforcement of such decree pending the review. *Creighton v. Keith*, 50 Neb. 810 (70 N. W. 406).

719. (1902.) By the perfecting an appeal in a suit in equity the parties are placed in the same situation, and their rights are the same, as they were at the time of the commencement of the action. *Riley Bros. Co. v. Melia*, 3 Unof. 666 (92 N. W. 913).

720. (1904.) When a decree in equity requires the plaintiff to deposit money or securities in court as conditions precedent to enforcing the decree against the defendant, and defendant, within the time limited for making such deposit, appeals from said decree and supersedes the same, the time allowed for making the deposit is thereby extended until a like time after the decree becomes again enforceable. *Ruzicka v. Hotovy*, 72 Neb. 589 (101 N. W. 328).

Fixing conditions of bond.

720*a*. (1902.) In cases not within the purview of section 677 of the code of civil

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procedure, but in which the court has allowed a supersedeas, the district court should fix not only the amount of the supersedeas bond but the conditions thereof; and if it does not, the party seeking a supersedeas should proceed in the appropriate manner to obtain an order fixing such conditions. *Carson v. Jansen*, 65 Neb. 423 (91 N. W. 398).

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720*b*. (1903.) If the district court fails to fix the conditions of the supersedeas bond, application should be made for a further order, and there is no supersedeas until the terms of the bond are determined by the court and the required bond is given. *State, ex rel. Baker, v. Baxter*, 4 Unof. 869 (96 N. W. 647).

Operation of supersedeas bond.

721. (1879.) Where a proper supersedeas bond is filed and approved, no execution can issue on the judgment until the bond is set aside, modified, or the appellant fails to perfect his appeal. *State Bank v. Green*, 8 Neb. 297.

722. (1894.) Where an order is made discharging an attachment, the filing of a petition in error and the filing and approval of a supersedeas bond within the time fixed by the court, not to exceed twenty days, operate to continue the lien of the attachment in force pending error proceedings. The issuance of a summons in error within that time is not necessary for that purpose. *McDonald v. Bowman*, 40 Neb. 269 (58 N. W. 704).

723. (1894.) Filing approved supersedeas bond below and petition in error in supreme court does not suspend an order of the district court recalling an order of sale and permitting defendant to file stay after twenty days from rendition of decree of foreclosure. *State, ex rel. Harris, v. Laflin*, 40 Neb. 441 (58 N. W. 936).

723*a*. (1897.) A proper supersedeas bond executed, filed, and approved in one cause will not act as a supersedeas of a decree subsequently rendered in another action between the same parties. *State, ex rel. Morrissey, v. Ramsey*, 50 Neb. 166 (69 N. W. 758).

724. (1898.) A bond executed in accordance with the third clause of section 677 of the code of civil procedure, conditioned that the appellants will prosecute an appeal without delay and during its pendency not commit, or suffer to be committed, any waste upon the premises involved in the action, will not supersede an order appointing a receiver for said premises. *Lowe v. Riley*, 57 Neb. 252 (77 N. W. 758).

725. (1902.) The perfecting of an appeal to the supreme court from a decree of the district court in a suit in equity, together with the filing and approval of a supersedeas bond, operates to suspend such decree, and the case is thereupon pending here for trial *de novo*. *Riley Bros. Co. v. Melia*, 3 Unof. 666 (92 N. W. 913).

725*a*. (1903.) The filing and approval of a supersedeas bond in an error proceeding from a judgment of the district court suspends the lien of the judgment, which is a mere incident thereto; and the running of the statute of limitations against the lien of such judgment is suspended during the pendency of such error proceedings in the supreme court. *Ebel v. Stringer*, 4 Unof. 43 (93 N. W. 142).

726. (1905.) An appeal and supersedeas operates to deprive the purchasers of property at execution sale of the use of the premises after the interest on his claim ceased. *Westerfield v. South Omaha Loan & Bldg. Ass'n*, 75 Neb. 58 (107 N. W. 1010).

726*a*. (1904.) A supersedeas is a statutory remedy, and if not given within the time limited by statute, the right to such remedy is lost, and if given thereafter, is ineffective. *Whitaker v. McBride*, 5 Unof. 411 (98 N. W. 877).

——— Sufficiency of bond.

726*b*. (1895.) A supersedeas undertaking executed by several sureties, but one of whom resides in the county in which such undertaking is required, the others being residents of a different county in this state, should not be rejected on the ground that the resident surety lacks the necessary property qualifications, provided his co-sureties possess all of the qualifications prescribed by law, and the undertaking in other respects satisfies the requirements of the statute. *State, ex rel. Lion Ins. Co., v. Baker*, 45 Neb. 39 (63 N. W. 139).

727. (1895.) An appeal bond in an action for injunction which omits a material condition prescribed by law is insufficient and will not operate to supersede a decree of the district court dissolving an order of injunction and continue the order in force during the pendency of the appeal to the supreme court. *O'Chandler v. State*, 46 Neb. 10 (64 N. W. 373).

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727a. (1897.) A bond, though filed and approved, will not operate as a supersedeas unless it contains the conditions prescribed by law. *State, ex rel. Morrissey, v. Ramsey*, 50 Neb. 166 (69 N. W. 758).

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727b. (1901.) A supersedeas bond not conditioned as required by statute is insufficient to prevent the enforcement of the judgment or decree it was given to supersede. *Gillespie v. Morsman*, 2 Unof. 162 (95 N. W. 1127).

728. (1902.) In an error proceeding from a decree of the district court foreclosing a real estate mortgage, an undertaking which does not provide for the payment of "the value of the use and occupation of the property" is not effective as a supersedeas. *Collins v. Brown*, 64 Neb. 173 (89 N. W. 754).

729. (1905.) The statute, prior to the recent amendment, allowed the supersedeas of a decree confirming a sale upon the foreclosure of mortgage by giving a waste and cost bond only, and the purchaser at such sale could not recover for the use of the premises while the order of confirmation was so superseded, pending an appeal, even though the appeal was voluntarily dismissed by the appellant. *Westerfield v. South Omaha Loan & Bldg. Ass'n*, 75 Neb. 58 (107 N. W. 1010).

Qualifications of sureties.

729a. (1895.) The only qualifications prescribed by the civil code for sureties on undertakings therein authorized are those mentioned in section 898, viz., that such sureties must be residents of this state, worth double the sum to be secured beyond the amount of their debts, and have property liable to execution in this state equal to the sum to be secured. *State, ex rel. Lion Ins. Co., v. Baker*, 45 Neb. 39 (63 N. W. 139).

Additional or new security.

730. (1894.) Where it is shown that a supersedeas bond is entirely inadequate in amount, a sufficient bond may be required of the appellant as a condition necessary to the continuance of a stay of proceedings. *Tulleys v. Keller*, 42 Neb. 788 (60 N. W. 1015).

Approval of bond.

730a. (1897.) It is the duty of the clerk of the district court to determine whether the sureties on a supersedeas bond, when the same is duly tendered, are financially responsible for the amount of the penalty of such bond; and, if the clerk so finds, it is his duty to approve and file the bond. *State, ex rel. Beard, v. Cook*, 51 Neb. 822 (71 N. W. 733).

Allowance by court.

730b. (1896.) It is within the power of the supreme court in its discretion, after obtaining jurisdiction of a case by appeal, to allow a supersedeas in cases not provided for by statute, and upon terms which the court may prescribe. *Home Fire Ins. Co. v. Dutcher*, 48 Neb. 755 (67 N. W. 766).

730c. (1896.) In cases where the statute makes no provision for a supersedeas as a matter of right, the court may in its discretion allow a supersedeas upon conditions which it may affix for the protection of the parties. *Home Fire Ins. Co. v. Dutcher*, 48 Neb. 755 (67 N. W. 766).

731. (1897.) In such cases not within the statute the district court may, in its discretion, allow a supersedeas on proper terms, and should do so where the appellant's rights will be jeopardized if the order is not superseded, and no party will be injured beyond the protection of a bond by superseding the order. *Penn Mutual Life Ins. Co. v. Creighton Theatre Building Co.*, 51 Neb. 659 (71 N. W. 197).

732. (1902.) After obtaining jurisdiction of a cause by appeal, the supreme court may, in its discretion, allow a supersedeas in cases not provided for by statute, upon such terms as it may prescribe. *Carson v. Jansen*, 65 Neb. 423 (91 N. W. 398).

732a. (1902.) In cases not within the purview of section 677 of the code of civil procedure, the district court may, in its discretion, allow a supersedeas upon conditions which it determines to be proper or necessary for the protection of the parties. *Carson v. Jansen*, 65 Neb. 423 (91 N. W. 398).

733. (1905.) It is within the discretion of the district court to determine whether a supersedeas should be allowed. But this is a legal discretion, and where such supersedeas is refused, the supreme court will, in a proper case, supersede the judgment of the district court upon proper terms. *Prante v. Lompe* 74 Neb. 210 (104 N. W. 1150).

Proceeding in cause upon giving security for restitution.

734. (1898.) A plaintiff may proceed to enforce his judgment obtained on a contract for the payment of money only, notwithstanding the execution by the defendant of

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a sufficient supersedeas bond as required by law to stay proceedings pending a review of the judgment in the appellate court, upon the plaintiff executing, with at least two sufficient sureties, the undertaking prescribed by section 591 of the code of civil procedure and obtaining leave from the court below, or a judge thereof in vacation, to enforce the collection of the judgment. *Bodewig v. Standard Cattle Co.*, 56 Neb. 217 (76 N. W. 580).

735. (1898.) Where plaintiff has complied with the provisions of section 591 of said code, the defendant is not entitled to an order restraining the enforcement of the judgment during the pendency of error proceedings to review such judgment. *Bodewig v. Standard Cattle Co.* 56 Neb. 217 (76 N. W. 580).

IX. RECORD AND PROCEEDINGS NOT IN RECORD.

Burden of showing error in the record, see *post*, §§ 1568-1578.

Dismissal for defects relating to record, see *post*, §§ 1436-1444.

Effect of filing, as election to proceed by error instead of appeal, see *ante*, §§ 48-49.

Presumption where record fails to show error, see *post*, §§ 1560-1659.

A. Matters Which Should Be Contained in Record.

Necessity of bill of exceptions to bring matters into record, see *post*, §§ 893-951.

Tribunal where proceedings were had.

736. (1871.) Transcripts of records of proceedings had in the district court, when filed in the supreme court for the purpose of reviewing the action appearing thereby, must show when and where the court was held, its term, and the names of the judges and other officers present, and be duly authenticated by its clerk. *McDonald v. Penniston*, 1 Neb. 324.

737. (1872.) A transcript of the record of the proceedings of the district court filed in the supreme court must show upon its face when, where, and before what court proceedings were had, so as to make it appear that they were before a court known to the law, held at a time and place authorized by law, and were *coram judice*. *Orr v. Orr*, 2 Neb. 170; (1877) *Clark v. Wright*, 6 Neb. 413.

Jurisdiction of lower court.

738. (1901.) The records of inferior courts must affirmatively show that such courts have acted within the scope of their authority. *Kuker v. Beindorff*, 63 Neb. 91 (88 N. W. 190).

739. (1902.) Ordinarily, when a judgment or order of an inferior court is assailed on the ground of a want of jurisdiction, every fact essential to jurisdiction must affirmatively appear; but such rule has no application, when the transcript before the reviewing court shows on its face that the jurisdictional steps, actually taken, are omitted therefrom. *Biart v. Myers*, 3 Unof. 196 (91 N. W. 573).

Rules of lower court.

740. (1899.) The supreme court will not take judicial notice of the rules of practice of the district court. To be considered, such rules must be made a part of the record. *Dunn v. Bozarth*, 59 Neb. 244 (80 N. W. 811).

Docket of lower court.

741. (1898.) Entries made upon the trial docket of the district court cannot be considered on review for the purpose of ascertaining what were the proceedings in that court. *Barker v. State*, 54 Neb. 53 (74 N. W. 427).

Contents of record on former appeal or in another case.

742. (1894.) A bill of exceptions must contain all the evidence upon which questions of fact are to be determined, a reference in such bill to evidence to be found by reference to another bill filed in an independent case not being sufficient. *Lowe v. Riley*, 41 Neb. 812 (60 N. W. 96); (1887) *Tecumseh Nat. Bank v. Best*, 50 Neb. 518 (70 N. W. 41).

743. (1896.) The parties cannot by stipulation make the bill of exceptions settled and allowed in another case the record. *State Ins. Co. v. Buckstaff Bros. Mfg. Co.* 47 Neb. 1 (66 N. W. 27).

744. (1898.) A second appeal to the supreme court is so far independent of a former appeal that pleadings filed in the original appeal cannot be referred to in that subsequently taken, for the purpose of ascertaining what issues had been originally joined and presumably were tried, when there was entered the decree sought to be reversed. *Calmelet v. Sichl*, 54 Neb. 97 (74 N. W. 407).

745. (1898.) Solely by stipulation, a bill of exceptions in one case cannot be made a part of the record of another case, even

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though the two cases be between the same parties. *Murphy v. Warren & Co.*, 55 Neb. 220 (75 N. W. 575).

Examination of juror.

746. (1888.) Examination of juror on his *voir dire* must be preserved in the record, so that it may appear he was examined on the question of whether he has expressed an opinion or not. *Everton v. Esgate*, 24 Neb. 235 (38 N. W. 794).

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Process.

747. (1902.) The supreme court cannot decide whether the district court erred in permitting an amendment to the return of a process, unless the process and the original return thereto, or authenticated copies of them, are preserved in the record or bill of exceptions. *Saussay v. Lemp Brewing Co.*, 64 Neb. 429 (89 N. W. 1048).

Pleadings.

748. (1880.) The omission to give a copy of the petition on which the judgment claimed to be erroneous was rendered, makes it impossible for the reviewing court to say whether it contained facts sufficient to warrant it or not, but the presumption will be that it did, unless the subject of the suit be one on which no cause of action could possibly be shown to exist. *Reynolds v. Reynolds*, 10 Neb. 574 (7 N. W. 322).

749. (1883.) Every case submitted to the supreme court for review should contain a transcript of the pleadings constituting the issue tried in the district court, otherwise the judgment of the court below will be affirmed. *Galley v. Knapp*, 14 Neb. 262 (15 N. W. 329).

750. (1887.) It is an inflexible rule of practice, that in order to predicate error upon the refusal of a trial court to permit a supplemental pleading to be filed, the paper proposed, or at least the substance of it, must be made a part of the record. *Killinger v. Hartman*, 21 Neb. 297 (31 N. W. 918).

751. (1895.) Assignments of error based on an order sustaining a demurrer will not be considered where the demurrer has been omitted from the transcript. *Ball v. Nelson*, 45 Neb. 205 (63 N. W. 361).

752. (1896.) Should a party desire to urge in the supreme court that he was entitled to a judgment in his favor upon the pleadings, they must be copied into the transcript. *Lewis Investment Co. v. Boyd*, 48 Neb. 604 (67 N. W. 456).

753. (1896.) Where the record shows that a reply was filed, defendant will not be heard to insist that his answer should be taken as true because of his failure to have the reply copied into the transcript. *Lewis Investment Co. v. Boyd*, 48 Neb. 604 (67 N. W. 456).

754. (1898.) When there is filed in the supreme court on appeal no pleading but a supplemental petition, and the decree discloses that it was rendered upon consideration of a petition and supplemental petition, the decree may be affirmed. *Calmelet v. Sichl*, 54 Neb. 97 (74 N. W. 407).

755. (1899.) Alleged error in striking out portions of a pleading omitted from the transcript for review will be disregarded. *Doolittle v. American Nat. Bank*, 58 Neb. 454 (78 N. W. 926).

756. (1900.) An assignment of error predicated upon the insufficiency of a petition will not be considered upon review, unless a copy of the proceeding is included in the transcript. *Western Seed & Irrigation Co. v. Morton*, 59 Neb. 579 (81 N. W. 616).

757. (1902.) Where the ground of complaint is that the findings of themselves would entitle the plaintiff in error to more relief than was granted, a record containing the findings and judgment only is insufficient to procure modification or reversal, since the prayer of the petition may have been more limited than the relief warranted by the facts alleged and found. *Shelby v. Creighton*, 2 Unof. 264 (96 N. W. 382).

758. (1902.) Where the findings show a narrower liability than that enforced by the judgment of the court, or show no liability and the judgment enforces one, or in any other way a discrepancy between findings and judgment is presented which no possible state of the pleadings could justify, modification or reversal may be had upon a record showing such findings and judgment only. *Shelby v. Creighton*, 2 Unof. 264 (96 N. W. 382).

——— Amendment of pleadings.

759. (1895.) A ruling amending a pleading below cannot be reviewed on error unless it affirmatively appears what particular amendment was allowed. *German-American Ins. Co. v. Hart*, 43 Neb. 441 (61 N. W. 582).

760. (1896.) A record containing a journal entry "Now on this day came the parties hereto with their attorneys and leave is hereby granted the plaintiff to amend the petition herein by interlineation, to which the defendant duly excepts," *held*,

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too indefinite to present for review the question of the propriety of the action of the trial court, there being no statement of what was embodied in the amendment; and furthermore, in order to make any error in such order available for review a statement of what was allowed to be done and the matter of the amendment should have been made a part of and preserved by the bill of exceptions. *Imhoff v. Richards*, 48 Neb. 590 (67 N. W. 483).

761. (1902.) The supreme court cannot take judicial notice of the records of the district court, and when the record in this court shows that an amended petition was filed in the district court, but does not show that a new cause of action was set up in the amended petition, the statute of limitations will cease to run from the commencement of the action. *Bush v. Tecumseh Nat. Bank*, 64 Neb. 451 (90 N. W. 236).

762. (1903.) Where it is claimed that the court erred in permitting a pleading to be amended during trial, the alleged fact must be shown by the record; its existence will not be presumed. *Pratt v. Smith* 68 Neb. 151 (94 N. W. 104.)

Motions.

763. (1891.) The supreme court will not review the action of the district court in overruling a motion for a change of venue, where the motion is not included in the records brought up. *Van Etten v. Butt*, 32 Neb. 285 (49 N. W. 365).

764. (1896.) The supreme court cannot determine that the ruling of the district court upon a motion was without justification, when there is presented for review neither the motion nor the proofs submitted in support of it. *Hudson v. Pennock*, 48 Neb. 359 (67 N. W. 188).

765. (1899.) A ruling on a motion not included in the transcript will not be considered. *Brown v. Johnson*, 58 Neb. 222 (78 N. W. 515).

766. (1900.) A motion to set aside a sale cannot be considered, unless certified in the transcript by the clerk of the district court. *Mandell v. Weldin*, 59 Neb. 699 (82 N. W. 6).

Proceedings for removal of cause.

767. (1876.) Upon suggestion of diminution of record, certificates of the clerk of the United States circuit court were produced to show that before judgment was rendered, the case had been removed to that court. *Held*, That the question of removal could only be reviewed upon a bill of exceptions showing the course taken to obtain it, and the action of the district court thereon. *Singleton v. Boyle*, 4 Neb. 414.

Evidence.

Necessity for bill of exceptions to bring evidence into record, see *post*, §§ 902-917.

768. (1875.) Where the finding of the court below upon the facts is not disputed, and the only error complained of is one of law, the testimony taken need not be embodied in the record brought to the supreme court. *Rogers v. Omaha Hotel Co.*, 4 Neb. 54.

769. (1883.) Where, in the assessment of damages for right of way for a railroad by a jury, a plat of the land, showing the location of the road, etc., is used, a record of the evidence is not complete without it. *Missouri P. R. Co. v. Hays*, 15 Neb. 224 (18 N. W. 51).

770. (1884.) The decision of an inferior court in admitting evidence on the trial of a cause will not be reversed unless the evidence is before the supreme court, and prejudicial error is shown. *Wilson v. Young*, 15 Neb. 627 (19 N. W. 487).

771. (1889.) Plats introduced in evidence should be attached to the bill of exceptions. *Fink v. Republican V. R. Co.*, 27 Neb. 660 (43 N. W. 418).

772. (1891.) Errors of trial court in overruling motions to exclude evidence will not be considered unless the motion, the ruling, and the evidence are presented in the record by bill of exceptions. *Zimmerman v. Klingeman*, 31 Neb. 495 (48 N. W. 268).

773. (1892.) Proceedings in district court, to contest an election to locate county seat, will not be reviewed by the supreme court in the absence of bill of exceptions. *Peters v. Morey*, 34 Neb. 82 (51 N. W. 312).

774. (1892.) A party is not entitled to review, on error or appeal, the decision of a trial court in denying a new trial upon the ground of newly discovered evidence, unless all the testimony given on the hearing of the motion is set out in a bill of exceptions. *Wohlenberg v. Melchert*, 35 Neb. 803 (53 N. W. 982); (1894) *National Lumber Co. v. Ashby*, 41 Neb. 292 (59 N. W. 913).

775. (1894.) Allegations of error in admitting and refusing evidence will not be considered in absence of a bill of exceptions.

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Haskell v. Valley County, 41 Neb. 234 (59 N. W. 680).

776. (1896.) The supreme court will take judicial notice of the boundaries of a judicial district and of the counties therein. *Chicago, B. & Q. R. Co. v. Hyatt*, 48 Neb. 161 (67 N. W. 8).

777. (1896.) In order to entitle the unsuccessful party to a petition for a new trial under section 318 of the code to a review in the supreme court, the evidence on the former trial must, when material, be preserved in the bill of exceptions. *Western Gravel Co. v. Gauer*, 48 Neb. 246 (67 N. W. 150).

778. (1897.) Alleged error in admitting an account-book in evidence was disregarded upon review, where the party complaining failed to make the book or its contents a part of the bill of exceptions. *Anderson v. Beeman*, 52 Neb. 387 (72 N. W. 361).

779. (1900.) The supreme court does not take judicial cognizance of the net earnings of railroad companies, and can not assume, without proof, that the "Maximum Rate Law" (Session Laws, 1893, ch. 24) is not, or was at the time of its enactment, confiscatory legislation. *Nebraska Telephone Co. v. Cornell*, 59 Neb. 737 (82 N. W. 1).

780. (1903.) The ruling of the district court on a motion for a judgment on the pleadings, can not be reviewed on appeal if it appears that the judgment is sustained by and conforms to the pleadings and there is no bill of exceptions. *Danforth v. Fowler*, 68 Neb. 452 (94 N. W. 637).

781. (1906.) Evidence not having been preserved in the manner provided by law in the bill of exceptions cannot be considered on appeal. *Parker v. State*, 76 Neb. 765 (108 N. W. 121).

782. (1906.) Under the practice of the supreme court, where the record contains no bill of exceptions and the pleadings are sufficient to support the judgment of the trial court, it will be affirmed. *McIntyre v. Mote*, 77 Neb. 418 (109 N. W. 763).

——All of the evidence.

783. (1871.) All the evidence adduced on the trial should be preserved in the bill of exceptions, and the fact be accordingly stated, in order to justify a claim that the court below erred in refusing a new trial, asked for on the ground that the verdict was not sustained by sufficient evidence. *Midland P. R. Co. v. McCartney*, 1 Neb. 398.

784. (1875.) Bills of exceptions should state affirmatively that they contain "all the evidence." To state that they contain "the substance of the evidence introduced bearing upon the issues," is not sufficient. *Omaha & Northwestern R. Co. v. Menk*, 4 Neb. 21; (1877) *Faulkner v. Meyers*, 6 Neb. 414.

785. (1876.) If the bill of exceptions does not affirmatively show that it contains all the evidence, the supreme court will not examine the question whether the verdict is against evidence. *Wilcox v. Saunders*, 4 Neb. 569; (1877) *Faulkner v. Meyers*, 6 Neb. 414.

786. (1887.) Bills of exceptions should contain all the evidence considered by a court in the trial of a cause. If not, it must be presumed that the findings of the trial court on questions of fact are correct. *Aspinwall v. Sabin*, 22 Neb. 73 (34 N. W. 72; 3 Am. St. Rep. 258); (1889) *Chamberlain v. Brown*, 25 Neb. 434 (41 N. W. 284); (1892) *Becker v. Simonds*, 33 Neb. 680 (50 N. W. 1129); (1896) *Greene v. Greene*, 49 Neb. 546 (68 N. W. 947; 59 Am. St. Rep. 560; 34 L. R. A. 110); (1899) *Barr v. Post*, 59 Neb. 361 (80 N. W. 1041; 80 Am. St. Rep. 680).

787. (1889.) A verdict of a jury and judgment thereon will not be set aside as being unsupported by the evidence when the bill of exceptions shows upon its face that all the evidence submitted to the trial jury is not before the supreme court; all presumptions being in favor of the regularity of the proceedings of the district court. *Garneau Cracker Co. v. Palmer*, 28 Neb. 307 (44 N. W. 463); (1895) *Omaha Fire Ins. Co. v. Berg*, 44 Neb. 522 (62 N. W. 862); (1896) *Warner v. Hutchins*, 48 Neb. 672 (67 N. W. 745); 1901) *Chicago, B. & Q. R. Co. v. Bigley*, 1 Unof. 225 (95 N. W. 344)

788. (1892.) Where it appears from an inspection of a bill of exceptions that important and material evidence introduced on the trial of the cause has been omitted therefrom, the bill of exceptions will not be considered by this court for the purpose of determining whether the verdict is supported by the evidence. *Schneider v. Tombling*, 34 Neb. 661 (52 N. W. 283).

789. (1894.) Findings if a referee will not be reviewed where his certificate to the bill of exceptions fails to show that the bill contains all evidence adduced. *McClain v. Morse*, 42 Neb. 52 (60 N. W. 334).

790. (1895.) A verdict will not be dis-

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turbed as being contrary to the evidence where important testimony has been omitted from the bill of exceptions. *Conger v. Dodd*, 45 Neb. 36 (63 N. W. 125); (1897) *Anderson v. Beeman*, 52 Neb. 387 (72 N. W. 361); (1897) *Dunn v. Eberly*, 52 Neb. 468 (72 N. W. 485).

791. (1899.) Where, upon an inspection of a bill of exceptions, palpable omissions appear, the reviewing court will not pass upon the sufficiency of the evidence. *Davidson v. Gretna State Bank*, 59 Neb. 63 (80 N. W. 256); (1900) *Scott v. Society of Russian Israelites*, 59 Neb. 571 (81 N. W. 624).

792. (1902.) Evidence will not be reviewed, where it is not disclosed that all of it is in the bill of exceptions. *Dederick v. Gillespie*, 63 Neb. 422 (88 N. W. 659).

——— Excluded evidence.

793. (1876.) To obtain a review of the action of the court in excluding evidence from the jury, the testimony offered, and the ground of its exclusion, should be preserved by bill of exceptions. *Commissioners of Kearney County v. Kent*, 5 Neb. 227.

794. (1884.) Where documentary evidence is excluded by the trial court, if such exclusion is sought to be assigned in the supreme court as error, the excluded evidence must be preserved by the bill of exceptions. Error cannot be presumed. *O'Dea v. State*, 16 Neb. 241 (20 N. W. 299); (1892) *Schneider v. Tombling*, 34 Neb. 661 (52 N. W. 283; (1892) *Conner v. Draper*, 34 Neb. 870 (52 N. W. 720); (1896) *Graham v. Frazier*, 49 Neb. 90 (68 N. W. 367); (1897) *Brinckle v. Stitts*, 53 Neb. 10 (73 N. W. 223).

795. (1889.) In the absence of a copy of the will in the bill of exceptions, the supreme court cannot say whether the property was improvidently distributed, and owing to such absence it cannot be presumed that the district court erred in excluding the evidence as to the financial condition of some who would naturally be the recipients of the bounty of the testator. *Latham v. Schaal*, 25 Neb. 535 (41 N. W. 354).

——— Depositions.

796. (1881.) When error is assigned upon the refusal of the court to suppress and exclude depositions as evidence, to have a review of the ruling, it is necessary that such depositions be included in the record. *Stevenson v. Anderson*, 12 Neb. 83 (10 N. W. 552).

797. (1896.) Error in reading a deposition to the jury will not be held prejudicial where it was not preserved by a bill of exceptions. *Keens v. Robertson*, 46 Neb. 837 (65 N. W. 897).

——— For review of questions of fact.

798. (1888.) Where none of the evidence produced on the trial is preserved in the record, it is impossible to review the facts. *Welborn v. Eskey*, 25 Neb. 193 (40 N. W. 959); (1896) *White v. Smith*, 47 Neb. 625 (66 N. W. 638); (1897) *Iowa Loan & Trust Co. v. Walker*, 50 Neb. 667 (70 N. W. 243); (1897) *Everingham v. Harris*, 51 Neb. 627 (71 N. W. 300); (1897) *Alexander v. Overton*, 52 Neb. 283 (72 N. W. 212); (1898) *Mills v. Hamer*, 55 Neb. 445 (75 N. W. 1105); (1901) *Hammer v. Coglizer*, 1 Unof. 633 (95 N. W. 681); (1903) *Emery v. Hanna*, 4 Unof. 491 (94 N. W. 973).

799. (1888.) In an appeal from the judgment setting aside a finding by a referee the bill of exceptions should contain all of the record as contained in the district court, and a motion to strike out certain matter of evidence, on the ground that the same was not before the referee, was properly overruled. *Gibson v. Gibson*, 24 Neb. 394 (39 N. W. 450).

800. (1888.) The assignment in a motion for a new trial, that the verdict of the jury was not sustained by sufficient evidence, cannot be considered by the supreme court in proceedings in error, unless the evidence submitted to the jury is before the court by a proper bill of exceptions. *Schroeder v. Rinehard*, 25 Neb. 75 (40 N. W. 593).

801. (1889.) The verdict of a jury was set aside and a new trial granted upon the motion of the losing party, based upon a number of assignments, among which were, misconduct of the jurors, and that the verdict was not sustained by sufficient evidence. In the absence of a bill of exceptions showing what the evidence was, it is presumed that the decision of the court in granting the new trial was correct, the journal entry not showing the reasons for which the verdict was set aside. *Latham v. Schaal*, 25 Neb. 535 (41 N. W. 354).

802. (1890.) In a record without pleadings in which it appeared from a journal entry of the judgment that the plaintiff's cause of action arose from defendant's live stock trespassing upon cultivated ground and the defendant's answer an award of ar-

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bitrators, under the herd law, as a bar to the action, *held*, that a bill of exceptions exhibiting the evidence on which the judgment was rendered was required to review it. *Herbison v. Taylor*, 29 Neb. 217 (45 N. W. 626).

803. (1892.) Where judgment is entered according to referee's conclusions of law, the evidence not being preserved by bill of exceptions, the supreme court cannot consider whether evidence supports findings. *Brown v. Williams*, 34 Neb. 376 (51 N. W. 851).

804. (1894.) The supreme court cannot examine the question whether the verdict is sustained by the evidence, when the evidence adduced on the trial is not made a part of the record by a bill of exceptions. *Murphy v. Gould*, 40 Neb. 728 (59 N. W. 383); (1894) *Appelget v. McWhinney*, 41 Neb. 253 (59 N. W. 918).

805. (1894.) The finding of the amount due the mortgagee for repairs cannot be reviewed, since the evidence upon which the same was based is not contained in the bill of exceptions. *Morrow v. Jones*, 41 Neb. 867 (60 N. W. 369).

806. (1895.) Where the questions presented in error proceedings are dependent upon the existence of certain facts there can be no review of such questions in the absence of a showing that any evidence was introduced upon the trial in the district court. *Bowen v. State*, 46 Neb. 23 (64 N. W. 353).

807. (1896.) The action of the district court in overruling a motion cannot be reviewed where evidence was necessary to support such motion and such evidence was not preserved by a bill of exceptions. *First Nat. Bank of Madison v. Carson*, 48 Neb. 763 (67 N. W. 779); (1903) *Cox v. Crow*, 4 Unof. 434 (94 N. W. 524); (1903) *Hagadorn v. Wagoner*, 4 Unof. 713 (96 N. W. 184).

808. (1898.) The entire omission from the bill of exceptions of evidence necessary to sustain an essential controverted averment of appellant's petition necessitates the affirmance of the judgment of the district court. *Hoffman v. Becker*, 56 Neb. 678 (77 N. W. 53).

809. (1902.) Objections to an appraisement are unavailable unless the evidence offered thereon is preserved in bill of exceptions. *Simpson v. Snook*, 2 Unof. 412 (89 N. W. 168).

810. (1903.) On a general finding for the defendant in a trial to the court, where the evidence is not preserved and there is no special finding inconsistent with such general finding, if the answer sets forth a defense, the judgment of the trial court must in the absence of error in making up the pleadings, be upheld. *Snyder v. Johnson*, 69 Neb. 266 (95 N. W. 692).

811. (1903.) When, after issue joined, there has been a trial and the record recites that the plaintiff introduced all his evidence, which the trial court found to be insufficient and dismissed the action, the judgment will not be reviewed in this court in the absence of a bill of exceptions, although it also recites that in the opinion of the trial judge the petition does not state facts sufficient to constitute a cause of action. *McCowan v. Votaw*, 4 Unof. 370 (93 N. W. 1129).

812. (1904.) An action in district court was voluntarily dismissed without prejudice and afterwards, during the same term, it was reinstated upon evidence presented. *Held*, That where such evidence is not preserved by bill of exceptions, error by abuse of discretion will not be presumed. *Union P. R. Co. v. Smith*, 5 Unof. 631 (99 N. W. 813).

813. (1906.) The supreme court will take jurisdiction of an appeal in equity, where no bill of exceptions is filed with the transcript; but if the judgment of the district court is one which might be supported by competent testimony on the questions of fact arising on the pleadings, in the absence of a bill of exceptions containing the testimony, the supreme court will presume that the judgment is supported by the evidence. *McMillan v. Diamond*, 77 Neb. 671 (110 N. W. 542).

——— For review of instructions.

814. (1889.) The testimony not being preserved in the record, the court cannot say that it was error to refuse certain instructions. *Fischer v. Burchall*, 27 Neb. 245 (42 N. W. 1034); (1896) *City Nat. Bank of Hastings v. Thomas*, 46 Neb. 861 (65 N. W. 895); (1897) *Union P. R. Co. v. Thorne*, 51 Neb. 472 (70 N. W. 1119).

815. (1891.) Instructions to the jury apparently judicious, and not excepted to on the trial, are not reversible error unless the evidence is presented in the record by bill of exceptions. *Zimmerman v. Klingeman*, 31 Neb. 495 (48 N. W. 268).

816. (1895.) Applicability of instruc-

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tions to evidence and rulings as to testimony will not be considered in absence of a bill of exceptions. *Nelson v. Johnson*, 44 Neb. 7 (62 N. W. 244).

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817. (1899.) Where corrections of instructions depends on the evidence they will not be reviewed in absence of a properly authenticated bill of exceptions. *Crawford v. Smith*, 57 Neb. 503 (77 N. W. 1078).

818. (1901.) When a case is brought to the supreme court by petition in error and there is no bill of exceptions in the record, instructions given by the trial court that might have been proper under any possible condition of the evidence under the pleadings will not be held erroneous and prejudicial. *Connor v. Schreiner-Flack Grain Co.*, 2 Unof. 188 (96 N. W. 221).

——— For review of ruling on motion for new trial.

819. (1888.) Where a new trial is sought upon a petition filed after the term at which the judgment was rendered, the evidence on the trial as well as the newly discovered evidence must be set out in a bill of exceptions. *Omaha, N. & B. H. R. Co. v. O'Donnell*, 24 Neb. 753 (40 N. W. 298).

820. (1895.) The ruling upon a motion for a new trial will not be reviewed where the evidence considered upon the hearing has not been preserved by a bill of exceptions. *Spotswood v. Nat. Bank of Commerce*, 44 Neb. 1 (62 N. W. 245).

821. (1907.) A decision of a district court granting an application for a new trial on the ground of newly discovered evidence will not be reviewed by the supreme court in the absence of a bill of exceptions containing both the evidence used on the trial and that alleged to have been newly discovered. *Dickinson v. Aldrich*, 79 Neb. 198 (112 N. W. 293).

——— For review on appeal.

822. (1874.) In chancery causes commenced prior to the act of 1867, abolishing distinctions between actions at law and suits in equity, and carried by appeal to the supreme court, the entire record should be brought to the supreme court. *Wamsley v. Crook*, 3 Neb. 344.

823. (1878.) On appeal, if the evidence be not wholly preserved, and brought into the record, the decision of questions of fact will not be disturbed. And this is the rule whether the trial below be to the court, to a referee, or to a jury. *Farmer v. Volentine*, 7 Neb. 498.

824. (1882.) In cases appealed to the supreme court, the same steps are required to preserve the evidence for use on appeal as are required in a review by proceedings in error. *Leech v. Philpott*, 12 Neb. 577 (12 N. W. 116).

825. (1903.) Where, on an appeal in equity from a judgment of the district court, the record contains no bill of exceptions and the pleadings are sufficient to support the judgment, it will be affirmed. *Stansbury v. Storer*, 70 Neb. 603 (97 N. W. 805).

Ruling on evidence.

826. (1899.) The decision of a trial court in a cause in which there was a trial to the court without a jury cannot, in an appeal to the supreme court, be assailed because based on the evidence from which there had been an improper exclusion of a portion from consideration, where it does not appear of record that any portion of the evidence was so excluded. *Hanscom v. Meyer*, 57 Neb. 786 (78 N. W. 367; 73 Am. St. Rep. 544).

Affidavits.

Necessity of bill of exceptions to bring affidavit into record, see *post*, §§ 920-937.

827. (1877.) Affidavits of jurors in support of a motion for a new trial, which are not embodied in the bill of exceptions, will not be considered by the supreme court. *Ray v. Mason*, 6 Neb. 101.

828. (1883.) Affidavits used in the district court will not be considered in the supreme court in error proceedings, unless made part of the record, which can ordinarily be done only by means of a bill of exceptions. *Walker v. Lutz*, 14 Neb. 274 (15 N. W. 352); (1889) *Barlass v. Braash*, 27 Neb. 212 (42 N. W. 1028); (1895) *Houston v. City of Omaha*, 44 Neb. 63 (62 N. W. 251).

829. (1884.) Affidavits used at the hearing of a motion to dissolve an attachment will not be considered by the supreme court unless preserved by a bill of exceptions. *Tessier v. Crowley*, 16 Neb. 369 (20 N. W. 264).

830. (1891.) To review a ruling of the district court in striking from the files an affidavit claimed to contain language disrespectful to the trial court, the affidavit must be incorporated in the bill of exceptions, and if the trial judge refuse to do

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so, he will, in a proper case, be compelled by mandamus to include the same in the bill of exceptions. *Van Etten v. Butt*, 32 Neb. 285 (49 N. W. 365).

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831. (1895.) Where papers are filed with a motion and are necessary to a determination thereof, the ruling on the motion will not be reviewed where the papers are not preserved by a bill of exceptions. *Fremont Butter & Egg Co. v. Peters*, 45 Neb. 356 (63 N W. 791).

832. (1901.) To obtain a review of the action of a trial court on an application to continue, the affidavits on which it was heard must be made a part of the bill of exceptions. *Donahue v. Potter & George Co.*, 63 Neb. 128 (88 N. W. 171); (1902) *Kinney v. Bittinger*, 3 Unof. 817 (92 N. W. 1005).

833. (1902.) Defects in a replevin affidavit not brought to the supreme court with the record will not be considered. *Skow v. Locke*, 3 Unof. 176 (91 N. W. 204).

834. (1903.) An assignment of error, based on the alleged misconduct of the jury, will not be considered, where such misconduct is ascertainable only from affidavits not included in the bill of exceptions. *Pledger v. Chicago, B. & Q. R. Co.*, 69 Neb. 456 (95 N. W. 1057).

835. (1906.) Affidavits used on the hearing of a motion to set aside a default, if not preserved in the bill of exceptions, will not be considered in this court. *Jordan v. Jackson*, 76 Neb. 15 (107 N. W. 1047).

Stipulations.

Necessity for bill of exceptions to bring stipulation into record, see *post*, §§ 945-947.

836. (1902.) Stipulations not embraced in the record, will not be considered. *Bush v. Tecumseh Nat. Bank*, 64 Neb. 451 (90 N. W. 236).

Fact as to which mistake is claimed.

837. (1877.) An accident or mistake in respect of a fact occurring on the trial of a cause in the district court which is not incorporated in a bill of exceptions and made a part of the record, is not sufficient ground to set aside the judgment of the supreme court and grant a new trial. *Morrill v. Taylor*, 6 Neb. 236.

Instructions.

Necessity for bill of exceptions to bring instructions into record, see *post*, §§ 938-942.

838. (1892.) Objections to instructions will not be considered, when the charge of the court was not copied into the record brought up. *Schneider v. Tombling*, 34 Neb. 661 (52 N. W. 283); (1896) *Callen v. Rose*, 47 Neb. 638 (66 N. W. 639).

839. (1889.) Objection cannot be raised to refusal to give instructions not set out in the bill of exceptions. *Bowie v. Spaids*, 26 Neb. 635 (42 N. W. 700).

840. (1894.) Error cannot be predicated for the refusing a request to charge, where such instruction is not contained in the record brought to the supreme court. *Wiseman v. Ziegler*, 41 Neb. 886 (60 N. W. 320).

841. (1895.) Where error is assigned upon the giving of a certain instruction, on the ground that while abstractly correct, it is misleading for want of modifications, the court will not consider such assignment where it appears that the whole charge is not included in the transcript, because proper modifications may have been given in other instructions. *Conger v. Dodd*, 45 Neb. 36 (63 N. W. 125).

Misconduct of counsel.

842. (1898.) A litigant, to take advantage of alleged misconduct of opposing counsel, must call the attention of the trial court to such misconduct at the time it occurs, ask for protection therefrom, preserve in the bill of exceptions the alleged misconduct with the ruling of the court and exceptions thereto, and present the record as an assignment of error. *Chicago, B. & Q. R. Co. v. Kellogg*, 54 Neb. 127 (74 N. W. 454).

843. (1899.) Alleged misconduct of counsel will not be reviewed where the only record thereof consists of averments in the motion for a new trial. *Muchow v. Reid*, 57 Neb. 585 (78 N. W. 263).

844. (1899.) Alleged misconduct of counsel, consisting of statements during argument to the jury, to be available on review must be made the subject of an objection at the time, a ruling obtained, and exception taken thereto, and the portion of the proceedings incorporated in the bill of exceptions. *Summers v. Simms*, 58 Neb. 579 (79 N. W. 155).

845. (1906.) To obtain a review of the rulings of the district court on objections to alleged misconduct of counsel in addressing the jury, the record must show, not only that objections were made, but the matter objected to, and the rulings of the court thereon. *Union P. R. Co. v. Edmondson*, 77 Neb. 682 (110 N. W. 650).

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Allowance of attorney's fees.

846. (1897.) Assessment of amount of attorney's fee and allowance thereof are not reviewable upon a record failing to show such allowance. *Hanover Fire Ins. Co. v. Stoddard*, 52 Neb. 745 (73 N. W. 291).

Verdict.

847. (1894.) The objection that the verdict is not sustained by, or is contrary to, the weight of the evidence, or that it is contrary to law, connot be considered upon a record in which such verdict does not appear. *Hiatt v. Kinkaid*, 40 Neb. 178 (58 N. W. 700).

Judgment or final order.

848. (1871.) The attention of counsel is called to the necessity of seeing to it, that proper orders are entered in the records of the district court, and that full transcripts thereof are brought to the supreme court. *Orr v. Seaton*, 1 Neb. 105.

849. (1894.) Where the transcript filed in this court does not contain the judgment, or final order, of the district court sought to be reviewed, the petition in error will be dismissed. *Baker v. Kloster*, 41 Neb. 890 (60 N. W. 318); (1895) *Jandt v. Deranlieu*, 43 Neb. 422 (61 N. W. 632); (1897) *Union P. R. Co. v. Young*, 52 Neb. 190 (71 N. W. 1014); (1898) *Forbes v. Morearty*, 54 Neb. 505 (74 N. W. 822); (1899) *Bohman v. Chase*, 58 Neb. 712 (79 N. W. 707); (1901) *Post v. Smith*, 1 Unof. 94 (95 N. W. 500); (1902) *Jones v. Miller*, 2 Unof. 581 (89 N. W. 598); (1905) *Modern Woodmen of America v. Plummer*, 74 Neb. 711 (105 N. W. 181).

850. (1896.) In order to confer jurisdiction upon the supreme court to review on error a judgment of the district court there must be filed in the supreme court a certifiefidfi transcript of the judgment. A stipulation as to the character of the judgment, or a recital thereof in the petition in error, is insufficient. *Wachsmuth v. Orient Ins. Co.*, 49 Neb. 590 (68 N. W. 935).

851. (1898.) In every case presented to the supreme court by proceedings in error there must be of the record a transcript of the proceedings in the trial court inclusive of the judgment or final order, authenticated by the certificate of the clerk of such court, otherwise the error proceeding must be dismissed. *Casler v. Nordgren*, 55 Neb. 669 (76 N. W. 524).

852. (1898.) Alleged error in an order modifying a decree so as to appoint a master to make the sale instead of the sheriff was not reviewed where the transcript did not contain a copy of the decree or a copy of the order modifying it. *La Selle v. Nicholls*, 56 Neb. 458 (76 N. W. 870).

853. (1899.) An order refusing to extend the time for preparing a bill of exceptions cannot be reviewed where the order does not appear of record. *Doolittle v. American Nat. Bank*, 58 Neb. 454 (78 N. W. 926).

854. (1901.) An assignment of error that the justice failed to state in his docket that a writ of attachment was issued, presents no question for review where the record fails to disclose any order dissolving or sustaining the attachment. *Kuker v. Beindorff*, 63 Neb. 91 (88 N. W. 190).

855. (1901.) To predicate error upon a ruling of the court, the record must show affirmatively what the ruling was. *Ledwith v. Campbell*, 1 Unof. 695 (95 N. W. 838).

856. (1902.) When the record in a proceeding in the supreme court does not contain a transcript from the journal of the district court of an alleged order made by that court, its absence is not supplied by a recital in the bill of exceptions, certified by the court reporter to be true, that such an order was made, if the judge, at the time of settling the bill of exceptions, certifies that the recital is false and orders it to be stricken out. *Saussay v. Lemp Brewing Co.*, 64 Neb. 429 (89 N. W. 1048).

857. (1905.) Where the transcript shows no order disposing of the motion for a new trial, and no final judgment, the supreme court is without jurisdiction and the appeal will be dismissed. *Wall v. Kerr*, 74 Neb. 603 (104 N. W. 1076).

858. (1907.) A transcript upon an appeal to this court which does not contain a final order or judgment presents nothing for review. *Propeck v. Propeck*, 79 Neb. 218 (112 N. W. 302).

Grounds for decision.

859. (1896.) Where there was a stipulation for a continuance, and a dismissal at the same term, the order of dismissal cannot be reviewed in absence of a record showing the grounds of the court's ruling. *School District No. 1 v. Bishop*, 46 Neb. 850 (65 N. W. 902).

Presentation of question to lower court.

860. (1874.) When an objection is made to the admission of any particular testimony, the ground of the objection should be stated, together with the ruling of the

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court, and both preserved by bill of exceptions; otherwise they will not be considered in the supreme court. *Michel v. Ware*, 3 Neb. 229.

861. (1878.) Where the record does not show that any exception was taken to the charge of the court to the jury, no foundation is laid for a review of the instructions in the supreme court. *Scofield v. Brown*, 7 Neb. 221.

862. (1879.) In order to make errors committed by the court below on the trial, in ruling upon the evidence, or in giving the law to the jury, ground for reversing the judgment, the record must show that they were clearly pointed out to the court below in the motion for a new trial. *McCormick v. Keith*, 8 Neb. 142.

863. Assignments of error relating to the giving and refusal of instructions cannot be considered unless the record discloses that exceptions were taken at the trial. (1894) *Rea v. Bishop*, 41 Neb. 202 (59 N. W. 555); (1896) *City of Kearney v. Smith*, 47 Neb. 408 (66 N. W. 533); (1896) *Unland v. Garton*, 48 Neb. 202 (66 N. W. 1130); (1896) *Lowe v. Vaughan*, 48 Neb. 651 (67 N. W. 464); (1896) *Merrill v. Equitable Farm & Stock Co.*, 49 Neb. 198 (68 N. W. 365); (1897) *Rema v. State*, 52 Neb. 375 (72 N. W. 474; (1902) *German Ins. Co. v. Stiner*, 2 Unof. 308 (96 N. W. 122).

864. (1894.) In order to obtain a review of matters occuring on the trial it must appear that the errors complained of were called to the attention of the district court by a motion for a new trial. A record which discloses that a motion for a new trial was filed and overruled, but which does not disclose the grounds of such motion, is insufficient for this purpose. *Koehler v. Summers*, 42 Neb. 330 (60 N. W. 567).

865. (1895.) A motion for a new trial is a necessary part of a record to review by petition in error a judgment based on the findings of a court. *Weber v. Kirkendall*, 44 Neb. 766 (63 N. W. 35).

866. (1898.) Taking an exception is an act of counsel in court. The evidence of the act is its notation of record. *State v. Bartley*, 56 Neb. 810 (77 N. W. 438).

867. (1898.) A journal entry disclosed the presentment of a motion for a new trial. In the same entry was stated that defendant moved for judgment, also the rendition of the same—following all of which there appeared this: "To all of which plaintiff duly excepts." *Held*, Sufficient evidence of the exception to the action of the court on the motion for a new trial, although somewhat questionable practice to have the exception so noted. *State v. Bartley*, 56 Neb. 810 (77 N. W. 438).

868. (1899.) An assignment of error that the court erred in denying a motion for a continuance is without merit where the record does not disclose that the motion was ever presented to the court for decision, or that there was any action or refusal to act thereon. *Nelson v. Farmland Security Co.*, 58 Neb. 604 (79 N. W. 161).

869. (1899.) Alleged errors occurring at the trial of a law action cannot be reviewed, unless there is in the record authentic evidence that a motion for a new trial was overruled by the district court. *Chicago, R. I. & P. R. Co. v. Young*, 58 Neb. 678 (79 N. W. 556).

870. (1902.) The supreme court cannot consider or pass upon assignments of error when the record fails to show any rulings on, or exceptions to, the matters complained of in the court below. *Wells v. Fetzer*, 2 Unof. 551 (89 N. W. 596).

Ruling of court on objections.

871. (1880.) When the error complained of lies in the exclusion of testimony under objection by opposing counsel, and the record, although showing the objections made, is silent as to the ruling of the court thereon, there is no question presented for review. *Haller v. Blaco*, 10 Neb. 36 (4 N. W. 362).

872. (1895.) Assignments in a petition in error relating to errors occuring at the trial and in the rendition of judgment will not be considered where the record fails to show a ruling on a motion for a new trial. *Leach v. Renwald*, 45 Neb. 207 (63 N. W. 387).

873. (1901.) Where reversal of a judgment is sought by reason of errors required to be set up in a motion for a new trial, the record must show a ruling upon such motion. *Voorheis, Miller & Co. v. Leisure*, 1 Unof. 601 (95 N. W. 676).

Opinion of lower court.

874. (1898.) Where a case is tried to the court without a jury and a general finding made upon which judgment is rendered, and, in addition thereto, the court files a written opinion in the case, such opinion is not an essential part of the record of the case when it is brought here for review. *Phenix Ins. Co. v. Fuller*, 53 Neb. 811 (74

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N. W. 269; 68 Am. St. Rep. 637; 40 L. R. A. 408).

875. (1900.) What the presiding judge may say, on the hearing of a motion or trial of a cause, respecting his reasons for granting an order in the case at chambers, is not evidence; and such statement cannot be considered for any purpose. *Northwestern Mutual Life Ins. Co. v. Burr*, 60 Neb. 476 (83 N. W. 663).

Review of decision of intermediate court.

876. (1891.) Errors of law occurring at the trial will not be reviewed in the supreme court upon a petition from the county court to the disctrict court in a civil action tried to the county court without a jury. *Nickerson v. Needles*, 32 Neb. 230 (49 N. W. 433).

877. (1894.) Where a proceeding in error is prosecuted from the judgment of a justice of the peace to the district court, a petition in error must be filed in that court, specifically enumerating the errors relied on for a reversal of such judgment; and to enable the supreme court to review the judgment of the district court on said error proceeding, the petition in error, on which the district court acted, must be incorporated into the record brought here. *Lean v. Andrews*, 38 Neb. 656, (57 N. W. 401).

878. (1894.) The testimony taken at the hearing of an application for a liquor license, and transmitted to the district court, becomes a part of the record, and no bill of exceptions is necessary to bring it before the supreme court for review. *Powell v. Egan*, 42 Neb. 482 (60 N. W. 932).

879. (1894.) To enable the supreme court to review the judgment of the district court reversing the judgment of the county court on error proceedings, the petition in error on which the district court acted must be incorporated into the record. *Lean v. Andrews*, 38 Neb. 656 (57 N. W. 401); (1895) *Jandt v. Deranlieu*, 43 Neb. 422 (61 N. W. 632).

880. (1895.) The action of the district court in affirming an order dissolving an attachment in the county court will not be reviewed in the supreme court when the record of the county court has been omitted from the transcript. *Goldsmith v. Wix*, 43 Neb. 573 (61 N. W. 718).

881. (1895.) An order of the district court refusing to strike out the pleadings because presenting issues not made before a justice from whom the case was appealed cannot be reviewed unless the record discloses the issues presented before the justice. *First Nat. Bank of Omaha v. Chilson*, 45 Neb. 257 (63 N. W. 362).

882. (1897.) Where the sole question presented in the district court was the regularity of the appointment of a county judge by county commissioners, the affirmance of the judgment of the county court by a district court must be approved in the supreme court as being the only judgment which the district court could have rendered in view of the impossibility of perpetuating the evidence adduced in the county court upon the question therein presented. *Lowe v. Bishop*, 52 Neb. 551 (72 N. W. 959).

883. (1902.) When the judgment of a district court, in a proceeding in error to review the judgment of a justice of the peace, is before the supreme court for review, the transcript must contain the judgment of the justice and such other proceedings as are up for review. *Saussay v. Lemp Brewing Co.*, 64 Neb. 429 (89 N. W. 1048).

884. (1902.) A judgment of a district court, on an appeal from an order of an excise board, granting a license to sell malt, spirituous and vinous liquors, will not be reviewed by the supreme court in the absence of a duly certified transcript of the application, remonstrance and the final order of such board in the premises. *Marferding v. Jones*, 2 Unof. 441 (89 N. W. 290).

885. (1903.) Alleged errors by reason of change of issues on appeal from the county court will not be reviewed unless the transcript shows that there was a judgment in and appeal from that court and sets forth the pleadings therein. (*Walton v. Campbell*, 51 Neb. 788.) *Kummer v. Dubuque Turbine and Roller Mills Co.*, 4 Unof. 347 (93 N. W. 938).

Matters not essential to review.

886. (1871.) The court reflects upon the habit of inserting in the transcripts of the proceedings in the district court, papers filed therein upon which no question is made, because the same unnecessarily encumber and burden the records of the supreme court. *Morgan v. Larsh*, 1 Neb. 361; (1872) *Smith v. Fife*, 2 Neb. 10.

887. (1882.) Only such matter should be included in a transcript brought to the supreme court as is necessary to a correct understanding of the case. *Galley v. Galley*, 13 Neb. 200 (13 N. W. 172); (1888) *Hilton v. Bachman*, 24 Neb. 490 (39 N. W. 419).

888. (1897.) A bill of exceptions is sufficient if it contains all of the record of the

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proceedings to be reviewed necessary to explain the exception taken. (*Dietrichs v. Lincoln & N. R. Co.*, 12 Neb. 225.) *Sanford v. Modine*, 51 Neb. 728 (71 N. W. 740).

889. (1898.) The judgment of the district court must stand or fall upon the statutory record of the case—that is, the pleadings, the finding and judgment, and the bill of exceptions made a part of the record, and an opinion filed by the trial court should not be considered. *Phenix Ins. Co. v. Fuller*, 53 Neb. 811 (74 N. W. 269; 68 Am. St. Rep. 637; 40 L. R. A. 408).

890. (1898.) The transcript brought to this court should contain so much of the record of the district court as is essential to a correct understanding of the case. *Koores v. State, ex rel. Shoop*, 54 Neb. 486 (74 N. W. 823).

891. (1901.) Affidavits not presented to and considered by the trial court will not be considered in the supreme court in the event that the case is brought to this court for review, and therefore should not be included in the bill of exceptions. *State, ex rel. Pierson, v. Fawcett*, 2 Unof. 243 (96 N. W. 219).

892. (1906.) A transcript on appeal should contain the judgment or order sought to be reversed or modified, and, in addition thereto, only such matters as may be necessary to present the rulings sought to be reviewed; to include other matters is a useless expense and tends to obscure the real questions presented. *Fike v. Ott*, 76 Neb. 439 (107 N. W. 774).

B. Necessity of Bill of Exceptions to Bring Matters into Record.

Use of bill of exceptions in another case, see *ante*, §§ 742-745.

In general.

893. (1882.) Appellants having filed their answer out of time were defaulted, and a motion to set aside such default overruled and a second answer stricken from the files. There being no bill of exceptions no case is presented to the supreme court and appeal dismissed. *Dewey v. Lewis*, 12 Neb. 306 (11 N. W. 330).

894. (1883.) When it is sought to present to the supreme court alleged errors, occurring upon the trial of a cause in the district court, a bill of exceptions, settled and signed as required by statute, is indispensably necessary, and no other paper, record, or showing can be made to take its place. *Edwards v. Kearney*, 14 Neb. 83 (15 N. W. 329); (1894) *Scott v. Spencer*, 42 Neb. 632 (60 N. W. 892); (1896) *Oltmanns v. Findlay*, 47 Neb. 289 (66 N. W. 425).

895. (1883.) Where a motion for a new trial is made for reasons which would not otherwise be apparent from the record, they should be incorporated in a bill of exceptions. *Missouri P. R. Co. v. Hays*, 15 Neb. 224 (18 N. W. 51).

896. (1884.) Papers in a case, not a part of the record proper, can only be considered by the supreme court in cases brought to this court on error, or by appeal, when the same are embodied in a bill of exceptions. *Frederick v. Ballard*, 16 Neb. 559 (20 N. W. 870).

897. (1885.) A bill of exceptions is necessary only to bring into the record that which without one would not be a part thereof. *O'Donohue v. Hendrix*, 13 Neb. 255 (13 N. W. 215).

898. (1887.) Where plaintiff filed his petition in equity in the district court to which defendant presented a demurrer, on the ground that the petition did not state the facts sufficient to constitute a cause of action, and such demurrer was sustained, neither a motion for a new trial nor bill of exceptions was necessary in order to obtain a review in the supreme court by appeal. *Hays v. Mercier*, 22 Neb. 656 (35 N. W. 894).

899. (1896.) Where it is sought to present to the supreme court alleged errors occurring at the trial in a district court to determine which involves an examination of matters which can only properly be presented by a bill of exceptions, such bill, settled and signed as prescribed by law, is indispensably necessary. *Scott v. Spencer*, 42 Neb. 632 (60 N. W 892); (1897) *Denise v. City of Omaha*, 49 Neb. 750 (69 N. W. 119); (1898) *Andrews v. Kerr*, 54 Neb. 618 (74 N. W. 1071).

900. (1903.) Where error affirmatively appears on the face of the record proper, a bill of exceptions is unnecessary to obtain a review of such errors. *Herman v. Beck*, 68 Neb. 566 (94 N. W. 512).

For review on appeal.

901. (1901.) An appeal may be prosecuted from a decree in equity, though no bill of exceptions was settled and allowed. *National Wall Paper Co. v. Columbia Nat. Bank*, 63 Neb. 234 (88 N. W. 481; 56 L. R. A. 121).

Evidence.

Effect of quashing bill of exceptions, see *post*, §§ 1266-1284.

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Necessity for having evidence in record, see *ante*, §§ 768-825.

902. (1877.) Where evidence has been introduced in the court below, which is not properly a matter of record, a party who desires to avail himself of it in the supreme court must preserve the same by a bill of exceptions. *Ray v. Mason*, 6 Neb. 101.

903. (1879.) When there is no bill of exceptions the supreme court will presume that there was sufficient evidence before the court below to sustain the findings and judgment. *State v. Knapp*, 8 Neb. 436; (1884) *Madsen v. Norfolk Mill Co.*, 15 Neb. 644 (19 N. W. 636).

904. (1880.) If a party rely upon the fact that there was no evidence in a case where evidence was necessary, he must establish it by a proper bill of exceptions. *Credit Foncier v. Rogers* 10 Neb. 184 (4 N. W. 1012).

905. (1880.) Where testimony is offered and excluded, the bill of exceptions must set forth the testimony thus offered and rejected. *McMillan v. Mallory*, 10 Neb. 228 (4 N. W. 1004; 35 Am. Rep. 471).

906. (1881.) There being no bill of exceptions, it will be presumed that the evidence sustains the decree, and that the mortgage contained a provision for an attorney's fee so as to be notice to a purchaser of the mortgaged premises. *White v. Rourke*, 11 Neb. 519 (9 N. W. 689).

907. (1884.) Where evidence has been introduced in the court below, which is not properly a matter of record, a party who wished to avail himself of it in the supreme court must preserve the same by a bill of exceptions. *Thesing v. School District No. 57*, 16 Neb. 134 (19 N. W. 625).

908. (1886.) Where it is sought to review the judgment of the trial court upon the facts, the evidence must be preserved in a bill of exceptions. *Roberts v. Hershiser*, 20 Neb. 594 (31 N. W. 237).

909. (1887.) Objections to the form of notice to a tenant to quit, will not be considered, there being no bill of exceptions. *Hitchcock v. McKinster*, 21 Neb. 148 (31 N. W. 507).

910. (1889.) Plats introduced in evidence should be attached to the bill of exceptions. *Fink v. Republican V. R. Co.*, 27 Neb. 660 (43 N. W. 418).

911. (1891.) Without a bill of exceptions embodying the evidence, the verdict will not be set aside as excessive and not sustained by the evidence. *Zimmerman v. Klingeman*, 31 Neb. 495 (48 N. W. 268); (1901) *Elkhorn Valley Bank v. Marley*, 61 Neb. 583 (85 N. W. 846).

912. (1895.) The character of the evidence introduced below can only be shown in the supreme court by a properly authenticated bill of exceptions. It cannot be shown by affidavits filed in the appellate court. *Scott v. Spencer*, 44 Neb. 93 (62 N. W. 312).

913. (1896.) Assignments of error relating to the sufficiency of the evidence and the rulings of the court in receiving and excluding evidence, will be disregarded in the absence of a bill of exceptions properly allowed and authenticated. *Andres v. Kridler*, 47 Neb. 585 (66 N. W. 649); (1898) *Cole v. Arlington State Bank*, 54 Neb. 632 (74 N. W. 1100); (1898) *Village of Arlington v. Barothy*, 56 Neb. 656 (77 N. W. 52).

914. (1896.) Where there is presented by appeal only the sufficiency of the evidence to sustain the judgment of the district court, such judgment will be affirmed when there is to be found in the record no bill of exceptions. *Winters v. Means*, 48 Neb. 333 (67 N. W. 155); (1896) *Aultman, Miller & Co. v. Welch*, 49 Neb. 117 (68 N. W. 364); (1897) *Douglas v. Smith*, 50 Neb. 899 (70 N. W. 511); (1898) *Gay v. Reynolds*, 57 Neb. 194 (77 N. W. 661); (1899) *Noble v. Neal*, 57 Neb. 797 (78 N. W. 383); (1899) *Doolittle v. American Nat. Bank*, 58 Neb. 454 (78 N. W. 926); (1901) *Bankers Life Ass'n v. Comm'rs of Douglas County*, 61 Neb. 202 (85 N. W. 54); (1901) *University of Michigan v. McGuckin*, 62 Neb. 489 (87 N. W. 180; 57 L. R. A. 917).

915. (1897.) In the absence of a bill of exceptions, issues of fact cannot be considered in the supreme court on appeal, even though the transcript of the pleadings and proceedings recites that the cause was originally determined on an agreed statement of facts copied in such transcript. Following *State Ins. Co. of Des Moines v. Buckstaff Bros. Mfg. Co.*, 47 Neb. 1 (66 N. W. 27). *Stuart v. Burcham*, 50 Neb. 823 (70 N. W. 383).

916. (1901.) Evidence relating to challenges of jurors for cause and to the array can not be considered, unless settled and allowed by a bill of exceptions. *West v. State*, 63 Neb. 257 (88 N. W. 503).

917. (1901.) The evidence used in the district court, upon a hearing of a motion to

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correct an entry in the journal, must be preserved in a bill of exceptions, or it will not be considered in the supreme court. *Miller v. Brown*, 1 Unof. 754 (95 N. W. 797).

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Depositions.

918. (1871.) A deposition used upon a hearing in the district court, but not included nor referred to in the bill of exceptions, will, on motion in the supreme court, be stricken out of the transcript. *Nebraska City v. Baker*, 1 Neb. 180.

919. (1883.) Depositions given or offered in evidence in the trial court must be embodied in a bill of exceptions to authorize the supreme court to consider them. *Kyle v. Chase*, 14 Neb. 528 (16 N. W. 821.)

Affidavits.

Necessity of having affidavits in record, see *ante*, §§ 827-835.

920. (1880.) Affidavits used on a hearing in the district court must be preserved by a bill of exceptions in order to be considered by the supreme court. A certificate by the clerk of the district court that such affidavits were used on the hearing of the cause must be disregarded, not being authorized by the statute. *Aultman v. Howe*, 10 Neb. 8 (4 N. W. 357).

921. (1881.) Affidavits used on a hearing in the district court must be embodied in a bill of exceptions to be available in the supreme court. *Oliver v. Sheeley*, 11 Neb. 521 (9 N. W. 689); (1883) *Kyle v. Chase*, 14 Neb. 528 (16 N. W. 821); (1884) *Dorrington v. Minnick*, 15 Neb. 397 (19 N. W. 456); (1884) *Empkie v. McLean*, 15 Neb. 629 (19 N. W. 593); (1884) *Donovan v. Sherwin*, 16 Neb. 129 (20 N. W. 26); (1890) *Burke v. Pepper*, 29 Neb. 320 (45 N. W. 466); (1890) *McCarn v. Cooley*, 30 Neb. 552 (46 N. W. 715); (1891) *Payne v. Jones*, 33 Neb. 260 (50 N. W. 8); (1891) *Veneman v. McCurtain*, 33 Neb. 643 (50 N. W. 955); (1896) *Minick v. Minick*, 49 Neb. 89 (68 N. W. 374); (1898) *Smith Bro. Loan Co. v. Weiss*, 56 Neb. 210 (76 N. W. 564); (1901) *Newtson v. Walker*, 1 Unof. 118 (95 N. W. 470); (1902) *Phœnix Mutual Life Ins. Co. v. Williams*, 3 Unof. 79 (90 N. W. 756); (1903) *Stansbury v. Storer*, 70 Neb. 603 (97 N. W. 805).

922. (1883.) It is only where affidavits are not otherwise a part of the record that their incorporation in a bill of exceptions is required. *Republican V. R. Co. v. Boyse*, 14 Neb. 130 (15 N. W. 364). [Overruled. *Tessier v. Crowley*, 16 Neb. 369].

923. (1883.) To make affidavits used to impeach an award of arbitrators a part of the record so as to be available on proceedings in error, they must be embodied in a bill of exceptions allowed and signed by the judge, or clerk of the court, as the statute directs. *Sides v. Brendlinger*, 14 Neb. 491 (17 N. W. 113).

924. (1884.) Affidavits in support of a motion for a new trial which are not embodied in the bill of exceptions, will not be considered by the supreme court. *Dolen v. State*, 15 Neb. 405 (19 N. W. 627); (1891) *Hunter v. Bell*, 33 Neb. 249 (49 N. W. 1132); (1891) *Van Etten v. Butt*, 32 Neb. 285 (49 N. W. 365); (1893) *Bush v. Bank of Commerce*, 38 Neb. 403 (56 N. W. 989); (1895) *Gray v. Godfrey*, 43 Neb. 672 (62 N. W. 41); (1896) *Rosecrans v. Asay*, 49 Neb. 512 (68 N. W. 627); (1899) *Langdon v. Wintersteen*, 58 Neb. 278 (78 N. W. 501); (1899) *Willits v. Arena Fruit Co.*, 58 Neb. 659 (79 N. W. 624); (1901) *Wayne Nat. Bank v. Kruger*, 1 Unof. 270 (95 N. W. 476); (1901) *Johnson v. Carlson*, 1 Unof. 368 (95 N. W. 788).

925. (1884.) Affidavits alleged to have been made at the hearing of a motion to set aside a default and judgment in the district court, but which have not been embodied in or saved by a bill of exceptions, will not be considered in the supreme court. *Vindquest v. Perky*, 16 Neb. 284 (20 N. W. 301); (1894) *Beard v. Ringer*, 41 Neb. 831 (60 N. W. 95).

926. (1884.) Affidavits other than the verifications of pleadings constitute no part of the record proper, but must be embodied in the bill of exceptions. *Frederick v. Ballard*, 16 Neb. 559 (20 N. W. 870).

927. (1885.) Affidavits filed as evidence in the district court must be certified to the supreme court by a proper bill of exceptions, and be thus made a part of the record, or they cannot be considered. *Bradshaw v. State*, 17 Neb. 147 (22 N. W. 361); (1896) *Norfolk Nat. Bank v. Job*, 48 Neb. 774 (67 N. W. 781).

928. (1885.) Affidavits used as evidence upon the hearing of a motion in the district court will not be considered in the supreme court unless preserved as a part of the record by a bill of exceptions. And when such papers are improperly attached to the record they will, upon motion, be stricken from the files. *Graves v. Scoville*, 17 Neb. 593 (24 N. W. 222); (1886) *Jacoby v. Mitchell*, 19 Neb. 537 (26 N. W. 255); (1886) *Joiner v. Van Alstyne*, 20 Neb. 578 (30 N. W. 944); (1892) *Wohlenberg v. Mel-*

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chert, 35 Neb. 803 (53 N. W. 982); (1893) *Maggard v. Van Duyn*, 36 Neb. 862 (55 N. W. 263); (1894) *Barry v. Barry*, 39 Neb. 521 (58 N. W. 193); (1894) *Aldrich v. Bruss*, 39 Neb. 569 (58 N. W. 194); (1894) *National Lumber Co. v. Ashby*, 41 Neb. 292 (59 N. W. 913); (1897) *Morsch v. Besack*, 52 Neb. 502 (72 N. W. 853); (1889) *Mercantile Trust Co. v. O'Hanlon*, 58 Neb. 482 (78 N. W. 925); (1903) *Gutterson v. Meyer*, 68 Neb. 767 (94 N. W. 969).

929. (1887.) An affidavit used in resistance of a motion to dismiss an appeal on the ground that the transcript, etc., of the proceedings before the justice were not presented to the clerk of the district court within the time required by law cannot be considered in the supreme court on a proceeding in error to the district court to reverse its judgment sustaining such motion, and dismissing the appeal, unless such affidavit is preserved by bill of exceptions and so made a part of the record. *Clapp v. Bowman & Ware*, 22 Neb. 198 (34 N. W. 362).

930. (1889.) Affidavits used at the hearing of a motion to dissolve an attachment will not be considered in the supreme court on error, unless preserved by a bill of exceptions. *Olds Wagon Co. v. Benedict*, 25 Neb. 372 (41 N. W. 254); (1890) *Strunk v. State, ex rel. Lipp*, 31 Neb. 119 (47 N. W. 640); (1892) *Hobbs v. Hunt*, 34 Neb. 657 (52 N. W. 278).

931. (1891.) Where affidavits or other evidence are used on the hearing of a motion for a change of venue in the district court, such evidence must be preserved in a bill of exceptions to be available in the supreme court. *Van Etten v. Kosters*, 31 Neb. 285 (47 N. W. 916).

932. (1891.) Affidavits as to alleged misconduct of jurors, used in the district court will not be considered by the supreme court, unless they are made a part of the record, by being embodied in a bill of exceptions. *City of Plattsmouth v. Boeck*, 32 Neb. 297 49 N. W. 167).

933. (1892.) Where issues of fact are tried on affidavits, the supreme court will not review the order of the district court upon such evidence, unless the affidavits are identified and preserved in the form of a bill of exceptions. *Fitzgerald v. Benadom*, 35 Neb. 317 (53 N. W. 72).

934. (1893.) Affidavits used in support of a motion for a continuance in the district court, to be available in the appellate court, must be made a part of the record by a bill of exceptions. *Barton v. McKay*, 36 Neb. 632 (54 N. W. 968); (1895) *Nelson v. Johnson*, 44 Neb. 7 (62 N. W. 244); (1897) *Hartford Fire Ins. Co. v. Corey*, 53 Neb. 209 (73 N. W. 674); (1898) *Reid v. Panska* 56 Neb. 195 (78 N. W. 534); (1901) *Union Nat. Bank of Chicago v. Touzalin Improvement Co.*, 1 Unof. 116 (95 N. W. 489).

935. (1894.) In absence of a bill of exceptions the averments of a petition for a receiver must be taken as true where they have not been denied except by affidavits used as evidence. *Lowe v. Riley*, 41 Neb. 812 (60 N. W. 96).

936. (1903.) Affidavits filed in support of objections to jurisdiction over the person, to be available in proceedings in error, must be preserved by bill of exceptions. *Gretch v. Maxfield*, 4 Unof. 256 (93 N. W. 934).

937. (1906.) Affidavits found in the files of the case or attached to the transcript cannot be considered as having been used in support of a motion for a new trial, unless they are included in and shown by the certificate of the proper officer to be a part of the bill of exceptions, and to have been actually used in evidence upon the hearing of the motion. *Loar v. State*, 76 Neb. 148 (107 N. W. 229).

Instructions.

Necessity for having instructions in record, see *ante*, §§ 383-841.

938. Instructions are properly matters of record and should not be embodied in a bill of exceptions. (1881) *Eaton v. Carruth*, 11 Neb. 231 (9 N. W. 58); (1883) *Cleveland Paper Co. v. Banks*, 15 Neb. 20 (16 N. W. 833).

939. (1891.) Instructions must be preserved in a bill of exceptions in order to be reviewed. *Lincoln Nat. Bank v. Davis*, 32 Neb. 1 (48 N. W. 892).

940. (1895.) Instructions given and refused are a part of the record and need not be and should not be embodied in a bill of exceptions. *Blumer v. Bennett*, 44 Neb. 873 (63 N. W. 14).

941. (1897.) Instructions may be reviewed when properly certified in the transcript, and need not be embodied in the bill of exceptions. *Bennett v. McDonald*, 52 Neb. 278 (72 N. W. 268).

942. (1898.) The instructions to a jury are proper matters of record, and need not be preserved in the bill of exceptions. *State v. Bartley*, 56 Neb. 810 (77 N. W. 438).

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Motions.

943. (1881.) Motion for new trial, and all matters required by the statutes to be filed with the clerk and entered upon the journal of the court, should not be embodied in a bill of exceptions. *Eaton v. Carruth*, 11 Neb. 231 (9 N. W. 58).

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944. (1900.) A motion to vacate a sale, when filed, is a part of the record and should not be embodied in the bill of exceptions. *Mandell v. Weldin*, 59 Neb. 699 (82 N. W. 6).

Stipulations.

Necessity for having stipulation in record, see *ante*, § 836.

945. (1890.) Where a stipulation of facts between the parties to a trial in the district court is presented without a bill of exceptions, the supreme court will not accept it as the whole of the evidence upon which the findings and judgment of the court below were predicated unless it is brought up on a proper bill of exceptions. *Herbison v. Taylor*, 29 Neb. 217 (45 N. W. 626).

946. (1896.) A written stipulation of facts forms no part of a record for review unless made so by a bill of exceptions. *State Ins. Co. v. Buckstaff Bros. Mfg. Co.*, 47 Neb. 1 (66 N. W. 27); (1901) *Keeler v. Manwarren*, 61 Neb. 663 (85 N. W. 839).

947. (1901.) An agreed statement of facts not incorporated in a bill of exceptions is not properly in the record. *Bankers Life Ass'n. v. Commissioners of Douglas County*, 61 Neb. 202 (85 N. W. 54).

Rules of district court.

948. (1902.) The rules of practice in a district court, alleged to have a material bearing on the rulings complained of, before they can enter into a determination of a question presented in the supreme court, must be incorporated in the bill of exceptions. *Jones v. Cleary*, 2 Unof. 541 (89 N. W. 386).

Certificates.

949. (1891.) Neither a certificate of the clerk of the district court, showing in what proportion the names of the persons upon the list from which the petit jurors were drawn were selected from the several wards and precincts of D. county, nor a certificate of the county clerk, showing the number of votes returned as cast in the respective wards and precincts of said county, such certificates not having been made a part of a bill of exceptions, will be considered in an appellate proceeding in the supreme court. *Neal v. State*, 32 Neb. 120 (49 N. W. 174).

Effect of failure to procure bill.

Questions considered when bill of exceptions has been quashed, see *post*, §§ 1266-1284.

950. (1880.) A party or his attorney is justified in relying on the stenographic reporter for a transcript of the oral proceedings of a trial, and if without fault on his part such transcript is not prepared within the time limited by law, and he is thereby deprived of his bill of exceptions, the court, in a proper case, wil grant a new trial. *Curran v. Wilcox*, 10 Neb. 449 (6 N. W. 762).

951. (1896.) The failure of a defeated party, through his own neglect, to secure a true bill of exceptions, presents no ground for reversal. *Blomgren v. Holmquest*, 49 Neb. 49 (68 N. W. 382).

C. Contents, Making and Settlement of Bill of Exceptions.

Nature and purposes in general.

952. (1885.) The purpose of a bill of exceptions is to identify the paper or instrument and designate it as the paper or instrument used on the hearing. *Graves v. Scoville*, 17 Neb. 593 (24 N. W. 222).

953. (1901.) The function of a bill of exceptions is to bring into the record the facts on which the trial court decided the questions of law presented for review. *State, ex rel. Pierson, v. Fawcett*, 2 Unof. 243 (96 N. W. 219).

Requisites and sufficiency in general.

954. (1882.) The same procedure is to be observed in preparing a bill of exceptions in an equity case as in an action at law. *Uhling v. Schellenberg*, 12 Neb. 609 (12 N. W. 272).

955. (1895.) A bill of exceptions should begin with a proper caption, the matter should be systematically arranged, and the judge should, by reference, identify the exhibits. *Vaughn v. Crites*, 44 Neb. 812 (62 N. W. 1098).

956. (1899.) The validity of a bill of exceptions does not depend upon the time within which a motion for a new trial is filed. *Nebraska Nat. Bank v. Pennock*, 59 Neb. 61 (80 N. W. 255).

957. (1901.) A bill of exceptions made up of affidavits presented before a trial court on objections to an award, and which does not purport, and is not certified, to present the evidence taken before the arbitrators

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who rendered the award, cannot be considered with reference to the question as to whether or not the award was sustained by such evidence. *Shutt v. Hebebrand*, 1 Unof. 573 (95 N. W. 785).

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958. (1903.) The supreme court is under no obligation to consider a bill of exceptions which is not fairly and reasonably legible. *Hoy v. State*, 69 Neb. 516 (96 N. W. 228).

959. (1895.) The provisions of section 587*a* of the code of civil procedure authorizing the certification of the original bill of exceptions confined to proceedings in the supreme court reviewing judgments of district courts. The original bill of exceptions cannot be certified from a county court to the district court. *Sedgwick v. Durham*, 45 Neb. 86 (63 N. W. 142).

Statutory provisions.

960 (1886.) The statute relating to bills of exceptions being remedial in its nature will be liberally construed. *Morehead v. Adams*, 18 Neb. 569 (26 N. W. 242); (1901) *Williams v. Miles*, 62 Neb. 566 (87 N. W. 315).

Right to bill.

961. (1894.) The right to a bill of exceptions is not implied from the right to prosecute proceedings in error, and that a bill of exceptions cannot be allowed except in pursuance of statutory authority. *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb. 520 (57 N. W. 161). *Hopkins v. Scott*, 38 Neb. 661 (57 N. W. 391).

Matters included in general.

962. (1881.) Where the exception is for the admission of illegal evidence on the trial, it is not necessary that bill contain more of the testimony than is necessary to explain the exception taken. *Dietrichs v. Lincoln & N. R. Co.*, 12 Neb. 225 (10 N. W. 718).

963. (1899.) A bill of exceptions may properly include a record of events transpiring in the presence of the court, but not formally introduced in evidence. *State, ex rel. Bankers Reserve Life Ass'n, v. Scott*, 59 Neb. 499 (81 N. W. 305).

964. (1899.) The rules of practice of the district court may be incorporated into the bill of exceptions without being formally introduced in evidence. *State, ex rel. Bankers Reserve Life Ass'n, v. Scott*, 59 Neb. 499 (81 N. W. 305).

965. (1902.) Matters merely in the judge's mind, and which were in no way a part of the public proceedings at a hearing, are not properly a part of a bill of exceptions. *State, ex rel. Cobb, v. Fawcett*, 63 Neb. 523 (88 N. W. 681).

966. (1902.) A bill of exceptions may properly include a record of events which took place in the presence of or under the direction of the court and matters of which the court took judicial notice, if in face considered by the court in arriving at a decision, although not formally introduced in evidence. *State, ex rel. Cobb, v. Fawcett*, 64 Neb. 496 (90 N. W. 250).

Incorporating evidence at former trial.

967. (1898.) Where there have been two or more trials, the bill of exceptions cannot, after the ruling on the final motion, reach back indefinitely and bring into the record the evidence adduced on former trials. *State, ex rel. Morton, v. Dickinson*, 56 Neb. 251 (76 N. W. 543).

Incorporating exhibits.

968. (1899.) Ballots which have been used in evidence, in an election contest, can be made a part of a bill of exceptions though not physically attached to such bill at the time of the settlement. *Mauck v. Brown*, 59 Neb. 382 (81 N. W. 313).

969. (1901.) Where ponderous articles, which do not admit of physical attachment to the record proper, are part of the evidence in the case, are referred to in the bill of exceptions, and articles, answering to such reference, are filed in the supreme court with the record in the case, and produced at the hearing, bearing the marks of identification of the official reporter of the trial court; and their identity is unchallenged, save in the course of the argument, the articles produced will be treated as a part of the bill of exceptions. *O'Neill v. Chicago, R. I. & P. R. Co.*, 62 Neb. 358 (86 N. W. 1098).

Incorporating grounds of objection.

970. (1899.) Grounds of objection to a ruling, order or judgment which do not appear in the record may be brought into the bill of exceptions by the party complaining, by reducing such grounds of objection to writing and asking to have them incorporated into such bill of exceptions. *State, ex rel. Bankers Reserve Ins. Co., v. Scott*, 59 Neb. 499 (81 N. W. 305).

Duty of stenographer to furnish transcript.

971. (1896.) The supreme court will not make an order on a stenographer below to prepare a transcript of evidence for a bill of exceptions where the district judge made

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such an order upon condition that the fees should be paid, there being shown neither a compliance with the order nor an attempt to review it. *Argabright v. State*, 46 Neb. 822 (65 N. W. 886).

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Presentment to adverse party.

972. (1880.) Before a bill of exceptions is signed by the judge, whether in open court or during vacation, he should be satisfied that all parties to the record interested therein have been given suitable opportunity to examine the same, and to propose changes or additions. *Jefferson County v. Saxon*, 10 Neb. 14 (4 N. W. 309).

973. (1882.) Where a bill of exceptions was signed without being submitted to adverse party for examination and amendment, a motion to quash the same was sustained. *Uhling v. Schellenberg*, 12 Neb. 609 (12 N. W. 272); (1882) *Howard v. Lamaster*, 13 Neb. 221 (13 N. W. 211); (1884) *Madsen v. Norfolk Mill Co.*, 15 Neb. 644 (19 N. W. 636).

974. (1882.) If there is no receipt or other evidence in the record, an affidavit stating the delivery of the bill to the adverse party must show when and to whom the bill was delivered. *Howard v. Lamaster*, 13 Neb. 221 (13 N. W. 211).

975. (1892.) In appeal cases, where the interests of the parties plaintiff or defendant are so connected that the appeal necessarily will bring up the entire record, the failure to serve the bill of exceptions on some of such parties will not be cause for quashing the bill. *Reynolds v. Dietz*, 34 Neb. 265 (51 N. W. 747).

976. (1892.) Where there are two or more principal defendants against whom the plaintiff is seeking to enforce a claim, there being no particular controversy between them, service of the bill of exceptions upon one of such defendants or his attorney within the time fixed by statute will be sufficient. *Crane v. Keck*, 35 Neb. 683 (53 N. W. 606).

977. (1893.) In a case where appellees with adverse interests were represented by different counsel, the appellant left the draft of a proposed bill of exceptions at the office of one of appellee's counsel and notified the attorneys for the others that it was there for inspection. *Held*, Not a sufficient submission under section 311 of the code; and that the bill would be quashed as to all appellees to whom it had not otherwise been submitted. *Fitzgerald v. Brandt*, 36 Neb. 683 (54 N. W. 992).

978. (1896.) A proposed bill of exceptions is not submitted to the adverse party or his attorney of record, within the meaning of section 311 of the code, by leaving it at the office of the attorney in his absence. *Lancaster County Bank v. Gillilan*, 49 Neb. 165 (68 N. W. 352).

979. (1897.) A motion to quash a bill of exceptions on the ground that it was not presented to the adverse party or his attorney for examination and amendment within the statutory period should be made within a reasonable time after the bill is filed in the appellate court, and where not made for nearly eighteen months after the filing of the transcript, and after briefs upon the merits have been printed and served by the respective parties, such objection will be considered waived. *Nash v. Costello*, 50 Neb. 325 (69 N. W. 969).

980. (1897.) Objection to a bill of exceptions that it was not presented for examination and amendment within the statutory period, not made before the bill was signed and allowed by the trial judge, but raised for the first time in the supreme court, will not be considered. *Thompson v. Missouri P. R. Co.*, 50 Neb. 329 (69 N. W. 1119).

980*a*. (1908.) A bill of exceptions will not be quashed upon the motion of an appellee, to whom it had been properly submitted, because it was not served upon another party to the action. *First Nat. Bank of Plattsmouth v. Gibson*, 80 Neb. 577 (114 N. W. 777).

Proposed amendments.

981. (1879.) Within ten days from the expiration of the time fixed by statute, or the order of the court for preparing the bill by statute, or the order of the court for preparing the bill and submitting it to the adverse party, it must be returned to the party seeking the bill, with the proposed amendments, if any. And the party excepting has ten days after the expiration of the time fixed by law for the return of the bill to him in which to present the bill to the judge for his approval and signature. *First Nat. Bank of Omaha v. Bartlett*, 8 Neb. 319.

982. (1881.) It is the duty of the adverse party, upon receiving a bill of exceptions, to propose amendments thereto, and return such bill with his proposed amendments within the time limited by statute to the party proposing the bill. *Deck v. Smith*, 12 Neb. 205 (10 N. W. 705).

983. (1888.) A party seeking a bill of

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exceptions, who presents the proposed bill to the adverse party or his attorneys for amendment, within the time fixed by law or the order of the court, is entitled to have such bill examined by such adverse party, and amendments thereto proposed, if necessary. *State, ex rel. Covey, v. Gaslin*, 25 Neb. 71 (40 N. W. 601).

984. (1893.) Section 311 of the code makes it the duty of a party to whom is submitted a draft of a bill of exceptions for examination to return it with his proposed amendments, if any, within ten days. *Fitzgerald v Brandt*, 36 Neb. 683 (54 N. W. 992).

985. (1898.) In settling a bill of exceptions it is not sufficient that a paper containing suggestions of amendments be attached, and that it be disclosed that such amendments were allowed. Amendments which are allowed should be actually made in the body of the bill. *Brennan-Love Co. v. McIntosh*, 56 Neb. 140 (76 N. W. 461).

986. (1901.) A bill of exceptions allowed by the trial judge is not invalidated nor rendered incomplete or defective by failure upon his part to pass upon proposed amendments; if the party proposing such amendments desires to rely upon or take advantage of them in the supreme court, he should take the proper steps to require a ruling thereon. *Warren v. Wales*, 1 Unof. 446 (95 N. W. 610).

——— Effect of failure to propose amendments

987. (1882.) An adverse party upon receiving a bill of exceptions must propose amendments thereto and return the same with his proposed amendments to the party preparing the bill within the time limited by law. If no amendments are proposed, the judge, if satisfied of the correctness of the bill, may sign the same. *Fitzgerald v. Hollingsworth*, 13 Neb. 199 (13 N W. 209).

988. (1883.) Where a bill of exceptions purporting to contain all the testimony is submitted to the adverse party for amendment, and such party certifies that he has no amendments to propose to the same, the court will presume that such bill contains all the evidence, notwithstanding the certificate may not fully so certify. *Cattle v. Haddox*, 14 Neb. 59 (14 N. W. 803); (1898) *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803 (77 N. W. 346).

Time for preparation and service.

989. (1873.) Exceptions relating to instructions given to a jury, must be reduced to writing during the term at which the trial took place. *Holmes v. Wilhite*, 3 Neb. 147.

990. (1874.) To make exceptions to the charge of the court to the jury available to the party excepting, or to the ruling of the court in refusing to give instructions asked for, or to the admission of testimony, the exceptions must be reduced to writing at the same term at which the trial took place. *Hughes v. Kellog*, 3 Neb. 186.

991. (1881.) Under act of 1877, page 11, a bill of exceptions might be prepared within the time limited from the adjournment of the court *sine die*. (This is not statute law by amendment of 1881. Comp. Stat., 571.) *State, ex rel. Odien, v. Weaver*, 11 Neb. 163 (8 N. W. 385).

991*a*. (1886.) When pending the proceeding on a motion for a new trial a remittitur is entered and the motion overruled the statutory time may be had in which to prepare the bill of exceptions after the remittitur. *Dodge v. Runels*, 20 Neb. 33 (28 N. W. 849). [Overruled. *City of Seward v. Klenk*, 27 Neb. 615.]

992. (1886.) By section 311 of the civil code the time within which a bill of exceptions is to be prepared begins to run from the final adjournment of the district court. *Nyce v. Shaffer*, 20 Neb. 507 (30 N. W. 943).

993. (1889.) A jury trial was had in the district court at the March term thereof, 1888, the verdict being returned on the 7th day of the month. Within three days thereafter plaintiff in error filed a motion for a new trial. On the 30th of April the court adjourned *sine die*, without having passed upon the motion for a new trial. The next regular term convened on the 28th day of May, the same year. On the 30th day of July the motion for a new trial was argued and submitted to the court and on August 6 it was overruled. On the 26th day of September a bill of exceptions was served on defendant in error, who returned it October 11 without suggestion of amendment, and on the same day filed a protest with the judge against the allowance of the bill. On motion to quash it was *held*, that the bill was not served upon defendant in error within the time required by section 311 of the civil code, and the motion was sustained. *City of Seward v. Klenk*, 27 Neb. 615 (43 N. W. 407).

994. (1892.) The time within which a party must prepare and serve a bill of exceptions begins to run from the final ad-

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journment of the term of court at which the cause was decided and not from the date of the formal entry of the judgment by the clerk upon the journal. *Bickel v. Dutcher*, 35 Neb. 761, distinguished. *State, ex rel. Cochran, v. Hopewell*, 35 Neb. 822 (53 N. W. 990).

995. (1893.) The cause was tried in the district court on the 17th day of December, 1889, and forty days were given to reduce the exceptions to writing. The term of court adjourned without day December 23, and on the 29th day of the following month the trial judge, on a showing of diligence, granted an extension of thirty days' additional time in which to complete and serve a bill of exceptions. A draft of the bill was served on the attorneys of the successful party on February 19, 1890. *Held*, That the same was presented in time. *First Nat. Bank of Denver v. Lowrey*, 36 Neb. 290 (54 N. W. 568).

996. (1894.) The time for preparing and serving a bill of exceptions preserving the evidence introduced on a hearing of a preliminary motion where no time is given to reduce the exceptions to writing, begins to run from the final adjournment of the term of court at which the decision upon the motion was made, and not from the close of the term at which the final judgment in the case was rendered. *Schields v. Horbach*, 40 Neb. 103 (58 N. W. 720).

997. (1896.) Where a trial has been had and a motion for a new trial sustained, the time for preparing a bill of exceptions embodying the evidence on that trial is fixed at the latest by the term at which final judgment was rendered, or at which the motion for a new trial was sustained, and not by the term at which final judgment was rendered, or at which a new trial was had, or a new trial after such second trial denied. *State ex rel. Marrow, v. Ambrose*, 47 Neb. 235 (66 N. W. 306).

998. (1896.) The fact that the party excepting has been diligent, and the delay was caused by the default of the reporter in preparing a transcript, does not authorize the submission of a bill after the expiration of the time fixed by law. *Horbach v. City of Omaha*, 49 Neb. 851 (69 N. W. 121); (1897) *Mathews v. Mulford*, 53 Neb. 252 (73 N. W. 661).

999. (1897.) The official reporter's default in preparing a transcript of the testimony does not authorize the submission of the bill after expiration of the time fixed by law and the order of the court. *Mathews v. Mulford*, 53 Neb. 252 (73 N. W. 661).

1000. (1898.) If there be no motion for a new trial, as in equity cases, the bill must be served within fifteen days from the final adjournment of the term at which judgment is rendered. *State, ex rel. Morton, v. Dickinson*, 56 Neb. 251 (76 N. W. 543).

1001. (1898.) Where no order is made extending the time, a bill of exceptions, including the evidence given on the trial of a case, must be served within fifteen days from the final adjournment of the term at which the motion for a new trial is ruled on. *State, ex rel. Morton, v. Dickinson*, 56 Neb. 251 (76 N. W. 543).

1002. (1900.) Where no order is made fixing a time for preparing a bill of exceptions including the evidence adduced on the hearing of a motion to set aside a default and vacate a decree, such bill must be served within fifteen days from the final adjournment of the term at which the motion was determined. *State, ex rel. First Nat. Bank of Plattsmouth, v. Ramsey*, 60 Neb. 191 (82 N. W. 625).

——— **Presumption as to time.**

1003. (1885.) Where the transcript shows that a bill of exceptions was taken during the trial of an action of forcible entry and detainer, it will be presumed to have been prepared at that time, although not signed till a few days afterwards. *Smith v. Kaiser*, 17 Neb. 184 (22 N. W. 368).

——— **Extension of time.**

1004. (1879.) The statute allows a party excepting, fifteen days from the rising of the court, in which to prepare and submit to the adverse party a bill of exceptions. If longer time is desired, the court may extend the time not exceeding forty days from the rising of the court. *First Nat. Bank of Omaha v. Bartlett*, 8 Neb. 319; (1880) *Jefferson County v. Saxon*, 10 Neb. 14 (4 N. W. 309).

1005. (1886.) Where an order of the district court extended the time forty days from the adjournment of the court in which to "present" a bill of exceptions, *Held*, To mean the time within which to prepare the bill and present the same to the adverse party or his attorney. *Morehead v. Adams*, 18 Neb. 569 (26 N. W. 242).

1006. (1888.) When a judge decides upon the evidence before him that the party seeking a bill of exceptions has made a "due showing of diligence" in the preparation of the bill, and therefore extends the time in

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which to prepare the same, the supreme court will not review the evidence on which such extension was granted for the purpose of determining whether the showing was sufficient. *Greenwood v. Cobbey*, 24 Neb. 648 (39 N. W. 833).

1007. (1888.) Where time to prepare bill is extended, it is not necessary to preserve the evidence on which such extension was granted; nor is such order subject to review. *Greenwood v. Cobbey*, 24 Neb. 648 (39 N. W. 833).

1008. (1891.) Where, after a verdict has been returned in the district court, the judge of another district who tried the cause ceased to preside and returns to his own district, before the motion for a new trial is heard and determined, the motion may be passed upon by the court where the case is pending where the judge of that district is sitting, and the court has authority to allow not exceeding forty days from the adjournment of the term to prepare and serve the bill of exceptions. *State, ex rel. Downing, v. Gaslin*, 32 Neb. 291 (49 N. W. 353).

1009. (1891.) Where a district court has given a party forty days from the adjournment of a term to reduce his exceptions to writing, the judge has authority to extend the time in which to prepare and serve a bill of exceptions, for a period not exceeding forty days additional, when it appears that the party seeking the bill has used due diligence. Such power exists, notwithstanding the period first allowed expired before the application for an extension of time was made. *McDonald v. McAllister*, 32 Neb. 514 (49 N. W. 377).

1010. (1891.) Notice of application for additional time to prepare and serve a bill of exceptions is not essential. *McDonald v. McAllister*, 32 Neb. 514 (49 N. W. 377); (1893) *First Nat. Bank of Denver v. Lowrey*, 36 Neb. 290 (54 N. W. 568); (1899) *Hunter v. Union Life Ins. Co.*, 58 Neb. 198 (78 N. W. 516).

1011. (1891.) Where the orders extending the time in which to prepare a bill of exceptions do not exceed eighty days from the adjournment of the court *sine die*, this court will not review the action of the judge in extending the time. *Payne v. Jones*, 33 Neb. 260 (50 N. W. 8).

1012. (1891.) The code authorizes the court to grant forty days from the final adjournment of the court in which to prepare a bill of exceptions. If this time is insufficient, the court, or a judge thereof, may extend the time in which to prepare such bill an additional forty days. If the judge before whom the cause was tried is absent from his district, another judge of the same district where there are two or more, may make an order extending the time. *Payne v. Jones*, 33 Neb. 260 (50 N. W. 8)

1013. (1892.) The district judge, by overruling a motion to correct the record to make it show that the time to prepare a bill of exceptions had been extended forty days, in effect held that no such order had been made, and the signing of a bill by him within the time named was without authority. *Gray v. Elbling*, 35 Neb. 278 (53 N. W. 68).

1014. (1893.) On the granting of an order extending the time for preparing and serving a bill of exceptions, the proper practice is to file the same with the clerk of the district court. *First Nat. Bank of Denver v. Lowrey*, 36 Neb. 290 (54 N. W. 568).

1015. (1895.) A motion for the extension of time to prepare and serve a bill of exceptions may be overruled where the applicant has not been diligent. *Stein v. Vannice*, 44 Neb. 132 (62 N. W. 464).

1016. (1896.) An application for additional extension of time to prepare a bill of exceptions should be addressed to the judge to whose ruling exceptions was taken, such extension by another judge being ineffective. *Hanscom v. Lantry*, 48 Neb. 665 (67 N. W. 762).

1017. (1896) An inability to submit the bill to the adverse party or his attorney, on account of absence of the latter, the party proposing the bill having been diligent, would undoubtedly be good cause for extending the time, and the rights of both parties would thereby be saved. *Lancaster County Bank v. Gillilan*, 49 Neb. 165 (68 N. W. 352).

1018. (1896.) Section 311 of the code of civil procedure fixes and limits the time within which proposed bills of exceptions may be submitted to the adverse party. In the absence of any order, the party excepting has for this purpose fifteen days from the adjournment *sine die* of the term at which judgment is rendered or at which a motion for a new trial is ruled on. The court may in its discretion allow additional time, not exceeding forty days from such adjournment. Upon due showing of diligence, and not otherwise, the judge who

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tried the cause may further extend the time, but not beyond forty days additional. *Horbach v. City of Omaha*, 49 Neb. 851 (69 N. W. 121)

1019. (1904.) The trial court has no authority to extend the time for preparing and serving a bill of exceptions more than 80 days from the adjournment of the term at which the cause was tried, motion for new trial overruled and judgment entered. A bill allowed in violation of this provision of the statute will be quashed upon motion duly made in the supreme court. *Stock v. Luebben*, 72 Neb. 254 (100 N. W. 307).

1020. (1904.) Where an ex parte order extending the time for the presentation of a bill of exceptions has been found upon a hearing to have been wrongfully and fraudulently obtained, a district judge may set the order aside, and refuse to settle and allow the bill because not presented within the statutory time. In such case he will not be compelled by mandamus to settle and allow the bill. *State, ex rel. Pritschan, v. Sornborger*, 72 Neb. 615 (101 N. W. 241),

——Effect of delay.

1021. (1871.) If the bill of exceptions be not reduced to writing and tendering during the term at which the trial is had, it will be disregarded. *Monroe v. Elburt*, 1 Neb. 174.

1022. (1884.) When a proposed bill of exceptions is not served upon the adverse party within forty days after the adjournment of the district court—that being the time allowed for such service—the judge of the district court has no authority to sign and allow such bill over the protest of the party against whom the bill is sought to be used, and such bill of exceptions will, on motion, be stricken from the files of the supreme court. *Birdsall, Son & Co. v. Carter*, 16 Neb. 422 (20 N. W. 287).

1023. (1889.) The decision of the district court was made March 9, 1889, the motion for a new trial being overruled on the same day. Court adjourned *sine die* on the 16th day of the same month without granting an extension of time within which to prepare and serve a bill of exceptions. On the 18th day of April, and more than fifteen days after the final adjournment of court, the bill of exceptions was served upon defendant in error, who refused to acknowledge service on account of the expiration of time. On the 22d day of May plaintiff in error notified defendant in error to appear forthwith before the judge of the district court before whom the case was tried and show cause against the allowance of the bill. On that day the judge refused "to correct the record" so as to make it appear that the additional time was granted, but signed the bill, giving as a reason therefor that the attorney for plaintiff in error was laboring under the wrong impression that an extension had been granted. It was held that the judge had no authority to sign the bill, and upon the motion of plaintiff in error the exceptions were quashed. *Greenwood v. Craig*, 27 Neb. 669 (43 N. W. 427).

1024. (1897.) A party seeking a bill of exceptions presented his proposed bill to the adverse party or his attorney for amendment subsequent to the expiration of the time fixed by law and the order of the trial judge, and objection to the allowance of the bill, on that ground, was distinctly made to the trial judge before the same was settled and allowed, which objection was renewed at the earliest opportunity in the appellate court, and prior to the briefing of the cause on the merits. *Held*, That the bill should be quashed. *Horbach v. City of Omaha*, 49 Neb 851, followed. *Trumble v. Trumble*, 50 Neb. 332 (69 N. W. 968).

Notice of presentment for allowance.

1025. (1893.) Where no amendments are proposed to a bill of exceptions, no notice of the presentation of the bill to the judge for allowance is required to be served on the adverse party. *First Nat. Bank of Denver v. Lowrey*, 36 Neb. 290 (54 N. W. 568); (1899) *Hunter v. Union Life Ins. Co.*, 58 Neb. 198 (78 N. W. 516).

Stipulations as to allowance or settlement.

1026. (1878.) A stipulation of the attorneys in the cause, stating that the record is a correct transcript of the proceedings, may be sufficient to justify the judge in the court below in signing the bill as presented, but forms no basis for the supreme court to consider the matters embodied in the bill of exceptions. *Credit Foncier of America v. Rogers*, 8 Neb. 34.

1027. (1890.) A stipulation of the attorneys in a cause stating that the record is a correct transcript of the proceedings, or that the files annexed are the original files, and that the transcript may be accepted as the bill of exceptions, may be sufficient to justify the judge in the court below in signing the same as a bill of exceptions, but forms no sufficient basis for the supreme

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court to consider the same as a bill of exceptions, without having been settled and signed as such. (See *Credit Foncier v. Rogers*, 8 Neb. 34.) *McCarn v. Cooley*, 30 Neb. 552 (46 N. W. 715).

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1028. (1897.) A stipulation, "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," *held* sufficient to authorize the clerk to sign and settle the bill. *Behrends v. Beyschlag*, 50 Neb. 304 (69 N. W. 835).

1029. (1901.) Where a proposed bill of exceptions is submitted to opposing attorneys for examination and suggestions of amendments, who, after examination, return the bills indorsed thereon "we consent this bill of exceptions to be allowed and signed," and afterwards enter into a stipulation that the clerk of the district court may settle and 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. *Williams v. Miles*, 62 Neb. 566 (87 N. W. 315).

Settlement.

1030. (1881.) The judge should not erase his name after bill of exceptions is filed. *Deck v. Smith*, 12 Neb. 205 (10 N. W. 705).

1031. (1883.) A bill of exceptions, though agreed to by the attorneys of both parties by stipulation, unless settled and signed by the judge or clerk, will be quashel on motion. *McCathron v. McCathron*, 15 Neb. 144 (17 N. W. 265).

1032. (1889.) A paper in the semblance of a bill of exceptions, but which has not been allowed and certified by the judge who tried the cause in the court below, nor by the clerk of such court, under the circumstances, or in the manner provided by statute, filed with the record in the supreme court will be stricken out on motion. *Holloway v. Schooley*, 27 Neb. 553 (43 N. W. 346).

1033. (1891.) A bill of exceptions must be authenticated in some of the modes provided by law to authorize a reviewing court to act upon it. *Jewett v. Osborne*, 33 Neb. 24 (49 N. W. 774).

1034. (1891.) Excuses for the failure of the judge, before whom a cause was tried, to sign a bill of exceptions which is not signed, cannot be considered as a reason for sustaining the bill. *Jewett v. Osborne*, 33 Neb. 24 (49 N. W. 774).

1035. (1894.) There is no authority of law for the settlement of a bill of exceptions embodying the evidence taken on the hearing of proceedings by supervisions to remove a county officer. *Hopkins v. Scott*, 38 Neb. 661 (57 N. W. 391).

1036. (1899.) The settlement and allowance are of the bill as a whole, inclusive of the statements of the heading and the body relative to what it contains; and where, from an inspection of the entire bill, it is obvious that the word "testimony" was used with reference to the evidence, and as synonymous with "evidence," it may be accorded such extended signification. *Woolworth v. Parker*, 57 Neb. 417 (77 N. W. 1090).

——— Loss of signature.

1037. (1890.) Where the signature to the bill of the trial judge is shown to have been lost, a copy of the same attached to the bill is sufficient. *Warren v. Brown*, 31 Neb. 8 (47 N. W. 633).

Authority to settle—Referee.

1038. (1881.) A referee has authority to sign a bill of exceptions which may contain all the evidence taken by him. *Turner v. Turner*, 12 Neb. 161 (10 N. W. 545).

1039. (1881.) A bill of exceptions of a cause before a referee is not to be signed by the judge but by the referee, and is not subject to the provisions of section 311 of the code for settling bills of exceptions. *Turner v. Turner*, 12 Neb. 161 (10 N. W. 545); (1890) *State, ex rel. Dunterman, v. Gaslin*, 30 Neb. 651 (46 N. W. 917); (1892) *Whalen v. Brennan*, 34 Neb. 129 (51 N. W. 759); (1892) *Carlson v. Beckman*, 35 Neb. 392 (53 N. W. 203).

1040. (1897.) In the course of a trial before a referee only the referee has the power to certify as to exceptions; and a bill of exceptions embodying only such matters, if settled and signed by the clerk of the district court alone, is entirely nugatory. *Disbrow v. McNish*, 52 Neb. 309 (72 N. W. 216).

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——Chairman of county board.

1041. (1902.) A bill of exceptions of the evidence offered in a proceeding before the board of county commissioners must be signed, settled, and allowed by the chairman of such board. *Union Stock Yards Nat. Bank v. Thurston County*, 65 Neb. 408 (91 N. W. 286).

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——Judge of district court.

1042. (1894.) The judge of the district court, who passes upon a preliminary motion in a case, may properly settle a bill of exceptions preserving the evidence introduced upon the hearing of such motion, notwithstanding another judge presided at the trial of the case upon the merits. *Schields v. Horbach*, 40 Neb. 103 (58 N. W. 720).

——Trial judge whose term has expired.

1043. (1884.) "The judge who heard or tried a case" in the district court has authority to settle and allow a bill of exceptions in a case tried before him after the expiration of his term of office. *State, ex rel. Cressman, v. Barnes*, 16 Neb. 37; (19 N. W. 701); (1891) *Quick v. Sachsse*, 31 Neb. 312 (47 N. W. 935); (1896) *Hanscom v. Lantry*, 48 Neb. 665 (67 N. W. 762.)

——Clerk of court.

1044. (1877.) Under the provision of the act to amend sections 308 and 311 of the code (laws 1877, p. 12) the clerk of the court can settle and sign a bill of exceptions only in case of the death of the judge, and not in case of his resignation. *Schaffroneck v. Martin*, 9 Neb. 38 (2 N. W. 343).

1045. (1894.) A clerk of the district court has no authority to sign and allow a bill of exceptions under conditions other than those specified in section 311 of the code. *Scott v. Spencer*, 42 Neb. 632 (60 N. W. 892); (1895) *Glass v. Zutavern*, 43 Neb. 334 (61 N. W. 579; 47 Am. St. Rep. 763).

1046. (1894.) In order to authorize the clerk of the district court to settle a bill of exceptions it must appear that the conditions exist where under section 311 of the code of civil procedure permits the clerk to exercise such authority. Therefore, although the parties may have agreed in advance of the preparation of the bill that the clerk might settle the same, he is not authorized to do so when the proposed bill, instead of being agreed upon, is returned with proposed amendments and those are not complied with. *Guthrie v. Brown*, 42 Neb. 652 (60 N. W. 939).

1047. (1895.) In order to confer upon a clerk authority to sign a bill of exceptions it must appear that the judge is dead or prevented by sickness or absence from signing and allowing the bill, or the parties or their counsel must agree upon the bill and attach their written stipulation. *Nelson v. Johnson*, 44 Neb. 7 (62 N. W. 244).

1048. (1895.) In this case there are presented only questions of fact which cannot be examined upon what purports to be a bill of exceptions signed by the clerk of the district court wherein judgment was rendered, for the reason that there was no showing of the sickness or absence of the presiding judge from his district, and because the parties litigant did not agree upon such bill. Following *Scott v. Spencer*, 42 Neb. 632 (60 N. W. 892). *Griggs v. Harmon*, 45 Neb. 21 (63 N. W. 125).

1049. (1895.) Questions of fact will not be considered where the bill of exceptions was settled without authority by the clerk of the district court *Mattis v. Connolly*, 45 Neb. 628 (63 N. W. 918).

1050. (1896.) The clerk of the district court is clothed with the power to sign and allow a bill of exceptions, when it is made to appear by affidavit that the trial judge is absent from his district. *Chicago, B. & Q. R. Co. v. Hyatt*, 48 Neb. 161 (67 N. W. 8).

1051. (1897.) The statute by which the clerk of the district court is allowed to settle and sign a bill of exceptions, instead of the judge who heard or tried the cause must be strictly construed, and the methods prescribed by statute, if any, for making the facts on which the clerk's authority to settle and sign a bill of exceptions apparent of record, should be followed; and where the statute requires a showing of the facts to be by affidavit, a statement by the clerk, in the certificate, that he has personal knowledge of the facts, will not be sufficient to take the place of the required affidavit. *Scott v. Overall*, 50 Neb. 144 (69 N. W. 777). [See *Williams v. Miles*, 62 Neb. 566.]

1052. (1898.) In cases where the clerk of the district court is authorized to settle bills of exceptions, the act may be performed by a deputy, it not being shown that the principal is absent. *Brownell v. Fuller*, 54 Neb. 586 (74 N. W. 1105).

——Stipulation authorizing clerk to settle.

1053. (1883.) By the seventh clause of section 311 of the code of civil procedure,

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where the parties in an action agree upon a bill of exceptions by a written stipulation attached thereto, the clerk of the court is authorized to settle and allow it, independently of whether the judge is either disqualified or unable to do so. *Great Western Mfg. Co. v. Hunter*, 14 Neb. 452 (16 N. W. 474).

1054. (1894.) Settlement of a bill of exceptions by clerk upon stipulation must be agreed to by all the parties to the record or their attorneys and must be made within the time fixed by law or allowed by the court. *Reynolds v. Dietz*, 39 Neb. 180 (58 N. W. 89).

1055. (1894.) A clerk can settle a bill of exceptions upon agreement of parties only when the unanimous consent of all the parties interested is shown by a stipulation to that effect attached to the proposed bill of excepions, signed either by the parties themselves or their attorney of record in the case wherein the bill is proposed, or by an attorney or agent whose special authority to sign is affirmatively shown. *Reynolds v. Dietz*, 39 Neb. 180 (58 N. W. 89).

1056. (1894.) 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. *Scott v. Spencer*, 42 Neb. 632 (60 N. W. 892); (1895) *Yenney v. Central City Bank*, 44 Neb. 402 (62 N. W. 872).

1057. (1895.) The mere stipulation of counsel in a case that the clerk of the court may sign and allow a bill of exceptions is not sufficient to confer authority upon him to do so. To confer authority upon the clerk of a district court to sign and allow a bill of exceptions it must appear that the judge is dead, or that he is prevented by sickness, or absence from his district, from signing and allowing the bill; or, the parties or their counsel must agree upon the bill of exceptions and attach thereto their written stipulation to that effect. *Scott v. Spencer*, 42 Neb. 632, followed. *School District No. 49 v. Cooper*, 44 Neb. 714 (62 N. W. 1084); (1895) *Martin v. Fillmore County*, 44 Neb. 719 (62 N. W. 863); (1895) *Rice v. Winter*, 45 Neb. 517 (63 N. W. 830).

1058. (1896.) A stipulation is sufficient to authorize the clerk to sign a bill of exceptions when, by its terms, it clearly shows that the particular bill of exceptions to which the stipulation is attached is agreed upon by the parties as a correct bill. *Fire Ass'n of Philadelphia v. Ruby*, 49 Neb. 584 (68 N. W. 939).

Time for allowance and settlement.

1059. (1876.) In vacation a judge has no authority to allow a bill of exceptions. And if the record disclose that it was so allowed, it will not be considered. *Mewis v. Johnson Harvester Co.*, 5 Neb. 217. [Overruled. *State v. Weaver*, 11 Neb. 165.]

1060. (1894) A bill of exceptions to be settled by the clerk upon agreement of parties, must be acted upon by such clerk within the time fixed by statute, or within the time allowed by the court or judge for the settlement of such bill of exceptions. *Reynolds v. Deitz*, 39 Neb. 180 (58 N. W. 89).

1061. (1894.) Where amendments are proposed to a bill of exceptions, the draft of the bill, with the proposed amendments must be presented to the trial judge within ten days after the return of the same to the party seeking the allowance of the bill, upon five days' notice to the adverse party or his attorney of record of the time and place of such presentation. *Schields v. Horbach*, 40 Neb. 103 (58 N. W. 720). [Overruled. *State v. Scott*, 53 Neb. 571.]

——— Commencement of running of limitation.

1062. (1892.) When a cause is tried to the court without the intervention of a jury, at one term of the district court, and taken under advisement, and final decree rendered at a subsequent term of said court, the time for settling a bill of exceptions begins to run from the close of the term at which the decision was rendered. *State, ex rel. Cochran, v. Hopewell*, 35 Neb. 822 (53 N. W. 990).

1063. (1895.) By virtue of section 311 of the code of civil procedure and the order of the court, the plaintiff in error was required to present his proposed bill of exceptions to the trial judge for settlement within sixty days after the adjournment *sine die* of the term of court at which the motion for a new trial was overruled and judgment rendered. *Conway v. Grimes*, 46 Neb. 288 (64 N. W. 971).

1064. (1898.) Where forty days are given to prepare a bill of exceptions, the draft of the bill and proposed amendments are submitted to the trial judge in time if presented to him within sixty days after the final adjournment of the term at which the

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decision was rendered. *State, ex rel. Medland, v. Scott*, 53 Neb. 571 (74 N. W. 35).

1065. (1898.) Assuming, but not deciding, that the absence from the county of both trial judge and clerk during the period within which a proposed bill of exceptions should have been presented for settlement excused a failure to have it settled within that time, still the statutory time began to run, under that assumption, from the time of the judge's return, and he was not authorized to allow the bill when it was not presented for more than ten days after his return. *Supreme Tent of the Knights of the Maccabees v. Kreig*, 54 Neb. 588 (74 N. W. 1104).

1066. (1898.) The motion for a new trial mentioned in section 311 of the code of civil procedure, as amended in 1895, does not necessarily mean the motion immediately preceding the judgment. It means in every case the motion following the particular trial, the events of which it is sought to make authentic history. *State, ex rel. Morton, v. Dickinson*, 56 Neb. 251 (76 N. W. 543).

1067. (1899.) The time for settling a bill of exceptions containing the evidence on a hearing of an application for an interlocutory order, begins to run from the final adjournment of the term at which the order complained of is made. *State, ex rel. Kendall, v. Dickinson*, 58 Neb. 56 (78 N. W. 382).

——Excuses for delay.

1068. (1878.) When a bill of exceptions is properly presented to a judge for his signature within sixty days from the rising of the court, it is no cause for dismissing an action that the bill was signed after the expiration of sixty days from that time. *Leighton & Brown v. Stuart*, 8 Neb. 96.

1069. (1881.) Where the adverse party permits the bill of exception to lie in his office and makes no amendments, thus preventing its being filed within the proper time he cannot seek to have the same quashed for being filed out of time. *Deck v. Smith*, 12 Neb. 205 (10 N. W. 705).

1070. (1886.) Where a bill of exceptions with certain proposed amendments of the averse party was submitted to a judge for his signature, and held by him in an apparent effort to have the attorneys agree upon certain points, and was signed after more than six months had elapsed from the entering of the decree, the party was not thereby deprived of the right of appeal. *Parker v. Kuhn*, 19 Neb. 394 (27 N. W. 399).

1071. (1887.) The law relating to the time in which bills of exception are to be prepared is to be liberally construed, and where a court reporter is unable to prepare the bill within eighty days from the adjournment of the court *sine die* the fault not being that of the plaintiff in error, the bill should be signed and made a part of the record. *Richards v. State*, 22 Neb. 145 (34 N. W. 346). [Overruled. 49 Neb. 851; 53 Neb. 253; 1 Unof. 805]; (1891) *State, ex rel. Downing, v. Gaslin*, 32 Neb. 291 (49 N. W. 353).

1072. (1890.) A bill of exceptions was duly presented to the judge before whom the case was tried, and as no objections or amendments were offered thereto, and he was about to hold court in the county where the case had been tried, he carried the bill with him, and on arriving at the court room signed the same and left it on the lawyers' table therein, one end of which seemed to be occupied with papers and records. One of the appellant's attorneys coming into court, the judge stated to him that he had signed the bill and left it on the table. The attorney, however made oath that he did not understand the judge and did not know that the bill had been signed and returned. The bill was removed by some one and placed among the clerk's papers and was covered up and found months afterwards by him, after diligent search. On a motion being filed to dismiss the appeal because not taken in six months, *held*, that the time while the bill was thus mislaid would be deducted from the time intervening between the rendition of the judgment and the filing of the transcript in the supreme court. *Allis v. Newman*, 29 Neb. 207 (45 N. W. 621). [Overruled. *Stull v. Cass County*, 51 Neb. 760.]

1073. (1892.) Where a motion was made to quash the bill of exceptions because not presented to and signed by the judge within the time fixed by law, it appeared that the bill had been presented to one of the attorneys for the defendant in error within the time fixed by statute; that such attorney had retained the bill for a long time and that the delay in presenting the bill to the judge for his signature was caused by such attorney retaining the bill; *held*, that such default could not be assigned as a reason for quashing the bill and that the motion

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would be overruled. *Meyer & Raapke v. Fagan*, 34 Neb. 184 (51 N. W. 753)

1074. (1898.) The fact that the defendant in error held the proposed bill longer than the law permitted did not excuse a subsequent default by the plaintiff in error. *Supreme Tent of the Knights of the Maccabees v. Kreig*, 54 Neb. 588 (74 N. W. 1104).

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——— Presumption as to time.

1075. (1878.) When it does not appear at what time a bill of exceptions was presented to a judge for his signature, it will be presumed to have been presented within the period requird by the statute. *Leighton & Brown v. Stuart*, 8 Neb. 96.

1076. (1888.) A bill of exceptions will not be dismissed upon the ground that it was not presented to trial judge for his settlement and allowance within ten days from its return to the party seeking allowance of bill by opposite party, unless it shall appear that bill was not presented to such judge within fifteen days, or such additional time, not exceeding forty days from the adjournment of the court *sine die*, as might have been allowed by the court, and twenty days additional, making, in a case of full extension of the time allowed for the completion of the bill, sixty days in all. *Sherwin v. O'Connor*, 23 Neb. 221 (36 N. W. 491).

1077. (1890.) Where there is nothing in the record to show when the trial court adjourned, bill will be presumed to have been presented in time. *Warren v. Brown*, 31 Neb. 8 (47 N. W. 633).

——— Effect of delay.

1078. (1895.) A motion to quash the bill of exceptions because not presented to the trial judge for settlement within the time required by law should be sustained. *Conway v. Grimes*, 46 Neb. 288 (64 N. W. 971).

Compelling allowance or settlement.

1079. (1885.) Mandamus will lie to compel a judge to sign a bill of exceptions after he is out of office. *State v. Guthrie*, 17 Neb. 113 (22 N. W. 77).

1080. (1891.) If a judge refuses to settle and sign a bill of exceptions duly presented to him for that purpose, the court, in a proper case, will compel action on his part, and endeavor, as far as possible, to save the rights of the parties. *Jewett v. Osborne*, 33 Neb. 24 (49 N. W. 774).

1081. (1899.) A litigant has an absolute legal right to the allowance of a bill of exceptions embracing all the evidence considered on the hearing of an application for an interlocutory order. This right in a proper case, may be enforced by mandamus. *State, ex rel. Kendall, v. Dickinson*, 58 Neb. 56 (78 N. W. 382).

Consideration of quashed or defective bill.

1082. (1881.) Where a motion for a new trial is decided at a term subsequent to that at which it is made, and one of the grounds assigned therein is that the verdict is not sustained by the evidence, a bill of exceptions, containing all the testimony, signed at the term at which the motion is overruled, will be considered for the purpose of determining that question. *Scott v. Waldeck*, 11 Neb. 525 (10 N. W. 409). [Overruled. 42 Neb. 272; 46 Neb. 861; 47 Neb. 235.]

1083. (1890.) A bill of exceptions when signed by trial judge long after time fixed by law, will be considered by supreme court solely to determine sufficiency of evidence; alleged errors at trial will not be reviewed. *City of Seward v. Klenck*, 30 Neb. 775 (47 N. W. 85).

1084. (1894.) After a bill of exceptions has been quashed, it can be considered for no other purpose in the case in which it was originally filed. *Jones v. Wolfe*, 42 Neb. 272 (60 N. W. 563); (1895) *Conway v. Grimes*, 46 Neb. 288 (64 N. W. 971); (1896) *City Nat. Bank of Hastings v. Thomas*, 46 Neb. 861 (65 N. W. 895); (1896) *Reed v. Rice*, 48 Neb. 586 (67 N. W. 459).

1085. (1896.) Eleven months after overruling a motion for a new trial the court, on motion, entered judgment *nunc pro tunc* on the verdict. The motion was resisted and a bill of exceptions settled. The judge certified that the bill of exceptions consisted of fourteen pages, numbered from one to fourteen, both inclusive. He did not certify that it contained any of the evidence used on hearing of the motion. From the bill of exceptions brought here the first eight pages were missing. *Held*, (1) That such bill of exceptions would not be considered for any purpose; (2) that the supreme court would presume that the district court, on the hearing of said motion, had before it evidence showing that a judgment had in fact been rendered or ordered at the time the motion for a new trial was overruled. *Van Etten v. Test*, 49 Neb. 725 (68 N. W. 1023).

1086. (1899.) Where a bill of exceptions

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has been quashed the evidence cannot be considered by the supreme court. *Johnson v. Klein*, 58 Neb. 243 (78 N. W. 514).

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D. Abstracts of Record.

Contents.

1087. (1886.) The abstract of causes in the supreme court, provided for by the act of 1885, is to take the place of a bill of exceptions and should contain all that is required by such a bill. The court will not look beyond the abstract. *Ballard v. Cheney*, 19 Neb. 58 (26 N. W. 587).

1088. (1886.) The abstracts of cases in the supreme court, under the act of 1885, should set forth so much of the case as is necessary to a full understanding of all questions presented for decision, and is to take the place of the transcript and bill of exceptions. *Alexander v. Irwin*, 20 Neb. 204 (29 N. W. 385). (See 19 Neb. 58.)

1089. (1899.) Where a cause brought to this court on error is submitted under section 1 of rule 2, the printed abstract must include the petition in error, or an abstract of the assignments of error therein contained, and a failure in that regard will work an affirmance of the judgment. *O'Neill v. Flood*, 58 Neb. 218 (78 N. W. 497); (1899) *Manning v. Freeman*, 58 Neb. 485 (78 N. W. 924); (1900) *Renard v. Wyckoff*, 61 Neb. 19 (84 N. W. 410).

Effect as limitation of record.

1090. (1897.) In a case submitted on an agreed printed abstract under rule 2, the court will not look beyond the abstract, and unless error affirmatively appears therefrom the judgment below will be affirmed. *Closson v. Rohman*, 50 Neb. 323 (69 N. W. 760); (1897) *Home Fire Ins. Co. v. Skoumal*, 51 Neb. 655 (71 N. W. 290); (1897) *Wheeler v. Barker*, 51 Neb. 846 (71 N. W. 750); (1897) *Zink v. Westervelt*, 52 Neb. 90 (71 N. W. 960; (1899) *O'Neill v. Flood*, 58 Neb. 218 (78 N. W. 497); (1899) *Manning v. Freeman*, 58 Neb. 485 (78 N. W. 924); (1900) *Renard v. Wyckoff*, 61 Neb. 19 (84 N. W. 410).

1091. (1897.) In a case submitted on an abstract the court will not examine the transcript. *North Platte Water-Works Co. v. City of North Platte*, 50 Neb. 853 (70 N. W. 393).

1092. (1897.) In a case submitted on an agreed printed abstract under rule 2, the court will not look beyond the abstract, and if it appears from that abstract that evidence was introduced, the nature of which is not disclosed, it will be presumed to have been of such a character as to sustain the finding of the district court. *Shewell v. City of Nebraska City*, 52 Neb. 138 (71 N. W. 952).

1093. (1898.) Under section 1 of rule 2 of the supreme court (52 Neb. ix.) the agreed printed abstract must be complete in itself, without reference to the transcript, and, when error does not affirmatively appear from an examination of such abstract, the judgment sought to be reviewed will be affirmed. *Grand Lodge A. O. U. W. v. Higgins*, 55 Neb. 741 (76 N. W. 438).

E. Making, Form and Requisites of Transcript.

Necessity.

Dismissal for failure to file transcript, see *post*, §§ 1436-1444.

1094. (1894.) In order to effect an appeal to the supreme court from a judgment of the district court it is necessary to file with the clerk of the supreme court, within six months from the rendition of the judgment, a transcript of the proceedings, authenticated by the certificate of the clerk of the district court. Such requirement is jurisdictional and cannot be waived by the parties, and the filing of the original pleadings in the district court does not take the place of such certified transcript. *Moore v. Waterman*, 40 Neb. 498 (58 N. W. 940).

1095. (1897.) In absence of a transcript of the proceedings below, assignments of error may be overruled and the judgment affirmed. *Smith v. People's Building, Loan & Savings Ass'n*, 52 Neb. 445 (72 N. W. 486).

1096. (1901.) In order to supersede a judgment under sections 588 and 590, code of civil procedure, a transcript as well as a petition in error must be filed in the supreme court. *Morton v. Western Seed & Irrigation Co.*, 2 Unof. 131 (96 N. W. 183).

——— By cross-appellant.

1097. (1892.) A transcript for the supreme court filed in time is available to both parties, and may be used by a cross-appellant, though he has not served notice of appeal, and though appellant has voluntarily dismissed his proceeding. *Shickle H. & H. Iron Co. v. Kent*, 34 Neb. 568 (52 N. W. 286).

1098. (1898.) One party having perfected an appeal by filing a transcript in this court, the other may maintain a cross-appeal on the same transcript. It is unnecessary for him to file a duplicate. *McDonald v. Buckstaff*, 56 Neb. 88 (76 N. W. 476).

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Nature and form.

1099. (1872.) The form of transcripts to be filed in this court prescribed. *Nuckolls v. Irwin*, 2 Neb. 60.

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1100. (1902.) Requirements as to signing complete record are directory, and not essential to validity of court's action. *Colony v. Billingsley*, 2 Unof. 670 (89 N. W. 744).

1101. (1902.) In equitable actions this court acquires jurisdiction, on appeal, by the filing of a duly certified transcript within the statutory time; and when duly certified transcripts of the record in two or more cases are included under one cover, and filed in due time, jurisdiction attaches over each case. *Hall v. Moore*, 3 Unof. 574 (92 N. W. 294).

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1102. (1880.) In order to bring a case to the supreme court by appeal, the appellant must within six months from the date of the rendition of the judgment, file a transcript, containing the pleadings, the judgment or decree, and all the testimony and proofs offered in evidence on the hearing. *Jefferson County v. Saxon*, 10 Neb. 14 (4 N. W. 309). [Modified. *Schuyler v. Hanna*, 28 Neb. 601 (44 N. W. 731; 11 L. R. A. 32).]

1103. (1890.) In order to bring a cause into this court by appeal, the appellant must, within six months from the date of the rendition of the judgment, or decree, or making of the final order appealed from, file with the clerk of this court a certified transcript of the proceedings had in the cause in the court below. It is not essential to jurisdiction that such transcript should contain the depositions, testimony, or proofs offered in evidence in the lower court. *Schuyler v. Hanna*, 28 Neb. 601 (44 N. W. 731; 11 L. R. A. 321).

Substitutes.

1104. (1891.) Where a copy of an instruction is filed with a record in the supreme court, with a certificate of the clerk of the district court that the original is lost, and an undisputed affidavit that the copy is correct, it will not be eliminated from the files. *Hitchcock v. Shager*, 32 Neb. 477 (49 N. W. 374).

1105. (1903.) Upon petition in error to the supreme court, the proceedings of the district court can be shown only by a transcript of the records of that court duly certified. Affidavits can not be used to supply omissions in such transcript. *Crancer & Curtice Co. v. McKinley Music Co.*, 69 Neb. 700 (96 N. W. 617).

——— Original papers.

1106. (1894.) The filing of the original pleadings in the district court does not take the place of the certified transcript. *Moore v. Waterman*, 40 Neb. 498 (58 N. W. 940); (1895) *School District 49 v. Cooper*, 44 Neb. 714 (62 N. W. 1084).

1107. (1895.) In section 586 of the code, relating to transcripts for review, the word "proceedings" includes duly certified copies of the pleadings on which an action was tried. *School District 49 v. Cooper*, 44 Neb. 714 (62 N. W. 1084).

1108. (1897.) The requirement that there shall be a transcript of the proceedings of the district court filed in the supreme court is not complied with by filing the original pleadings with a certified transcript of the record showing the entry of a judgment; and under such circumstances the judgment sought to be reversed, when found from the transcript to have been within the jurisdiction of district court, will be affirmed. *Peck v. Nebraska Loan & Trust Co.*, 50 Neb. 227 (69 N. W. 777); (1897) *Smith v. Beagle*, 50 Neb. 445 (69 N. W. 936); (1905) *Smith v. Delane*, 74 Neb. 594 (104 N. W. 1054).

1109. (1898.) The words, "A transcript of the proceedings," as employed in section 586 of the code of civil procedure to designate what shall be filed with a petition in error, include within their meaning duly certified copies of the original papers and pleadings in the trial court, which it is sought to present to the attention of the appellate court. The filing of the original papers and pleadings is not contemplated, and will not fulfill the requirements of the statute. *Royal Trust Co. v. Exchange Bank*, 55 Neb. 663 (76 N. W. 425).

1110. (1902.) The original files and papers are not a transcript within the meaning of section 586, code of civil procedure, and can not take the place thereof nor supply defects therein. *Brabham v. Custer County*, 3 Unof. 801 (92 N. W. 989).

Effect of failure to make proper transcript.

1111. (1897.) A party or his attorney is justified in relying upon the stenographic reporter for a copy of the testimony. *Holland v. Chicago, B & Q. R. Co.*, 52 Neb. 100 (71 N. W. 989).

1112. (1890.) Filing of transcript of pleadings and decree in lower court is sufficient to confer jurisdiction upon the supreme court, and having jurisdiction for one purpose, it exists for all others. *Schuyler v.*

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Hanna, 28 Neb. 601 (44 N. W. 731; 11 L. R. A. 321).

F. Authentication and Certification.

Dismissal of petition in error for failure to authenticate transcript, see *post*, §§ 1436-1444.

Authentication by clerk.

1113. (1882.) A bill of exceptions must be authenticated as provided by law. *Edwards v. Kearney*, 13 Neb. 502 (14 N. W. 536).

1114. (1885.) A bill of exceptions not certified by the clerk of the trial court as being a part of the record in the said court, nor as being the original bill of exceptions in such case, and which appears never to have been filed by or presented for filing to the clerk of such court, will be quashed on motion. *Flynn v. Jordan*, 17 Neb. 518 (23 N. W. 519).

1115. (1885.) Where the original bill of exceptions in a cause tried in the district court is intended to be used in the supreme court, the clerk of the district court must attach his certificate to the same that it is the original bill. *Hogan v. O'Neil*, 17 Neb. 641 (24 N. W. 213); (1888) *Yates v. Kinney*, 23 Neb. 648 (37 N. W. 590).

1116. (1889.) Instructions given and refused cannot be considered unless certified in the transcript by the clerk of the district court. *Chamberlain v. Brown*, 25 Neb. 434 (41 N. W. 284).

1117. (1891.) There were five certificates of the clerk of the district court, four of them being dated August 5, 1889, and attached to separate stipulations in the district court; and one certificate dated August 24, 1889, to the record proper. *Held*, That the four certificates dated August 5, 1889, were entirely unnecessary and tended to cumber the record. *Gibson v. Smith & Co.*, 31 Neb. 354 (47 N. W. 1052).

1118. (1894.) Where the transcript of a judgment is the only paper filed in the supreme court authenticated by the certificate of the clerk of the district court, and the judgment was one within the jurisdiction of the lower court, it will be affirmed. *Moore v. Waterman*, 40 Neb. 498 (58 N. W. 940).

1119. (1895.) A bill of exceptions will not be considered for any purpose unless properly authenticated. *Nelson v Johnson*, 44 Neb. 7 (62 N. W. 244); (1896) *Felber v. Gooding*, 47 Neb. 38 (66 N. W. 39); (1896) *Derse v. Strause*, 49 Neb. 665 (68 N. W. 1021); (1896) *Spurck v. Dean*, 49 Neb. 66 (68 N. W. 375); (1897) *Costello v. Kottas*, 52 Neb. 15 (71 N. W. 950); (1898) *Coy v. Miller*, 54 Neb. 499 (74 N. W. 958).

1120. (1896.) Where the bill of exceptions is not properly authenticated by the certificate of the clerk of the district court, as required by law, it need not be examined by the supreme court. *Childerson v. Childerson*, 47 Neb. 162 (66 N. W. 281); (1896) *First Nat. Bank of Greenwood v. Cass County*, 47 Neb. 172 (66 N. W. 300); (1896) *Romberg v. Fokken*, 47 Neb. 198 (66 N. W. 182); (1896) *Union P. R. Co. v. Kinney*, 47 Neb. 393 (66 N. W. 449); (1896) *Andres v. Kridler*, 47 Neb. 585 (66 N. W. 649); (1896) *German Nat. Bank of Beatrice v. Terry*, 48 Neb. 863 (67 N. W. 856); (1896) *Royse v. State Nat. Bank of St. Joseph*, 50 Neb. 16 (69 N. W. 301); (1897) *Chicago Lumber Co. v. Benjamin*, 50 Neb. 143 (69 N. W. 769); (1897) *Behrends v. Beyschlag*, 50 Neb. 304 (69 N. W. 835); (1897) *Talcott v. Field*, 50 Neb. 635 (70 N. W. 229); (1897) *State, ex rel. Gray, v School District*, 51 Neb. 236 (70 N. W. 948); (1897) *Union P. R. Co. v. Thorne*, 51 Neb. 472 (70 N. W. 1119). (1897) *Hodgin v. Whitcomb*, 51 Neb. 617 (71 N. W. 314); (1897) *Hazelet v. Holt County*, 51 Neb. 724 (71 N. W. 719); (1897) *Gray v. Elbling*, 51 Neb. 726 (71 N. W. 720); (1897) *Chicago, R. I. & P. R. Co. v. Ringo*, 52 Neb. 163 (71 N. W. 1016); (1897) *Hale v. Sheehan*, 52 Neb. 184 (71 N. W. 1019); (1897) *Kroeger v. Nieman*, 52 Neb. 285 (72 N. W. 216); (1897) *Brockman Commission Co. v. Sang*, 52 Neb. 506 (72 N. W. 856); (1897) *Winquest v. Schaefer*, 52 Neb. 626 (72 N. W. 1058); (1898) *Shaffer v. Vincent*, 53 Neb. 449 (73 N. W. 932); (1898) *Harris v. Barton*, 53 Neb. 568 (74 N. W. 49); (1898) *Henley v. Evans*, 54 Neb. 187 (74 N. W. 578); (1898) *Beatrice Savings Bank v. Beatrice Chautauqua*, 54 Neb. 592 (74 N. W. 1065); (1898) *Coad v. Barry*, 57 Neb. 177 (77 N. W. 341); (1898) *Gay v. Reynolds*, 57 Neb. 194 (77 N. W. 661); (1899) *Noble v. Neal*, 57 Neb. 797 (78 N. W. 383); (1899) *Murphey v. Illinois Trust & Savings Bank*, 58 Neb. 428 (78 N. W. 714-715); (1901) *Faust v. Deering*, 63 Neb. 244 (88 N. W. 477); (1902) *Palmer v. Mizner*, 2 Unof. 903 (93 N. W. 1121); (1905) *Miles v. State*, 74 Neb. 684 (105 N. W. 301).

1121. (1896.) A paper purporting to be a motion for a new trial cannot be considered, unless certified to in the transcript by the clerk of the district court. *Romberg v. Fokken*, 47 Neb. 198 (66 N. W. 282); (1898)

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Hake v. Woolner, 55 Neb. 471 (75 N. W. 1087).

1122. (1896.) Where there is no error sufficiently assigned in the petition in error to challenge the attention of the supreme court, except such as are claimed to have arisen upon the alleged giving or refusal to give instructions, an entire failure to authenticate these alleged instructions precludes the consideration of assignments of error with respect thereto. *Burlington v. Baders*, 47 Neb. 204 (66 N. W. 288).

1123. (1896.) A bill of exceptions in a cause tried in the district court must be filed with the clerk of that court, and if the original bill is to be used in the supreme court, it must be authenticated by the certificate of the clerk of the trial court. *Wood Mowing & Reaping Machine Co. v. Gerhold*, 47 Neb. 397 (66 N. W. 538).

1124. (1896.) A bill of exceptions will not be considered in the supreme court unless certified to be the original or a true copy. *Sieberling & Co. v. Fletcher*, 47 Neb. 847 (66 N. W. 839); (1897) *Reuther v. Zimbleman*, 50 Neb. 165 (69 N. W. 837); (1897) *Groneweg v. Mathewson*, 52 Neb. 591 (72 N. W. 844).

1125. (1896.) To authenticate a document attached to a transcript as the bill of exceptions settled in the case a certificate of the clerk, under the seal of the district court, identifying the document as the original, or a copy of the bill of exceptions, is essential. *Merrill v. Equitable Farm & Stock Co.*, 49 Neb. 198 (68 N. W. 365).

1126. (1896.) A bill of exceptions must be certified by the clerk of the trial court as being a part of the record in said court, or as being the original bill of exceptions in the case, in order that the matters therein may be considered by the supreme court. *Yankton, N. & S. W. R. Co. v. State*, 49 Neb. 272 (68 N. W. 487).

1127. (1897). Where to an examination and settlement of questions argued to the supreme court, an inspection of the evidence contained in a bill of exceptions, is necessary, and such bill lacks the authentication of the clerk of the trial court, the points presented may be overruled. *Chicago Lumber Co. v. Benjamin*, 50 Neb. 143 (69 N. W. 769).

1128. (1897.) Where on appeal, the bill of exceptions is uncertified by the clerk, and the pleadings support the decree rendered, it will be affirmed. *Berger v. Lincoln County*, 50 Neb. 687 (70 N. W. 235, 248); (1901) *Porter v. Detrick*, 2 Unof. 29 (96 N. W. 271).

1129. (1897.) Where the judgment assailed has not been authenticated by the certificate of the clerk of the district court, the proceeding in the appellate court may be dismissed. *First Nat. Bank of Pierce v. Noble*, 52 Neb. 507 (72 N. W. 857).

1130. (1897.) To authenticate a document attached to a record as the original bill of exceptions or a copy thereof, a certificate of the clerk of the trial court to that effect is indispensable. *Bryant v. Cunningham*, 52 Neb. 717 (72 N. W. 1054).

1131. (1898.) A bill of exceptions, to be considered in reviewing the judgment of a district court, must be a part of the record of the case brought to the supreme court, and to make it such it must be settled as the bill of exceptions in the case under review in pursuance of the provisions of section 311, code of civil procedure. *Murphy v. Warren & Co.*, 55 Neb. 220 (75 N. W. 575).

1132. (1903.) The supreme court will, on its own motion, refuse to consider a document appearing in the record and purporting to be a bill of exceptions but in no way authenticated as such by the certificate of the clerk of the lower court. *Palmer v. Mizner*, 70 Neb. 200 (97 N. W. 334).

1133. (1903.) A document accompanying a transcript will be disregarded unless authenticated by the certificate of the clerk of the district court. *Village of Holstein v Klein*, 4 Unof. 33 (93 N. W. 214).

1134. (1905.) A bill of exceptions will be quashed where it is not certified and identified in such manner that the supreme court may know that it is the identical bill allowed by the trial court, and the whole thereof. *State v. Paxton*, 75 Neb. 214 (106 N. W. 166).

1135. (1906.) A bill of exceptions must be filed with the clerk of the trial court, and if the original bill is to be used in the supreme court it must be authenticated by said clerk. A document attached to a transcript and purporting to be a bill of exceptions cannot be considered, unless it be authenticated as such by the certificate of the clerk. *Duncan v. State*, 75 Neb. 764 (106 N. W. 1014).

——— **Sufficiency.**

1136 (1880.) A mere certificate of the clerk of the district court that certain affidavits were used on the hearing in the court below is not such an authentication as is required by the statute. *Aultman v. Howe*, 10 Neb. 8 (4 N. W. 357).

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1137. (1883.) A bill of exceptions in a cause tried in the district court must be filed in that court, and if the original bill is used in the supreme court, the clerk of the district court must attach his certificate to the same that it is the original bill. *Aultman v. Patterson*, 14 Neb. 57 (14 N. W. 804).

1138. (1883.) A transcript of a judgment of the district court, brought to the supreme court for review, certified by the clerk of the court under his official seal, is sufficiently authenticated without the signature of the judge. *Polin v. State*, 14 Neb. 540 (16 N. W. 898).

1139. (1895.) In order to authenticate a document attached to a record as the bill of exceptions settled in the district court there must be a certificate of the clerk to that effect. *Yenney v. Central City Bank*, 44 Neb. 402 (62 N. W. 872).

1140. (1895.) In order to authenticate a document attached to a record as the bill of exceptions settled in the district court there must be a certificate of the clerk of the court to that effect. *Moore v Waterman*, 40 Neb. 498, followed. *Martin v. Fillmore County*, 44 Neb. 719 (62 N. W. 863).

1141. (1898.) A certificate by the clerk of the district court merely stating that the original bill was filed in his office on a certain date is insufficient to identify a document contained in the transcript as being either such original bill or a copy. *Shaffer v. Vincent*, 53 Neb. 449 (73 N. W. 932).

1142. (1898.) Where there is expressly excepted from the certificate of a clerk of the district court authenticating a transcript the journal entry of that court on the motion for a new trial, such entry must be treated as though not appearing in the transcript. *Geneva Nat. Bank v. Donovan*, 53 Neb. 613 (74 N. W. 33).

1143. (1901.) Where the clerk's certificate to a transcript simply states that such transcript contains copies of certain enumerated papers and proceedings in the case, the transcript does not purport to be complete. *Gooding v. Ransom*, 63 Neb. 78 (88 N. W. 169).

1144. (1901.) Where a certificate of the clerk of the district court attached to the record certifies "that the above and foregoing is the original bill of exceptions, and also a true and perfect transcript of the record in the above-entitled cause, as the same is on file and of record in my office," it is a sufficient authentication. *Vansyoc v. Freewater Cemetery Ass'n*, 63 Neb. 143 (88 N. W. 162).

1145. (1903.) The certificate allowing a bill of exceptions should affirmatively show that the bill contains all the evidence given upon the trial; and, in the absence of such showing, the supreme court cannot review any finding of the trial court or jury where the sufficiency of the evidence to support such finding is questioned. *Spence v. Lane*, 70 Neb. 381 (97 N. W. 478).

1146. (1905.) The statute (587*a* of the code) provides that a bill of exceptions, where the original bill is used, shall be attached to the transcript of the record. Where the supreme court is presented with what purports to be a bill of exceptions contained in two separate and detached volumes, neither of which is certified by the clerk of the district court, and the contents of this volume show that there was other important and material evidence upon which the decision of the case must depend, and there is nothing in the clerk's certificate or in the record itself by which the supreme court can, with any certainty, determine whether the volume not certified or otherwise identified contains the omitted evidence, the bill will be quashed. *State v. Paxton*, 75 Neb. 214 (106 N. W. 166).

——— Alteration of certificate.

1147. (1895.) A transcript of the proceedings below may be stricken from the files and the appeal dismissed where it appears that the certificate of authentication has been materially altered with the intention of misleading the appellate court. *Felber v. Boyd*, 44 Neb. 700 (62 N. W. 1059).

——— Loss of authentication.

1148. (1897.) Where there is satisfactory evidence that there had been a proper authentication of a bill of exceptions attached thereto, which, by accident, had become detached and lost, such showing was neld sufficient secondary evidence to justify consideration of the bill of exceptions as such. *Winters v. Means*, 50 Neb. 209 (69 N. W. 753).

——— Stipulation as substitute.

1149. (1895.) A stipulation by the parties that a transcript for review contains all the proceedings below cannot be substituted for a certificate of the clerk of the district court. *McDonald v. Grabow*, 46 Neb. 406 (64 N. W. 1093).

Certificate as to contents by judge or referee.

1150. (1899.) In the absence of a stipulation waiving it, the certificate of the judge

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presiding at the trial as to what the testimony was is essential in its authentication for the supreme court. *Hale v. Christy*, 8 Neb. 264.

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1151. (1888.) Where instructions were delivered orally and reduced to writing by the stenographic reporter and inserted in the bill of exceptions, but not certified by the judge, a motion to strike them out of a bill would be sustained. *Yates v. Kinney*, 23 Neb. 648 (37 N. W. 590); *Brady v. Flint*, 23 Neb. 785 (37 N. W. 647).

1152. (1894.) A bill of exceptions will not be considered in supreme court where the referee before whom the case was tried failed to certify that all the evidence adduced had been preserved. *McClain v. Morse*, 42 Neb. 52 (60 N. W. 334).

1153. (1899.) A bill of exceptions must be presented to the trial judge for settlement, and when settled it must be signed by him, and he must certify that it is allowed. *Woolworth v. Parker*, 57 Neb. 417 (77 N. W. 1090).

——— **Sufficiency.**

1154. (1881.) When objection is made that the finding of a referee is not supported by the evidence, his certificate to the bill of exceptions must show that the bill contains all the evidence. *Turner v. Turner*, 12 Neb. 161 (10 N. W. 545).

1155. (1877.) Where the presiding judge certifies only that the testimony set out in the bill of exceptions "is in substance all the evidence on the trial of this cause, and there was no other evidence material to the issue offered by either of the parties," the finding will not be interfered with. *Faulkner v. Meyers*, 6 Neb. 414.

1156. (1883.) The fact that the certificate of the judge does not show that the bill of exceptions contains all the testimony is not ground for quashing the bill. *Cattle v. Haddox*, 14 Neb. 59 (14 N. W. 803).

1157. (1883.) When the judge, in a bill of exceptions, certifies that the plaintiffs "introduced evidence tending to prove the allegations of the bill of particulars," this will be taken as showing, sufficiently for a proceeding in error, that there was evidence enough to submit to the jury, and to have warranted a finding in their favor upon the issues joined. *Marsh v. Snyder*, 14 Neb. 237 (15 N. W. 341).

1158. (1886.) Papers in a bill of exceptions marked by the initials of the judge, written by himself, will not be stricken out of the bill as not being identified. *Morehead v. Adams*, 18 Neb. 569 (26 N. W. 242).

1159. (1893.) Certificate of the trial judge attached to the bill in this case as follows "February 26, 1890. All evidence. True bill. Ordered part of record in this case," although informal, is sufficient. *First Nat. Bank of Denver v. Lowrey*, 36 Neb. 290 (54 N. W. 568).

1160. (1897.) A certificate "that the foregoing is all the evidence offered by either party on the trial of the cause" is not sufficient to embrace the *voir dire* examination of a juror, or the evidence adduced on the hearing of a challenge to the whole panel or array of jurors. *Durfee v. State*, 53 Neb. 214 (73 N. W. 676).

1161. (1898.) The use of the word "testimony" for "evidence" in the certificate of the trial judge in the allowance of a bill of exceptions, if the meaning is obvious, or it is clear that the latter is intended, will not render the document inoperative. *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803 (77 N. W. 346).

1162. (1899.) Where the certificate of the trial court attached to the record states "that the foregoing is a true and perfect transcript of the record in the above entitled cause, except the bill of exceptions, which original bill is thereto attached," it is a sufficient authentication of such bill. *Herman v. Kneipp*, 59 Neb. 208 (80 N. W. 816).

1163. (1901.) The certificate of the trial judge to a bill of exceptions "that the foregoing is all the evidence offered by either party on the trial of the cause," is not sufficient to embrace the *voir dire* examination of a juror. *Durfee v. State*, 53 Neb. 214, followed. *Coil v. State*, 62 Neb. 15 (86 N. W. 925).

1164. (1905.) The certificate of a trial judge, to a bill of exceptions, should show that the bill, consisting of a number of volumes, marked in a certain manner, contains all the testimony in the case. *State v. Paxton*, 75 Neb. 214 (106 N. W. 166).

1165. (1906.) The certificate of the presiding judge attached to a bill of exceptions, to the effect that the bill contains all the evidence offered by either party on the trial of the cause, is a sufficient certification that the bill contains all the evidence received or offered. *Sheibley v. Huse*, 75 Neb. 811 (106 N. W. 1028).

——— **Effect of recitals.**

1166. (1890.) Where no reply is filed below, a certificate of the trial judge, that the

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new matter set up in the answer was treated as denied by a reply, will not be considered by the supreme court, as it is neither an amendment of the record nor a supplement to the bill of exceptions. *Ley v. Miller*, 28 Neb. 822 (45 N. W. 174).

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G. Transmission and Filing.

Necessity.

1167. (1880.) In order to bring a case into this court by appeal the appellant must, within six months from the date of the rendition of the judgment appealed from, procure and file with the clerk of the supreme court a transcript of the proceedings in the court below, containing the pleadings, the judgment or decree, and all the testimony and proofs offered in evidence on the hearing of the cause in that court. *Jefferson County v. Saxon*, 10 Neb. 14 (4 N. W. 309). [Modified. *Schuyler v. Hanna*, 28 Neb. 601).

1168. (1883.) A bill of exceptions in a cause tried in the district court must be filed in that court. *Aultman v. Patterson*, 14 Neb. 57 (14 N. W. 804); (1898) *Wood Mowing & Reaping Machine Co. v. Gerhold*, 47 Neb. 397 (66 N. W. 538); (1905) *Duncan v. State*, 75 Neb. 764 (106 N. W. 1014).

1169. (1893.) A bill of exceptions must be filed in the district court of the proper county. *First Nat. Bank of Denver v. Lowrey*, 36 Neb. 290 (54 N. W. 568).

1170. (1894.) A transcript of the proceedings containing the final judgment sought to be reviewed must be filed with the petition in error, and prior to the issuing of the summons in error, in order to confer jurisdiction upon the supreme court. *Garneau v. Omaha Printing Co.*, 42 Neb. 847 (61 N. W. 100).

1171. (1899.) The filing of a petition in error in the supreme court is alone insufficient to invest jurisdiction. It is indispensable to jurisdiction that there should be filed with the petition in error, and within the time fixed by statute, a transcript of the proceedings of the district court containing the final judgment sought to be reviewed. *Slobodisky v. Curtis*, 58 Neb. 211 (78 N. W. 522).

1172. (1899.) The appellate jurisdiction of the supreme court depends upon the filing with the clerk of a duly authenticated transcript of the proceedings of the district court containing the judgment or final order sought to be reversed. *Snyder v. Lapp*, 59 Neb. 243 (80 N. W. 806).

1172*a*. (1901.) In order to supersede a judgment under sections 588 and 590, code of civil procedure, a transcript as well as a petition in error must be filed in the supreme court. *Morton v. Western Seed & Irrigation Co.*, 2 Unof. 131 (96 N. W. 183).

Withdrawal.

1173. (1895.) Appellee may withdraw from the supreme court a transcript which he filed with a motion to quash the supersedeas bond before appellant's appeal had been docketed. *Kountze v. Erck*, 45 Neb. 288 (63 N. W. 804).

H. Defects, Objections, Amendment and Correction.

Amendment of petition in error, see *ante*, §§ 653-655.

Effect of defects.

1174. (1882.) When a cause is submitted to this court on a record so imperfect as to render it impossible to tell therefrom whether the facts assigned for error exist or not, the judgment of the court below will be affirmed. *Cunningham v. Tonnemaker*, 13 Neb. 462 (14 N. W. 397).

1175. (1894.) Where, upon an inspection of the bill of exceptions, palpable omissions appear, and the bill is so ineligible and so unsystematically arranged that an intelligent examination is impracticable, the supreme court will upon review assume that there was evidence sufficient to sustain the findings of the trial court upon questions of fact. *Badger Lumber Co. v. Mayes*, 38 Neb. 822 (57 N. W. 519).

1176. (1903.) In case it appears from the transcript filed and a further transcript duly certified, that a party has wilfully filed an incomplete and incorrect transcript or has altered the transcript certified and furnished him, for the purpose of deceiving this court, the transcript will be stricken from the files. *Keeley Institute v. Riggs*, 70 Neb. 134 (96 N. W. 1010).

Clerical errors.

1177. (1886.) A clerical mistake of the clerk of a trial court in copying an instruction into the transcript will not be sufficient cause for reversing a judgment if it affirmatively appears by the phraseology of the instruction what its original language was, and that such instruction, being upon an immaterial matter, could work no prejudice to the party on trial if correctly copied. *Ballard v. State*, 19 Neb. 609 (28 N. W. 271).

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Objections and motions to quash.

1178. (1874.) Motions to strike out part of the transcript of the court below, will not be entertained in the supreme court. Whatever objection is taken to the record, should be presented in the argument of the cause upon its merits. *Hughes v. Kellogg*, 3 Neb. 186.

1179. (1885.) A party who moves to quash a bill of exceptions must specifically point out in his motion the objections complained of. *Smith v. Kaiser*, 17 Neb. 184 (22 N. W. 368).

1180. (1885.) Where a motion supported by affidavit is filed to strike the bill of exception from the record, upon the grounds that it has been mutilated by adding certain words thereto since being signed, the motion will be overruled unless it is made to appear that the mutilation was made by the plaintiff in error or his attorney. *Clark v. Gell*, 17 Neb. 284 (22 N. W. 562).

1181. (1885.) An objection to a bill of exceptions, on the ground that the clerk has not certified that it is the original bill, may be taken either by motion to quash the exceptions, or on the final hearing. *Hogan v. O'Neil*, 17 Neb. 641 (24 N. W. 213).

1182. (1890.) Where a second motion to set aside a default and judgment in the district court was duly filed therein and overruled, no objections being made to it in that court, a motion to strike it from the record will not be entertained in the supreme court. *Burke v. Pepper*, 29 Neb. 320 (45 N. W. 466).

1183. (1891.) A motion to quash a bill of exceptions, being a technical objection, must itself be free from fault; therefore where the grounds assigned are "because the same (the bill) was not made and signed as required by law," the motion should be overruled, unless there is a total want of some material requirement—such as the signature of the judge. *Walker v. Morse*, 33 Neb. 650 (50 N. W. 1055). [Overruled. *Moline, M & S. Co. v. Curtis*, 38 Neb. 520.]

1184. (1898.) On motion to quash a bill of exceptions the supreme court may receive in evidence a certified copy of an affidavit not included in the record for review. *Brownell v. Fuller*, 54 Neb. 586 (74 N. W. 1105).

1185. (1900.) A motion to quash a bill of exceptions is of no avail where no bill has been settled. *Rhea v. State*, 61 Neb. 15 (84 N. W. 414).

1186. (1901.) Objections to a bill of exceptions cannot be heard from a party asking an affirmance of a judgment expressly based upon it. *Armstrong v. Mayer*, 1 Unof. 119 (95 N. W. 483).

Waiver of objections.

1187. (1882.) A motion to quash a bill of exceptions will not be entertained after a case, which has been reached in the regular order of business, is submitted. *Dietrich v. Lincoln & N. R. Co*, 13 Neb. 500 (14 N. W. 528).

1188. (1883.) Where an attorney of record, to whom a bill of exceptions is presented for examination, proposed amendments thereto without objection, he cannot afterwards be heard to complain that it was not presented to him within the statutory time. *Omaha & N. R. Co. v. Redick*, 14 Neb. 55 (14 N. W. 665); (1890) *Warren v. Brown*, 31 Neb. 8 (47 N. W. 633).

1189. (1883.) A trial was had before a referee, who made a report, and the testimony and exceptions taken before him were returned to the court, but not signed. Exceptions were filed to the report, which were overruled, and judgment entered on the report, and the judge signed the bill of exceptions taken before the referee. *Held*, That as no objection was made in the district court to the bill of exceptions because not signed by the referee, the objection will not be considered by the supreme court. *Cattle v. Haddox*, 14 Neb. 59 (14 N. W. 803).

1190. (1883.) If a party object to the bill for any reason other than that it is inaccurate, he must rely upon such objections and refuse to receive and retain the bill for examination. *Cheney v. Cooper*, 14 Neb. 413 (16 N. W. 433).

1191. (1883.) Where a bill of exception is returned by the attorneys for the adverse party, signed and approved by them after the expiration of the statutory time for filing the objection that it is filed out of time is thereby waived. *Cheney v. Cooper*, 14 Neb. 413 (16 N. W. 433).

1192. (1885.) Where a bill of exceptions was submitted to the adverse party for correction, and amendments made to the same and then duly signed, it is a waiver of all objections as to matters of form. *Smith v. Kaiser*, 17 Neb. 184 (22 N. W. 368).

1193. (1888.) Objections to matters of form in a bill of exceptions by which it is sought to quash the bill, must be made within a reasonable time after bill is filed in

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appellate court; and where not made for more than a year after filing of transcript, and after case is set for trial and plaintiff has prepared and printed briefs on the main issue, such objections will be deemed to be waived. *Yates v. Kinney*, 23 Neb. 648 (37 N. W. 590).

1194. (1888.) Where an original bill of exceptions is sent by the clerk of a district court to the supreme court, it is his duty to certify the same; but this objection may be waived by the parties, and will be deemed to be waived where the bill is treated by the adverse party as perfect, either by affirmative acts or long acquiescence. *Yates v. Kinney*, 23 Neb. 648 (37 N. W. 590). [Overruled as to waiver. 47 Neb. 198; 47 Neb. 393; 47 Neb. 397.]

1195. (1888.) A party seeking a bill of exceptions, who presents the proposed bill to the adverse party or his attorneys for amendment, within the time fixed by law or the order of the court, is entitled to have such bill examined by such adverse party, and amendments thereto proposed, if necessary; and if, instead of such proposed amendments, the bill is returned, on the alleged ground that the time in which to prepare the same had expired, it will be deemed a waiver of objections to the bill itself. *State, ex rel. Covey, v. Gaslin*, 25 Neb. 71 (40 N. W. 601).

1196. (1889.) Where a bill of exceptions is served after time, right of objection thereto on that ground is not waived by retaining the bill more than ten days. *City of Seward v. Klenk*, 27 Neb. 615 (43 N. W. 4107).

1197. (1891.) When a proposed bill of exceptions is served upon the adverse party, after the period has elapsed within which it should have been submitted and signed, and the bill is returned to the party seeking its allowance without proposing any amendments or making any objections as to the time he received it, the judge should allow the bill. *State, ex rel. Downing, v. Gaslin*, 32 Neb. 291 (49 N. W. 353).

1198. (1892.) Where a defendant fails to file a motion to quash a bill of exceptions until after briefs upon the merits have been made and served the court will consider the objection waived. *Crane Bros. Mfg. Co. v. Keck*, 35 Neb. 683 (53 N. W. 606).

1199. (1893.) Upon the consideration of a motion for a new trial where there were used several affidavits identified by the clerk of the court, and counsel for the respective parties having stipulated that the affidavits contained all the evidence offered on either side on said motion, and counsel, upon whom was served the proposed bill of exceptions, having returned the same without suggestion or amendment, and the said clerk having settled the proposed bill of exceptions, a motion to strike out said affidavits because not shown to have been used on the determination of said motion, or identified in the bill of exceptions, must be overruled. *Wheeler v. Olson*, 37 Neb. 562 (56 N. W. 309).

1200. (1894.) When the party suggesting amendments to a bill of exceptions appears before the judge and insists that his amendments be allowed, without making any objections as to the sufficiency of the notice, or that the bill was not submitted to the judge in time, he waived all objections as to the sufficiency of the notice, and as to the time the bill was presented to the judge for his approval and signature. *Schields v. Horbach*, 40 Neb. 103 (58 N. W. 720).

1201. (1896.) The omission of the clerk's certificate authenticating the bill is not waived by failure of the parties to object thereto on that ground. *Romberg v. Fokken*, 47 Neb. 198 (66 N. W. 282); *Union P. R. Co. v. Kinney*, 47 Neb. 393 (66 N. W. 449).

1202. (1897.) Where a bill is served upon the adverse party after the time therefor had expired, and the parties stipulated in writing that the trial judge should sign and allow the bill, it is a waiver of the objection that the bill was not presented within the time fixed by law or the order of the court. *Thompson v. Missouri P. R. Co.*, 50 Neb. 329 (69 N. W. 1119).

1203. (1897.) A motion to quash a bill of exceptions which has been duly allowed by the trial judge and properly authenticated, the motion having been made more than a year after the filing of the bill and the transcript in the supreme court, and after the service of briefs in the case, comes too late. *Thompson v. Missouri P. R. Co.*, 50 Neb. 330 (70 N. W. 385).

1204. (1898.) Objection to a bill of exceptions because it was not presented for examination and amendment in the statutory period, made for the first time in the appellate court nearly two years after filing transcript, and after service of briefs upon the merits by the party seeking the reversal, comes too late. *Saunders v. Bates*, 54 Neb. 209 (74 N. W. 578).

1205. (1898.) Defendant in error did not waive his right to move to quash the bill by appearing before the trial judge merely

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to object to its allowance, nor by failing to file the motion until after the time had expired within which the plaintiff in error was required to file his briefs to the merits, such briefs not having been filed. *Supreme Tent of the Knights of the Maccabees v. Kreig*, 54 Neb. 588 (74 N. W. 1104).

Amendment or correction in trial court.

1206. (1887.) Under the present system of practice if a court having jurisdiction finds itself powerless to do full justice for want of a full and perfect record, the order of the court in which the cause is pending upon appellate proceeding, on the court or tribunal below, takes the place of the more formal and expensive writ of certiorari on suggestion of diminution of the record. If after one order has issued and a return made thereto it appears that the record is still imperfect, other orders may issue on the suggestion of the some or the opposite party. *Nebraska & C. R. Co. v. Storer*, 22 Neb. 90 (34 N. W. 69).

1207. (1889.) When it is made to appear to the supreme court that there are errors and mistakes in the bill of exceptions, and that evidence is included therein which was not in the bill of exceptions at the time it was signed by the judge of the district court and that important evidence has been omitted in making up the bill, the supreme court will order the bill to be referred back to the judge before whom the case was tried, for examination and correction. *Hoagland v. Van Etten*, 27 Neb. 705 (43 N. W. 422).

1208. (1896.) Where documents have been omitted from a bill of exceptions through the fault of defendant in error, plaintiff in error may be permitted to withdraw it from the supreme court for the purpose of presenting to the trial judge an application for amendment. *Macfarland v. West Side Improvement Ass'n*, 47 Neb. 661 (66 N. W. 637).

1209. (1897.) A court of record has the inherent power to correct its own records, even after appeal, so that such amended record may show correctly the history of the proceedings before the appeal was taken. *Andresen v. Lederer*, 53 Neb. 128 (73 N. W. 664).

1210. (1897.) A trial court, after an appeal has been perfected therefrom, has no power to so correct its records, that, in fact, a modification of the judgment already appealed from shall be affected. *Andresen v. Lederer*, 53 Neb. 128 (73 N. W. 664).

1211. (1897.) Where a bill of exceptions filed in the supreme court has been remanded with permission to the lower court to rule on a motion to correct the bill, additional matter properly inserted by the trial judge and certified to the appellate court will not be eliminated on motion of defendant in error. *Macfarland v. West Side Improvement Ass'n*, 53 Neb. 417 (73 N. W. 736).

1212. (1898.) After an appeal perfected, an amendment of the record of the judgment appealed from to show certain facts and a subsequent amendment whereby such facts were eliminated from the record, *held* to have accomplished nothing by way of amendment. *Andresen v. Carson*, 54 Neb. 678 (74 N. W. 1072).

1213. (1898.) A district judge has authority, after the expiration of the time for settling a bill of exceptions, to make corrections therein, if it be found not to disclose what it was intended to at the time of settlement. *Brennan-Love Co. v. McIntosh*, 56 Neb. 140 (76 N. W. 461).

1214. (1898.) If it be disclosed, after the bill reaches this court, that it does not disclose what the trial judge intended at the time of settlement, it will be remanded to the district court for correction under his supervision. *Brennan-Love Co. v. McIntosh*, 56 Neb. 140 (76 N. W. 461).

1215. (1899.) Where a bill does not disclose what it was intended to at the time it was allowed, it may be corrected by the trial judge after the time for settlement has expired. *McWaid v. Blair State Bank*, 58 Neb. 618 (79 N. W. 620).

1216. (1900.) A bill of exceptions filed with the supreme court and not withdrawn by leave thereof and presented to the trial judge for correction, can not be corrected in a suit of mandamus against the trial judge. *State, ex rel Waldron, v. Ramsey*, 59 Neb. 518 (81 N. W. 439).

1217. (1902.) A party who complains that a trial judge has incorporated improper matter in a bill of exceptions has an adequate remedy at law, within the code of civil procedure, section 646, so that mandamus to correct the record will not be granted. *State, ex rel. Cobb, v. Fawcett*, 64 Neb. 496 (90 N. W. 250).

1218. (1902.) In case exceptions are filed which were not properly taken at the time the instructions were given, they have no place in the record, and the remedy is to correct the record in the district court by striking them therefrom, the same as where

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exceptions not seasonably taken are noted by counsel upon the written charge. *City of Lincoln v. Sager*, 2 Unof. 598 (89 N. W. 617).

Amendment or correction in appellate court.

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1219. (1876.) The date of filing indorsed on a transcript by the clerk in a cause brought to the supreme court, is merely *prima facie* evidence of the time at which it was received by him. The court will correct a mistake made in the date to the prejudice of either party, and affidavits will be received for the purpose of determining when the transcript was delivered to the clerk. *Tootle v. White*, 4 Neb. 401.

1220. (1887.) The affidavit of the clerk of the district court cannot be resorted to for the purpose of correcting a transcript of the record certified to by him. If a false or erroneous record is certified to by him, it should be corrected by a certified transcript of the record as it is. *Haggerty v. Walker*, 21 Neb. 596 (33 N. W. 244).

1221. (1892.) The supreme court will not require exhibits to be supplied which have never been made a part of the bill of exceptions. *Bickel v. Dutcher*, 35 Neb. 761 (53 N. W. 663).

1222. (1892.) Where exhibits are stricken out by the trial court upon objection of appellant that the same are not true copies of the original, and the bill of exceptions is allowed without them, the supreme court will not entertain a motion by the appellant to require the appellee to supply such exhibits. *Bickel v. Dutcher*, 35 Neb. 761 (53 N. W. 663).

1223. (1893.) The entries upon the journal of the district court are conclusive evidence of its proceedings. If the clerk has not made such entries in conformity with the facts or the rulings of the judge, the remedy is by a correction of the journal by order of the district court. The supreme court will not substitute a paper certified to be a memorandum of journal entry prepared by the judge for the journal entry itself, as it appears in the transcript filed in this court and certified to be a true transcript of the record. *Chicago, B. & Q. R. Co. v. Anderson*, 38 Neb. 112 (56 N. W. 794). [No reference to this point in opinion.]

1224. (1896.) The supreme court will not, as a matter of course, permit a record to be withdrawn for the purpose of amending a bill of exceptions; and especially is this true where it appears that a failure to incorporate into the bill of exceptions all the evidence is due to the laches of the party seeking the amendment. *Macfarland v. West Side Improvement Ass'n*, 47 Neb. 661 (66 N. W. 637).

1225. (1896.) A motion to correct a bill of exceptions by supplying evidence omitted therefrom through inadvertence will not be entertained by the supreme court. *Warner v. Hutchins*, 48 Neb. 672 (67 N. W. 745).

1226. (1896.) An irregularity in a notice of the commencement of a cause in the district court, being shown by the amended transcript to have resulted from an error in transcribing the proceeding below, corrected. *Scarborough v. Myrick*, 49 Neb. 32 (68 N. W. 382).

1227. (1897.) The statutes neither command nor authorize the supreme court to amend the record of the trial court in a case brought up for review. *Thompson & Sons Mfg. Co. v. Nicholls*, 52 Neb. 312 (72 N. W. 217).

1228. (1898.) One seeking review by a proceeding in error must file a transcript and petition in error within a year after rendition of the judgment assailed, but amendments to the transcript may be filed afterward. *Moss v. Robertson*, 56 Neb. 774 (77 N. W. 403).

1229. (1903.) Affidavits addressed to the trial court after judgment on a motion to amend the reporter's notes of the evidence can not be considered by the appellate court, in the absence of a ruling by the trial court on such motion. *Modern Brotherhood of America v. Cummings*, 68 Neb. 256 (94 N. W. 144).

1230. (1905.) Where a party relies upon an order of the district court, which he alleges was made, but which the record of that court does not disclose, he must apply to that court for a correction of the record. This court can only consider the record of the proceedings of the district court as it appears in the transcript. *Barker Co. v. Central West Investment Co.*, 75 Neb. 43 (105 N. W. 985).

1231. (1907.) Where, upon the final hearing of a case, the trial judge makes an order permitting the defendant to offer the testimony taken at a former trial, and afterwards includes the evidence so taken in the bill of exceptions, the same will not be stricken from the record in this court. *Anthes v. Schroeder*, 79 Neb. 355 (112 N. W. 593).

1231*a*. (1907.) Where appellant files a

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certified copy of a judgment, together with a præcipe and assignment of errors, and nine months thereafter files a motion to supply the record, a transcript, a bill of exceptions and a brief, but does not serve a notice of the motion, or present it to the court, he cannot three months later, when the case is called for hearing, suggest a diminution of the record, and obtain leave to file copies of the record. *Cathers v. Glissman*, 80 Neb. 384 (114 N. W. 1135).

Additional transcript.

1232. (1903.) If a transcript is incomplete or incorrect in some particular, the appropriate remedy is to procure an additional or corrected transcript duly certified, and the original record cannot be ordered brought up for inspection. *Keeley Institute v. Riggs*, 70 Neb. 134 (96 N. W. 1010).

Cost of including unnecessary papers.

1233. (1888.) Where no objection is made to the summons, or to the return of the officer thereon, such summons should be omitted from the transcript. So with journal entries not involved in the case, and the costs of such immaterial matter, if the proper motion is made, will be taxed to the party at fault. *Winkler v. Roeder*, 23 Neb. 706 (37 N. W. 607; 8 Am. St. Rep. 155).

1234. (1892.) Where unnecessary papers are included in the transcript, as the original petition where there is an amended one, the summons and return to the same, together with motions and demurrers to the petition where no point is made upon such pleadings or papers, the costs of the same will be taxed to the party at fault. *Streitz v. Hartman*, 35 Neb. 406 (53 N. W. 215).

I. Conclusiveness, Impeachment and Contradicting.

Conclusiveness of transcript or bill of exceptions.

1235. (1888.) The transcript of the trial court, duly certified by the clerk, imports absolute verity; and will alone be recognized by this court as to all matters which are properly of record in that court. *Hoagland v. Van Etten*, 23 Neb. 462 (36 N. W. 755); (1892) *Worley v. Shong*, 35 Neb. 311 (53 N. W. 72); (1894) *Grand Island Savings & Loan Association v. Moore*, 40 Neb. 686 (59 N. W. 115); (1895) *Chadron Banking Co. v. Mahoney*, 43 Neb. 214 (61 N. W. 594); (1895) *Davis v. Snyder*, 45 Neb. 415 (63 N. W. 789); (1896) *School District No. 1 v. Bishop*, 46 Neb. 850 (65 N. W. 902); (1896) *Norwegian Plow Co. v. Bollman*, 47 Neb. 186 (66 N. W. 292; 31 L. R. A. 747); (1896) *Minick v. Minick*, 49 Neb. 89 (68 N. W. 374); (1900) *Fulton v. Ryan*, 60 Neb. 9 (82 N. W. 105); (1901) *Wentz v. Meyer*, 2 Unof. 36 (96 N. W. 272); (1897) *Seaver v. Hall*, 50 Neb. 878 (70 N. W. 373).

1236. (1893.) A bill of exceptions duly allowed and certified by the trial judge imports absolute verity and its truthfulness cannot be assailed collaterally. *Gregory v. Kaar*, 36 Neb. 533 (54 N. W. 859).

1237. (1891.) Where the record which purports to contain all the evidence fails to show that a certain resolution on which the action is based was introduced in evidence, or its admission waived, the court in considering the case must be governed by the record. *City of Seward v. Conroy*, 33 Neb. 430 (50 N. W. 329).

1238. (1894.) A transcript of the record authenticated by the certificate of the clerk of the district court is conclusive evidence of the contents of the pleadings upon which the case was tried. *Phenix Ins. Co. v. Rad Bila Hora Lodge*, 41 Neb. 21 (59 N. W. 752).

1239. (1894.) The transcript of the record filed in the supreme court imports in this court absolute verity. If in fact incorrect, the district court, and not the supreme court, must make the correction. *Weander v. Johnson*, 42 Neb. 117 (60 N. W. 353); (1896) *Omaha Loan & Trust Co. v. Hogeboom*, 47 Neb. 7 (66 N. W. 14); (1897) *Merchants Savings Bank v. Noll*, 50 Neb. 615 (70 N. W. 247).

1240. (1896.) The authenticated transcript of the record of the trial court imports absolute verity on appeal, and cannot be impeached by mere statements of counsel in the brief filed. *Lewis Investment Co. v Boyd*, 48 Neb. 604 (67 N. W. 456).

1241. (1896.) In the record presented to the supreme court appeared a copy of a journal entry in which was set forth the overruling of a demurrer by the trial court and that the demurrant failed to plead or answer further, but elected to stand on the demurrer. *Held*, That such recitals must be taken by the supreme court as true statements of what occurred in the trial court. *Church v. Callihan*, 49 Neb. 542 (68 N. W. 932).

1242. (1897.) The appellate court will not draw an inference contradicting the record in order to sustain an assignment of error. *Nebraska Land, Stock-Growing &*

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Investment Co. v. McKinley-Lanning Loan & Trust Co., 52 Neb. 410 (72 N. W. 357).

1243. (1898.) The mere fact that in a journal entry a motion sustained was described as "a motion to dismiss an appeal because not taken in time" *held* not sufficient to prevent the appellate court from considering whether or not the ruling on said motion was proper, in view of grounds urged therein, but not recited in said journal entry. *Andresen v. Carson*, 54 Neb. 678 (74 N. W. 1072).

1244. (1899.) An objection that no testimony was received below must be overruled where the record shows the hearing was in the nature of a trial, and that all the evidence offered was received. *Broadwater v. Foxworthy*, 57 Neb. 406 (77 N. W. 1103).

1245. (1901.) A recital in the transcript that the court instructed the jury to find for the plaintiff, is a mere conclusion, and in the absence of the instruction upon which it is based from the transcript and bill of exceptions, an assignment of error, predicated on such instruction, will not be considered. *Startzer v. Clarke*, 1 Unof. 91 (95 N. W. 509).

1246. (1901.) A bill of exceptions allowed and signed by the trial judge becomes a part of the record in the case, and its recitals cannot be impeached by affidavits filed for that purpose. *Phœnix Ins. Co. v. Howe*, 2 Unof. 20 (96 N. W. 73).

1247. (1902.) It is conclusively presumed in the supreme court that the duly certified transcript of the proceedings of the lower court contains everything that ought to be considered in determining the correctness of the ruling complained of. *Bush v. Tecumseh Nat. Bank*, 64 Neb. 451 (90 N. W. 236).

Conclusiveness of certificate.

1248. (1883.) Where from an inspection of a bill of exceptions it is apparent that material evidence has been omitted, the certificate that it contains all that was used on the trial will not be taken as conclusive on that point. *Missouri P. R. Co. v Hays*, 15 Neb. 224 (18 N. W. 51).

1249. (1896.) The supreme court will not weigh the evidence to see if it sustains the verdict, when the bill of exceptions, on its face, reveals that a deposition introduced and read upon the trial has been omitted therefrom, even though the trial judge has certified that the bill contains all the evidence offered or given upon the trial. *Storz v. Finklestein*, 48 Neb. 27 (66 N. W. 1020); (1898) *Alling v. Fisher*, 55 Neb. 239 (75 N. W. 536).

1250. (1896.) When it appears from statements in the bill of exceptions that it does not contain all the evidence introduced at the trial of the case, such must be taken to be the fact, in the absence of any other or further proof on the subject than the certificate to the bill to the effect that it contains all the evidence. *Greene v. Greene*, 49 Neb. 546 (68 N. W. 947; 59 Am. St. Rep. 560; 34 L. R. A. 110).

1251. (1901.) Where the record shows that there was an amendment of pleadings at the rial but its nature does not appear, the clerk's certificate that the transcript is full and complete creates a presumption that the pleadings as set forth contain the amendment. *Schrandt v. Young*, 62 Neb. 254 (86 N. W. 1085).

Conflict in record.

1252. (1893.) Where the copy of an affidavit appearing in the transcript differs from that in the bill of exceptions, only the latter will be considered. *Lundgren v. Erik*, 38 Neb. 363 (56 N. W. 992).

Impeachment or contradicting.

1253. (1893.) On proceedings by petition in error to review a judgment of the district court, the minutes of the judge on the trial docket will not be received to impeach the judgment as entered at large upon the journal and approved by the judge. *Gage v. Bloomington Town Co.*, 37 Neb. 699 (56 N. W. 491).

1254. (1894.) Original evidence cannot be received in supreme court to contradict or alter the record of the district court. *McDonald v. Bowman*, 40 Neb. 269 (58 N. W. 704).

1255. (1894.) The supreme court cannot consider entries made upon the trial docket of the district court for the purpose of ascertaining what was decided in the court below. The approved journal entry of a judgment is indisputable evidence of what the judgment was. *Brown v. Ritner*, 41 Neb. 52 (59 N. W. 360).

——— Affidavits.

1256. (1889.) Where an affidavit of an attorney as to what took place at a trial, is contradicted by the recitals in the record, the latter must control. *Barlass v. Braash*, 27 Neb. 212 (42 N. W. 1028).

1257. (1895.) Where objection to the

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introduction of a written instrument was that it had been altered and the copy in the bill of exceptions did not show such alteration an affidavit not used on the hearing in the district court but attached to the record here is incompetent to show that the original instrument appeared to be altered. *Chadron Banking Co. v. Mahoney*, 43 Neb. 214 (61 N. W. 594).

1258. (1895.) An affidavit filed in the appellate court, stating when the terms of the lower court were held, is incompetent to contradict a contrary showing in the transcript. *Woodward v. Baird*, 43 Neb. 310 (61 N. W. 612).

1259. (1897.) On motion to dismiss appeal because the transcript was filed too late, an affidavit of appellee's attorney containing, *inter alia*, a statement that he searched the records after the time to appeal expired and did not find the transcript, *held* insufficient to contradict a record showing that the transcript was filed in time. *Fenton v. American Jewelry Co.*, 51 Neb. 395 (70 N. W. 931).

1260. (1897.) Matters certified as part of a record cannot be controlled by statements contained in an affidavit. *Security Nat. Bank v. Latimer*, 51 Neb. 498 (71 N. W. 38).

J. Question Presented for Review.

Limitation by scope of record in general.

1261. (1882.) A question discussed in the brief of counsel, but not raised in the record, will not be considered. *Dietrichs v. Lincoln & N. R. Co.*, 13 Neb 43 (13 N. W. 13); (1902) *Moulthan v. Apking*, 64 Neb. 378 (90 N. W. 1051).

1262. (1892.) When the transcript of the record in a civil case brought to the supreme court contains only the pleadings and record of the entry of judgment, which latter conforms to the pleadings, and in which no errors appear, the judgment will be affirmed. *Fuller v. Ryan* 33 Neb. 697 (50 N. W. 1044).

1263. (1900.) Questions not presented for review by the record before the court, will not be considered. *Dufrene v. Johnson*, 60 Neb. 18 (82 N. W. 107).

1264. (1901.) The supreme court is not authorized to look beyond the transcript and bill of exceptions for what transpired at the trial. *Kuker v. Beindorff*, 63 Neb. 91 (88 N. W. 190).

1265. (1902.) Where no part of the record prior to an *alias* order of sale on which property is sold is brought to the supreme court on an appeal from an order of confirmation, no irregularity or lack of authority to issue such *alias* order can be presumed. *National Life Ins. Co. v. Crandall*, 2 Unof. 335 (96 N. W. 624).

In absence of bill of exceptions.

1266. (1879.) When there is no bill of exceptions the supreme court can only notice such errors as appear on the face of the record proper. *Miller v. Rolph*, 8 Neb. 438; (1879) *National Life Ins. Co. v. Robinson*, 8 Neb. 452.

1267. (1883.) Where the only objection to the judgment is, that the verdict is not sustained by the evidence, and for any cause the bill of exceptions be quashed or stricken from the files, the judgment will be affirmed. *McCathron v. McCathron*, 15 Neb. 144 (17 N. W. 265).

1268. (1883.) The paper claimed to be a bill of exceptions being quashed, and there being no point raised, or question involved in the case, which can be considered without an examination of the testimony on which the judgment was rendered, the judgment must be affirmed. *Roode v. Sherer*, 15 Neb. 146 (17 N. W. 265).

1269. (1893.) Where a bill of exceptions has been quashed and the court below correctly applied the law to the facts found by a referee, that being the only question for review, the judgment will be affirmed. *Brown v. Farmers & Merchants Banking Co.*, 36 Neb. 434 (54 N. W. 671).

1270. (1895.) The ruling upon a motion for a new trial will not be reviewed where the evidence considered upon the hearing has not been preserved by a bill of exceptions. *Spotswood v. Nat. Bank of Commerce*, 44 Neb. 1 (62 N. W. 245).

1271. (1896.) Assignments of a petition in error which can be reviewed only in connection with a bill of exceptions will be disregarded where no authentic bill is contained in the record. *Wood Mowing & Reaping Machine Co. v. Garhold*, 47 Neb. 397 (66 N. W. 538); (1898) *German Nat. Bank v. Farmers & Merchants Bank*, 54 Neb. 593 (74 N. W. 1086).

1272. (1897.) The alleged errors being wholly dependent upon the nature of the evidence admitted and excluded, are not available to plaintiffs in error, because of the bill of exceptions having been quashed on motion before the final submission. *Rey-*

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nolds v. McCandless, 50 Neb. 225 (69 N. W. 760).

1273. (1897.) If errors are assigned of a trial court's refusal to give requested instructions, and to determine the force of such assignments would necessitate an examination of the evidence introduced at the trial, the bill of exceptions containing the evidence having been quashed, the evidence is not before the supreme court, the errors, if any, do not affirmatively appear, and the assignments may be overruled. *Sunday Creek Coal Co. v. Burnham*, 52 Neb. 364 (72 N. W. 487).

1274. (1898.) In an appeal to the supreme court, in the absence of a bill of exceptions, if the petition or pleading on which the decree is predicated contains sufficient statements of a cause and proper prayer for the relief thereby afforded, questions which for decision necessitate a reference to the bill of exceptions will not be considered, and an affirmance of the decree is proper. *Beatrice Savings Bank v. Beatrice Chautauqua*, 54 Neb. 592 (74 N. W. 1065); (1903) *Grove v. Dineen*, 4 Unof. 722 (96 N. W. 253).

1275. (1898.) When a bill of exceptions has been quashed, no question will be considered, a determination of which necessarily involves an examination of the evidence adduced in the trial court. *Home Fire Ins. Co. v. Weed*, 55 Neb. 146 (75 N. W. 539); (1899) *Johnson v. Klein*, 58 Neb. 243 (78 N. W. 514); (1899) *Walker v. Allen*, 58 Neb. 537 (78 N. W. 1070); (1899) *McGraw v. Chicago, R. I. & P. R. Co.*, 59 Neb. 397 (81 N. W. 306).

1276. (1901.) 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. *Pettibone v. Fitzgerald*, 62 Neb. 869 (88 N. W. 143); (1902) *Palmer v. Mizner*, 2 Unof. 903 (93 N. W. 1121).

1277. (1902.) Where a bill of exceptions is quashed and the only assignments of error relate to the introduction of evidence, and a general assignment that the judgment is contrary to the law and the evidence, the reviewing court will only inquire whether the pleadings will support the judgment. *Gonzales-Mandelbaum Co. v Broghamer*, 64 Neb. 83 (89 N. W. 621).

1278. (1902.) Where an answer in an equity suit to modify a judgment pleads former adjudication, and the plaintiff puts such plea in issue by a denial, in the absence of a bill of exceptions, it will be presumed that the action of the trial court in not sustaining the plea is supported by sufficient evidence. *Spargur v. Prentiss*, 66 Neb. 222 (92 N. W. 300).

1279. (1903.) A plaintiff who has been defeated upon a trial in the court below by a general finding of issues of fact, upon petition, answer and reply, in favor of his adversary, and who prosecutes error without having preserved the evidence in a bill of exceptions, and without having obtained a ruling upon a motion for a new trial, can assign but one ground of error in the supreme court, viz., that the answer does not state facts constituting a defense to the petition. *Bemis v. McCloud*, 4 Unof. 729 (96 N. W. 214).

1280. (1903.) On an appeal from a decree of the district court where there is no bill of exceptions preserved and the record contains nothing but the clerk's transcript, the supreme court is only required to examine the record far enough to ascertain whether or not the pleadings are sufficient to sustain the decree. *Grove v. Dineen*, 4 Unof. 722 (96 N. W. 253).

1281. (1905.) Upon an appeal in an equity case in which there have been special findings of fact, but in which no bill of exceptions has been preserved, only such findings will be considered as are embraced within the issues; and the decree, if supported by the pleadings, will be upheld if, and in so far as, it is not in irreconcilable conflict with such findings. *Kupke v. Polk*, 73 Neb. 590 (103 N. W. 321).

1282. (1905.) When the trial court, in an action in equity, makes special findings of fact, and no general finding, and the evidence is not preserved, the sole question for the supreme court on appeal is whether the judgment is supported by the pleadings and the special findings. If in such case there is no finding upon a material issue, that issue must upon appeal be determined against the party on whom the burden of establishing such issue rested. *Kupke v. Polk*, 73 Neb. 590 (106 N. W. 495).

1283. (1905.) Where the evidence introduced on the trial of one charged with a constructive contempt of court for the violation of an order of injunction is not preserved and authenticated by a proper bill of exceptions, the only question which can be considered by the reviewing court is whether the pleadings contained in the transcript support the judgment, and, if they are found sufficient, the judgment will be affirmed. *Miles v. State*, 74 Neb. 684 (105 N. W. 301).

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1284. (1907.) The rule to the effect that, in the absence of a bill of exceptions, it will be presumed that the instructions are based upon the evidence, has no application to instructions recalled before a verdict was reached. *Hibner v. Westover*, 78 Neb. 161 (110 N. W. 732).

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X. ASSIGNMENT OF ERRORS.

Assignment of errors in motion for new trial, see *ante*, §§ 533-579.

Specification of errors.

1285. (1878.) On proceeding in error, when the assignment is "that the finding of the said court is against the law and the evidence," and no specific error of law is pointed out in the motion for a new trial, and the judgment being clearly warranted, by the finding of all the issues in favor of the defendant, the only question raised is simply whether the verdict of the court, upon the facts, is supported by the evidence. *Brunswick v. McClay*, 7 Neb. 137. [Changed by statutes. *Labaree v. Klosterman*, 33 Neb. 150 (49 N. W. 1102).

1286. (1893.) Assignments of error which are so vague and indefinite as not to indicate the rulings complained of will be disregarded in the supreme court. *Gregory v. Kaar*, 36 Neb. 533 (54 N. W. 859).

1287. (1894.) In order to obtain a review of alleged errors the petition in error must assign the same with such particularity as to enable the court to determine the precise ruling complained of. *Hanlon v. Union P. R. Co.*, 40 Neb. 52 (58 N. W. 590); (1894) *Wiseman v. Ziegler*, 41 Neb. 886 (60 N. W. 320); (1898) *Allsman v. Richmond*, 55 Neb. 540 (75 N. W. 1094); (1902) *Ketelman v. Chicago Brush Co.*, 65 Neb. 429 (91 N. W. 282).

1288. (1894.) If a litigant is of opinion that a ruling of the district court was erroneous and prejudicial to him, he must set out in his petition in error the precise action of the district court which he claims was erroneous. *Von Dorn v. Mengedoht*, 41 Neb. 525 (59 N. W. 800); (1895) *Quinn v. Moss*, 45 Neb. 614 (63 N. W. 931).

1289. (1894.) Errors of law, to be available in the supreme court to the complaining party must be specifically assigned in the petition in error. *Clark v. Carey*, 41 Neb. 780 (60 N. W. 78); (1899) *Bennett v. McDonald*, 59 Neb. 234 (80 N. W. 826).

1290. (1895.) An assignment "irregularity in the proceedings of the jury" is too indefinite to be considered. *Omaha Fire Ins. Co. v. Dierks & White*, 43 Neb. 473 (61 N. W. 740).

1291. (1895.) An assignment "irregularity in the proceedings of the court and abuse of discretion, by which the defendant was prevented from having a fair trial," is too indefinite to be considered. *Omaha Fire Ins. Co. v. Dierks & White*, 43 Neb. 473 (61 N. W. 740); (1895) *Houston v. City of Omaha*, 44 Neb. 63 (62 N. W. 251); (1901) *Rawlings v. Anheuser-Busch Brewing Ass'n*, 1 Unof. 555 (95 N. W. 792).

1292. (1896.) To present for review errors alleged to have occurred during the trial of a cause the assignment should, in apt words, set forth some matter for which a motion for a new trial is authorized by the code of civil procedure. *Beavers v. Missouri P. R. Co.*, 47 Neb. 761 (66 N. W. 821).

1293. (1896.) Plaintiff in error should specifically state in his petition the action, or the omission, of the court of which he complains, and an assignment of errors appearing upon the record at certain pages, is insufficient. *Ætna Ins. Co. v. Simmons*, 49 Neb. 811 (69 N. W. 125).

——— Errors of law occurring at trial.

1294. (1883.) Under the general assignment, "errors of law occurring at the trial," objections to the instructions given or refused cannot be considered. Such instructions must be pointed out in some way either by number or other means of identifying the same. *Hastings & G. I. R. Co. v. Ingalls*, 15 Neb. 123 (16 N. W. 762).

1295. (1894.) An assignment, "errors of law occurring at the trial of said cause, and duly excepted to," although sufficient in a motion for a new trial, is not specific enough, when contained in a petition in error, to secure a review of the rulings of the trial court on the admission or exclusion of testimony. *Murphy v. Gould*, 40 Neb. 728 (59 N. W. 383); (1896) *Fremont, E. & M. V. R. Co. v. Root*, 49 Neb. 900 (69 N. W. 397).

1296. (1894.) If a litigant is of opinion that a trial court erred in its ruling, and desires to review such error in the supreme court, he should specifically state in his petition in error here the identical action of the district court which he claims was erroneous and an assignment for "errors of law during the course of the trial" is not sufficient. *Haskell v. Valley County* 41 Neb. 234 (59 N. W. 680).

1297. (1895.) An assignment, "erors of law occurring at the trial," is sufficient, in a

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motion for a new trial, to enable the district court to determine whether it erred in admitting or rejecting evidence; but under such an assignment in a petition in error the supreme court cannot review anything. *Risse v. Gasch*, 43 Neb. 287 (61 N. W. 616); (1895) *Houston v. City of Omaha*, 44 Neb. 63 (62 N. W. 251).

1298. (1895.) An assignment, "errors of law occurring at the trial and excepted to," is too indefinite to be considered. *Omaha Fire Ins. Co. v. Dierks & White*, 43 Neb. 473 (61 N. W. 740); (1897) *Boyd v. Mains*, 52 Neb. 314 (72 N. W. 269); (1899) *Hart v. Weber*, 57 Neb. 442 (77 N. W. 1085); (1900) *Missouri P. R. Co. v. Tipton*, 61 Neb. 49 (84 N. W. 416); (1901) *Parsons Band Cutter & Self-Feeder Co. v. Gadeke*, 1 Unof. 605 (95 N. W. 850); (1905) *Brooks v. Stanley*, 74 Neb. 858 (105 N. W. 551).

1299. (1895.) An assignment in a petition in error, "errors of law occurring at the trial, excepted to at the time," is too indefinite to secure a review of the rulings of the trial court on the admission or exclusion of testimony. *Mullen v. Morris*, 43 Neb. 596 (62 N. W. 74); (1895) *Schelly v. Schwank*, 44 Neb. 504 (62 N. W. 1069); (1896) *Imhoff v. Richards*, 48 Neb. 590 (67 N. W. 483); (1898) *Blodgett v. McMurtry*, 54 Neb. 69 (74 N. W. 392); (1898) *Jaeggi v. Galley*, 54 Neb. 800 (75 N. W. 238).

——— **Pleadings.**

Effect of failure to assign error, see *post*, §§ 1363, 1364.

1300. (1886.) When the plaintiff in error fails to point out alleged defects in the sufficiency of a petition it will be held good. *Pratt v. Smith*, 20 Neb. 48 (28 N. W. 849).

1301. (1895.) Where a petition contains a number of causes of action not separately stated and numbered, an assignment of error to the admission of evidence on the ground that said causes of action did not constitute a cause of action, will not be considered. *Exeter Nat. Bank v. Orchard*, 43 Neb. 579 (61 N. W. 833).

1302. (1901.) Assignments of error that (1) the court erred in overruling a demurrer to the petition, and (2) in giving judgment in favor of the plaintiff call only for an inquiry as to whether the petition states a cause of action. *Seven Valleys Bank v. Wise*, 61 Neb. 880 (86 N. W. 923).

——— **Admission or exclusion of evidence.**

Effect of failure to assign error, see *post*, § 1365.

Single assignment against several rulings, see *post*, §§ 1352, 1353.

1303. (1879.) An assignment of error in these words, "because the court erred in admitting testimony in said case upon the trial of the same offered by the plaintiff," or "because the court erred in rejecting evidence offered by the defendants upon the trial of the cause," is too indefinite to be considered. *Lyman v. McMillan*, 8 Neb. 135; (1879) *Burlington & M. R. R. Co. v. Harris*, 8 Neb. 140; (1893) *Farwell v. Cramer*, 38 Neb. 61 (56 N. W. 716); (1894) *Cortelyou v. Maben*, 40 Neb. 512 (59 N. W. 94); (1894) *Havens v. Grand Island Light & Fuel Co.*, 41 Neb. 153 (59 N. W. 681); (1895) *Kearney Electric Co. v. Laughlin*, 45 Neb. 390 (63 N. W. 941); (1895) *Kearney Canal & Water Supply Co. v. Akeyson*, 45 Neb. 635 (63 N. W. 921); (1896) *City of Omaha v. Richards*, 49 Neb. 244 (68 N. W. 528); (1896) *Burke v. Brown*, 49 Neb. 723 (68 N. W. 1026).

1304. (1879.) An assignment that the "court erred in admitting the evidence of H. and other witnesses to which said plaintiff objected," is bad for indefiniteness. *Burlington & M. R. R. Co. v. Harris*, 8 Neb. 140.

1305. (1880.) An assignment of error "that the court erred in admitting the testimony" of the witnesses (naming them), when objection was made to only a portion of such testimony, is too indefinite to be noticed. *Graham v. Hartnett*, 10 Neb. 517 (7 N. W. 280).

1306. (1881.) An assignment of error in permitting the introduction of testimony of certain witnesses "upon the question of value" of the land in controversy, is too general. *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb. 585 (10 N. W. 491); *Id. v. Ward* 11 Neb. 597 (10 N. W. 524).

1307. (1886.) Errors assigned upon the admission of irrelevant evidence are not considered unless they point out specifically the evidence to which they severally refer. *Cook v. Pickrel*, 20 Neb. 433 (30 N. W. 421); (1894) *Bloedel v. Zimmerman*, 41 Neb. 695 (60 N. W. 6); (1894) *Wonderlick v. Walker*, 41 Neb. 806 (60 N. W. 103); (1897) *Phœnix Ins. Co. of Hartford v. King*, 52 Neb. 562 (72 N. W. 855).

1308. (1891.) An assignment of error in a petition in error in the following language: "Errors of law occurring during the trial in the admission and rejection of evidence which will more fully appear by reference to the bill of exceptions filed here-

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with," criticised and disapproved. *Davis v. Getchell*, 32 Neb. 792 (49 N. W. 776).

1309. (1891.) A petition in error must specifically point out the rulings of the trial court, on the admission of testimony, which are relied on for a reversal, or they will not be considered. *Lowe v. City of Omaha*, 33 Neb. 587 (50 N. W. 760); (1894) *Kirkendall, Jones & Co. v. Davis*, 41 Neb. 285 (59 N. W. 915); (1894) *Wiseman v. Ziegler*, 41 Neb. 886 (60 N. W. 320); (1894) *Hedrick v. Strauss*, 42 Neb. 485 (60 N. W. 928); (1895) *City of Chadron v. Glover*, 43 Neb. 732 (62 N. W. 62); (1895) *Edney v. Baum*, 44 Neb. 294 (62 N. W. 461); (1895) *Smith v. Mason*, 44 Neb. 610 (63 N. W. 41); (1895) *Stoppert v. Nierle*, 45 Neb. 105 (63 N. W. 382); (1895) *Scroggin v. Johnston*, 45 Neb. 714 (64 N. W. 236); (1895) *Boyes v. Summers*, 46 Neb. 308 (64 N. W. 1066); (1895) *Redman v. Voss*, 46 Neb. 512 (64 N. W. 1094); (1896) *Coburn v. Watson*, 48 Neb. 257 (67 N. W. 171); (1897) *Woodbridge v. De Witt*, 51 Neb. 98 (70 N. W. 506); (1897) *Grand Island & W.C. R. Co. v. Swinbank*, 51 Neb. 521 (71 N. W. 48); (1897) *Morsch v. Besack*, 52 Neb. 502 (72 N. W. 953); (1898) *Phœnix Ins. Co. v. King*, 54 Neb. 630 (74 N. W. 1103); (1898) *Davis v. Otoe County*, 55 Neb. 677 (76 N. W. 465); (1899) *Churchill v. White*, 58 Neb. 22 (78 N. W. 369; 76 Am. St. Rep. 64).

1310. (1892.) An assignment of error that the court erred in admitting the evidence of a witness for plaintiff, as shown by a certain page of the record furnished by the official reporter, and made a part of the bill of exceptions is sufficient for the purpose of reviewing the rulings of the trial court on the admission of the evidence on the page referred to. *Darner v. Daggett*, 35 Neb. 695 (53 N. W. 608). [Overruled. *Phœnix Ins. Co. v. King*, 54 Neb. 630.]

1311. (1893.) The supreme court will not review upon error the rulings of the district court excluding or admitting testimony, unless the error complained of is specifically assigned in the petition in error with such certainty as to enable the court, upon examinaton of the record, to ascertain the particular error complained of. *Farwell v. Cramer*, 38 Neb. 61 (56 N. W. 716).

1312. (1895.) Assignments of error that a verdict rendered is not supported by sufficient evidence, and the judgment pronounced thereon is contrary to the law of the case, cannot be sustained because certain evidence admitted without objection on the trial was irrelevant under the pleadings. *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473, followed. *Ins. Co of North America v. Bachler*, 44 Neb. 549 (62 N. W. 911).

1313. (1897.) Under an assignment of error that the damages awarded are excessive, the supreme court will not review the action of the trial court in admitting in evidence items of damage. *Roberts v. Hopper*, 50 Neb. 681 (70 N. W. 244).

1314. (1898.) An assignment in a petition in error that the court erred in rejecting evidence, "as appears at record, pages 209, 209½, 210, 211, 212, 216, 216½, 217, 220, 223, 224, 230, 238, 239, 240, 241, 243," is too general for consideration. *Phœnix Ins. Co. v. King*, 54 Neb. 630 (74 N. W. 1103).

1315. (1898.) An assignment that evidence appearing on a certain page of the bill of exceptions was erroneously admitted may be disregarded, in absence of an objection on such page. *Globe Oil Co. v. Powell*, 56 Neb. 463 (76 N. W. 1081).

1316. (1899.) To review error in excluding a single answer on cross-examination, the assignment of error must be specific. *Honaker v. Vesey*, 57 Neb. 413 (77 N. W. 1100).

1317. (1899.) An assignment in a petition in error that the court erred in sustaining an objection to a question of a certain number, found on a page of a designated number, is sufficiently specific to present the ruling for review. *Bennett v. McDonald* 59 Neb. 234 (80 N. W. 826).

1318. (1899.) An assignment in a petition in error that "the court erred in overruling the objections of plaintiff in error to each of the following questions," giving the number of the question and the page of the record where found, is sufficiently specific to entitle the party to have the same reviewed. *Bennett v. McDonald*, 59 Neb. 234 (80 N. W. 826).

1319. (1899.) An assignment of error of the action of the trial court in refusing to strike out testimony should specifically designate the portion of the record to which it is sought to challenge attention. *Palmer v. First Bank of Ulysses*, 59 Neb. 412 (81 N. W. 303).

1320. (1901.) Upon an assignment of error in the supreme court that the trial court erred in overruling the motion for a new trial, the supreme court will not consider alleged errors of the trial court in excluding evidence. *Mains v. Mains*, 1 Unof. 679 (95 N. W. 776).

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1321. (1903.) An assignment that "the court erred in excluding from the testimony proof as to the truth of the article and the charges made therein," is too general and indefinite to be entitled to consideration where a portion of the testimony offered upon the subjects mentioned was rightly excluded. *Williams v. Fuller*, 68 Neb. 354 (94 N. W. 118; 97 N. W. 246).

1322. (1907.) The supreme court will not consider an assignment that the trial court erred in receiving evidence over the objection of the party. Our attention must be called to the specific evidence against which the objection is urged. *Tarpenning v. Knapp*, 79 Neb. 62 (112 N. W. 290).

1322*a*. (1907.) An assignment of error that "the court erred in admission of incompetent evidence as to the measure of damages" is too vague to invoke the judgment of the supreme court. *Smith v. Western Union Telegraph Co.*, 80 Neb. 395 (114 N. W. 288).

——— **Sufficiency of evidence.**

Effect of failure to assign error, see *post*, § 1366.

1323. (1895.) An assignment of error that the verdict is against the weight of evidence is not good. It should allege that the verdict is not sustained by sufficient evidence. *Barmby v. Wolfe*, 44 Neb. 77 (62 N. W. 318).

1324. (1896.) An assignment of error that "the verdict is contrary to the evidence and is so exceedingly small as to clearly appear to have been given under the influence of passion, prejudice, or undue means," does not raise the question of error in assessment of the amount of the recovery by the jury independently, or aside from the consideration of the influence of passion, prejudice, or undue means. *Beavers v. Missouri P. R. Co.*, 47 Neb. 761 (66 N. W. 821).

1325. (1899.) An assignment in a petition in error that "the verdict of the jury is not sustained by sufficient evidence, and is not in accord with the evidence and instructions," is sufficiently definite and specific to require the appellate court to review the evidence preserved in the bill of exceptions to ascertain whether the same supports the finding and judgment. *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1 (78 N. W. 359).

——— **Instructions.**

Assignment to the giving of instructions *en masse*, see *post*, §§ 1349-1351.

Effect of failure to assign error, see *post*, §§ 1367-1369.

1326. (1879.) An assignment "that the court erred in the instructions given to the jury on the trial of said action" is bad for indefiniteness. *Burlington & M. R. R. Co. v. Harris*, 8 Neb. 140; (1881) *Birdsall v. Carter*, 11 Neb. 143 (7 N. W. 751).

1327. (1879.) An assignment "that the court erred in refusing to give said instructions, which the plaintiff prayed the said court to give," is bad for indefiniteness. *Burlington & M. R. R. Co. v. Harris*, 8 Neb. 140.

1328. (1894.) An assignment of error which does not specifically designate an instruction complained of will not be considered in the supreme court. Reference by affidavits not made part of the bill of exceptions is insufficient. *Hewitt v. Commercial Banking Co.*, 40 Neb. 820 (59 N. W. 693).

1329. (1894.) The objection that the court failed to instruct the jury upon the law of the case is not raised by an assignment that there was error in giving instructions, the instructions being correct. *Davis v. Hilbourn*, 41 Neb. 35 (59 N. W. 379).

1330. (1894.) An assignment of error, which is directed generally by numbers merely, against three out of four instructions given at the request of the successful party is insufficient where none of said instructions are numbered, since it is too indefinite and uncertain as to the particular instructions intended. *Reed v. Wood*, 42 Neb. 496 (60 N. W. 909).

1331. (1896.) Assignments of error relating solely to the intelligibility of an instruction do not raise a question as to the correctness of a proposition properly stated in the instruction. *Romberg v. Hediger*, 47 Neb. 201 (66 N. W. 283).

1332. (1896.) An assignment that the verdict is contrary to law does not present for review alleged errors in the instructions. Such an assignment raises the question whether the verdict is contrary to the law as contained in the charge given by the court to the jury. *Drexel v. Daniels*, 49 Neb. 99 (68 N. W. 399).

1333. (1897.) Where the court has given instructions which, whether erroneous or not, cannot be regularly reviewed because of the lack of proper specific assignments of objections or exceptions thereto, their quality will not be examined or determined under an

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assignment which alleges a refusal of the general requests to charge the jury on the issues of law or to charge the jury on all material questions in the case. *Hanover Fire Ins. Co. v. Stoddard*, 52 Neb. 745 (73 N. W. 291).

1334. (1902.) Error in refusing instructions must be specifically pointed out. *Trompen v. Yates*, 66 Neb. 525 (92 N. W. 647).

1335. (1903.) Alleged errors in the giving of instructions must be specifically pointed out, or they cannot be considered by the supreme court. *Cox v. Crow*, 4 Unof. 434 (94 N. W. 524).

1335*a*. (1907.) When a trial court has instructed a jury generally upon the issues and law of a case, and there has been no request for different or additional instructions, an assignment of error in the supreme court that "the court erred in failing to instruct the jury as to the law of the case" is too vague to call for consideration. *Smith v. Western Union Telegraph Co.*, 80 Neb. 395 (114 N. W. 288).

——— **Misconduct of jury.**

1336. (1895.) A petition in error alleging misconduct of the jury must state the conduct complained of. *Houston v. City of Omaha*, 44 Neb. 63 (62 N. W. 251).

——— **Verdict.**

Effect of failure to assign error, see *post*, § 1373.

1337. (1896.) An assignment that a verdict is "contrary to the instructions of the court" will be overruled if it appears that the verdict is in accordance with any one of the instructions. *Ætna Ins. Co. v. Simmons*, 49 Neb. 811 (69 N. W. 125).

1338. (1897.) Under an assignment that the verdict is not supported by sufficient evidence, an appellate court cannot deduct from the jury's award in favor of plaintiff the amount of a set-off not interposed as a defense. *Sickel v. Bishop*, 53 Neb. 141 (73 N. W. 455).

1339. (1897.) An assignment that the verdict is too large presents the question of error in allowing interest before six months from the date of the last item of an account. *Garneau v. Omaha Printing Co.*, 52 Neb. 383 (72 N. W. 360).

1340. (1898.) Error in the assessment of the amount of recovery is not presented, in an action based on contract, by an assignment that the verdict is not sustained by the evidence. *Nye & Schneider Co. v. Snyder*, 56 Neb. 754 (77 N. W. 118).

1341. (1901.) The assignment that a verdict is contrary to law is not sufficiently specific to entitle it to consideration. *Farmers Bank v. Garrow*, 63 Neb. 64 (88 N. W. 131).

——— **Judgment.**

Effect of failure to assign error, see *post*, § 1374.

1342. (1878.) In proceedings in error, if the petition below set forth a good cause of action, in a matter within the jurisdiction of the court, in order to obtain a review of the judgment the particular ground upon which it is claimed to be erroneous must be specifically pointed out; otherwise it will be presumed that the judgment is right. *Lowrie v. France*, 7 Neb. 191.

1343. (1901.) In an action tried to the court, in which separate findings of fact and conclusions of law were made, an assignment in the petition in error that "the judgment is contrary to law and is not sustained by sufficient evidence" does not call for specific review of each of the several conclusions of law. *Modern Woodmen of America v. Lane*, 62 Neb. 89 (86 N. W. 943).

1344. (1901.) In an action tried to the court, in which separate findings of fact and conclusions of law were made, the assignment that the judgment is contraary to law, none of the separate conclusions of law being complained of, and some being clearly right, can only be considered so far as to ascertain whether such conclusions support the judgment. *Modern Woodmen of America v. Lane*, 62 Neb. 89 (86 N. W. 943).

1345. (1901.) A judgment entered in accordance with section 511 of the code is none the less a joint judgment. Hence an assignment of error that the "court erred in rendering a joint judgment against the defendants" does not raise the question whether the requirements of said section should have been complied with. *Campbell v. Lane*, 2 Unof. 63 (95 N. W. 1043).

1346. (1903.) An assignment of error that the judgment is contrary to law is too vague and indefinite to present any question for consideration in the supreme court. *Bosserman v. Larson*, 4 Unof. 107 (93 N. W. 411).

——— **Ruling on motion for new trial.**

Effect of failure to assign error, see *post*, §§ 1375-1380.

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1347. (1894.) An assignment in a petition in error, that "the court erred in overruling the motion for a new trial," is too general where several distinct grounds are urged in the motion. *Glaze v. Parcel*, 40 Neb. 732 (59 N. W. 382); (1894) *Wiseman v. Ziegler*, 41 Neb. 886 (60 N. W. 320); (1895) *City of Chadron v. Glover*, 43 Neb. 732 (62 N. W. 62); (1895) *Stein v. Vannice*, 44 Neb. 132 (62 N. W. 464); (1895) *Pearce v. McKay*, 45 Neb. 296 (63 N. W. 851); (1895) *Sigler v. McConnell*, 45 Neb. 598 (63 N. W. 870); (1895) *Moore v. Hubbard*, 45 Neb. 612 (63 N. W. 847); (1896) *Post v. Olmstead*, 47 Neb. 893 (66 N. W. 828); (1897) *McCord v. Hamel*, 52 Neb. 286 (72 N. W. 220); (1897) *Phœnix Ins. Co. of Hartford v. King*, 52 Neb. 562 (72 N. W. 855); (1897) *Brinckle v. Stitts*, 53 Neb. 10 (73 N. W. 223); (1897) *Otis v. Claussen*, 53 Neb. 100 (73 N. W. 465); (1898) *Jaeggi v. Galley*, 54 Neb. 800 (75 N. W. 238); (1898) *Allsman v. Richmond*, 55 Neb. 540 (75 N. W. 1094); (1898) *Bradley v. Slater*, 55 Neb. 334 (75 N. W. 826); (1899) *National Masonic Accident Ass'n v. Burr*, 57 Neb. 437 (77 N. W. 1098); (1899) *Hart v. Weber*, 57 Neb. 442 (77 N. W. 1085); (1899) *Walker v. Allen*, 58 Neb. 537 (78 N. W. 1070).

Including several errors in one assignment.

1348. (1901.) An assignment of error in not dismissing an action "because neither said complaint nor said summons stated facts sufficient to constitute a cause of action" cannot be sustained if the complaint was sufficient. *Armstrong v. Mayor*, 1 Unof. 119 (95 N. W. 483).

——— Instructions.

Effect of failure to assign error, see *post*, §§ 1367-1369.

Sufficiency of assignment in general, see *ante*, §§ 1326-1335.

1349. (1880.) An assignment of error, "That the court erred in the instructions given to the jury on the trial of said action," is too indefinite to be considered unless the whole charge be bad. *Tagg v. Miller*, 10 Neb. 442 (6 N. W. 764).

1350. (1894.) An assignment of error as to the giving or refusal *en masse* of certain instructions will be considered no further than to ascertain that any one of such instructions was properly given or refused. *Hiatt v. Kinkaid*, 40 Neb. 178 (58 N. W. 700); (1894) *McDonald v. Bowman*, 40 Neb. 269 (58 N. W. 704); (1894) *Jenkins v. Mitchell*, 40 Neb. 664 (59 N. W. 90); (1894) *Murphy v. Gould*, 40 Neb. 728 (59 N. W. 383); (1894) *Armann v. Buel*, 40 Neb. 803 (59 N. W. 515); (1894) *Hewett v. Commercial Banking Co.*, 40 Neb. 820 (59 N. W. 693); (1894) *Meyer v. Union Bag & Paper Co.*, 41 Neb. 67 (59 N. W. 696); (1894) *Havens v. Grand Island Light & Fuel Co.*, 41 Neb. 153 (59 N. W. 681); (1894) *Rea v. Bishop*, 41 Neb. 202 (59 N. W. 555); (1894) *City of Beatrice v. Reid*, 41 Neb. 214 (59 N. W. 770); (1894) *Haskell v. Valley County*, 41 Neb. 234 (59 N. W. 680); (1894) *Wonderlick v. Walker*, 41 Neb. 806 (60 N. W. 103); (1894) *McEvony v. Rowland*, 43 Neb. 97 (61 N. W. 124); (1895) *Chaffee v. Atlas Lumber Co.*, 43 Neb. 224 (61 N. W. 637; 47 Am. St. Rep. 753); (1895) *Glass v. Zutavern*, 43 Neb. 334 (61 N. W. 579; 47 Am. St. Rep. 763); (1895) *Omaha Fire Ins. Co. v. Dierks & White*, 43 Neb. 473 (61 N. W. 740); (1895) *Schelly v. Schwank*, 44 Neb. 504 (62 N. W. 1069); (1895) *Stoppert v. Nierle*, 45 Neb. 105 (63 N. W. 382); (1895) *Smith v. First Nat. Bank of Chadron*, 45 Neb. 444 (63 N. W. 796); (1895) *Diers v. Mallon*, 46 Neb. 121 (64 N. W. 722; 50 Am. St. Rep. 598); (1896) *Kaufmann v. Cooper*, 46 Neb. 644 (65 N. W. 796); (1896) *McCormal v. Redden*, 46 Neb. 776 (65 N. W. 881); (1896) *First Nat. Bank of Wilber v. Ridpath*, 47 Neb. 96 (66 N. W. 37); (1896) *Oltmanns v. Findlay*, 47 Neb. 289 (66 N. W. 425); (1896) *Fairfield v. Kern*, 48 Neb. 254 (67 N. W. 166); (1896) *Newman v. Ryne*, 48 Neb. 362 (67 N. W. 189); (1896) *Woodworth v. Parrott*, 48 Neb. 675 (67 N. W. 761); (1896) *Stough v. Ogden*, 49 Neb. 291 (68 N. W. 516); (1896) *Dempster Mill Mfg. Co. v. First Nat. Bank of Holdrege*, 49 Neb. 321 (68 N. W. 477); (1896) *Creighton v. Haythorn*, 49 Neb. 526 (68 N. W. 934); (1896) *Denise v. City of Omaha*, 49 Neb. 750 (69 N. W. 119); (1896) *Ætna Ins. Co. v. Simmons*, 49 Neb. 811 (69 N. W. 125); (1897) *Behrends v. Beyschlag*, 50 Neb. 304 (69 N. W. 835); (1897) *Town v. Missouri P. R. Co.*, 50 Neb. 768 (70 N. W. 402); (1897) *Hodgin v. Whitcomb*, 51 Neb. 617 (71 N. W. 314); (1897) *Sloan v. Wherry Bros.*, 51 Neb. 703 (71 N. W. 744); (1897) *Adams-Smith Co. v. Hayward*, 52 Neb. 79 (71 N. W. 949); (1897) *Atwood v. Marshall*, 52 Neb. 173 (71 N. W. 1064); (1897) *Hoefer v. Langhorst*, 53 Neb. 364 (73 N. W. 692); (1898) *Langhorst v. Coon*, 53 Neb. 765 (74 N. W. 257); (1898) *Unland v. McCormick Harvesting Machine Co.*, 54 Neb. 364 (74 N. W. 629); (1898) *National Masonic*

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Accident Ass'n v. Day, 55 Neb. 127 (75 N. W. 576); (1898) *Pease Piano Co. v. Cameron*, 56 Neb. 561 (76 N. W. 1053); (1899) *Spirk v. Chicago B. & Q. R. Co.*, 57 Neb. 565 (78 N. W. 272); (1899) *Langdon v. Wintersteen*, 58 Neb. 278 (78 N. W. 501); (1900) *World Mutual Benefit Ass'n v. Worthing*, 59 Neb. 587 (81 N. W. 620); (1900) *Frenzer v. Richards*, 60 Neb. 131 (82 N. W. 317); (1901) *Green v. Tierney*, 62 Neb. 561 (87 N. W. 331); (1902) *Runquist v. Anderson*, 64 Neb. 755 (90 N. W. 760); (1902) *Axthelm v. Chicago, R. I. & P. R. Co.*, 2 Unof. 444 (89 N. W. 313); (1902) *Buck v. Hogeboom*, 2 Unof. 853 (90 N. W. 635); (1902) *Canon v. Farmers Bank*, 3 Unof. 348 (91 N. W. 585); (1905) *Mattern v. McCarthy*, 73 Neb. 228 (102 N. W. 468); (1906) *Skinner v. Wilson*, 76 Neb. 445 (107 N. W. 771).

1351. (1897.) Errors in respect to giving or refusing instructions must be separately assigned. *McCord v. Hamel*, 52 Neb. 286 (72 N. W. 220); (1897) *Hanover Fire Ins. Co. v. Stoddard*, 52 Neb. 745 (73 N. W. 291); (1897) *Peck v. Tingley*, 53 Neb. 171 (73 N. W. 450); (1898) *Langhorst v. Coon*, 53 Neb. 765 (74 N. W. 257); (1898) *McCormick Harvesting Machine Co. v. Courtright*, 54 Neb. 18 (74 N. W. 418); (1899) *Palmer v. First Bank of Ulysses*, 59 Neb. 412 (81 N. W. 303).

——— **Rulings on evidence.**

Effect of failure to assign error, see *post*, § 1365.

Sufficiency of assignment in general, see *ante*, §§ 1303-1322.

1352. (1895.) An assignment of error in the supreme court that the district court erred in admitting the evidence of a certain witness will be overruled if any of the evidence given by the witness was competent. *Eagle Fire Co. v. Globe Loan & Trust Co.*, 44 Neb. 380 (62 N. W. 895); (1895) *Kearney Electric Co. v. Laughlin*, 45 Neb. 390 (63 N. W. 941); *Sigler v. McConnell*, 45 Neb. 598 (63 N. W. 870); (1898) *Allsman v. Richmond*, 55 Neb. 540 (75 N. W. 1094); (1900) *World Mutual Benefit Ass'n v. Worthing*, 59 Neb. 587 (81 N. W. 620).

1353. (1898.) An assignment of error directed to a group of rulings on a certain class of evidence raises only the question of the admissibility of such evidence as a whole. It presents no question peculiar to one ruling of the group. *Nye & Schneider Co. v. Snyder*, 56 Neb. 754 (77 N. W. 118)

Joint assignments.

1354. (1894.) A joint assignment of error in a petition of error made by two or more persons which is not good as to all who joined therein will be overruled as to all. *Gordon v. Little*, 41 Neb. 250 (59 N. W. 783); (1895) *Small v. Sandall*, 45 Neb. 306 (63 N. W. 824); (1895) *Harold v. Moline, Milburn and Stoddard Co.*, 45 Neb. 618 (63 N. W. 929); (1897) *Minneapolis Threshing-Machine Co. v. Regier*, 51 Neb. 402 (70 N. W. 934); (1897) *Shabata v. Johnston*, 53 Neb 12 (73 N. W. 278); (1898) *Knight v. Darby*, 55 Neb. 16 (75 N. W. 48); (1898) *Wollam v. Brandt*, 56 Neb. 527 (76 N. W. 1081); (1898) *Brong v. Spence*, 56 Neb. 638 (77 N. W. 54); (1899) *Spencer v. Johnston*, 58 Neb. 44 (78 N. W. 482); (1899) *Hier v. Hutchings*, 58 Neb. 334 (78 N. W. 638); (1902) *Curtis v. Osborne*, 63 Neb. 837 (89 N. W. 420); (1899) *Levy v. South Omaha Savings Bank*, 57 Neb. 312 (77 N. W. 769); (1899) *American Bank of Beatrice v. Hand*, 59 Neb. 273 (80 N. W. 908); (1900) *Moseman v. State*, 59 Neb. 629 (81 N. W. 853); (1900) *Poska v. Stearns*, 60 Neb. 708 (84 N. W. 80); (1901) *Storm v. Holmes*, 2 Unof. 16 (96 N. W. 73); (1903) *Anderson v. Hall*, 4 Unof. 494 (94 N. W. 981); (1904) *City of Lincoln v. Bailey*, 5 Unof. 619 (99 N. W. 830); (1904) *Felsch v. Babb*, 72 Neb. 736 (101 N. W. 1011); (1905) *Kupke v. Polk*, 73 Neb. 590 (103 N. W. 321).

Effect of failure to assign particular errors.

1355. (1879.) To enable the supreme court to examine and pass upon alleged errors occurring upon a trial to a jury, it is necessary that the attention of the trial court be specifically called to each alleged error in a motion for a new trial, and the same be also specifically pointed out to the supreme court in the petition in error. *McCormick v. Drummett*, 9 Neb. 384 (2 N. W. 729).

1356. (1879.) Where points made in the motion for a new trial are not contained in the petition in error they will be considered as abandoned. *McCormick v. Drummett*, 9 Neb. 384 (2 N. W. 729).

1357. (1894.) It is no part of the duty of the supreme court to search a record for the purpose of ascertaining if there is error in it. On the other hand, every reasonable presumption will be indulged in favor of the correctness of the judgment of a district court, and any ruling of that court, alleged to be erroneous, must be specifically pointed

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out to be reviewed here. *Minick v. Huff*, 41 Neb. 516 (59 N. W. 795).

1358. (1895.) Alleged errors not assigned in the petition in error will be disregarded. *Erck v. Omaha Nat. Bank*, 43 Neb. 613 (62 N. W. 67); (1899) *Stuart v. Bank of Staplehurst*, 57 Neb. 569 (78 N. W. 298); (1900) *Schlageck v. Widhalm*, 59 Neb. 541 (81 N. W. 448); (1901) *Payne v. Pettibone & Nixon*, 1 Unof. 789 (96 N. W. 117); (1902) *Kennard v. Grossman*, 2 Unof. 743 (89 N. W. 1025); (1903) *Bosserman v. Larson*, 4 Unof. 107 (93 N. W. 411).

1359. (1898.) While the supreme court will not reverse a case for errors not called to the attention of the district court and specifically assigned in the supreme court, nevertheless, when, in passing upon the assignments of error properly made, it is disclosed that they are not well taken because of an unassigned error, of which the defendant in error must avail himself to defeat the assignments made, and which the supreme court must pass upon to decide the case, such error will be corrected. *Adams v. Nebraska Savings & Exchange Bank*, 56 Neb. 121 (76 N. W. 421).

1360. (1900.) Where a cause is submitted under section 1 of rule 2, and the printed abstract contains no specifications of error, the judgment will be affirmed. *Peoples Building, Loan & Savings Ass'n v. Pearlman*, 61 Neb. 1 (84 N. W. 408).

1361. (1903.) To authorize the supreme court to review the rulings of the trial court on motions and other matters of precedure, the party complaining must except to such rulings, file a motion for a new trial, and present the questions by a petition in error. *Danforth v. Fowler*, 68 Neb. 452 (94 N. W. 637).

1362. (1897.) In an error proceeding a point not presented by an assignment of error will be disregarded, though argued in briefs of counsel. *Clarke v. Nebraska Savings & Exchange Bank*, 50 Neb. 669 (70 N. W. 237); (1897) *Aitken v. Rawlings*, 52 Neb. 539 (72 N. W. 858); (1898) *Phœnix Ins. Co. v. King*, 54 Neb. 630 (74 N. W. 1103).

——— Sufficiency of pleadings.

Sufficiency of assignment, see *ante*, §§ 1300-1302.

1363. (1894.) The supreme court on error or appeal may on its own motion look into the record to determine whether the petition below states a cause of action. *Thomas v. Franklin*, 42 Neb. 310 (60 N. W. 568).

1364. (1902.) Where a demurrer is sustained to defendant's answer and he refuses to plead further, the action of the trial court in sustaining such demurrer will not be reviewed here unless such action is specificially alleged against in the petition in error. *Harris v. Nye & Schneider Co.*, 3 Unof. 169 (91 N. W. 250).

——— Rulings on evidence.

Sufficiency of assignment, see *ante*, §§ 1303-1322, 1352, 1353.

1365. (1892.) The ruling of the trial court on the admission and exclusion of testimony will not be reviewed by the supreme court, where the same are not pointed out in the petition in error. *Kroll v. Ernst*, 34 Neb. 482 (51 N. W. 1032); (1893) *Vennum v. Huston*, 38 Neb. 293 (56 N. W. 970); (1896) *Graham v. Frazier*, 49 Neb. 90 (68 N. W. 367); (1896) *Denise v. City of Omaha*, 49 Neb. 750 (69 N. W. 119; (1898) *Smith v. Kennard*, 54 Neb. 523 (74 N. W. 859); (1898) *Burnet v. Cavanagh*, 56 Neb. 190 (76 N. W. 578); (1898) *Security Abstract Title Co. v. Longacre*, 56 Neb. 469 (76 N. W. 1073); (1899) *Vix v. Whyman*, 58 Neb. 190 (78 N. W. 497); (1901) *Johnson v. Carlson*, 1 Unof. 368 (95 N. W. 788).

——— Sufficiency of evidence.

Sufficiency of assignment, see *ante*, §§ 1323-1325.

1366. (1894.) The supreme court will not review the evidence for the purpose of ascertaining whether it sustains the verdict, where the question is not specifically raised by the petition in error. *Wiseman v. Ziegler*, 41 Neb. 886 (60 N. W. 320); (1899) *Humpert v. McGavock*, 59 Neb. 346 (80 N. W. 1038).

——— Instructions.

Sufficiency of assignment, see *ante*, §§ 1326-1335, 1349-1351.

1367. (1893.) Error in the giving or refusal of instructions will not be considered unless specially assigned. *Hewitt v. Eisenbart*, 36 Neb. 794 (55 N. W. 252); (1893) *Richardson & Boynton Co. v. Winter*, 38 Neb. 288 (56 N. W. 886).

1368. (1894.) Instructions not pointed out in the motion for new trial or petition in error will be disregarded. *Hedrick v. Strauss*, 42 Neb. 485 (60 N. W. 928); (1897) *Morsch v. Besack*, 52 Neb. 502 (72 N. W. 953).

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1369. (1900.) Where the error in the giving of instructions is not so assigned that it can be reviewed, a verdict in accord with such instructions must be permitted to stand. *Frenzer v. Richards*, 60 Neb. 131 (82 N. W. 317).

——— **Assessment of damages.**

1370. (1894.) Inadequacy of damages found by the jury cannot be considered upon review when not assigned as error in the petition. *Oliver v. Chicago, B. & Q. R. Co.*, 40 Neb. 845 (59 N. W. 351).

1371. (1897.) The question as to whether there was error in the assessment of the amount of recovery will not be considered unless raised by a proper assignment of error. *Montgomery v. Albion Nat. Bank*, 50 Neb. 652 (70 N. W. 239).

1372. (1898.) Excess in the amount of recovery cannot be considered in the supreme court when not assigned as error in the petition in error. *Hammond v. Edwards*, 56 Neb. 631 (77 N. W. 76).

——— **Verdict.**

Sufficiency of assignment, see *ante*, §§ 1337-1341.

1373. (1899.) Alleged error in the verdict will not be considered on review when not raised either in the motion for a new trial or petition in error. *Hart v. Weber*, 57 Neb. 442 (77 N. W. 1085).

——— **Form of judgment.**

Sufficiency of assignment, see *ante*, §§ 1342-1346.

1374. (1894.) An objection that a judgment in replevin was not in the alternative, cannot be considered if not contained in the petition in error. *Spaulding v. Overmire*, 40 Neb. 21 (58 N. W. 736).

——— **Rulings in motion for new trial.**

Sufficiency of assignment, see *ante*, § 1347.

1375. (1894.) Where after a second trial defendant assigned as error the overruling of its motion for judgment on the special findings had at the first trial, and it is nowhere pointed out wherein the court erred in sustaining the motion for a new trial and there were assignments in such motion referring to matters not in the record, the supreme court must assume that the new trial was properly granted, and therefore that the motion for judgment was properly overruled. *Omaha & R. V. R. Co. v. Chollette*, 41 Neb. 578 (59 N. W. 921).

1376. (1897.) Where the grounds of a motion for a new trial are in substance those prescribed by section 314 of the code, and the assignments in the petition in error are based upon those grounds, the supreme court is not without jurisdiction to review a case on error simply because the petition in error does not specifically allege that the court below erred in overruling the motion for a new trial. *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369 (70 N. W. 955). [Overruled. *James v. Higginbotham*, 60 Neb. 203.]

1377. (1900.) A judgment will not be reversed for error of law occurring at the trial, unless it is alleged in the petition in error, and shown by the record, that the court erred in overruling the motion for a new trial. *James v. Higginbotham*, 60 Neb. 203 (82 N. W. 625); (1902) *Gandy v. Cummins*, 64 Neb. 312 (89 N. W. 777); (1902) *Achenbach v. Pollock*, 64 Neb. 436 (90 N. W. 304); (1902) *Gregory v. Leavitt*, 2 Unof. 637 (89 N. W. 764); (1902) *Zimmerman v. Kearney County Bank*, 3 Unof. 323 (91 N. W. 497); (1902) *Orcutt v. McNair*, 3 Unof. 608 (92 N. W. 200).

1377*a*. (1903.) Errors required to be assigned in a motion for a new trial, will be deemed waived, unless the ruling on such motion is assigned as error in the supreme court. *Cole v. Adams County*, 4 Unof. 226 (93 N. W. 701); (1905) *Beckwith v. Dierks Lumber Co.*, 75 Neb. 349 (106 N. W. 442).

1378. (1902.) Where this question is raised by counsel the supreme court will adhere to the rule that a judgment will not be reversed for errors of law unless it is alleged in the petition in error that the court erred in overruling the motion for a new trial. Where it is not so raised the supreme court will consider the objection waived, and determine the case upon its merits. *Orcutt v. McNair*, 3 Unof. 608 (92 N. W. 200).

1379. (1903.) Objection that the evidence is insufficient will not be considered, where there is no assignment of error to the overruling of a motion for a new trial. *Moores v. Jones*, 4 Unof. 319 (93 N. W. 1016).

1380. (1903.) A judgment will not be reversed for errors which are required to be assigned on a motion for a new trial, unless it is alleged in the petition in error and shown by the record that the court erred in overruling such motion and the rule will be strictly adhered to where defendant calls the court's attention to the defect, both in

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his brief and on oral argument. *Coxe Bros. & Co. v. Omaha Coal, Coke and Lime Co.*, 4 Unof. 412 (94 N. W. 519).

Defects and objection.

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1381. (1885.) Assignments of error which in any manner bring before the supreme court a question presented by the record will not be stricken out of the petition in error. *Gregory v. Edgerly*, 17 Neb. 373 (22 N. W. 243).

1381*a*. (1907.) Errors assigned by appellee in his printed brief filed after the date required by rule 35 will be considered when the appellant neither objects to the service and filing thereof, nor moves to strike it from the record as having been filed out of time. *Hart v. Murdock*, 80 Neb. 274 (114 N. W. 268).

Waiver of assignments.

1382. (1894.) An assignment of error not included in the points relied on for a reversal will be deemed waived. *Hedrick v. Strauss*, 42 Neb. 485 (60 N. W. 928).

Affidavits to support assignments.

1383. (1895.) An assignment in a petition in error, that the district court erred in not granting a new trial on account of "accident or surprise," must be sustained by affidavits showing the truth of the assignment. *Omaha Fire Ins. Co. v. Dierks & White*, 43 Neb. 473 (61 N. W. 740).

XI. BRIEFS.

Dismissal of appeal for failure to file brief, see *post*, §§ 1146, 1146*a*.

Waiver of errors not argued in brief, see *post*, §§ 2048-2052.

Specification of errors.

1384. (1891.) The several errors examined, and there being no brief pointing to the materiality or prejudicial character of the errors, which, in the absence of argument and authority, are not apparent, the several assignments are overruled. *Townsend v. Case Threshing Machine* Co., 31 Neb. 836 (48 N. W. 899).

1385. (1893.) To obtain a review of specific errors they must be pointed out in the brief of the party complaining. *Phœnix Ins. Co. v. Reams*, 37 Neb. 423 (55 N. W. 1074); *Brown v. Dunn*, 38 Neb. 52 (56 N. W. 703).

1386. (1896.) The rule of practice of the supreme court requires a litigant who brings a judgment here for review on error in his brief,—in addition to a concise statement of the facts of the case,—under appropriate headings, to allege what particular thing the district court did, or refused to do, which it is claimed was error, collating under such headings the arguments and citing the authorities which he deems sustain his contention. *Ætna Ins. Co. v. Simmons*, 49 Neb. 811 (69 N. W. 125).

1387. (1899.) A party desiring the court to pass upon the constitutionality of a statute should point out in his brief the section of the constitution which he claims the law infringes. *Farmers & Merchants Ins. Co. v. Wiard*, 59 Neb. 451 (81 N. W. 312).

1388. (1902.) On appeal the supreme court is not bound to pass upon questions not fairly raised in the briefs of counsel for appellant. *Farmers Loan & Trust Co. v. Hastings*, 2 Unof. 337 (96 N. W. 104); (1902) *Russell v. Anderson*, 3 Unof. 528 (92 N. W. 151).

——— Sufficiency.

1389. (1903.) The supreme court is not bound to examine questions not so raised in the briefs as to state specifically what is complained of, the reason and basis of the complaint, and the exact portions of the record material thereto. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624 (94 N. W. 822).

1390. (1903.) The supreme court is not bound to examine questions not raised in the briefs as to state fairly what is complained of, the reason and basis of the complaint, and the exact portion of the record material thereto. *Livingston v. Moore*, 2 Unof. 498 (89 N. W. 289).

1391. (1903.) A general statement in a brief that the court erred in sustaining objections to a certain line of testimony, without indicating where the rulings complained of are to be found in the record, or the nature of the evidence offered, the objections made, and the rulings thereon, is not sufficient to call for any examination of the matter by the supreme court. *Merrill v. Garver*, 4 Unof. 830 (96 N. W. 619).

Points and arguments.

1392. (1898.) Exception to an assignment of error against the admission in evidence of a group of documents offered together are not waived by confining the discussion in the briefs to a single document, the objection urged being good against all. *Sloan v. Fist*, 53 Neb. 691 (74 N. W. 45).

1393. (1898.) Quotations in briefs from a written opinion of the trial judge may be

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considered on review, though neither the original opinion nor a copy thereof is in the transcript. *Abraham v. City of Fremont*, 54 Neb. 391 (74 N. W. 834).

1394. (1902.) Where in an argument and brief, error is assigned for giving and refusing a group of instructions and no reason is pointed out, or authorities cited, by or from which the court can determine the several questions involved in the assignment, the matters should receive no consideration. *Albion Milling Co. v. First Nat. Bank of Weeping Water*, 64 Neb. 116 (89 N. W. 638).

1395. (1906.) The mere printing of an assignment of error in a brief without comment, and without statement attempting to show why or for what reason or in what respect the trial court erred, is not sufficient to require this court to discuss the errors complained of. *Hoch v. Schlattan*, 76 Neb. 522 (107 N. W. 759).

Improper recitals.

1396. (1892.) Where the character of the parties or the attorneys is not involved in the case, all imputations or insinuations against them in the briefs, are improper and prejudicial to the party making them. Nor will the supreme court sanction insinuations against the trial judge. *Flannagan v. Elton*, 34 Neb. 355 (51 N. W. 967).

1397. (1893.) Insinuations and imputations of unfairness and improper motives to the trial judge are highly improper and prejudicial to the party making them. *Lau v. Grimes Dry Goods Co.*, 38 Neb. 215 (56 N. W. 954).

——Striking out brief.

1398. (1894.) It is conduct reprehensible in the highest degree for counsel in their briefs and arguments in the supreme court to indulge in reflections upon the integrity of the district judges. Briefs filed here containing such reflections will not be considered by the supreme court, but ordered stricken from the files. *Ganzer v. Schiffbauer*, 40 Neb. 633 (59 N. W. 98).

1399. (1900.) Briefs containing matter disrespectful to the court will be stricken from the files. *State, ex rel. Smyth, v. Kennedy*, 60 Neb. 300 (83 N. W. 87).

1400. (1904.) The court will, on its own motion, strike from the records a motion and brief which contain personal criticisms of a commissioner of the supreme court, and of his character and motives in the performance of his official duties. *Krug Brewing Co. v. Healey*, 71 Neb. 662 (101 N. W. 329).

Filing and service.

1401. (1887.) Where a *habeas corpus* case is brought on error from a district court the ordinary rules as to the time of filing briefs will not be adhered to, but the case will be heard as soon as practicable after the petitioner's brief is filed. *Smith v. State*, 21 Neb. 552 (32 N. W. 594).

1402. (1899.) A brief filed after a cause has been submitted will not be considered upon points not previously called to the attention of the court. *State v. Omaha Nat. Bank*, 59 Neb. 483 (81 N. W. 319).

1403. (1906.) In order to perfect his cross-appeal, the brief should be filed in due season. *Meade Plumbing, Heating & Lighting Co. v. Irwin*, 77 Neb. 385 (109 N. W. 391).

1404. (1906.) Briefs will be held to have been filed in due season where appellant neither objects to service and filing thereof, nor moves to have it stricken from the record as having been filed out of time. *Meade Plumbing, Heating & Lighting Co. v. Irwin*, 77 Neb. 391 (111 N. W. 636).

Failure to file or serve.

1405. (1889.) Where a cause is submitted without briefs pointing out objections to instructions, the latter will not be examined. *Sanders v. Quick*, 28 Neb. 162 (44 N. W. 88).

1406. (1901.) When a cause is submitted to the court without oral argument and upon the brief of the appellant or plaintiff in error alone, the record will not ordinarily be critically examined, but its contents will be presumed to be such as they are represented to be in the brief. *Reynolds v. Phillips*, 1 Unof. 114 (95 N. W. 491).

1407. (1905.) When a cause is submitted without oral argument upon a brief by the plaintiff in error alone, recitals of fact in the brief not obviously erroneous, and, of course, not contradicted, will be taken as true. *Aria Cattle Co. v. Burk*, 73 Neb. 39 (102 N. W. 74); (1902) *Deering & Co. v. Walter*, 2 Unof. 364 (96 N. W. 517).

1408. (1907.) Under section 1 of rule 2 of the supreme court, whenever a cause is reached and the brief of the party having the affirmative is not on file, the judgment will be affirmed or the proceeding dismissed. *Larson v. Chicago, B. & Q. R. Co.*, 78 Neb. 434 (110 N W. 1015).

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——Affirmance of judgment.

1409. (1883.) In a case brought to this court on error or appeal, and no brief is furnished or filed for the use of the court, as required by rule VII, or for cause shown, the operation of such rule be suspended as applicable to such case, the judgment or decree will be affirmed, unless there is error plainly apparent on the face of the record. *Rawalt v. Brewer*, 15 Neb. 56 (17 N. W. 266).

1410. (1890.) Where a cause is submitted to the supreme court without brief or oral argument, no error appears in the record, and verdict is not contrary to the evidence, the judgment will be affirmed. *Cornell v. Barnum*, 28 Neb. 862 (45 N. W. 173).

1411. (1892.) Judgments in causes submitted to supreme court without briefs or oral argument will ordinarily be affirmed without an investigation of the questions presented. *Stabler v. Gund*, 35 Neb. 648 (53 N. W. 570); (1894) *Zimmerman Mfg. Co. v. Tower*, 40 Neb. 306 (58 N. W. 931); (1894) *Miller v. Lewis*, 41 Neb. 692 (60 N. W. 11); (1894) *Kilpatrick-Koch Dry Goods Co. v. Cook*, 41 Neb. 737 (60 N. W. 83); (1894) *Obert v. Wentz*, 42 Neb. 104 (60 N. W. 353); (1895) *Betz v. Martin*, 45 Neb. 341 (63 N. W. 811).

1412. (1893.) When no briefs are filed by either party in the case brought into the supreme court on error the nourt will examine the pleadings and evidence, and if the judgment conforms thereto it will be affirmed. *Phenix Ins. Co. v. Reams*, 37 Neb. 423 (55 N. W. 1074); (1893) *Brown v. City of Omaha*, 38 Neb. 583 (57 N. W. 287); (1894) *Norwegian Plow Co. v. Mower*, 42 Neb. 659 (60 N. W. 915); (1894) *Langdon v. Campbell & Deerson*, 43 Neb. 67 (61 N. W. 84); (1895) *Moore v. McCollum*, 43 Neb. 617 (62 N. W. 41); (1895) *Gaines v. Bonnell*, 45 Neb. 260 (63 N. W. 790); (1895) *Denney v. Denslow*, 45 Neb. 613 (63 N. W. 917).

1413. (1899.) Where the appellant fails to file a brief in the supreme court, the judgment will be affirmed, when the cause is reached in its order, without an examination of the questions presented by the record. *Edney v. Baum*, 59 Neb. 147 (80 N. W. 502).

1414. (1900.) Where in a cause submitted under rule 2 upon a printed abstract of the record, neither party files briefs, the judgment will be affirmed. *Brower v. Fass*, 60 Neb. 6 (82 N. W. 98).

XII. DISMISSAL OR ABANDONMENT.

Dismissal in eminent domain proceedings, see *Eminent Domain*, §§ 245-249.

Taking writ of error on dismissal of appeal, see *ante*, §§ 53, 54.

Voluntary dismissal or withdrawal.

1415. (1898.) The fact that the parties to a suit have stipulated that an appeal of another case against the same appellee, involving the same facts, should operate as an appeal of their case and that the decision in such other case should operate as a decision in their case, will not prevent the appellant in such other case, who was not a party to such stipulation, from dismissing his appeal. *Tuttle v. City of Omaha*, 55 Neb. 55 (75 N. W. 50).

Dismissal on consent.

1416. (1895.) The appellee has the right to dismissal of appeal by appellant pursuant to a settlement with the latter in an acion to enforce specific performance of a contract for the purchase of realty, where the appellant's attorney claims a lien for fees and expenses and asks to intervene. *Sheedy v. McMurtry*, 44 Neb. 499 (63 N. W. 21).

Grounds for dismissal.

——Mistake in form of remedy.

1417. (1876.) Where the remedy should have been by petition in error, the motion to dismiss the appeal was sustained, but as the transcript was on file, leave was granted the plaintiff to file a petition in error. *Stewart v. Carter*, 4 Neb. 564.

——Want of final judgment.

1418. (1893.) Where it does not appear from the transcript that a final order has been rendered, the petition in error in such a case will be dismissed. *Smith v. Johnson*, 37 Neb. 675 (56 N. W. 323).

——Failure to preserve question for review.

1419. (1883.) A motion to dismiss proceedings in error will not be sustained on the ground that the motion for a new trial was not made within the time limited by the statute. *Hollenbeck v. Tarkington*, 14 Neb. 430 (16 N. W. 472).

1420. (1883.) The want of a motion for a new trial is not sufficient to warrant a summary dismissal of proceedings in error. *Baldwin v. Foss*, 14 Neb. 455 (16 N. W. 480); (1891) *Gaughran v. Crosby*, 33 Neb. 33 (49 N. W. 776); (1899) *Slobodisky v. Curtis*, 58 Neb. 211 (78 N. W. 522); (1900) *Biart v. Myers*, 59

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Neb. 711 (82 N. W. 7); (1900) *Rhea v. State*, 61 Neb. 15 (84 N. W. 414).

1421. (1890.) Failure to except to the overruling of a motion for a new trial will not justify supreme court in dismissing case. *Burke v. Pepper*, 29 Neb. 320 (45 N. W. 466).

1422. (1890.) The failure to file a motion for a new trial in the court below, while it will prevent a review of the errors occurring at the trial, is no cause for striking the petition in error and transcript from the files. *Cheney v. Wagner*, 30 Neb. 262 (46 N. W. 427); (1892) *Shickle H. & H. Iron Co. v. Kent*, 34 Neb. 568 (52 N. W. 286).

1423. (1904.) A motion to dismiss a proceeding in error will not lie on the ground that no motion for a new trial was filed in the trial court by the plaintiff in error, because the supreme court will examine the record so far as is necessary to determine whether the pleadings sustain the judgment. *Eccles v. United States Fidelity & Guaranty Co.*, 72 Neb. 439 (100 N. W. 942).

1424. (1905.) Failure to file a motion for a new trial is not fatal to the jurisdiction of an appellate court and will not support a motion to dismiss a petition in error. *State, ex rel. Gardner, v. Shrader*, 73 Neb. 618 (103 N. W. 276).

——— Defect of parties.

1425. (1890.) When all parties to a joint judgment have not been brought before a reviewing court in proceedings in error, as either plaintiff or defendant, and no excuse is given for not doing so, the defendant may have the case dismissed. *Hendrickson v. Sullivan*, 28 Neb. 790 (44 N. W. 1135).

1426. (1901.) A petition in error will be dismissed where it is prosecuted by one who has no interest in the controversy, and against whom no judgment has been entered. *Large & Amsden Co. v. Nott & Son*, 1 Unof. 147 (95 N. W. 484).

——— Failure to take proceedings in time.

1427. (1878.) Where it appears on the face of a petition in error that it was not filed in the time required by statute the defect may be taken advantage of by motion. *French v. English*, 7 Neb. 124.

1428. (1883.) A motion to dismiss proceedings in error will not be sustained on the ground that the bill of exceptions was not settled within the statutory time. *Hollenbeck v. Tarkington*, 14 Neb. 430 (16 N. W. 472); *Baldwin v. Foss*, 14 Neb. 455 (16 N. W. 480).

1429. (1887.) Where judgment was rendered November 5, 1885, and a petition in error was filed in the supreme court December 24, 1886, a motion to dismiss for want of jurisdiction was sustained, the petition in error being filed more than one year after the rendition of final judgment by the district court. *Clark v. Morgan & Co.*, 21 Neb. 673 (33 N. W. 245).

1430. (1889.) Proceedings to reverse, vacate, or modify judgments of the district courts must be commenced in the supreme court within one year from the rendition of the final judgment (code, sec. 592), and if commenced after the period named, they may be dismissed on motion. *Patterson v. Woodland*, 28 Neb. 250 (44 N. W. 112).

1431. (1894.) A motion to dismiss an action brought to the supreme court on error must be sustained when the transcript containing the final judgment sought to be vacated was filed in the supreme court after the lapse of a year from the date of said judgment. *Record v. Butters*, 42 Neb. 786 (60 N. W. 1019); (1897) *Stull v. Cass County*, 51 Neb. 760 (71 N. W. 777).

1432. (1897.) An appeal to the supreme court not taken within six months from the date of the rendition of the decree or final order sought to be reviewed will be dismissed. *Omaha Loan & Trust Co. Savings Bank v. Knight*, 50 Neb. 342 (69 N. W. 933); *Renard v. Thomas*, 50 Neb. 398 (69 N. W. 932).

1433. (1903.) In case of a failure to return a bill of exceptions within the statutory time, proceedings in error may be commenced on the return of the bill of exceptions, and a motion to dismiss the case or quash the bill, made by the party whose fault or misconduct caused the delay, will be overruled. *Saxton v. Harrington*, 68 Neb. 446 (94 N. W. 605).

——— Defect in appeal bond.

1434. (1887.) Where a bond for an appeal filed, within the time required by law, has been duly approved by the proper officer, such appeal will not be dismissed although some of the formal requirements of the statute have not been complied with, if the defects can be cured by amendment or the filing of a new bond. *Jacobs v. Morrow*, 21 Neb. 233 (31 N. W. 739).

1435. (1902.) Where the sufficiency of an appeal bond is assailed, a peremptory dismissal without an opportunity to file a new bond is error. *Gannon v. Phelan*, 64 Neb. 220 (89 N. W. 1028).

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——Defects relating to record.

1436. (1876.) A motion to strike a petition in error from the files on the ground that what purports to be a bill of exceptions cannot be so considered, will not be entertained. This objection must be taken either by a motion to quash the exceptions, or on the final hearing. *Mewis v. Johnson Harvester Co.*, 5 Neb. 217.

1437. (1888.) The plaintiff in error filed a petition in error in the supreme court, upon which a summons in error was issued and served on the defendant, but failed to file a transcript of the proceedings of the trial court. The defendant afterwards filed a motion to dismiss for the failure to file a transcript, and served notice upon the plaintiff's attorney of the pendency of such motion. *Held*, That the motion must be sustained. *Sturtevant v. Wineland*, 22 Neb. 702 (36 N. W. 277).

1438. (1892.) A motion to dismiss an appeal will not be sustained on the ground that the bill of exceptions attached to the transcript filed in the supreme court was not properly signed. Objections to a bill of exceptions must be raised by motion to quash. *Carlson v. Beckman*, 35 Neb. 392 (53 N. W. 203).

1439. (1892.) It is the settled law of this state that an appeal will not be dismissed on the ground that no bill of exceptions has been settled and allowed. *Hines v. Cochran*, 35 Neb. 828 (53 N. W. 1118).

1440. (1893.) The failure to assign alleged errors as grounds for a new trail is not of itself sufficient reason for the dismissing of a petition in error by the supreme court, but whenever it appears, from an inspection of the record in any cause, that the petition in error presents no question of law or fact for review by the supreme court, such cause will be considered as submitted on its merits and the judgment or decree affirmed. *Upton v. Cady*, 38 Neb. 209 (56 N. W. 881); (1885) *Erck v. Omaha Nat. Bank*, 43 Neb. 613 (62 N. W. 67).

1441. (1895.) A petition in error will be dismissed out of the supreme court when founded upon a transcript not authenticated by the certificate of the clerk of the trial court. *Otis v. Butters*, 46 Neb. 492 (64 N. W. 1093); (1896) *Einspahr v. Exchange Nat. Bank of Hastings*, 49 Neb. 557 (68 N. W. 933); (1898) *Bailey v. Eastman*, 54 Neb. 416 (74 N. W. 959); (1899) *Melcher v. Haley*, 58 Neb. 729 (79 N. W. 707).

1442. (1899.) The jurisdiction of the supreme court in proceedings in error attaches upon the filing of a petition in error and transcript of the judgment, within the statutory time, and the issuing and service of process. If the transcript be so incomplete as not to affirmatively disclose error, the proper order is affirmance, and not dismissal. *Hesser v. Johnson*, 57 Neb. 155 (77 N. W. 406).

1443. (1899.) A petition in error will be dismissed in absence of an authenticated tarnscript of the judgment. *Littell v. Cross*, 58 Neb. 594 (79 N. W. 157); (1899); *Burr v. Henry*, 59 Neb. 301 (80 N. W. 900); (1901) *Rooney v. Farrell*, 62 Neb. 611 (87 N. W. 388).

1444. (1905.) A petition in error will not be dismissed on motion of the defendant in error because of a failure to settle and file a bill of exceptions, where the only question to be determined is one of law, and it is properly presented by a transcript of the record of the proceedings of the lower court. *Johnson v. Emerick*, 74 Neb. 303 (104 N. W. 169).

——Failure to prosecute proceedings.

1445. (1874.) A cause pending in the supreme court, plaintiff in error failing for two successive terms to appear and prosecute the same, will, on motion of defendant in error, be dismissed at costs of plaintiff in error. *McCallum v. Brown*, 3 Neb. 372.

1446. (1886.) An appeal will not be dismissed for the mere failure of the appellant to file an abstract and brief within the time required by statute, unless it is apparent that the neglect is wilful, or that the appeal was not taken in good faith. *Steele v. Haynes*, 20 Neb. 316 (30 N. W. 63).

1446*a*. (1887.) Plaintiff filed its petition in error on the 22d day of February, 1886, since which time it has not appeared in the case. No abstract or brief having been filed, and no reason being shown for the delay, defendant is entitled, under rule four, to a dismissal of the petition in error. *School District v. O'Shea*, 21 Neb. 449 (32 N. W. 210).

1447. (1888.) A plaintiff residing at a great distance from the capital of the state employed certain attorneys at the latter place to attend to his case pending in the supreme court, which they neglected to do, without the plaintiff's fault, and the case was dismissed for want of prosecution. *Held*, That the plaintiff was entitled to have

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the case reinstated. *State, ex rel. Covey, v. Gaslin*, 25 Neb. 71 (40 N. W. 601).

——— Review unnecessary or ineffectual.

1448. (1883.) The title to the land in controversy having been obtained by the plaintiff in error since the judgment, through a conveyance from the defendant, in whom it was found to be by the judgment sought to have reversed to the end that the litigation may cease, and each party left secure in his rights, it is ordered that the petition in error be dismissed at the costs of the plaintiff in error. *Panko v. Irwin*, 14 Neb. 419 (16 N. W. 436).

1449. (1894.) An appeal from an order dismissing a suit in the nature of an equitable garnishment, brought to restrain the defendant from paying money to an alleged debtor of the appellant during the pendency of his suit at law aginst such debtor, will be dismissed without an examination on its merits, when it appears that appellant failed in his suit at law in the court below to establish his claim, and the judgment in such case has been afirmed by the supreme court. *Prentice Brownstone Co. v. King*, 39 Neb. 816 (58 N. W. 277).

1450. (1896.) Where the judgment of the district court required a justice of the peace to exercise his functions within a designated precinct, and by error proceedings it is sought to review only this part of the said judgment, and it is conceded that the term of office of the plaintiff in error has expired, the petition in error is dismissed as presenting no question of an existing substantive right of the plaintiff in error. *Edgerton v. State, ex rel. Strickler*, 50 Neb. 72 (69 N. W. 302).

1451. (1898.) It is proper to dismiss an appeal from an order denying relief in a suit for a new trial of another case wherein the decree was reversed on appeal. *Horbach v. Troup*, 53 Neb. 811 (74 N. W. 1118; 68 Am. St. Rep. 637; 40 L. R. A. 408).

1452. (1899.) A motion for dismissal of a proceeding to reverse the adjudication in an action by creditors' bill, the decree which determined the amount due the creditor a judgment debt, and annulled conveyances of titles to land as fraudulent, will not be sustained, for the reason that the debt has, subsequent to the decree, been satisfied and released. *Boldt v. First Nat. Bank of West Point*, 59 Neb. 283 (80 N. W. 905).

——— Waiver of objections.

1453. (1889.) Motion to dismiss an appeal should be filed before the preparation and service of briefs in the case, otherwise they will be disregarded. *Lloyd v. Reynolds*, 26 Neb. 63 (41 N. W. 1072).

1454. (1889.) A motion to dismiss an appeal because the plaintiff in error failed to file a transcript within one year after judgment in the trial court, will be overruled when the case has been submitted to the supreme court on its merits. *Sholes v. Kreamer*, 26 Neb. 556 (42 N. W. 724).

1455. (1895.) A motion to dismiss a cause out of the supreme court for want of prosecution, in order to be of any avail, must be presented before the final submission of the case upon the merits. *Moore v. McCollum*, 43 Neb. 617 (62 N. W. 41).

1456. (1899.) The motion to dismiss an appeal, if based on occurrences subsequent thereto or on the ground that the process and proceedings of the court are being used to further corrupt practices or purposes, should be presented as soon as may be after the facts have become known to the mover, but will be entertained at any time during the proceedings before trail on the merits, and after, if the reasons for the motion were not discovered before; and any delay in the presentment of the motion before trial will not constitute its waiver, unless it appears that the delay was purposely or without excuse. *Gage County v. King Bridge Co.*, 58 Neb. 827 (80 N. W. 56).

Motion to dismiss.

——— Notice.

1457 (1893.) A motion to dismiss a petition in error on the ground that the record shows the order sought to be reviewed was entered by consent of parties, will not be entertained by the supreme court, when notice of the motion has not been served prior to the expiration of the time fixed by rule 8 for serving briefs in the case. *Omaha Fire Ins. Co. v. Maxwell, Sharpe & Ross Co.*, 38 Neb. 358 (56 N. W. 1028).

1458. (1894.) A motion filed in the supreme court to dismiss an appeal, on the ground that the appellant has drawn from the clerk of the district court the money awarded him by the decree sought to be reviewed, will be heard, notwithstanding notice of said motion was not served on the opposite party until after the expiration of the time prescribed by the rules of the supreme court for serving briefs in the case, when it appears appellee had no notice or knowledge of the facts upon which the motion was based before the briefs were due.

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Harte v. Castetter, 38 Neb. 571 (57 N. W. 381).

——— Questions considered.

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1459. (1878.) On a motion to dismiss a cause out of the supreme court, the sufficiency of the assignments of error in the motion for a new trial will not be considered. *Leighton & Brown v. Stuart*, 8 Neb. 96.

1460. (1879.) On a mere motion to dismiss the appeal the supreme court will not examine the record to see whether it contains all the proceedings of the court below. If, however, on the submission of the cause, the supreme court finds the record so defective that the questions presented cannot be reviewed, it will make such order in the premises as may be just and proper. *State Bank v. Green*, 8 Neb. 297.

1461. (1892.) Supreme court will not consider the merits of a case upon motion to dismiss appeal, but will only inquire whether appeal lies, and whether it is properly taken and perfected. *Hines v. Cochran*, 35 Neb. 828 (53 N. W. 1118); (1900) *Bower v. Cassels*, 59 Neb. 620 (81 N. W. 622).

1462. (1897.) Where the report of sale is ambiguous as to the acceptance of the bid, but affords a fair basis for contention that a particular bid was accepted, that bidder may appeal from the order, and, on motion to dismiss the appeal, the court will not inquire whether the contention is well founded and the appellant entitled to a reversal. *Penn Mutual Life Ins. Co. v. Creighton Theatre Building Co.*, 51 Neb. 659 (71 N. W. 279).

1463. (1897.) On a motion to dismiss an appeal on the ground that the appellants are without an appealable interest, the question is not whether on the merits they are entitled to a reversal of the order appealed from, but it is whether the record shows that they are in the attitude of parties claiming a substantial right defeated by the order. *Penn Mutual Life Ins. Co. v. Creighton Theatre Building Co.*, 51 Neb. 659 (71 N. W. 279).

1463*a*. (1908.) Where the appeal of the original appellant, properly taken from a decree in equity, necessarily determines all the questions presented by the record and disposes of the case on its merits, a motion to dismiss as to other appellants will not be considered. *Whedon v. Lancaster County*, 80 Neb. 682 (114 N. W. 1102)

Abandonment.

1464. (1894.) A party who dockets an appeal in the supreme court will be *held* to have abandoned it where he subsequently files a petition in error within a year from judgment below. *Burke v. Cunningham*, 42 Neb. 645 (60 N. W. 903); (1899) *Slobodisky v. Curtis*, 58 Neb. 211 (78 N. W. 522).

1465. (1902.) Taking a second appeal in a case does not of itself constitute an abandonment of the first one. *Drexel v. Reed*, 65 Neb., 231 (91 N. W. 254); (1903) *Drexel v. Reed*, 69 Neb. 468 (95 N. W. 873).

XIII. DOCKETS AND CALENDARS.

Order of causes.

1466. (1878.) Ordinarily where cases pending in the supreme court are reached in their regular order on the docket, they will not be passed to the foot of the docket or continued, except by consent of both parties. *Rich v. State National Bank*, 7 Neb. 201 (29 Am. Rep. 382)

1467. (1901.) An application for a writ of mandamus by a private person for the enforcement of private rights will not be advanced, unless some good reason is made to appear why the application in the first instance was not made in the district court. *Armstrong v. Mayer*, 61 Neb. 355 (86 N. W. 489)

XIV. HEARING AND REHEARING.

In general.

1468. (1898.) The length of time devoted by the supreme court to an examination of a case is not the standard for testing the sufficiency of the court's consideration of questions presented for review. *Bartley v. State*, 55 Neb. 294 (75 N. W. 832).

Effect of failure to appear.

1469. (1882.) Ordinarily a defendant will not be required to appear in an action in the supreme court until the time to which the causes from the judicial district in which he resides are assigned. *State, ex rel. Richardson, v. Fritz*, 13 Neb 197 (13 N. W. 173).

1470. (1902.) When a general demurrer to a petition has been sustained, and a review of the ruling thereon sought by error proceedings, and the party interposing the demurrer fails to appear in the supreme court or point out the defects in the petition relied on to sustain the demurrer, a searching examination and critical analysis will not be made in order to find a defect in the

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petition rendering it vulnerable to such demurrer. *Darr v. Berquist*, 63 Neb. 713 (89 N. W. 256).

Arguments of counsel.

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1471. (1898.) The constitutional provision that "the right to be heard in all civil cases in the court of last resort by appeal, error, or otherwise, shall not be denied," does not prevent the supreme court from prescribing such reasonable rules as are deemed essential to the prompt and orderly disposition of causes for review, nor is the refusal to permit oral arguments violative of the constitution. *Schmidt v. Boyle*, 54 Neb. 387 (74 N. W. 964).

Rehearing.

1472. (1881.) A rehearing will be denied when more than thirty days have elapsed from time of filing opinion. *First Nat. Bank v. Yocum*, 12 Neb. 208 (10 N. W. 706).

1473. (1897.) A rehearing will not be granted when it is clear that no other conclusion than that already reached is possible. *Tecumseh Nat. Bank v. Saunders*, 51 Neb. 801 (71 N. W. 779).

——— Motions.

1474. (1883.) A motion for a rehearing must distinctly specify the grounds upon which it is based. *Spencer v. Thistle*, 14 Neb. 21 (14 N. W. 550).

1475. (1893.) Motions for rehearing may be filed as in cases where the opinions have been prepared by the supreme court, and such motions will be considered by the supreme court. If there is probable error a rehearing will be granted. *In re Supreme Court Commissioners*, 37 Neb. 655 (56 N. W. 298).

1476. (1901.) A motion for a rehearing should concisely state the ground or grounds upon which the decision is assailed. Arguments or citations of authorities have no place in a motion for a rehearing. *Crawford v. Hathaway*, 61 Neb. 317 (85 N. W. 303).

——— Grounds.

1477. (1897.) Where the supreme court in remanding a cause directs the trial court to tax all costs to appellee, the latter may move for a rehearing or for a modification of the order as to costs. *Oliver v. Lansing*, 51 Neb. 818 (71 N. W. 735).

1478. (1898.) Where a consideration of questions presented for review results in a proper and just disposition thereof, a rehearing should not be granted on the ground that the court did not devote sufficient time to an examination of the record and to the preparation of an opinion. *Bartley v. State*, 55 Neb. 294 (75 N. W. 832).

1479. (1903.) A rehearing will not be allowed because of technical defects in the record, not urged by counsel upon the hearing, but when a rehearing has been allowed because of doubt of the correctness of the decision on the questions determined, the cause stands for hearing as though no former decision had been made, and the court will not consider papers appearing with the transcript but not authenticated as a part of the record. *Palmer v. Mizner*, 70 Neb. 200 (97 N. W. 334).

——— Hearing on application.

1480. (1877.) Upon an application for a rehearing the court cannot receive any affidavits in respect of matters entirely foreign to the record. *Morrill v. Taylor*, 6 Neb. 236.

——— Effect of application as stay of proceedings.

1481. (1904.) The pendency in the supreme court of a second motion for rehearing is no ground for the district court's disregarding a regular mandate to enforce a decree. *Michigan Mutual Life Ins. Co. v. Klatt*, 5 Unof. 305 (98 N. W. 436)

1481*a*. (1907.) Rule 7 of the supreme court allowing 40 days from the filing of the opinion or rendition of the judgment in the case within which to file a motion for rehearing supersedes the general rule as to judgments becoming final at the expiration of the term at which they are rendered. This applied only to judgments and opinions by the court in its appellate jurisdiction. In the exercise of its original jurisdiction the provisions of section 602 *et seq.* of the code apply *State, ex rel. Caldwell, v. Lincoln St. R. Co.*, 80 Neb. 352 (118 N. W. 326).

XV. REVIEW.

Effect of stipulation of facts on appeal, see *Stipulation*, §§ 9, 10.

A. Scope and Extent in General.

Questions considered in absence of motion for new trial, see *ante*, §§ 465-526.

Questions presented for review by record, see *ante*, §§ 1261-1284.

Review limited to issues presented to trial court, see *ante*, §§ 208-249.

Review limited to theory on which cause was tried below, see *ante*, §§ 209-225.

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Matters considered in determining question.

1482. (1898.) In reviewing a case in which the trial court filed a written opinion, the supreme court will conclusively presume that the trial court considered all the competent evidence before it and decided all the material and necessary issues presented, though from the language of the written opinion the contrary should be made to appear. *Phenix Ins. Co. v. Fuller*, 53 Neb. 811 (74 N. W. 269; 68 Am. St. Rep. 637; 40 L. R. A. 408).

1482*a*. (1907.) When the evidence in the district court consists of oral testimony which is in sharp and irreconcilable conflict, and the conclusion derivable therefrom is dependent in part upon inferences from circumstances, some of which are in dispute, and in part upon the weight and credibility of testimony to be determined from the degree of competency of the witnesses, their opportunity for knowledge and the apparent clearness of their recollection, and the reasons therefor, the findings of the trial judge will be considered in determining the issues in the supreme court. *Cooley v. Rafter*, 80 Neb. 181 (113 N. W. 1003); *Wetherell v. Adams*, 80 Neb. 584 (114 N. W. 778).

1482*b*. (1907.) When an amended petition has been stricken from the files upon the ground that it states a different cause of action from that set forth in the original petition and one that is barred by the statute of limitations, the plaintiff is entitled on appeal to review the ruling of the court in striking the amended petition from the files. *Johnson v. American Smelting & Refining Co.*, 80 Neb. 250 (114 N. W. 144).

Instruction not complained of as law of case.

1483. (1906.) In the consideration of the assignments—the verdict is not sustained by sufficient evidence, is excessive and is contrary to law—instructions not complained of in such a way as to be reviewable in the supreme court will be taken as the law of the case, and if when tested by such instructions the verdict is not vulnerable to the objections lodged against it the assignments will not be sustained. *Skinner v. Wilson*, 76 Neb. 445 (107 N. W. 771).

Questions considered in general.

1484. (1885.) Where, in an action on certain promissory notes the maker, as a defense, alleges false representations of the payee by which he was deceived and sustained damages, if the evidence fails to establish false representations, technical objections based thereon will not be considered. *Milford v. La Rue*, 17 Neb. 418 (23 N. W. 8).

——— Matters not necessary to decision.

1485. (1904.) Where there are numerous assignments of error, the reviewing court will consider and discuss such of them only as appear to be essential to a proper disposition of the cause under review, and to finally determine the matters involved in the litigation. The fact that all assignments of error are not noticed and commented upon in the opinion, does not imply that they have not been considered and given due weight in arriving at a decision. *Horst v. Lewis*, 71 Neb. 365 (103 N. W. 460).

——— Appeal by portion only of the parties.

1486. (1885.) In an action in equity appealed from the district to the supreme court, if the interests of the parties appealing are so united with the others as to require the taking up of the whole record, the entire case will be reviewed. *McHugh v. Smiley*, 17 Neb. 626 (24 N. W. 277).

Theory and grounds of decision of lower court.

1487. (1895.) Where by a bill in equity relief is sought on two separate and distinct grounds, and it is affirmatively shown by the record that the decree for the plaintiff rests upon one ground only, and that the court expressly reserved its decision on the other, the examination of the supreme court on appeal will be confined to the issue determined by the district court. *Coombs v. MacDonald*, 43 Neb. 632 (62 N. W. 41).

1488. (1895.) In appellate proceedings the examination of the reviewing court will be confined to questions determined by the trial court. *Coombs v. MacDonald*, 43 Neb. 632 (62 N. W. 41).

1488*a*. (1908.) While the verdict of a jury should be set aside if contrary to an erroneous instruction of the court, the supreme court is not bound by the theory of such erroneous instruction in determining whether the misconduct of a member of the jury constitutes prejudicial error. *Albert v. Young*, 80 Neb. 677 (114 N. W. 936).

1488*b*. (1908.) The supreme court will not consider on appeal facts not presented by the pleadings. *Whedon v. Lancaster County*, 80 Neb. 682 (114 N. W. 1102).

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——— Questions arising subsequent to decision.

1489. (1901.) In reviewing rulings excluding evidence, the supreme court will only inquire whether the evidence was properly rejected at the time it was offered. *Erickson v. Schmill*, 62 Neb. 368 (87 N. W. 166).

Extent of review, dependent on mode of review.

Trial *de novo* on appeal, see *post*, §§ 1557-1559.

1490. (1893.) Where cases are brought into the supreme court by appeal, the rulings of the district court on the admission or rejection of evidence are not presented for review, the remedy therefor being by petition in error. *Phœnix Mut. Life Ins. Co. v. Brown*, 37 Neb. 705 (56 N. W. 488); (1896) *Walker v. Smith*, 54 Neb. 31 (74 N. W. 390); (1898) *Ainsworth v. Taylor*, 53 Neb. 484 (73 N. W. 927); (1898) *Alling v. Nelson*, 55 Neb. 161 (75 N. W. 581); (1898) *Village of Syracuse v. Mapes*, 55 Neb. 738 (76 N. W. 458); (1899) *Te Poel v. Shutt*, 57 Neb. 592 (78 N. W. 288); (1899) *Orr v. Bailey*, 59 Neb. 128 (80 N. W. 495); (1900) *McLain v. Maricle*, 60 Neb. 353 (83 N. W. 85); (1901) *State v. Bank of Commerce of Grand Island*, 61 Neb. 181 (85 N. W. 43; 52 L. R. A. 858); (1901) *Solt v. Anderson*, 62 Neb. 153 (86 N. W. 1076); (1901) *Battelle v. McIntosh*, 62 Neb. 647 (87 N. W. 361); (1901) *Smith v. Oster*, 1 Unof. 222 (95 N. W. 335); (1901) *Leavitt v. Bartholomew*, 1 Unof. 756 (93 N. W. 856); (1901) *Pettibone v. Yeiser*, 2 Unof. 65 (96 N. W. 193); (1902) *Stewart & Co. v. Allen*, 2 Unof. 333 (96 N. W. 528); (1902) *Cheston v. Wilson*, 2 Unof. 674 (89 N. W. 764); (1902) *Hillers v. Yeiser*, 3 Unof. 394 (93 N. W. 989); (1902) *Kinney v. Bittinger*, 3 Unof. 817 (92 N. W. 1005); (1903) *Farmers & Merchants Nat. Bank v. Mosher*, 68 Neb. 13 (94 N. W. 1003); (1903) *Flanagan v. Mathiesen*, 70 Neb. 223 (97 N. W. 287); (1903) *Guthrie v. Guthrie*, 4 Unof. 365 (93 N. W. 1131); (1905) *Kennell v. Randall*, 73 Neb. 829 (103 N. W. 677).

1491. (1898.) A party who brings a case to the supreme court by appeal impliedly consents to submit the issue for decision upon the evidence actually in the record. *Alling v. Nelson*, 55 Neb. 161 (75 N. W. 581).

1492. (1899.) On appeal to the supreme court the only question to be considered is whether the judgment or final order responds to, and is warranted by, the pleadings and proofs. To reach errors in interlocutory orders a petition in eror should be filed with the record. *National Life Ins. Co. v. Martin*, 57 Neb. 350 (77 N. W. 769); *Troup v. Horbach*, 57 Neb. 644 (78 N. W. 286); (1899) *Estep v. Schlesinger*, 58 Neb. 62 (78 N. W. 383); (1899) *Zimmerman v. Zimmerman*, 59 Neb. 80 (80 N. W. 643); (1901) *Nebraska Nat. Bank v. Hallowell*, 63 Neb. 309 (88 N. W. 556); (1901) *Pettibone v. Yeiser*, 2 Unof. 65 (96 N. W. 193); (1902) *McNaughton v. Burke*, 63 Neb. 704 (89 N. W. 274); (1902) *St. Andrew's Church v. Shaughnessy*, 63 Neb. 792 (89 N. W. 261); (1902) *Lau v. Blomberg*, 3 Unof. 124 (91 N. W. 206); (1904) *O'Neal v. Bellevue Improvement Co.*, 72 Neb. 899 (101 N. W. 1028).

1493. (1903.) In an equity cause brought to the supreme court on appeal, the ruling of the district court on a motion to strike an answer from the files can not be considered. *Danforth v. Fowler*, 68 Neb. 452 (94 N. W. 637).

1494. (1905.) Upon an appeal to the supreme court for a trial *de novo* of the issues tried in the district court, an error of that court in compelling the apellant plaintiff to elect upon which of two causes of action set forth in his petition he would proceed cannot be corrected. *Webber v. Ingersoll*, 74 Neb. 393 (104 N. W. 600).

Nature of decision appealed from.

1495. (1895.) A demurrer brings up for review not only the pleading demurred to, but all prior pleadings, and judgment on the demurrer must go against that party who is guilty of the first defect, and hence on appeal from an order overruling a demurrer to the answer, a decision reversing such order is in effect a decision that the petition is sufficient. *City of Hastings v. Foxworthy*, 45 Neb. 676 (63 N. W. 955; 34 L. R. A. 321).

1496. (1902.) An order denying a motion for a new trial and an order denying a petition for a new trial on the ground of newly-discovered evidence may both be reviewed in a single proceeding in error. *German Nat. Bank of Beatrice v. Edwards*, 63 Neb. 604 (88 N. W. 657).

——— Default judgment.

1497. (1899.) Alleged errors of law committed in the trial of a cause, or an objection that the evidence is not sufficient to support a finding and judgment, will not be reviewed either in error or on appeal to the

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supreme court, when the judgment was by default. *American Bank of Beatrice v. Hand*, 59 Neb. 273 (80 N. W. 908).

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B. Interlocutory, Collateral and Supplemental Proceedings.

Necessity for motion to retax costs to preserve question for review, see *ante*, §§ 374-377.

On appeal from final decision.

1498. Error in the taxation of costs must be raised by a motion in the lower court, to retax, followed if necessary by an appeal from the ruling on such motion, and cannot be reviewed on error from the judgment in the case. (1866) *Whitall v. Cressman*, 18 Neb. 508 (26 N. W. 245); (1892) *Railsback, Mitchell & Co. v. Patton*, 34 Neb. 490 (52 N. W. 277).

1499. (1888.) The decision of the district court in sustaining a motion for a new trial after a cause has been tried to a jury and verdict returned, is not a subject of review until after a final judgment is rendered in a cause. But where after verdict, and pending a ruling of the court upon a motion for a new trial, it is stipulated that the ruling of the court thereon may be reviewed by the supreme court, without reference to a subsequent trial, and that in case a new trial is refused upon review by the supreme court, the decision of the district court is affirmed, the cause shall be dismissed; or in case a new trial is granted, and upon review the order should be set aside and a judgment absolute rendered in the supreme court for the amount of the verdict, the supreme court will be governed by the stipulation, review the case, and render such judgment as the district court should have rendered. *Johnson v. Parrotte*, 23 Neb. 232 (36 N. W. 497).

1500. (1891.) The statute allows the defeated party against whom an attachment has been sustained to have the attachment proceedings reviewed on error after the final judgment in the case is rendered. *Walker v. Morse*, 33 Neb. 650 (50 N. W. 1055).

1501. (1898.) Section 275 of the code of civil procedure, authorizing an appeal from an interlocutory order, does not preclude a review of such an order upon a general appeal after final judgment in the case in which the order was made. *Seeds Dry-Plate Co. v. Heyn Photo-Supply Co.*, 57 Neb. 214 (77 N. W. 660).

On appeal from order made after judgment.

1502. (1880.) On appeal from an order of the district court confirming a sale of mortgaged premises, the supreme court will not consider a question involving the merits of the original case. *State Nat. Bank v. Scofield*, 9 Neb. 499 (4 N. W. 71).

1503. (1898.) Questions of computation or elements of findings on which a decree foreclosing a mortgage, a mechanic's lien, or a contract of sale, is based, will not be reviewed on appeal from the order confirming the foreclosure sale. *Hampton Lumber Co. v. Van Ness*, 54 Neb. 185 (74 N. W. 587).

C. Parties Entitled to Allege Error.

Waiver of error in admitting testimony of customs, see *Customs and Usage*, § 13.

Persons entitled to review, see *ante*, §§ 171-186.

Appellee.

1504. (1905.) An appellee may, by complaint in the nature of a cross-appeal, be relieved from erroneous or unjust conditions imposed upon him by the decree appealed from. *Kupke v. Polk*, 73 Neb. 590 (103 N. W. 321).

Joint party not appealing.

1505. (1896.) When the interests of several defendants are inseparably connected, an appeal by one defendant brings up the entire case. *Claflin v. American Nat. Bank of Omaha*, 46 Neb. 884 (65 N. W. 1056).

Error affecting only co-party.

1506. (1898.) Where there is presented no question on appeal but the sufficiency of the evidence to sustain the judgment as to one of three defendants, and the rights of the sole appellant are dependent upon those of defendants who have not appealed, the judgment may be affirmed. *Barnes v. George*, 54 Neb. 504 (74 N. W. 854).

1507. (1902.) Where only one of two defendants was served, and the verdict was against "the defendant," if the action admits of a several judgment, the defendant who was served with process and appeared and tried the case may not complain that judgment was entered irregularly against the other defendant as well. *Storey v. Kerr*, 2 Unof. 568 (89 N. W. 601).

1508. (1906.) Where the only parties affected by alleged errors in a decree are

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satisfied, others will not be heard to complain. *Nealon v. McGargill*, 77 Neb. 109 (108 N. W. 170).

Estoppel to allege error.

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Estoppel to appeal or bring writ of error, see *ante*, §§ 187-201.

1509. (1901.) A party failing to plead to a cross-petition, the court having jurisdiction of his person, will not be heard to say that an adverse finding thereon is not sustained by sufficient evidence. *Smith v. Allen*, 63 Neb. 74 (88 N. W. 155).

——— Error committed or invited by party complaining.

1510. (1887.) Where a cause was transferred to a justice of the peace upon a change of venue, and he being unable, by reason of bias and prejudice, to try the case, the defendant filed a motion to dismiss for said cause, which motion being overruled, he filed a motion supported by affidavit for a second change of venue, which motion was sustained, he could not predicate error upon the sustaining of his own motion. *Hitchcock v. McKinister*, 21 Neb. 148 (31 N. W. 507).

1511. (1888.) Where both plaintiff and defendant call witnesses to establish usage, neither can assign error in the admission of such testimony. *Howell, Jewett & Co. v. Graff, Murray & Co.*, 25 Neb. 130 (41 N. W. 142).

1512. (1889.) Where instructions are given at the request of a party, he cannot predicate error thereon. *Fremont, E. & M. V. R. Co. v. Meeker*, 28 Neb. 94 (44 N. W. 79); (1893) *Dawson v. Williams*, 37 Neb. 1 (55 N. W. 284); (1894) *Jonasen v. Kennedy*, 39 Neb. 313 (58 N. W. 122); (1894) *Omaha Fair & Exposition Ass'n v. Missouri P. R. Co.*, 42 Neb. 105 (60 N. W. 330); (1894) *Richards v. Borowsky*, 39 Neb. 774 (58 N. W. 277); (1896) *City of Omaha v. Richards*, 49 Neb. 244 (68 N. W. 528); (1899) *Shiverick v. Gunning*, 58 Neb. 29 (78 N. W. 460) [rehearing, 59 Neb. 73]; (1902) *Union P. R. Co. v. Lotway*, 2 Unof. 348 (96 N. W. 527); (1902) *Buck v. Hogeboom*, 2 Unof. 853 (90 N. W. 635); (1903) *Chicago, B. & Q R. Co. v. Troyer*, 70 Neb. 293 (103 N. W. 680).

1513. (1890.) A party who alleges error by reason of a technical defeat in the proceedings must himself be free from a like fault when he invokes the action of the court to correct the error. *Brown v. Goodyear*, 29 Neb. 376 (45 N. W. 618).

1514. (1890.) Where one party has introduced certain evidence, he cannot complain of similar evidence introduced by the other party. *Meharry v. Halligan*, 29 Neb. 565 (45 N. W. 927).

1515. (1891.) Where the assignee of a note, in an action thereon, introduces a stipulation that a certain party if present would testify that the note was usurious, he cannot on review predicate error upon the admission of such evidence. *Richardson v. Stone*, 32 Neb. 617 (49 N. W. 763).

1516. (1895.) Argument of counsel based on facts not in evidence is not reversible error if made in reply to similar argument of the adverse party. *Stratton v. Dole*, 45 Neb. 472 (63 N. W. 875).

1517. (1895.) A party who asks his adversary to offer in evidence a written instrument of doubtful competency cannot be heard to urge in the supreme court, when the instrument was immediately offered, that it should have been excluded as incompetent. *Smith v. Brown*, 46 Neb. 230 (64 N. W. 714).

1518. (1896.) A party cannot predicate error upon an order which he procured to be made. *Norwegian Plow Co. v. Bollman*, 47 Neb. 186 (66 N. W. 292; 31 L. R. A. 747); (1900) *Missouri P. R. Co. v. Fox*, 60 Neb. 531 (83 N. W. 744); (1901) *Storm v. Holmes*, 2 Unof. 16 (96 N. W. 73); (1902) *Holway v. American Exchange Nat. Bank*, 64 Neb. 67 (89 N. W. 382); (1904) *Holmes v. Seaman*, 72 Neb. 300 (100 N. W. 417); (1907) *Malcolm Savings Bank v. Cronin*, 80 Neb. 231 (116 N. W. 150).

1519. (1898.) A party tendering an immaterial issue which the court refuses to strike from the pleadings on motion of the other party, cannot be heard to object to evidence relating to that issue on the ground that it is immaterial. *Smith v. Meyers*, 54 Neb. 1 (74 N. W. 277).

1520. (1898.) A party who has induced the court to permit him to open and close the trial by representing that there was only one issue of fact for decision, cannot, after an adverse verdict recede from his position and obtain a new trial on the ground that there were other questions of fact which should have been submitted to the jury. *Home Fire Ins. Co. v. Decker*, 55 Neb. 346 (75 N. W. 841).

1521. (1898.) Error cannot be predicated upon the refusal to eliminate from the record the testimony which the party complain-

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ing himself introduced. *Chicago, R. I. & P. R. Co. v. Buel*, 56 Neb. 205 (76 N. W. 571).

1522. (1898.) A party cannot obtain a reversal on account of the admission of incompetent evidence which he brought out on the cross-examination of the witness of his adversary. *Chicago, R. I. & P. R. Co. v. Buel*, 56 Neb. 205 (76 N. W. 571).

1523. (1898.) One who tenders an instruction which is given, which assumes the existence of evidence to establish an issuable fact in the case, cannot afterwards be heard to assert that there was no evidence received tending to prove such fact. *American Fire Ins. Co. v. Landfare*, 56 Neb. 482 (76 N. W. 1068).

1524. (1898.) A party cannot complain of the giving of an instruction in harmony with one which he requested. *American Fire Ins. Co. v. Landfare*, 56 Neb. 482 (76 N. W. 1068); (1901) *Farmers Bank v. Garrow*, 63 Neb. 64 (88 N. W. 131); (1903) *Farmers Mutual Ins. Co. v. Cole*, 4 Unof. 130 (93 N. W. 730).

1525. (1900.) Argument of counsel based on matters not in evidence will not be reviewed if made in reply to similar argument of adverse counsel. *Nebraska Savings & Exchange Bank v. Brewster*, 59 Neb. 535 (81 N. W. 441).

1526. (1900.) Where a party requests instructions which are contradictory, he cannot complain if the court makes a wrong selection. *Missouri P. R. Co. v. Fox*, 60 Neb. 531 (83 N. W. 744).

1527. (1901.) A party who requests instructions on a certain theory cannot complain that the court gave other instructions proceeding on the same theory. *Schrandt v. Young*, 62 Neb. 254 (86 N. W. 1085).

1528. (1901.) 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*, 62 Neb. 456 (87 N. W. 167).

1529. (1901.) A party who requests instructions which were given to the jury, cannot afterwards object that the issue so presented was not raised by the pleadings. *Swigart v. Gentert*, 63 Neb. 157 (88 N. W. 159).

1530. (1901.) Where a question is submitted to the jury, after the request of a party for its submission, such party will not be heard to say that a finding thereon adverse to him is not sustained by sufficient evidence. *Iowa Savings Bank v. Frink*, 1 Unof. 26 (92 N. W. 916); (1901) *Chicago, B. & Q. R. Co. v. Johnston*, 1 Unof. 314 (95 N. W. 614). (1901) *Farmers Bank v. Garrow*, 63 Neb. 64 (88 N. W. 131); (1902) *Missouri P. R. Co. v. Hemingway*, 63 Neb. 610 (88 N. W. 673).

1531. (1901.) A party will not be heard to complain of an instruction on the ground that it submits issues not presented by the pleading, nor supported by the evidence, when an instruction given at his request submits the same issues. *Collier v. Gavin*, 1 Unof. 712 (95 N. W. 842).

1532. (1901.) A party is estopped to urge an objection that there is no evidence in support of a proposition contained in an instruction when he, himself, has asked for an instruction based on the same theory. *Collier v. Gavin*, 1 Unof. 712 (95 N. W. 842).

1533. (1902.) Where a party to a suit requests the submission of a question to the jury by the tender of an instruction which is refused, he cannot complain of an instruction, given by the court on its own motion, submitting the same question. *Kennard v. Grossman*, 2 Unof. 743 (89 N. W. 1025).

1534. (1903.) A party who objects to evidence and causes it to be excluded cannot obtain a reversal of the judgment as unsupported for want of the evidence so excluded. *Knudson v. Parker*, 70 Neb. 21 (96 N. W. 1010).

1535. (1903.) Where in an action on the official bond of a sheriff to recover damages for his neglect to file a deed of assignment under the provisions of Compiled Statutes, 1899, chapter 7, section 7, the defendants object to the introduction of the only evidence offered which would tend to mitigate the damages and reduce the amount of the plaintiff's recovery thus causing its exclusion, they are not in a position to complain of the judgment as excessive. *Huddleson v. Polk*, 70 Neb. 489 (100 N. W. 802).

1536. (1905.) Where, in an action for personal injuries, counsel for plaintiff invites the jury to return a verdict for the defendant if they find that the plaintiff is only entitled to nominal damages, and such verdict is returned, plaintiff cannot complain if the evidence would support a verdict for such damages. *Langdon v. Clarke*, 73 Neb. 516 (103 N. W. 62).

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1537. (1906.) Where evidence necessary to sustain a verdict has been erroneously excluded upon a general objection, the party at whose instance the evidence was excluded will not be heard to complain that the verdict, for want of such evidence, is not sufficiently sustained. *Lincoln County v. Chicago, B. & Q. R. Co.*, 77 Neb. 99 (108 N. W. 178).

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——— **Assent to proceedings.**

1538. (1889.) Error cannot be assigned upon a ruling or action of the district court made or taken with the consent of the complaining party. *Chamberlain v. Brown*, 25 Neb. 434 (41 N. W. 284).

1539. (1890.) Error cannot be predicated upon the admission of testimony which was introduced under an agreement of the parties. *Elsanger v. Grovijohn*, 29 Neb. 139 (45 N. W. 273).

1540. (1893.) A party cannot predicate error upon the overruling of a motion for a new trial by the district court, where such order was made in pursuance of the written stipulation of all the parties, although such stipulation was made for the purpose of the sooner getting the case into the supreme court. *Omaha Fire Ins. Co. v. Maxwell, Sharp & Ross Co.*, 38 Neb. 358 (56 N. W. 1028).

1541. (1894.) A party cannot be heard to urge error in the proceedings leading to a judgment which was entered by his own consent. *Weander v. Johnson*, 42 Neb. 117 (60 N. W. 353).

1542. (1895.) A party who has consented to a decree of foreclosure and a sale thereunder cannot be heard on appeal to question the correctness of the decree in so far as it was authorized by his own stipulation. *Hayden v. Lincoln City Electric R. Co.*, 43 Neb. 680 (62 N. W. 73).

1543. (1897.) The rule that parties who voluntarily submit to the introduction of irrelevant testimony and accept a verdict thereon, are precluded from thereafter urging that the evidence was irrelevant, does not apply to a case where the pleadings and the instructions of the court confined the jury to a consideration of one issue when there was no evidence to support the verdict on that issue, although there was evidence which might have sustained a similar verdict had other questions or different issues been submitted to the jury. *Esterly Harvesting Machine Co. v. Berg*, 52 Neb. 147 (71 N. W. 952).

1544. (1901.) A party will not be heard to complain in this court of the action of the lower court in the trial of a civil cause if the action of the court was by the "mutual agreement" of the parties to the suit. *Union Nat. Bank of Chicago v. Touzalin Improvement Co.*, 1 Unof. 116 (95 N. W. 489).

1545. (1903.) Where the record discloses that a defendant has raised the question and insisted in the district court that there was not sufficient evidence to warrant the submission of a material issue to the jury, and the court nevertheless insists on submitting the issue, the defendant is not estopped on appeal to raise the same question here, because he requested and obtained an instruction defining the law relative to the issue as he understands it to be. *Haslam v. Barge*, 69 Neb. 644 (96 N. W. 245)

1546. (1907.) Where a party objects to opinion evidence as to testamentary capacity, and preserves his exception, he does not waive the error by subsequently introducing similar evidence for the purpose of meeting his adversary's case, rebutting the evidence to which he excepted, but without any intention of abandoning his exceptions. *In re Estate of Cheney*, 78 Neb. 274 (110 N. W. 731).

——— **Recognition of validity of proceedings.**

1547. (1872.) A party having appealed from a judgment of the district court to the supreme court, has so recognized it as to be estopped from assailing it as having been irregularly entered. *Irwin v. Nuckolls* 3 Neb. 441. [Overruled. *Cahill v. Cantwell*, 31 Neb. 159.]

1548. (1887.) Alleged error in the admission of parts of certain documents in evidence, is cured where the objecting party afterwards introduces the documents. *Singer Mfg. Co. v. McAllister Bros.*, 22 Neb. 359 (35 N. W. 181).

1549. (1889.) A party cannot complain of the admission of evidence where he afterward introduces the same or similar evidence. *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb. 542 (41 N. W. 297).

1550. (1889.) To obtain the review of a decision sustaining or overruling a demurrer, the party must suffer a judgment in chief to be rendered on the demurrer; if he answers over and goes to trial upon the merits, he waives the demurrer and cannot assign the judgment upon the de-

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murrer as error. *Buck & Greenwood v. Reed*, 27 Neb. 67 (42 N. W. 894).

1551. (1901.) Where the trial court rejects certain evidence upon the express ground that it is not admissible under the answer, acquiescence in such rulings by obtaining leave to amend and amending the answer is a waiver of any error in the rulings based on the pleading prior to amendment. *Winterringer v. Warder, Bushnell & Glessner Co.*, 1 Unof. 414 (95 N. W. 619).

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D. Amendments, Additional Proofs and Trial de Novo.

Amendment of proceedings of lower court.

1552. (1886.) Where an action is brought upon a contract instead of a *quantum meruit*, and all the proof introduced without objection, showing the right of the plaintiff to recover, the supreme court will, if necessary, permit an amendment of the petition to conform to the proof, or remand the cause to the district court for such amendment. *Homan v. Steele, Johnson & Co.*, 18 Neb. 652 (26 N. W. 472).

1553. (1905.) In an appeal in equity in the supreme court an amended petition may be filed in conformity with the facts proved in the record. *Raley v. Raymond Bros. Clarke Co.*, 73 Neb. 496 (103 N. W. 57).

Further pleadings.

1554. (1897.) In a proceeding in error it is proper for defendant, by way of answer, to set up such facts subsequent to the judgment as are claimed to have the effect to waive the error complained of. *Shreck v. Gilbert*, 52 Neb. 813 (73 N. W. 276).

Additional proofs.

1555. (1893.) If it is within the discretion of the supreme court to receive original evidence in appeal cases, the exercise of such a discretion can be justified only in extreme and exceptional cases, where the injured party is without fault, and would be otherwise without a remedy. *Phœnix Mut. Life Ins. Co. v. Brown*, 37 Neb. 705 (56 N. W. 488).

——— Reference.

1556. (1886.) In proceedings in error to review a judgment of the district court, whereby the value of improvements, rents, and profits, and of the real estate, was found upon appraisement, the supreme court has no authority to order a reference for the purpose of ascertaining the value of rents and profits accruing after the verdict or assessment of the appraisers and during the pendency of the proceedings in the supreme court. *Burlington & M. R. R. Co. v. Dobson*, 19 Neb. 451 (27 N. W. 442).

Trial de novo.

1557. (1876.) 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 Neb. 539; (1901) *Troup v. Horbach*, 62 Neb. 564 (87 N. W. 316).

1558. (1904.) Upon an appeal in equity the supreme court will try the issue *de novo*, and will not be influenced in its decision by the findings of the trial court based upon depositions or other written evidence. The conclusions of the trial court, derived from the consideration of the evidence of witnesses examined in the presence of the court, will not be regarded unless, upon the whole record, in view of the position of the trial court in weighing such evidence, they appear to be right. *Grandin v. First Nat. Bank of Chicago*, 70 Neb. 730 (98 N. W. 70); (1904) *Naudain v. Fullenwider*, 72 Neb. 221 (100 N. W. 296).

1559. (1906.) Sections 138, 139 and 144 of the code, relative to variances and amendments, are applicable to the trial *de novo* in the supreme court of suits in equity on appeal. *Lichty v. Beale*, 75 Neb. 770 (106 N. W. 1018).

E. Presumptions.

Presumption as to abuse of discretion, see *post*, §§ 1660, 1661.

Presumption as to effect of error, see *post*, § 1874.

Proceedings of trial court in general.

1560. (1877.) To obtain a review in the supreme court, error must affirmatively appear in the record. The rule is, that whenever the facts stated in the record are consistent with the duty of the court, and nothing is shown to establish a contrary theory, it will be presumed that the court acted properly and all things were rightly done. *Fillion v. State*, 5 Neb. 351; (1896) *American Investment Co. v. McGregor*, 48 Neb. 779 (67 N. W. 785).

1561. (1878.) In a proceeding in error every presumption must be in favor of the correctness of the judgment of the court below. It is only "for errors appearing on the record" that the judgment of a district court can be properly reversed. *Frey v.*

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Drahos, 7 Neb. 194; (1884) *Thesing v. School District No. 57*, 16 Neb. 134 (19 N. W. 625).

1562. (1886.) All presumptions are in favor of the regularity of the proceedings of the district court. Error is never presumed. *Alexander v. Irwin*, 20 Neb. 204 (29 N. W. 385); (1888) *McBride v. Lathrop*, 24 Neb. 93 (38 N. W. 32); (1901) *Citizens Bank of Humphrey v. Stockslager*, 1 Unof. 799 (96 N. W. 591).

1563. (1898.) In the supreme court, in reviewing cases, the transcript being silent as to matters before the district court, it will be presumed taht the facts there disclosed were of such character as to warrant the judgment rendered. *Alling v. Fisher*, 55 Neb. 239 (75 N. W. 536).

1564. (1898.) Where the journal entry of a ruling recites that a party noted an exception to the order, it will be presumed that he was present in person or by counsel. *Royal Trust Co. v. Exchange Bank*, 55 Neb. 663 (76 N. W. 425).

1565. (1903.) If the record presented to the supreme court is not complete, and if, because of such incompleteness, it is impossible to determine whether the judgment of the district court is right or wrong, it will be presumed to be right. *Stedry v. Beck*, 4 Unof. 390 (94 N. W. 513).

1566. (1903.) Where there is no bill of exceptions preserved, and the record contains nothing but the clerk's transcript, the general presumption exists that every proceeding essential to the legality and validity of the judgment was validly taken. And where on any contingency supposable in the state of the record, the decision below might have been valid, such contingency will be so presumed. *Grove v. Dineen*, 4 Unof. 722 (96 N. W. 253).

1567. (1906.) The presumptions in favor of the regularity of the proceedings of superior courts are of no avail against facts shown by the record itself. *First Nat. Bank of Sutton v. Sutton Mercantile Co.*, 77 Neb. 596 (110 N. W. 306).

Burden of showing error.

1568. (1877.) Under the constitution and statute relating to proceedings in error the supreme court can only reverse, vacate, or modify a judgment rendered by the district court for errors appearing on the record. *Morrill v. Taylor*, 6 Neb. 236; (1898) *Maginn v. Pickard*, 57 Neb. 642 (78 N. W. 295); (1890) *Stark v. Bellamy*, 29 Neb. 608 (46 N. W. 85).

1569. (1877.) In order to review a refusal of the trial court to issue an attachment on a claim not due, the record must show such facts and circumstances as will fairly indicate an intent of defendant to defraud his creditors. *Seidentopf v. Annabil*, 6 Neb. 524.

1570. (1880.) It is a settled rule of law that every presumption is in favor of the correctness of the judgment of a court of general jurisdiction, until the contrary is made affirmatively to appear. *Credit Foncier v. Rogers*, 10 Neb. 184 (4 N. W. 1012); (1887) *Aspinwall v. Sabin*, 22 Neb. 73 (34 N. W. 72; 3 Am. St. Rep. 258); (1903) *Stansbury v. Storer*, 70 Neb. 603 (97 N. W. 805).

1571. (1884.) When the finding and judgment of the trial court are supported by sufficient evidence a new trial will not be ordered unless prejudicial error affirmatively appears. *Snyder v. Jennings*, 15 Neb. 372 (19 N. W. 501).

1572. (1884.) Error cannot be presumed. It must appear affirmatively in order to reverse a judgment. *Parody v. School District*, 15 Neb. 514 (19 N. W. 633); *Singer Mfg. Co. v. Doggett*, 16 Neb. 609 (21 N. W. 468); (1884) *Roehl v. Roehl*, 15 Neb. 655 (19 N. W. 632); (1884) *Birdsall, Son & Co. v. Carter*, 16 Neb. 422 (20 N. W. 287); (1885) *Bedford v. Ruby*, 17 Neb. 97 (22 N. W. 76); (1886) *Weir v. B. & M. R. R. Co.*, 19 Neb. 212 (26 N. W. 627); (1887) *McClure v. Lavender*, 21 Neb. 181 (31 N. W. 672); (1888) *Welborn v. Eskey*, 25 Neb. 193 (40 N. W. 959); (1894) *Weeks v. Wheeler*, 41 Neb. 200 (59 N. W. 554); (1896) *Union P. R. Co. v. Kinney*, 47 Neb. 393 (66 N. W. 449); (1898) *Andrews v. Kerr*, 54 Neb. 618 (74 N. W. 1071); (1899) *Union P. R. Co. v. Vincent*, 58 Neb. 171 (78 N. W. 457); (1899) *Mercantile Trust Co. v. O'Hanlon*, 58 Neb. 482 (78 N. W. 925); (1899) *First Nat. Bank of Broken Bow v. Stockham*, 59 Neb. 304 (80 N. W. 899); (1900) *Ashpole v. Hallgren*, 60 Neb. 196 (82 N. W. 623); (1901) *Gooding v. Ransom*, 63 Neb. 78 (88 N. W. 169); (1902) *Hobbs v. Warman*, 63 Neb. 703 (89 N. W. 255); (1902) *Falstrom v. Banning*, 64 Neb. 339 (89 N. W. 1133); (1902) *Shelby v. Creighton*, 2 Unof. 264 (96 N. W. 382); (1903) *Modern Brotherhood of America v. Cummings*, 68 Neb. 256 (94 N. W. 144).

1573. (1895.) All presumptions exist in

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favor of the regularity of the judgments of courts of general jurisdiction, and he who asserts the contrary is required to establish the alleged error by an exhibition of the record. *Wright v. State*, 45 Neb. 44 (63 N. W. 147).

1574. (1896.) Every judgment brought to the supreme court for review comes surrounded with the presumption of correctness, and the supreme court will not search a record for the purpose of ascertaining if it contains error. The burden is upon the party complaining of the action of the district court to specifically point out what is complained of and show that it was probably erroneous. *Ætna Ins. Co. v. Simmons*, 49 Neb. 811 (69 N. W. 125).

1575. (1898.) Upon a record presenting no question of law a judgment sustained by the evidence will be affirmed. *Mains v. Boyd*, 54 Neb. 170 (74 N. W. 392).

1576. (1901.) The burden of proof is upon the one asserting error, and until the error is made to appear from the record the judgment complained of will not be disturbed. *State v. Nebraska Savings & Exchange Bank*, 61 Neb. 496 (85 N. W. 391).

1577. (1902.) It is the duty of the plaintiff in error, in all cases, to point out the errors by reason of which he claims the judgment should be reversed, and unless the error is affirmatively established by the record, the judgment will be affirmed. *Nothdurft v. City of Lincoln*, 66 Neb. 430 (96 N. W. 163).

1578. (1902.) It is the duty of a plaintiff in error to bring to the supreme court a sufficient transcript of the record to show error affirmatively; if there is not enough upon the face of the transcript to cause the judgment to appear necessarily erroneous, the proceedings in error must fail. *Stewart v. Rosengren*, 66 Neb. 445 (92 N. W. 586).

Court where case originated.

1579. (1897.) From the mere fact that there was filed in the district court a copy of a petition and an answer entitled "In the County Court," and indorsed as therein filed, it will not be assumed that there was a judgment in, or an appeal from, the county court. *Walton v. Campbell*, 51 Neb. 788 (71 N. W. 737).

Jurisdiction of lower court.

1580. (1883.) When a record, brought to the supreme court on error, speaks of an order of attachment issued by a county judge, but fails to state in what amount it was issued, or to otherwise describe it, it will be presumed to have been issued in a case in which the county court had jurisdiction concurrently with the district court. *Schell v. Husenstine*, 15 Neb. 9 (16 N. W. 758).

1581. (1900.) In courts of general jurisdiction the rule is that the proceedings taken, including questions of jurisdiction, are presumed to be regular and in conformity with law. Where, however, the record discloses the jurisdictional steps taken, and it is made to appear that no jurisdiction was acquired over the defendant, the rule invoked is rendered unavailing. *Chicago, B. & Q. R. Co. v. County of Hitchcock*, 60 Neb. 722 (84 N. W. 97).

1582. (1901.) Jurisdictional facts will not be presumed in order to sustain the judgments of inferior courts, but when it appears that jurisdiction has once attached the presumption that the subsequent proceedings were regular will be indulged until the contrary is shown. *Kuker v. Beindorff*, 63 Neb. 91 (88 N. W. 190).

1583. (1902.) In the absence of an affirmative showing in the record a court of general jurisdiction will be conclusively presumed to have jurisdiction of the parties to the action. *Nehawka Bank v. Ingersoll*, 2 Unof. 617 (89 N. W. 618).

On appeal from intermediate court.

1584. (1879.) The supreme court will presume the docket entry and the certificate of a justice of the peace to have been made at the time they purport to be. *Dole v. Doddridge*, 9 Neb. 138 (1 N. W. 999).

1585. (1884.) Where the transcript of a justice's docket shows that the parties were present at the trial, the supreme court will not presume that judgment was rendered by default. *Rawalt v. Brewer*, 16 Neb. 444 (20 N. W. 391).

1586. (1887.) On an appeal from a judgment of a probate court in matters relating to an estate, where the judge aproves the bond for such appeal, it will be presumed the bond conforms to the orders of such court, although they do not appear in the record. *Jacobs v. Morrow*, 21 Neb. 233 (31 N. W. 739).

1587. (1887.) In a case brought on error to a district court, to reverse a judgment of that court reversing a judgment of a justice of the peace, and upon examining

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the petition in error to said justice of the peace and the record certified by him, it appears that there is reversible error assigned, it will be presumed by the supreme court that it was upon such errors that the judgment of the justice was reversed, and not upon other errors assigned, which are believed not to be reversible. *Stanton & Co. v. Spence*, 22 Neb. 191 (34 N. W. 359).

1588. (1888.) Judgment in the county court, upon which execution on which the levy was made was issued, having been for $490.43, and costs, the amount of costs not being shown in the record, nor the interest on the judgment computed, the finding of $539.20 is presumed to be correct. *Towne v. Sparks*, 23 Neb. 142 (36 N. W. 375).

1589. (1890.) A judgment of a justice of the peace, affirmed on error to the district court, and thence taken on error to the supreme court, no error appearing from the transcript of the justice, which is the only evidence before the higher courts, will be affirmed as of course. *McKeighan v. Graves*, 28 Neb. 801 (44 N. W. 1135).

1590. (1890.) Findings of a city council as to jurisdictional facts, in granting an application for a liquor license, presumed by supreme court to be supported by the evidence. *Lambert v. Stevens*, 29 Neb. 283 (45 N. W. 457).

1591. (1891.) Where the transcript of a judgment rendered by a justice of the peace on the veridct of a jury gives the names of the jurors and shows that no objection was made to the manner of selecting the jury, it will be presumed that the jury was selected in the mode pointed out in the statute. *Gapen v. Bretternitz*, 31 Neb. 302 (47 N. W. 918).

1592. (1903.) To warrant a reversal of a judgment of the district court, reversing an order of the county court, error must affirmatively appear. *Stedry v. Beck*, 4 Unof. 390 (94 N. W. 513).

Preliminary and interlocutory proceedings.

1593. (1876.) Where the record shows that a written order adjourning the district court is entered on the journal by the clerk, but it does not appear that the clerk formally adjourned the court, it will be presumed that he performed that duty. *Smith v. State*, 4 Neb. 277.

1594. (1894.) It is the duty of the district court to afford to defendants a full opportunity to present their defense, but it is also its duty to prevent unnecessary delays and discourage frivolous proceedings. In reviewing orders affecting the procedure in a case the supreme court will presume, in the absence of evidence to the contrary, that the district courts have acted with due regard to both principles. *Lichtenberger v. Worm*, 41 Neb. 836 (60 N. W. 93).

1595. (1894.) It will be presumed by the appellate court, in the absence of any showing upon the subject, that calendar for the county court was prepared and the causes set down for trial in strict compliance with the terms of the statute. *Bond v. Wyckoff*, 42 Neb. 214 (60 N. W. 564).

1596. (1896.) The supreme court will not presume the adjournment of a term of the district court from the fact that twenty-three days have intervened since a given day thereof. *Hyde v. Kent*, 47 Neb. 26 (66 N. W. 39).

1597. (1899.) Where the record shows an order adjourning to a future day in the term, and judicial proceedings carried on in the interval, it will be presumed, in favor of regularity, that there has been a reconvention and an express or implied vacation of the order of adjournment. *Greene v. Morse*, 57 Neb. 391 (77 N. W. 925; 73 Am. St. Rep. 761).

1598. (1901.) The statute not requiring a justice of the peace to enter upon his docket the hour when an order of adjournment is made, where jurisdiction has attached it will be presumed that such order was made at the proper time. *Kuker v. Beindorff*, 63 Neb. 91 (88 N. W. 190).

1599. (1901.) It is necessary that the affidavit for service by publication be filed in the proper office before publication of notice, but when a copy of the affidavit, in due form, is found in the bill of exceptions but without filing marks thereon, it will be presumed, in the absence of specific objections on the trial and any explanatory evidence, that the omission is but a clerical error on the part of the officer in making up the record. *Foley v. Doyle*, 1 Unof. 643 (95 N. W. 1067).

——— Special appearance.

1600. (1898.) A special appearance must be assumed to have been properly overruled when the affidavit upon which it was founded does not appear in the record in the supreme court. *Life Ins. Clearing Co. v. Altschuler*, 53 Neb. 481 (73 N. W. 942).

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Process.

1601. (1902.) When the evidence upon which the trial court acted in refusing to quash the service of a summons is not preserved in a bill of exceptions, the supreme court will presume that it was sufficient to warrant the decision. *Haskell v. Dutton*, 65 Neb. 274 (91 N. W. 395).

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Parties.

1602. (1889.) In an action on a note, where the record shows that a note was introduced in evidence, it will be presumed, in the absence of a showing to the contrary, that it was in a form authorizing plaintiff to sue on it. *Bair v. People's Bank*, 27 Neb. 577 (43 N. W. 347).

Pleadings.

1603. (1884.) Where the trial court permits an amendment to be made to a pleading during trial it will be presumed to be made to be "in furtherance of justice," unless the contrary appears from the record. *Singer Mfg. Co. v. Doggett*, 16 Neb. 609 (21 N. W. 468).

1604. (1886.) Where amended pleadings are filed in the district court and properly certified to the supreme court as a part of the transcript, it will be presumed that such pleadings were filed regularly and with the knowledge or permission of the district court, and they will be treated as properly in the record. *Johnson v. Missouri P. R. Co.*, 18 Neb. 690 (26 N. W. 347).

1605. (1893.) When it is sought to review a decree in equity by error proceedings, and the only error alleged is that the pleadings do not support the decree, every reasonable presumption must be indulged in support of the correctness of the decree; and unless it certainly appears that no such decree as rendered could lawfully be pronounced on the pleadings, it will not be disturbed. *Fitzgerald v. Brandt*, 36 Neb. 683 (54 N. W. 992).

1606. (1894.) Where an answer traverses the allegations of the petition by references to numbers of lines therein, and such numbering is not preserved in the transcript, it will be presumed that all material allegations were denied. *Bellevue Improvement Co. v. Village of Bellevue*, 39 Neb. 876 (58 N. W. 446).

1607. (1899.) The supreme court will not assume there was error in the overruling of a motion to require a party to make his pleading in the district court comply with a former pleading in the county court, where the record for review fails to show what pleading was filed in the county court. *Krebbs v. Holway*, 58 Neb. 65 (78 N. W. 397).

1608. (1901.) Where no reply appears in the record and there are other issues on which the cause was properly triable, it will not be presumed that the cause was tried on matters admitted by the pleadings. *Ames v. Parrott*, 61 Neb. 847 (86 N. W. 503; 87 Am. St. Rep. 536).

1609. (1902.) Where a cause is tried to the court and there is a general finding for the plaintiff, if any cause of action is stated and there is evidence thereon sufficient to sustain the finding, it will be presumed that the court proceeded thereon and the judgment will be affirmed, although the petition attempts also to state a cause of action of a different nature which would not sustain a recovery. *Omaha Brewing Ass'n v. Tillenburg*, 2 Unof. 277 (96 N. W. 107).

Qualifications of judge.

1610. (1896.) Where the record discloses an order of the district court sufficient in form but omitting the name of the judge by whom it was made, the fact that the sole judge of the district named was at the date thereof disqualified to act in such proceeding by reason of having been attorney for one of the parties raises no presumption against the validity of such order in view of the statute authorizing judges to interchange and hold court for each other. *Link v. Connell*, 48 Neb. 574 (67 N. W. 475).

Admissibility of evidence.

1611. (1895.) Error does not appear as to the introduction in evidence of a written instrument on the ground of material alteration where the copy in the bill of exceptions and other evidence fail to disclose such alteration. *Chadron Banking Co. v. Mahoney*, 43 Neb. 214 (61 N. W. 594).

1612. (1898.) The supreme court cannot assume that the rejection of written evidence was prejudicially erroneous when there is in the record before it no showing as to the nature of the evidence rejected. *Modern Woodman Accident Ass'n v. Shryock*, 54 Neb. 250 (74 N. W. 607; 39 L. R. A. 826).

Depositions.

1613. (1898.) Depositions filed in a lower court are presumed, in the absence of proof to the contrary, to have been transmitted to the district court within the time

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limited by the statute for that purpose. *Thomas v. Nebraska Moline Plow Co.*, 56 Neb. 383 (76 N. W. 876).

Sufficiency of evidence.

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1614. (1877.) When the record does not contain all the evidence, or show that no evidence was introduced or offered relative to issues of fact in a trial before the court, it will be presumed that the findings of the court are based on sufficient proof of the facts. *Hendrix v. Rieman*, 6 Neb. 516.

1615. (1880.) Where nothing whatever is shown, if evidence were necessary to have authorized the particular decision complained of, it will be presumed that the evidence was before the court. *Credit Foncier v. Rogers*, 10 Neb. 184 (4 N. W. 1012).

1616. (1884.) In the absence of a bill of exceptions it will be presumed that the necessary proof was produced at the trial. *Vindquest v. Perky*, 16 Neb. 284 (20 N. W. 301); (1896) *Van Etten v. Test*, 49 Neb. 725 (68 N. W. 1023); (1900) *Sutton v. Sutton*, 60 Neb. 400 (83 N. W. 200); (1900) *Fisk v. Thorp*, 60 Neb. 713 (84 N. W. 79); (1901) *Lexington Bank v. Marsh*, 1 Unof. 210 (95 N. W. 341); (1902) *Spargur v. Prentiss*, 66 Neb. 222 (92 N. W. 300); (1902) *Shelby v. Creighton*, 2 Unof. 267 (96 N. W. 382).

1617. (1888.) All presumptions are in favor of the regularity of the proceedings of courts of record when collaterally assailed, and where a decree contains the finding of a fact specially, which is pleaded in the petition, it must be presumed that sufficient evidence was submitted to the court to justify such finding. *Hilton v. Bachman*, 24 Neb. 490 (39 N. W. 419).

1618. (1893.) Exhibits, which the record shows were offered in evidence, will not be presumed to have been withheld from the consideration of the jury, in support of a contention that the verdict was unsupported by the evidence. *Dawson v. Williams*, 37 Neb. 1 (55 N. W. 284).

1619. (1895.) There being no bill of exceptions the supreme court will assume all facts well pleaded in the petition was established, and also, a failure to prove all affirmative propositions contained in the appellants pleadings. *City of Omaha v. Megeath*, 46 Neb. 502 (64 N. W. 1091).

1620. (1896.) In absence of a properly authenticated bill of exceptions, it will be presumed that every essential averment of the petition not negatived by the verdict was proved, and that the instructions refused should not have been given. *Romberg v. Hediger*, 47 Neb. 201 (66 N. W. 283).

1621. (1897.) In absence of a bill of exceptions it will be assumed that the district court was fully justified by the proofs in so ruling on various motions as to require the enforcement of its judgment which previously had been affirmed by the appellate court. *Tolerton & Stetson Co. v. German-American Savings Bank*, 52 Neb. 194 (71 N. W. 1013).

1622. (1898.) In an action to enjoin the issuance of bonds given in aid of internal improvements, the chief question being whether or not two signers on the petition were qualified freeholders, the record must be considered here on appeal as presented, and, in the absence of proof to sustain the allegations of the petition that these two persons were not freeholders, it must be presumed that they were, and they must be so considered in determining as to the number of proper signers of the petition. *Cummings v. Hyatt*, 54 Neb. 35 (74 N. W. 411).

1623. (1900.) Where, on appeal it was decided that on a certain point in the case the evidence was insufficient to prove a cause of action and the case was reversed, and a second trial had; the trial court submitting to the jury the question thus decided in the former appeal, in the absence of a record to the contray, it will be presumed in the trial court, having the evidence in both trials before it, found a material difference existing, from which it was determined that the decision in the case on appeal did not apply to the evidence as submitted in the second trial. *Missouri P. R. Co. v. Fox*, 60 Neb. 531 (83 N. W. 744).

1624. (1900.) Where a trial court makes a finding of fact it is not unreasonable to hold that there exists some testimony relating to the subject, even though it be claimed the evidence does not support the conclusion reached. *Blue Valley Lumber Co. v. Conro*, 61 Neb. 39 (84 N. W. 402).

1625. (1901.) Nothing appearing to the contrary it will be presumed that the judgment appealed from was within the pleadings and justified by proof. *Carter v. Gibson*, 61 Neb. 207 (85 N. W. 45; 52 L. R. A. 468).

1626. (1901.) In the absence of a bill of exceptions, it will be presumed that there was evidence sufficient to support an order approving the report of a receiver. *State v.*

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Nebraska Savings & Exchange Bank, 61 Neb. 496 (85 N. W. 391).

1627. (1902.) Where affidavits in support of and against the issuance of a temporary order of injunction are not preserved in a bill of exceptions, the supreme court will presume that they were sufficient to support the allegations of the petition and warrant the issuance of the order. *State, ex rel. Cohn, v. Jessen*, 66 Neb. 515 (92 N. W. 584).

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Instructions given or refused.

1628. (1871.) If the record does not show that it contains all the testimony, it will be presumed that there was evidence which would justify a charge of the court, although it does not appear at large. *Homan v. Laboo*, 1 Neb. 204.

1629. (1877.) Where the jury were told to disregard "all evidence in relation to bills upon which the witnesses were examined," but it not appearing what these "bills" were, nor what the testimony respecting them was, no error in this particular is apparent, and the propriety of the instruction will be presumed. *Faulkner v. Meyers*, 6 Neb. 414.

1630. (1891.) Where the instructions given by the court are not set out in the record, error cannot be predicated upon the refusal of the court to give certain instructions which were asked, the presumption being that the court did its duty and gave proper instructions. *Malcom v. Hanson*, 32 Neb. 50 (48 N. W. 883).

1631. (1895.) An instruction stating a correct rule of law applicable to a certain class of testimony will be presumed upon review to be without error in the absence of a bill of exceptions. *Nelson v. Johnson*, 44 Neb. 7 (62 N. W. 244).

1632. (1896.) In absence of a bill of exceptions, it will be presumed that instructions containing correct statements of law proper under the pleadings were applicable to the evidence. *Oltmans v. Findlay*, 47 Neb. 289 (66 N. W. 425); (1898) *Home Fire Ins. Co. v. Weed*, 55 Neb. 146 (75 N. W. 539); (1898) *Hudelson v. First Nat. Bank of Tobias*, 56 Neb. 247 (76 N. W. 570); (1899) *McGraw v. Chicago, R. I. & P. R. Co.*, 59 Neb. 397 (81 N. W. 306); (1902) *Meyers v. Menter*, 63 Neb. 427 (88 N. W. 662).

1633. (1900.) Where there is a defect in the record an instruction given will be presumed to have been warranted by material evidence not appearing of record. *Brownell v. Fuller*, 60 Neb. 558 (83 N. W. 669).

Or. direction of verdict.

1634. (1899.) In reviewing a judgment rendered on a verdict, given in obedience to a peremptory instruction, it is the duty of the reviewing court to assume the existence of every material fact which the evidence for the complaining party establishes or tends to prove. *Paxton v. State*, 59 Neb. 460 (81 N. W. 383; 80 Am. St. Rep. 689).

1635. (1902.) In a case where a verdict has been directed by the trial court, the reviewing court will assume the existence of every material fact which the evidence of the complaining party establishes, or tends to prove. *Nothdurft v. City of Lincoln*, 66 Neb. 430 (96 N. W. 163).

1636. (1903.) In reviewing the action of a trial court in directing a verdict, the supreme court will regard as conclusively established every fact favorable to the unsuccessful party which the evidence proves or tends to establish. *Preston v. Stover*, 70 Neb. 632 (97 N. W. 812).

1636*a*. (1907.) It is not only within the power, but it is the duty, of a trial court, in a proper case, to direct a verdict; and, when it does, and the pleadings warrant the verdict, and the evidence is not preserved, it will be presumed that such power was properly exercised. *Hibner v. Westover*, 78 Neb. 161 (110 N. W. 732).

Conduct of counsel.

1637. (1898.) A comment made by counsel in argument to the jury, with reference to a matter of evidence, will be presumed to have been made for a proper purpose and within the limits of legitimate argument, the contrary not appearing. *People's Nat. Bank v. Geisthardt*, 55 Neb. 232 (75 N. W. 582).

Verdict.

1638. (1900.) It is presumed that the jury followed the instructions of the court. *Missouri P. R. Co. v. Fox*, 60 Neb. 531 (83 N. W. 744).

Ruling on application for receiver.

1639. (1896.) The refusal of the district court to appoint a receiver must be affirmed when, neither by the petition nor by the proofs adduced, was there a showing that such refusal was erroneous. *Brown v. Fitzpatrick*, 49 Neb. 575 (68 N. W. 937).

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Special findings of jury.

1640. (1895.) A special finding will not be assumed to be in conflict with the general verdict of a jury, unless clearly so made to appear. *Citizens Nat. Bank of Grand Island v. Wedgwood*, 45 Neb. 143 (63 N. W. 375).

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Findings of court or referee.

1641. (1888.) Where the findings of fact, found specially by a trial court, were not excepted to and are in favor of the party appealing, they will be taken as correct and will not be questioned by the supreme court. *Harrington v. Latta*, 23 Neb. 84 (36 N. W. 364).

1642. (1892.) Where a referee is appointed by the court to hear the evidence and report his findings of fact and conclusions of law, within a given time, and the time for filing his report is subsequently extended by the court, upon stipulation of the parties until the first day of the next term of court, and the date when the next term convened not appearing from the record, it will be presumed that such report was made within the time designated by the court. *Brown v. Williams*, 34 Neb. 376 (51 N. W. 851).

1643. (1892.) In the supreme court the presumption is in favor of the correctness of the finding of fact by the trial court, and such finding will not be reversed unless clearly wrong. *Bickel v. McAleer*, 35 Neb. 515 (53 N. W. 374).

1644. (1903.) In a suit in equity, where the court makes special findings, and omits therefrom some fact conclusively established by the evidence essential to the decree, such fact, on appeal to the supreme court, will be treated as though found by the court. *Lynch v. Egan*, 67 Neb. 541 (93 N. W. 775).

1645. (1903.) The usual presumptions in favor of a finding of the trial do not obtain on appeal in an equity case. *Michigan Trust Co. v. City of Red Cloud*, 69 Neb. 585 (96 N. W. 140).

Judgment.

1646. (1880.) It is a settled rule of law that every presumption is in favor of the correctness of the judgment of a court of general jurisdiction, until the contrary is made affirmatively to appear. *Credit Foncier v. Rogers*, 10 Neb. 184 (4 N. W. 1012).

1647. (1903.) On a showing of time and opportunity to do so the presumption obtains that a district court has performed its duty in entering such judgment as is required by the terms of a mandate from the supreme court. *Abbott v. Lane*, 4 Unof. 629 (95 N. W. 599).

——— Default.

1648. (1903.) Where it appears that a default was entered by the district court in an action upon the same day on which defendant filed a general demurrer and it does not appear that the demurrer was on file at the time the default was entered, and further that defendant did not call the attention of the district court to the fact, if it was such, that a demurrer was on file, it will be presumed on error that the trial court acted regularly, and that the default was entered before the filing of the demurrer. *Grant v. Commercial Nat. Bank*, 67 Neb. 219 (93 N. W. 185).

Proceedings in enforcement of judgment or decree.

1649. (1898.) If it had been necessary or required that the person designated to conduct the foreclosure sale, should take and file an oath, in the absence of proof in the record to the contrary the presumption would prevail that there had been a compliance with such requirement. *Wright v. Stevens*, 55 Neb. 676 (76 N. W. 441).

1650. (1899.) If in the record presented in an appeal from an order of confirmation of a sale of real estate under decree of foreclosure there is no evidence that the property sold consisted of separate tracts or lots, it will be presumed that the officer who conducted the sale did his duty in a lawful manner and that his offer and sale of it as a whole or one piece of property was proper. *Michigan Mutual Life Ins. Co. v. Richter*, 58 Neb. 463 (78 N. W. 932).

1651. (1901.) Where the record is silent as to the filing of a copy of appraisement on foreclosure, it will be presumed it was duly filed. *Bostwick v. Keller*, 62 Neb. 815 (87 N. W. 1060).

1652. (1902.) Where the record is silent as to the time of filing copies of the certificates of liens, it will be presumed that they were duly and regularly filed. *Clark v. Wolf*, 2 Unof. 290 (96 N. W. 495).

1653. (1902.) Regularity of the trial court in passing upon a motion to confirm a sale will be presumed until overcome by affirmative proof in the record. *Jones v. Cleary*, 2 Unof. 541 (89 N. W. 386).

1654. (1902.) The presumption is that

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orders entered by the district court to enforce its decrees are regular and made upon proper notice. One who objects to them, for want of notice, where the record does not show such fact affirmatively, must sustain his objection by some proof in order to overcome such presumption. *Jones v. Miller*, 2 Unof. 582 (92 N. W. 201).

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Order granting or refusing new trial.

1655. (1898.) A judgment of the district court was vacated during the term at which it was rendered in response to a motion assigning as grounds therefor, (1) accident and surprise, (2) irregularity in the proceeding, (3) misconduct of the prevailing party, and (4) insufficiency of the evidence. The moving party failed to establish the existence of any of the first three grounds assigned in his motion. The evidence taken on the trial was not preserved in a bill of exceptions. *Held*, That the reason for the court's action not appearing, it will be presumed the evidence was insufficient to support the judgment and that the motion was sustained for that reason. *Bradley v. Slater*, 55 Neb. 334 (75 N. W. 826).

1656. (1903.) Where a plaintiff's allegations in a petition to open up a judgment for fraud of the successful party in obtaining it, filed under section 602 of the code, are sufficient, and the evidence taken at the hearing is not preserved, the action of the trial court in setting aside the judgment and granting a new trial will be presumed to have been on sufficient evidence. *Grand Lodge, A. O. U. W., v. Scott*, 3 Unof. 845 (93 N. W. 190).

1657. (1905.) On proceedings in error from an order granting a new trial, the grounds for the sustaining of the motion not appearing in the record, it will be presumed that the action of the trial court was correct; and the plaintiff in error must show affirmatively that none of the grounds alleged in the motion for new trial was valid and sufficient to justify the order before the supreme court will interfere. *City of Omaha v. Crocker*, 73 Neb. 240 (102 N. W. 459).

Presentation of question for review.

1658. (1902.) Where exceptions to instructions appear in the transcript immediately after the charge and before the record of submission to the jury and of the verdict, with an entry showing them to have been filed at the same time with the instructions, and are certified to by the clerk as part of the record of the district court, the same presumption arises as in case of notation by counsel upon the instructions themselves. *City of Lincoln v. Sager*, 2 Unof. 598 (89 N. W. 617).

1659. (1902.) Where the record merely shows a date of filing an instruction that it was given and was excepted to, the giving and exception will be presumed to be contemporaneous. *Skow v. Locke*, 3 Unof. 176 (91 N. W. 204).

F. Discretion of Lower Court.

Necessity for exception to present question of abuse of discretion for review, see *ante*, § 401.

Burden of showing abuse of discretion.

1660. (1884.) In a matter of discretion it will be presumed that it was properly exercised until the contrary is shown. *Vindquest v. Perky*, 16 Neb. 284 (20 N. W. 301); (1900) *Waldron v. First Nat. Bank of Greenwood*, 60 Neb. 245 (82 N. W. 856).

1661. (1906.) Every presumption is in favor of the correctness of the order of the district court, and, in the absence of evidence showing that its discretion was abused, the presumption that it was properly exercised in this instance will prevail. *Jordan v. Jackson*, 76 Neb. 15 (106 N. W. 999; 107 N. W. 1047).

Ruling on motion for continuance or change of venue.

1662. (1871.) Whether the refusal to grant a continuance can be assigned for error, *quære? Jameson v. Butler*, 1 Neb. 115.

1663. (1876.) Under the statute authorizing a district judge to adjourn court "if sick or for any other sufficient cause unable to attend," the reasons for such an adjournment are not subject to review by the supreme court. *Smith v. State*, 4 Neb. 277.

1664. (1881.) While an application for a continuance is addressed to the discretion of the court, yet where a party has been diligent, and it appears that there has been an abuse of discretion, operating to his prejudice in the final determination of the case, a new trial will be granted. *Johnson v. Dinsmore*, 11 Neb. 391 (9 N. W. 558).

1665. (1891.) An application for the postponement of a trial to a later day in the term, or for the continuance of a cause, is addressed to the sound legal discretion of the court, and the ruling thereon will not be disturbed, in the absence of a showing that there has been an abuse of discretion.

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Billings v. McCoy Brothers, 5 Neb. 187; (1891) *McDonald v. McAllister*, 32 Neb. 514 (49 N. W. 377); (1894) *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb. 281 (58 N. W. 695); (1895) *Stration v. Dole*, 45 Neb. 472 (63 N. W. 875); (1896) *Storz v. Finklestein*, 48 Neb. 27 (66 N. W. 1020); (1902) *Missouri P. R. Co. v. Hemingway*, 63 Neb. 610 (88 N. W. 673); (1903) *Harker v. Burbank*, 68 Neb. 85 (93 N. W. 949); (1903) *Miles v. Ballantine*, 4 Unof. 171 (93 N. W. 708); (1883) *Ingalls v. Nobles*, 14 Neb. 272 (15 N. W. 351); (1889) *Singer Mfg. Co. v. McAllister Bros.*, 22 Neb. 359 (35 N. W. 181); (1905) *City of Lincoln v. Lincoln St. R. Co.*, 75 Neb. 523 (106 N. W. 317); (1894) *Home Fire Ins. Co. v. Murray*, 40 Neb. 597 (59 N. W. 102); (1894) *Clark v. Carey*, 41 Neb. 780 (60 N. W. 78); (1896) *Burris v. Court*, 48 Neb. 179 (66 N. W. 1131); (1896) *Keens v. Robertson*, 46 Neb. 837 (65 N. W. 897).

1666. (1894.) The ruling of a district court on a motion for a continuance will not be disturbed unless it is manifest the court abused its discretion, and the litigant, himself guiltless of negligence or laches, was thereby deprived of an opportunity to make his case or defense. *Kansas City, W. & N. W. R. Co. v. Conlee*, 43 Neb. 121 (61 N. W. 111).

1667. (1895.) Motions for change of venue and for continuance are addressed to the sound discretion of the trial court, and unless it appears that there has been an abuse of such discretion, its rulings thereon will not be disturbed. *Stoppert v. Nierle*, 45 Neb. 105 (63 N. W. 382).

1667*a*. (1907.) In the absence of any showing on the part of defendants that they were unprepared to meet, or were surprised by, the allegations in an amendment to the petition allowed at the close of the trial, the decision of the district court refusing a continuance on account of the granting of such amendment will not be reviewed. *Bliss v. Beck*, 80 Neb. 290 (114 N. W. 162).

Ruling on petition to reinstate cause.

1668. (1872.) An order on a petition to reinstate a cause previously dismissed for want of prosecution is not an exercise of discretion merely, but is subject to review in the supreme court. *Smith v. Pinney*, 2 Neb. 139.

Rulings as to pleadings.

1669. (1897.) Permitting a defendant in default to file an answer is a matter resting largely in the discretion of the trial court, and a judgment will not be reversed because the defendant was permitted to answer out of time unless the record affirmatively discloses an abuse of discretion. *Grand Island & W. C. R. Co. v. Swinbank*, 51 Neb. 521 (71 N. W. 48).

——— Amendments.

1670. (1890.) The district court may grant an amendment of a pleading before or at the trial, upon such terms as to payment of costs as may be just, and error will not lie unless there has been an abuse of its discretion. *Omaha & R. V. R. Co. v. Brown*, 29 Neb. 492 (46 Neb. 39).

1671. (1895.) An order allowing an amendment will not be interfered with on review, except for an abuse of discretion on part of the lower court. *Kleckner v. Turk*, 45 Neb. 176 (63 N. W. 469); (1902) *Hubenka v. Vach*, 64 Neb. 170 (89 N. W. 789).

1672. (1896.) The propriety of granting or withholding leave to amend pleadings, to agree with the evidence in a case, is within the sound discretion of the trial judge, and unless there appears to have been an abuse of such discretion, no available error is presented. *Imhoff v. Richards*, 48 Neb. 590 (67 N. W. 483).

1673. (1897.) Whether an amendment to a pleading shall be allowed after issues have been joined and trial thereof commenced is within the discretion of the trial judge. The discretion is, however, a judicial one and subject to review to ascertain whether there has been an abuse thereof. *Harrington v. Connor*, 51 Neb. 214 (70 N. W. 911).

1674. (1898.) Amendments to pleadings should always be permitted when in furtherance of justice, and the rulings of the trial court refusing such privilege, will be reversed when the record presents a clear abuse of discretion. *Perkins County v. Miller*, 55 Neb. 141 (75 N. W. 577).

1675. (1902.) The question of the right to file amended pleadings during the trial is one which is confided to the discretion of the trial court, and unless the record clearly shows an abuse of discretion, the rulings thereon will be sustained. *Chicago, B. & Q. R. Co. v. Martelle*, 65 Neb. 540 (91 N. W. 364); (1904) *Nebraska Land & Feeding Co. v. Trauerman*, 70 Neb. 795 (98 N. W. 37).

Rulings as to stipulations.

1676. (1902.) The right of a party to withdraw or amend a stipulation of facts

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filed in a case is within the sound discretion of the trial court, and the ruling of the trial court with regard thereto will not be disturbed in the absence of abuse. *State Ins. Co. v. Farmers' Mutual Ins. Co.*, 65 Neb. 34 (90 N. W. 997).

Rulings on examination of jurors.

1677. (1876.) Where there is no abuse of the discretion vested in the district court, in excusing persons from serving on juries, its action in that regard will not be reviewed in the supreme court. *Dodge v. State*, 4 Neb. 220.

1678. (1893.) In superintending the impaneling of a jury some discretion is necessarily confided to the court, and the excusing of a juror for cause will not be held ground for reversal, unless there appears to have been an abuse of discretion. *Omaha St. R. Co. v. Beeson*, 36 Neb. 361 (54 N. W. 557).

1679. (1895.) Prejudicial error will not be found in the rulings of the trial court during the *voir dire* examination of a veniremen unless an abuse of discretion is shown. *Basye v. State*, 45 Neb. 261 (63 N. W. 811).

1680. (1897.) In examining a juror to ascertain whether a ground for challenge for cause exists, what questions may be asked, or what scope the examination may take, rests in the discretion of the trial court, and its rulings will not be disturbed unless there has been an abuse of discretion prejudicial to the party complaining. *Van Skike v. Potter*, 53 Neb. 28 (73 N. W. 295).

1681. (1898.) Retention or rejection of a juror, during the impaneling of a jury, to whom an objection has been interposed, is a matter within the discretion of the trial judge, and in the absence of an abuse of such discretion will furnish no available error. *State v. Bartley*, 56 Neb. 810 (77 N. W. 438).

1682. (1904.) A trial court has a large discretion in sustaining challenges for cause of persons drawn as talesmen to serve as jurors, and its exclusion of such a person cannot be successfully assigned for error when it is not shown by the party objecting that by reason thereof an incompetent juror has been included in the panel, and it does not appear that the court has committed an abuse of discretion. *Felsch v. Babb*, 72 Neb. 736 (101 N. W. 1011).

Conduct of trial in general.

1682*a*. (1908.) Unless an abuse of discretion is shown, the supreme court will not reverse a judgment of the district court because of the refusal of the court to permit the jury to view the premises. *Beck v. Staats*, 80 Neb. 482 (114 N. W. 633).

Rulings on evidence.

1683. (1897.) Some discretion is conferred upon the trial court in receiving evidence of experiments for the purpose of contradicting or corroborating other witnesses, and in order to authorize the reversal of a judgment on account of the admission or rejection of such evidence there must have been a clear abuse of discretion. *City of Ord v. Nash*, 50 Neb. 335 (69 N. W. 964).

1684. (1898.) Where testimony is received without objection, and a motion is made to strike it out on the ground of its incompetency, what disposition shall be made of the motion is a matter discretionary with the court. *McClellan v. Hein*, 56 Neb. 600 (77 N. W. 120).

1685. (1899.) A ruling on motion to strike out testimony, when within the discretion of the trial judge, will not be reversed except for an abuse of discretion. *Clark v. Douglas*, 58 Neb. 571 (79 N. W. 158).

1686. (1901.) If incompetent evidence is given without objection a subsequent motion to strike out is addressed to the sound discretion of the trial court and overruling of such motion is not ground for reversal. *McCormick Harvesting Machine Co. v. Carpenter*, 1 Unof. 273 (95 N. W. 617).

1687. (1903.) The admission or exclusion of declarations rests largely in the discretion of the trial court; such discretion is not an absolute discretion to be exercised arbitrarily but a legal discretion, the abuse of which constitutes reversible error. *Pledger v. Chicago, B. & Q. R. Co.*, 69 Neb. 456 (95 N. W. 1057).

——— Competency of witnesses.

1688. (1899.) The decision of preliminary issues touching the competency of witnesses, or admissibility of evidence, is for the trial judge. *Phenix Ins. Co. of Brooklyn v. Holcombe*, 57 Neb. 622 (78 N. W. 300; 73 Am. St. Rep. 532).

1689. (1901.) 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

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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*, 62 Neb. 1 (86 N. W. 936).

1690. (1901.) The competency of opinion evidence is largely in the discretion of the trial judge, and unless it is clearly inadmissible the ruling will not be disturbed. *Jerabek v. Kennedy*, 61 Neb. 349 (85 N. W. 279).

1691. (1901.) The competency of expert witnesses is a question largely within the discretion of the trial court, and its rulings thereon will not be reversed unless clearly erroneous as a matter of law. *Schmuck v. Hill*, 2 Unof. 79 (96 N. W. 158).

Order of proof.

1692. (1880.) The order of introducing evidence is discretionary with the trial court, especially when the trial is to the court without a jury, there being no abuse of such discretion. *Goodman v. Kennedy*, 10 Neb. 270 (4 N. W. 987).

1693. (1886.) The order of introducing evidence is discretionary with the trial court and its ruling is no cause for reversal where no abuse of discretion is shown. *Village of Ponca v. Crawford*, 18 Neb. 551 (26 N. W. 365); (1888) *Village of Ponca v. Crawford*, 23 Neb. 662 (37 N. W. 609); (1892) *McCleneghan v. Reid*, 34 Neb. 472 (51 N. W. 1037); (1892) *Consaul v. Sheldon*, 35 Neb. 247 (52 N. W. 1104); (1899) *Pennsylvania Co. v. Kennard Glass & Paint Co.*, 59 Neb. 435 (81 N. W. 372); (1902) *McDermott v. Manley*, 65 Neb. 194 (90 N. W. 1119).

Exclusion of witnesses.

1694. (1896.) An application to have the witnesses excluded from the court room during the progress of the trial of the cause in which they are to be examined is addressed to the sound discretion of the trial judge. Where a request for such action is refused and no abuse of the discretion is apparent, there is no available error. *Halbert v. Rosenbalm*, 49 Neb. 498 (68 N. W. 622).

Examination of witnesses.

1695. (1896.) In absence of an abuse of discretion, the action of the trial court in limiting the cross-examination of a witness will not be reviewed in the supreme court. *Stough v. Ogden*, 49 Neb. 291 (68 N. W. 516).

1696. (1897.) A judgment will not be reversed because the cross-examination of a witness was restricted unless there was an abuse of discretion on part of the trial court, prejudicial to the party complaining. *Atwood v. Marshall*, 52 Neb. 173 (71 N. W. 1064).

1697. (1901.) No error to refuse permission to go into new matter on cross-examination. *Black v. Webber*, 1 Unof. 468 (96 N. W. 606).

1698. (1902.) As the trial court is in a better position to pass on the question how far a party has been at fault in case of violation of an order separating witnesses, the supreme court will not interfere with its determination if it may be sustained by any inference reasonably deducible from the evidence. *Murray v. Allerton*, 3 Unof. 291 (91 N. W. 518).

——— Leading questions.

1699. (1892.) As a general rule, the allowing of a leading question is a matter within the discretion of the trial court, and a judgment should not be reversed on that ground unless it is apparent that there has been a clear abuse of discretion. *St. Paul & Marine Ins. Co. v. Gotthelf*, 35 Neb. 351 (53 N. W. 137); (1896) *Baum Iron Co. v. Burg*, 47 Neb. 21 (66 N. W. 8); (1897) *Perry v. German-American Bank*, 53 Neb. 89 (73 N. W. 538; 68 Am. St. Rep. 593); (1899) *Schmelling v. State*, 57 Neb. 562 (78 N. W. 279); (1901) *Hiersche v. Scott*, 1 Unof. 48 (95 N. W. 494); (1903) *Campion v. Lattimer*, 70 Neb. 245 (97 N. W. 290).

1700. (1903.) How far, if at all, a party shall be permitted to cross-examine, or put leading questions to his own witnesses, where they appear to be hostile or unwilling, is in the discretion of the trial court, and its rulings in such matters will not be disturbed except for manifest abuse of discretion. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624 (94 N. W. 822).

Reopening case for further testimony.

1701. (1896.) The granting or overruling of an application by a party to a suit who has rested his case, to withdraw the rest and offer or introduce further testimony, is a matter within the discretion of the trial judge, and where such an application has been allowed for the purpose of affording a party an opportunity to offer or introduce testimony on certain subjects specified in the motion and allowance, and

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the party seeks to extend the privilege accorded, further so as to include other and entirely different subjects, it is within the discretion of the trial court to grant or refuse such refusal so to do, it will not be error or cause for reversal of the judgment. *Omaha Real Estate & Trust Co. v. Kragscow*, 47 Neb. 592 (66 N. W. 658).

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1702. (1898.) The request of the plaintiff, who has closed the evidence in chief after the introduction of rebuttal evidence has been reached and is in progress, to be allowed to return to the evidence in chief, open that branch of the trial, and adduce further evidence therein, is within discretion of the trial court, and unless its ruling thereon is accompanied by an abuse of such discretion, it can furnish no reason for a reversal of the judgment. *McClellan v. Heim*, 56 Neb. 600 (77 N. W. 120).

Rulings on requests for special findings.

1703. Interrogatories for special findings may be submitted to the jury or refused in the discretion of the trial court, and unless there has been an abuse of discretion in that regard, the ruling will not be disturbed. (1888) *Floaten v. Ferrell*, 24 Neb. 347 (38 N. W. 732); (1894) *Murphy v. Gould*, 40 Neb. 728 (59 N. W. 383); (1894) *Atchison, T. & S. F. R. Co. v. Lawlor*, 40 Neb. 356 (58 N. W. 968); (1894) *Hedrick v. Strauss*, 42 Neb. 485 (60 N. W. 928); (1897) *Phœnix Ins. Co. v. King*, 52 Neb. 562 (72 N. W. 855); (1898) *Omaha & R. V. R. Co. v. Crow*, 54 Neb. 747 (74 N. W. 1066; 69 Am. St. Rep. 741); (1898) *American Fire Ins. Co. v. Landfare*, 56 Neb. 482 (76 N. W. 1068); (1901) *Huber Mfg. Co. v. Gottchall*, 1 Unof. 548 (96 N. W. 611); (1894) *Union P. R. Co. v. Cobb*, 41 Neb. 120 (59 N. W. 355); (1894) *Reed v. McRill*, 41 Neb. 206 (59 N. W. 775); (1902) *Chicago, St. P., M. & O. R. Co. v. Lagerkrans*, 65 Neb. 566 (91 N. W. 358; 95 N. W. 2); (1902) *City of Crete v. Hendricks*, 2 Unof. 847 (90 N. W. 215); (1904) *Johnson v. Heath*, 5 Unof. 369 (98 N. W. 832).

Arguments of counsel.

1704. (1895.) Although the practice of reading to the jury from reported decisions should not be encouraged, the subject is one within the discretion of the trial court and presents no grounds for interference by the supreme court in the absence of an abuse of discretion. *Stratton v. Dole*, 45 Neb. 472 (63 N. W. 875).

1705. (1895.) Considerable discretion is vested in the trial judge in controlling and managing the routine proceedings at the trial, and this applies to the opening statements of counsel as well as to other incidents of the trial. The discretion must be a reasonable one, and it is only where there has been a clear abuse of discretion that the error will be corrected by a reviewing court. *Stratton v. Nye*, 45 Neb. 619 (63 N. W. 928).

1706. (1902.) It is within the discretion of the trial court to limit the time for arguments to the jury, and an order so limiting time presents no question for review, unless it is made to appear that the arguments were thereby unduly restricted and that the time allotted to the complaining party was consumed. *Dixon v. State*, 46 Neb. 298 (64 N. W. 956); *Schrandt v. Young*, 2 Unof. 546 (89 N. W. 607).

Vacating or modifying judgments.

1707. (1879.) A modification or correction of an imperfect judgment, during the same term is discretionary with the court, and not reviewable on error. *Wise v. Frey*, 9 Neb. 217 (2 N. W. 375).

1708. (1894.) Rulings of trial courts in vacating judgments at the same term at which they were rendered are discretionary, and will not be reversed where there has been no abuse of discretion. *Bigler v. Baker*, 40 Neb. 325 (58 N. W. 1026; 24 L. R. A. 255).

1709. (1894.) In reviewing a ruling on a motion to vacate a judgment by default a stronger showing of abuse of discretion is required to justify reversal where the motion is sustained than where it is overruled. *Bigler v. Baker*, 40 Neb. 325 (58 N. W. 1026; 24 L. R. A. 255).

1710. (1902.) The district court has power to set aside, change or modify its judgments during the term at which they are rendered. An application to set aside a decree and allow the introduction of evidence upon a technical point, is addressed to the discretion of the court, and error cannot be predicated upon the ruling thereon. *Enyart v. Moran*, 64 Neb. 401 (89 N. W. 1045).

New trials.

1711. (1886.) Motions for a new trial are addressed to the sound discretion of the court, and in such cases a decision of the

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district court in granting a new trial will not be reversed unless there has been an abuse of such discretion. *Sang v. Beers*, 20 Neb. 365 (30 N. W. 258); (1904) *Kleutsch v. Security Mutual Life Ins. Co.*, 72 Neb. 75 (100 N. W. 139).

1712. (1888.) Where pending decision on a motion for a new trial, it is stipulated that the ruling thereon may be reviewed by the supreme court, without reference to a subsequent trial, and providing for the disposition of the case upon the ruling of the supreme court, the recognized rule, that in deciding a motion for new trial, the ruling of the district court will not be molested, unless there is an abuse of discretion, does not apply with its usual force, and the supreme court will examine the case, in the exercise of the jurisdiction conferred by the stipulation, without reference to such rule, but the rule that the jury must be the sole judges of questions of fact where the testimony is contradictory will be adhered to. *Johnson v. Parrotte*, 23 Neb. 232 (36 N. W. 497).

1713. (1896.) A stronger showing is required to reverse an order allowing a new trial than to reverse one denying it. *School District No. 1 v. Bishop*, 46 Neb. 850 (65 N. W. 902).

1714. (1900.) A motion for a new trial on the ground of accident or surprise is addressed to the sound discretion of the trial court. *Zimmerer v. Fremont Nat. Bank*, 59 Neb. 661 (81 N. W. 849).

1715. (1906.) The ruling on a motion for a new trial on the ground that the court proceed with the trial in the absence of defendant or his counsel will not be disturbed unless abuse of discretion is shown. *Simeral v. Rosewater*, 77 Neb. 854 (110 N. W. 546).

Directions to receiver.

1716. (1899.) An order of the court giving directions or instructions to a receiver in the performance of his trust will not be disturbed on review where no abuse of discretion is shown. *State v. Bank of Rushville*, 57 Neb. 608 (78 N. W. 281).

Taxation of costs.

1717. (1890.) The awarding of costs on the granting of a continuance is discretionary with the trial court. *Coombs v. Brenklander*, 29 Neb. 586 (45 N. W. 929).

1718. (1895.) The awarding and taxation of costs rests in the discretion of the trial court, where no statutory provision controls. *Woodward v. Baird*, 43 Neb. 310 (61 N. W. 612).

1719. (1901.) In other actions than those in which costs follow of course, the discretion of the trial court in awarding costs will not be interfered with, except where facts regularly brought before the supreme court show abuse of such discretion. *Porter v. Trompen*, 2 Unof. 76 (96 N. W. 226).

G. Questions of Fact, Verdicts and Findings.

Credibility of witnesses.

1720. (1882.) Where the testimony is conflicting, the quetsion of the credibility of the witnesses is to be determined by the jury. *Case v. Frederick*, 13 Neb. 423 (14 N. W. 169).

1721. (1894.) The supreme court will not weigh conflicting evidence nor pass upon the credibility of witnesses. *Omaha St. R. Co. v. Craig*, 39 Neb. 601 (58 N. W. 209).

1722. (1897.) The rule that the credibility of a witness is a matter for the determination of triers of fact does not require the supreme court, on appeal, to accept the statement of a witness, where it is demonstrated to be false. *Linton v. Cooper*, 53 Neb. 400 (73 N. W. 731).

1723. (1901.) The weight to be attached to the testimony of different witnesses is peculiarly and especially a question for the jury. They are the triers of fact, and their judgment, based on the consideration and weighing of conflicting evidence, should not be overturned, unless it can be said the verdict is clearly wrong and under no rational view of the case can the conclusion reached be justified. *Lammers v. Boehmer*, 62 Neb. 159 (86 N. W. 1067).

Verdicts.

1724. (1876.) Where a verdict or finding is clearly wrong it should be set aside; but if there is only doubt as to its correctness it will not be disturbed. *Seymour v. Street*, 5 Neb. 85.

1725. (1879.) Where the finding or verdict is clearly wrong, it should be set aside. In no other way can the rights of parties be protected. *Roberts v. Swearingen*, 8 Neb. 363.

1726. (1884.) In an action against a municipal corporation for negligence, where the question of the contributory negligence of the plaintiff is submitted to the jury and

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found against the city, the verdict will not be set aside clearly wrong. *City of Omaha v. Cane*, 15 Neb. 657 (20 N. W. 101).

1727. (1884.) The verdict of a jury upon questions of fact submitted to them is final, unless such verdict is manifestly wrong. *Rolfe v. Pilloud*, 16 Neb. 21 (19 N. W. 615, 970); (1886) *Lane v. Starkey*, 20 Neb. 586 (31 N. W. 238); (1887) *Manning v. Cunningham*, 21 Neb. 288 (31 N. W. 933).

1728. (1889.) Questions relating to damages for right of way are peculiarly of a local nature, and where the jury have been permitted to view the premises affected, and rendered a verdict, the verdict will not be set aside unless it is clearly wrong. *Fremont, E. & M. V. R. Co. v. Meeker*, 28 Neb. 94 (44 N. W. 79).

1729. (1893.) Where incompetent evidence is admitted against objections, but the admission of such evidence is not specifically assigned as error, the supreme court will nevertheless disregard such incompetent evidence in considering the question whether the verdict is sustained by the evidence. *Commercial Nat. Bank of St. Paul v. Brill*, 37 Neb. 626 (56 N. W. 382).

——In equitable actions.

1730. (1902.) As the findings of fact by the jury in equity cases are advistory only, if the court, having heard the testimony, adopts them and there is sufficient competent evidence to sustain them, errors in the admission of evidence are without prejudice. *Welch v. Tippery*, 66 Neb. 604 (92 N. W. 582).

1731. (1907.) The act of 1903 (laws 1903, ch. 125), section 681*a* of the code, relative to the mode of review in the supreme court of judgments in suits of equity, does not disturb the conclusiveness of decisions of fact by juries, or by trial judges sitting in their stead, in law cases. *First Nat. Bank of West Point v. Crawford*, 78 Neb. 665 (111 N. W. 587).

——Sufficiency of evidence to support.

1732. (1871.) The appellate court will presume the verdict of the jury sustained by the evidence, unless the contrary fully appear. *Midland P. R. Co. v. McCartney*, 1 Neb. 398.

1733. (1876.) A judgment will not be reversed on the ground that the finding or verdict is contrary to the evidence, unless it manifestly is so; and the reviewing court will always hesitate to reverse when doubts as to its propriety arise out of a conflict in oral evidence. *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117; (1878) *Cook v. Powell*, 7 Neb. 284; (1880) *Townley v. Cody*, 10 Neb. 383 (6 N. W. 464); (1882) *Travis v. Cooley*, 12 Neb. 482 (11 N. W. 740); (1882) *Gibson v. Cleveland Paper Co.*, 13 Neb. 277 (13 N. W. 403); (1882) *Potvin v. Curran*, 13 Neb. 302 (14 N. W. 400); (1894) *American B. & L. Ass'n v. Mordock*, 39 Neb. 413 (58 N. W. 107); (1901) *Becker v. Vollmer*, 1 Unof. 308 (95 N. W. 482); (1905) *Union P. R. Co. v. Fickenscher*, 74 Neb. 497 (105 N. W. 39).

1734. (1876.) A mere difference of opinion as to the weight of evidence between a reviewing court and the court which tried the cause is not sufficient to reverse a judgment. To do so the preponderance of evidence must be clear, obvious, and decided, or so great as to indicate prejudice, partiality, or corruption. *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117.

1735. (1876.) It is not the number of witnesses produced by a party, nor their language alone, that should be looked to in determining whether a new trial should be granted, but all the surrounding circumstances should be taken into the account and given due weight. *Blackburn v. Ostrander*, 5 Neb. 219.

1736. (1877.) Where a verdict is clearly wrong it should be set aside; but a mere difference of opinion between the court and jury will not warrant the former in setting aside the verdict of the latter. *Storms v. Eaton*, 5 Neb. 453; (1877) *Milton v. State*, 6 Neb. 136; (1877) *Hedman v. Anderson*, 6 Neb. 392; (1878) *Lea v. McLennan*, 7 Neb. 143; (1879) *Fisk v. State*, 9 Neb. 62 (2 N. W. 381); (1882) *Prescott v. Jones*, 13 Neb. 534 (14 N. W. 536); (1885) *Savage v. Pelton*, 17 Neb. 144 (22 N. W. 351); (1885) *Filley v. Norton*, 17 Neb. 472 (23 N. W. 347); (1889) *Durrell v. Hart*, 25 Neb. 610 (41 N. W. 551); (1895) *Risse v. Gasch*, 43 Neb. 287 (61 N. W. 616); (1895) *Spears v. Chicago, B. & Q. R. Co.*, 43 Neb. 720 (62 N. W. 68); (1898) *Missouri P. R. Co. v. Palmer*, 55 Neb. 559 (76 N. W. 169); (1899) *German-American Bank of Milwaukee v. Stickle*, 59 Neb. 321 (80 N. W. 910); (1905) *Davey v. Davey*, 73 Neb. 726 (103 N. W. 282); (1907) *Northwest Thresher Co. v. Eddyville State Bank*, 80 Neb. 377 (114 N. W. 291).

1737. (1879.) When there is not sufficient testimony to sustain a verdict, it will be set aside. *Fisk v. State*, 9 Neb. 62 (2

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N. W. 381); (1882) *Dunbar v. Briggs*, 13 Neb. 332 (14 N. W. 414); (1889) *Reid v. Colby*, 26 Neb. 469 (42 N. W. 485); (1890) *Hiatt v. Kinkaid*, 28 Neb. 721 (45 N. W. 236); (1893) *Wood River Bank v. Dodge*, 36 Neb. 708 (55 N. W. 234); (1896) *Anheuser-Busch Brewing A'ssn v. Murray*, 47 Neb. 627 (66 N. W. 635); (1897) *Esterly Harvesting Machine Co. v. Berg*, 52 Neb. 147 (71 N. W. 952); (1900) *Bradford v. Anderson*, 60 Neb. 368 (83 N. W. 173).

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1738. (1879.) Where there is a substantial support to the verdict by the evidence the finding of the jury will not be disturbed. *Atchison & N. R. Co. v. Jones*, 9 Neb. 67 (2 N. W. 363); (1888) *Riley v. Melquist*, 23 Neb. 474 (36 N. W. 657); (1888) *Sherwin v. O'Conner*, 24 Neb. 603 (39 N. W. 620); (1889) *Dickenson v. Pelton*, 27 Neb. 76 (42 N. W. 891); (1889) *City of Fremont v. Brenner*, 27 Neb. 405 (43 N. W. 177); (1893) *Hodgman v. Thomas*, 37 Neb. 568 (56 N. W. 199); (1893) *Schrider v. Tighe*, 38 Neb. 394 (56 N. W. 994); (1903) *Cozad Irrigation Co. v. Barnes*, 4 Unof. 418 (94 N. W. 603).

1739. (1883.) To warrant the setting aside of a verdict for want of evidence to support it, it is not enough that the court would have found differently from the jury upon it, but there must be no reasonable doubt of its insufficiency. *Converse v. Meyer*, 14 Neb. 190 (15 N. W. 340).

1740. (1884.) Except in very extraordinary cases the supreme court will only look into questions of fact sufficiently to ascertain that the jury, or court setting without a jury, had sufficient facts before it upon which to find its verdict or decision. And only in such cases will it consider the weight of testimony. *Poessenecker v. Weatherby*, 16 Neb. 94 (19 N. W. 599).

1741. (1884.) A judgment for damages will not be set aside simply because the damages allowed appear to be high, if there is any evidence to support the finding of the jury. Especially so when the verdict does not appear to have been the result of passion or prejudice. *Waters v. Reuber*, 16 Neb. 99 (19 N. W. 687; 49 Am. Rep. 710); (1902) *Village of Plainview v. Mendelson*, 65 Neb. 85 (90 N. W. 956).

1742. (1887.) A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through mistake, or some means not apparent in the record, will be set aside and a new trial awarded. *Sandwich Mfg. Co. v. Feary*, 22 Neb. 53 (33 N. W. 485).

1743. (1890.) If the evidence on behalf of one party, when considered without reference to the evidence introduced by the other party, sustains the verdict, the verdict will not be set aside by a reviewing court on the ground that it was not supported by the evidence. *Elsanger v. Grovijohn*, 29 Neb. 139 (45 N. W. 273).

1744. (1891.) That a verdict is excessive, and was rendered under the influence of passion and prejudice, assigned as an error in a civil action for review; *held*, that there must be some testimony or fact of record to support the conclusion. *Nowotny v. Blair*, 32 Neb. 175 (49 N. W. 357).

1745. (1893.) Where the burden of proof is upon the plaintiff to establish the *bona fides* of a chattel mortgage whereunder he claims, a verdict in favor of defendant will not be set aside on the ground that the verdict is not sustained by the evidence, unless the evidence offered by plaintiff is of a clear and convincing character. *Fitzgerald v. Meyer*, 37 Neb. 50 (55 N. W. 296).

1746. (1894.) It is a settled rule of the supreme court that the finding of fact made by a jury or trial judge will not be disturbed if supported by competent evidence. *Upton v. Levy*, 39 Neb. 331 (58 N. W. 95); (1895) *Schelly v. Schwank*, 44 Neb. 504 (62 N. W. 1069); (1895) *Shafer v. Briggs*, 46 Neb. 445 (64 N. W. 1079); (1896) *Kaufmann v. Cooper*, 46 Neb. 644 (65 N. W. 796); (1896) *Hay v. Miller*, 48 Neb. 156 (66 N. W. 1115); (1897) *Klose v. Bogue*, 52 Neb. 427 (72 N. W. 581); (1898) *Shafer v. Whiting*, 55 Neb. 756 (76 N. W. 446).

1747. (1894.) When the existence of a fraudulent motive was the question of fact submitted to a jury, its verdict will not be disturbed if sustained by competent evidence. *Melick v. Varney*, 41 Neb. 105 (59 N. W. 521).

1748. (1895.) A verdict will not be set aside because of the inadequacy of the damages awarded, when on one issue, if found for the plaintiff, they would be inadequate, but when the verdict may have been based on other issues calling for a smaller recovery. *Edney v. Baum*, 44 Neb. 294 (62 N. W. 461).

1749. (1896.) The fact that the testimony of a witness is unintelligible to the official stenographer of itself affords no

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ground for the reversal of a judgment. *Blomgren v. Holmquest*, 49 Neb. 49 (68 N. W. 382).

1750. (1900.) A verdict based upon evidence sufficient to establish a holding of possession of property adversely, openly, notoriously, exclusively and continuously for a period exceeding ten years prior to the commencement of an action, under a claim of right, will not be disturbed, although the evidence introduced to establish such fact may not be inconsistent with a holding under a claim other than that of title. *Murray v. Romine*, 60 Neb. 94 (82 N. W. 318).

1751. (1901.) The finding of a jury that a deed was made as an absolute conveyance of the title, and not as a mortgage to secure a debt due the grantee, will not be disturbed where there is evidence sufficient to support such finding. *Farmers & Merchants Ins. Co. v. Hahn*, 1 Unof. 510 (96 N. W. 255).

1752. (1905.) The supreme court will not set aside the verdict of a jury for want of evidence to support it, if there is sufficient evidence in the record, taken by itself, to have supported a judgment by default, unless the preponderance of the evidence against the verdict is so strong as to indicate that the verdict must have been predicated upon something other than the evidence. *Union P. R. Co. v. Fickenscher*, 74 Neb. 507 (110 N. W. 561).

1753. (1906.) When the amount of damages awarded by a jury cannot be ascertained from the facts proved, the verdict should be set aside. *Poels v. Wilson*, 77 Neb. 73 (108 N. W. 153); (1907) *Poels v. Brown*, 78 Neb. 783 (111 N. W. 798).

——Conflicting evidence.

1754. (1874.) A verdict will not be set aside merely because there is an apparent conflict in the testimony, or where the court is inclined to differ with the jury upon the weight of the evidence; but it should appear to a reasonable certainty, that injustice has been done to the party complaining, by the failure of the jury to give to the whole testimony its proper weight in determining the question submitted to them. *Brown v. Hurst*, 3 Neb. 353; (1877) *McCune v. Thomas*, 6 Neb. 488.

1755. (1877.) The verdict of a jury rendered on conflicting evidence, will not be disturbed unless it is clearly wrong. *High v. Merchants Bank*, 6 Neb. 155; (1878) *McCann v. McDonald & Co.*, 7 Neb. 305; (1881) *Huff v. Nims*, 11 Neb. 363 (9 N. W. 548); (1881) *O'Leary v. Iskey*, 12 Neb. 136 (10 N. W. 576); (1884) *Everett v. Hobleman*, 15 Neb. 376 (19 N. W. 452); (1884) *Coleman v. Ririe*, 15 Neb. 407 (19 N. W. 486); (1884) *Donovan v. Yard*, 16 Neb. 33 (19 N. W. 637); (1884) *McCormick v. Laughran*, 16 Neb. 87 (20 N. W. 107); (1884) *Faulkner v. Klamp*, 16 Neb. 174 (20 N. W. 220); (1884) *O'Dea v. State*, 16 Neb. 241 (20 N. W. 299); (1884) *Fitzgerald v. Fitzgerald*, 16 Neb. 413 (20 N. W. 269); (1884) *Sycamore Marsh Harvester Co. v. Grundrad*, 16 Neb. 529 (20 N. W. 832); (1885) *Warrick v. Rounds*, 17 Neb. 411 (22 N. W. 785); (1885) *Young v. Roberts*, 17 Neb. 426 (22 N. W. 792); (1885) *Nelson v. Johnansen*, 18 Neb. 180 (24 N. W. 730; 54 Am. Rep. 806); (1885) *Casebeer v. Rice*, 18 Neb. 203 (24 N. W. 693); (1885) *Parmele v. Conn*, 18 Neb. 288 (25 N. W. 93); (1886) *Gibson v. Sullivan*, 18 Neb. 558 (26 N. W. 368); (1886) *Romberg v. Hughes*, 18 Neb. 579 (26 N. W. 351); (1886) *Hutchinson v. State*, 19 Neb. 262 (27 N. W. 132); (1886) *White Lake Lumber Co. v. Stone*, 19 Neb. 402 (27 N. W. 395); (1886) *Meyer v. Wilkie*, 19 Neb. 509 (27 N. W. 727); (1886) *Morrill v. Tegarden*, 19 Neb. 534 (26 N. W. 202); (1886) *Dodge v. Runels*, 20 Neb. 33 (28 N. W. 849); (1886) *Nyce v. Shaffer*, 20 Neb. 507 (30 N. W. 943); (1887) *Rathman v. Norenberg*, 21 Neb. 467 (32 N. W. 305); (1887) *Driscoll v. Troughton*, 22 Neb. 260 (34 N. W. 497); (1887) *Stewart v. Schneider*, 22 Neb. 286 (34 N. W. 640); (1887) *Forbes v. Thomas*, 22 Neb. 541 (35 N. W. 411); (1888) *Colton & Co. v. Shafer*, 23 Neb. 724 (37 N. W. 615); (1888) *Camp & Compton v. Sadler*, 22 Neb. 732 (36 N. W. 144); (1889) *Klosterman v. Olcott*, 25 Neb. 382 (41 N. W. 250); (1889) *Youngson v. Pollock*, 25 Neb. 431 (41 N. W. 279); (1889) *Lowrey v. Shaffer*, 25 Neb. 832 (41 N. W. 796); (1889) *Sanders v. Quick*, 28 Neb. 162 (44 N. W. 88); (1889) *Feder, Nusbaum & Co. v. Solomon*, 26 Neb. 266 (42 N. W. 1); (1890) *Phœnix Ins. Co. v. Readinger*, 28 Neb. 587 (44 N. W. 864); (1890) *Wallace v. Thresher*, 28 Neb. 806 (44 N. W. 1135); (1890) *Curry v. Metcalf*, 30 Neb. 256 (46 N. W. 490); (1891) *Hunter v. Bell*, 33 Neb. 249 (49 N. W. 1132); (1892) *Roach v. Hawkinson*, 34 Neb. 658 (52 N. W. 373); (1894) *Howell Lumber Co. v. Campbell*, 38 Neb. 567 (57 N. W. 383); (1894) *Omaha St. R. Co. v. Clair* 39 Neb. 454 (58 N. W. 98); (1894) *Fremont, E. & M. V. R. Co. v. Leslie*, 41 Neb.

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159 (59 N. W. 559); (1894) *Kirkendall, Jones & Co. v. Davis*, 41 Neb. 285 (59 N. W. 915); (1894) *Peaks v. Lord*, 42 Neb. 15 (60 N. W. 349); (1894) *Barr v. City of Omaha*, 42 Neb. 341 (60 N. W. 591); (1894) *Fabens v. Atchison & N. R. Co.*, 43 Neb. 74 (61 N. W. 99); (1895) *Prewitt v. York County*, 43 Neb. 267 (61 N. W. 581); (1895) *Ripley v. Larsen*, 43 Neb. 687 (62 N. W. 39); (1895) *Brown v. Cleveland*, 44 Neb. 239 (62 N. W. 463); (1895) *B'Nai Israel v. Garneau*, 45 Neb. 592 (63 N. W. 828); (1896) *Haubrock v. Loeb*, 46 Neb. 868 (65 N. W. 1057); (1896) *Nelson v. Mills*, 47 Neb. 824 (66 N. W. 854); (1896) *Smith v. Smith*, 48 Neb. 21 (66 N. W. 1016); (1896 *Louis v. Union P. R. Co.*, 48 Neb. 151 (66 N. W. 1133); (1896) *Fremont, E. & M. V. R. Co. v. French*, 48 Neb. 638 (67 N. W. 472); (1896) *Spurck v. Dean*, 49 Neb. 66 (68 N. W. 375); (1896) *Graham v. Frazier*, 49 Neb. 90 (68 N. W. 367); (1896) *McCormick Harvesting Machine Co. v. Seeman*, 49 Neb. 312 (68 N. W. 482); (1896) *Halbert v. Rosenbalm*, 49 Neb. 498 (68 N. W. 622); (1896) *O'Brien v. Parsons*, 49 Neb. 729 (68 N. W. 1020); (1897) *Garneau v. Omaha Printing Co.*, 52 Neb. 383 (72 N. W. 360); (1897) *Patrick v. Commercial Nat. Bank of Fremont*, 52 Neb. 416 (72 N. W. 589); (1897) *Morsch v. Besack*, 52 Neb. 502 (72 N. W. 953); (1898) *Wurdeman v. Schultz*, 54 Neb. 404 (74 N. W. 951); (1898) *Herzke v. Blake*, 54 Neb. 465 (74 N. W. 959); (1898) *Union Life Ins. Co. v. Haman*, 54 Neb. 599 (74 N. W. 1090); (1898) *Stevens v. Kirk*, 54 Neb. 669 (74 N. W. 1066); (1898) *Jaeggi v. Galley*, 54 Neb. 800 (75 N. W. 238); (1898) *Bartlett v. Scott*, 55 Neb. 477 (75 N. W. 1102); (1898) *Allsman v. Richmond*, 55 Neb. 540 (75 N. W. 1094); (1898) *Emory v. State, ex rel. Morris*, 56 Neb. 550 (76 N. W. 1080); (1898) *Lydick v. Gill*, 57 Neb. 89 (77 N. W. 340); (1898) *Parlin, Orendorf & Martin Co. v. Albrecht*, 57 Neb. 99 (77 N. W. 355); (1899) *Winchester v. Roys*, 58 Neb. 182 (78 N. W. 1118); (1899) *Chicago, M. & St. P. R. Co. v. Johnston*, 58 Neb. 236 (78 N. W. 499); (1901) *Kuhn v. Nelson*, 61 Neb. 224 (85 N. W. 56); (1901) *Seymour v. Phillips*, 61 Neb. 282 (85 N. W. 72); (1901) *Modern Woodmen of America v. Kozak*, 63 Neb. 146 (88 N. W. 248); (1901) *Fischer v. Kram*, 63 Neb. 241 (88 N. W. 478); (1901) *McCormick Harvesting Machine Co. v. Johnson*, 1 Unof. 310 (95 N. W. 612); (1901) *Hefferman v. O'Neill*, 1 Unof. 363 (96 N. W. 244); (1901) *Pardee v. Nelson*, 1 Unof. 708 (96 N. W. 630); (1901) *Darrah v. Juel*, 1 Unof. 834 (96 N. W. 166 (1902) *Schaff v. Hamilton*, 2 Unof. 577 (N. W. 614); (1903) *Chicago, B. & Q. R. v. Winfrey*, 67 Neb. 13 (93 N. W. 52 (1903) *Cinfel v. Malena*, 67 Neb. 95 N. W. 165); (1903) *Bankers' Union of World v. Schwerin*, 67 Neb. 303 (92 N. 158); (1904) *Anderson v. Kannow*, 72 N 32 (99 N. W. 824); (1904) *Local Grain v. Maschmeier*, 5 Unof. 503 (98 N. W. 103 (1905) *Davey v. Davey*, 73 Neb. 726 (N. W. 282); (1906) *Flanagan v. Fabens*, Neb. 705 (110 N. W. 655); (1907) *City Wayne v. Dixon*, 78 Neb. 270 (110 N. 1135); (1907) *Hudson v. Truman*, 78 N 840 (112 N. W. 325); (1908) *Parker v. L don*, 80 Neb. 647 (114 N. W. 933).

1755*a*. (1877.) When conflicting te mony is fairly submitted to a jury, the co has no right to interfere with their findi on the ground of a mere difference of op ion as to its weight. *High v. Mercha Bank*, 6 Neb. 155.

1756. (1887.) Where a cause is subm ted to a jury upon conflicting testimo there being no objection to the instructi of the court, and the verdict is consist with the line of testimony presented by of the parties to the suit, an appellate co will presume that the jury adopted the of testimony with which their verdict co sponds. *Cooper & Co. v. Hall*, 22 Neb. (34 N. W. 349).

1757. (1888.) In an action for bala due upon an account the defense presen by the answer was that of payment. testimony was conflicting. This questio fact was decided by the jury in favor defendant, upon evidence which was sufficient to sustain the verdict. The ju ment, therefore, was not molested. *Co & Co. v. Shaffer*, 23 Neb. 724 (37 N. W. 6

1758. (1889.) There was a conflict evidence as to the ownership of a part the property replevied, two witnesses te fying to one state of facts, and one witn testifying to another and different state facts. *Held*, That the question raised this conflicting evidence was for the ju and not for the court of review. *Angle Bilby*, 25 Neb. 595 (41 N. W. 397).

1759. (1889.) A finding of a jury on question of negligence and contributory n ligence based on conflicting evidence, is c clusive. *Union P. R. Co. v. Rassmussen*, Neb. 810 (41 N. W. 778; 13 Am. St. R 527).

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1760. (1889.) Where the oral evidence as to the amount of damage to real estate from the construction of a railroad thereon is conflicting, and the jury examines the premises, the verdict will not be disturbed, though one for a much larger amount would have been sustained. *Fink v. Republican V. R. Co.*, 27 Neb. 660 (43 N. W. 418).

1761. (1890.) Both the district and supreme court in a proper case is clothed by the code with power to review the findings of a jury and where the verdict is clearly wrong set it aside, but this power will not be exercised merely because a greater number of witnesses testify against a given state of facts than those that testify in favor thereof. In such case it is the duty of the jury to scrutinize the testimony of each witness and ascertain from the evidence what his means of knowledge were, together with his apparent truthfulness and impartiality, and the verdict will not be disturbed unless it is clearly apparent that the jury committed an error. *Omaha & Republican V. R. Co. v. Brown*, 29 Neb. 492 (46 N. W. 39).

1762. (1894.) In an action on a note, where the answer set off a counter-claim for damages for the breach of a contract whereby defendant was appointed the exclusive agent for the sale of plaintiff's implements in Hays county, the evidence being conflicting, a verdict for defendant will not be set aside. *Sandwich Enterprise Co. v. West*, 42 Neb. 722 (60 N. W. 1012).

1763. (1901.) It cannot, at this late day, be anticipated that the supreme court will recede from the rule that the verdict of a jury will not be set aside solely because it is not supported by a mere preponderence of the evidence. Evidence is conflicting within the meaning of this rule as well when the testimony of a single witness is contradicted by circumstances and by statements elicited from him on cross-examination, as when it is disclosed by the conflicting testimony of several witnesses. *Teske v. Teske*, 1 Unof. 365 (95 N. W. 685).

1764. (1902.) Where the evidence is conflicting, and the court, upon a careful examination of it, is unable to say that a verdict based thereon is clearly and manifestly wrong, the presumption is that the jury, in their deliberations, were uninfluenced by passion or prejudice, and that they acted from proper motives, and unless there is some proof in the record to the contrary, the verdict will not be disturbed. *Sutton Exchange Bank v. Grosshans*, 3 Unof. 5 (90 N. W. 640).

1765. (1905.) A verdict upon conflicting evidence will not be disturbed except for specific error occurring at the trial. *Douglas v. Smith*, 75 Neb. 169 (106 N. W. 173).

1766. (1907.) Where the facts are disputed, it is solely the province of the jury to determine the same; and, whether the facts be disputed or undisputed, if different minds might honestly draw different conclusions from them, the case is properly left to the jury. *Ogden v. Sovereign Camp, Woodmen of the World*, 78 Neb. 804 (113 N. W. 524).

1767. (1907.) A judgment will not be reversed where the evidence relating to the amount of damages is conflicting, and where the rule of damages to be allowed is submitted to the jury under proper instructions. *Shepherd v. Lincoln Traction Co.*, 79 Neb. 834 (113 N. W. 627).

1767*a*. (1908.) When a verdict of a jury is found from conflicting testimony, the supreme court will not inquire into the preponderance of the evidence. *Cady Lumber Co. v. Wilson Steam Boiler Co.*, 80 Neb. 607 (114 N. W. 774).

——— **Against weight of evidence.**

1768. (1876.) The verdict of a jury should not be set aside on the ground of its being against the weight of evidence unless it is clearly so. And more especially ought this rule to be observed by reviewing courts. *Kittle v. De Lamater*, 4 Neb. 426; (1883) *New England Mortgage Security Co. v. Teller*, 14 Neb. 335 (15 N. W. 726); (1884) *Price v. Buck & Greenwood*, 16 Neb. 108 (20 N. W. 23); (1884) *Newman v. Mueller*, 16 Neb. 523 (20 N. W. 843); (1893) *Clapham v. Storm*, 36 Neb. 499 (54 N. W. 827); (1893) *Sun Fire Office v. Ayerst*, 37 Neb. 184 (55 N. W. 635); (1893) *Lee v. Brugmann*, 37 Neb. 232 (55 N. W. 1053); (1902) *City of Omaha v. Doty*, 2 Unof. 726 (89 N. W. 992).

1769. Mere preponderance of testimony against the verdict is not enough to warrant the court in disturbing it. It is not usual for courts to set it aside when there is any evidence to support it. (1871) *Jones v. Edwards*, 1 Neb. 170; (1876) *Blackburn v. Ostrander*, 5 Neb. 219; (1892) *Conner v. Draper*, 34 Neb. 870 (52 N. W. 720); (1894) *Storz v. Riley*, 41 Neb. 822 (60 N. W. 96).

1770. (1877.) To justify an interference

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with the finding of a court or jury, the preponderance of evidence must be clear, obvious and decided; but when the preponderance is so great, it is the duty of the reviewing court to correct the mistake. *Fried v. Remington*, 5 Neb. 525.

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1771. (1877.) When the verdict is against the clear weight of the evidence a new trial will be granted. *Mathewson v. Burr*, 6 Neb. 312; (1879) *Trego v. Lowrey*, 8. Neb. 238; (1882) *Bennett v. Rogers*, 12 Neb. 382 (11 N. W. 314); (1882) *Jennings v. Simpson*, 12 Neb. 558 (11 N. W. 880); (1882) *Victor Sewing Machine Co. v. Day*, 13 Neb. 408 (14 N. W. 169); (1883) *Gandy v. Pool*, 14 Neb. 98 (15 N. W. 223); (1883) *Kuhns v. Bankes*, 15 Neb. 92 (17 N. W. 356); (1885) *Clark v. Gell*, 17 Neb. 284 (22 N. W. 562); (1886) *Cummings v. Winters*, 19 Neb. 719 (28 N. W. 302); (1889) *Brown v. Smith*, 26 Neb. 376 (42 N. W. 90); (1890) *State Bank v. Smith*, 29 Neb. 434 (45 N. W. 691); (1891) *Conway v. St. Joseph Iron Co.* 33 Neb. 454 (50 N. W. 326); (1892) *Aultman, Miller & Co. v. Scheele & Fisher*, 34 Neb. 819 (52 N. W. 817); (1903) *Sovereign Camp, Woodmen of the World, v. Hruby*, 70 Neb. 5 (96 N. W. 998); (1907) *Berard v. Atchison & N. R. Co.*, 79 Neb. 830 (113 N. W. 537).

1772. (1882.) When it is clear that material testimony has been disregarded by the jury, and which if considered and given due weight, would require a different verdict from that returned, a new trial will be granted. *Dunbier v. Day*, 12 Neb. 596 (12 N. W. 109).

1773. (1882.) When the verdict is so clearly against the weight of evidence as to lead to the conviction that it was the result of passion, prejudice, or inadvertence on the part of the jury, it will be set aside and a new trial granted. *Holland v. Griffith*, 13 Neb. 472 (14 N. W. 387).

1774. (1886.) Where, in an action to recover damages for injury to property, the cause of the injury is a matter of conjecture, a verdict in favor of the plaintiff will not be set aside at his instance because the verdict is not as large as it probably would have been had the cause of the injury been fully proved. *Benzon v. Burlington & M. R. Co.*, 18 Neb. 659 (26 N. W. 467).

1775. (1893.) A new trial should be allowed when it is clear that material uncontradicted evidence has been disregarded by the jury, and which, if considered and given due weight, would have required a different verdict from that returned. *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642 (54 N. W. 976).

1776. (1894.) Where there is sufficient evidence to justify a verdict it will not be disturbed merely because of the comparative number of witnesses on each side, or on account of mere probabilities as to the comparative weight of the testimony considered alone on the record in the supreme court. *Rector v. Canfield*, 40 Neb. 595 (58 N. W. 1131).

——— Approval of trial court.

1777. (1898.) A verdict on conflicting evidence, approved by the trial court, will not be disturbed in the appellate court. *Hammond v. Edwards*, 56 Neb. 631 (77 N. W. 75); (1898) *Brong v. Spence*, 56 N. W. 638 (77 N. W. 54).

1778. (1893.) When a jury has decided a question of fact properly submitted, and the trial judge has overruled a motion for a new trial, then, if the record discloses competent evidence on which the finding may have been based, such finding cannot be disturbed by the supreme court. *Sonnenschein v. Bartels*, 37 Neb. 592 (56 N W. 210).

——— Successive verdicts.

1779. (1885.) When a case has been tried three times, the verdict of the jury each time being in favor of the plaintiff, the court will not set aside the third verdict as being against the weight of evidence, unless it is clearly wrong. *Dunbar v. Briggs*, 18 Neb. 94 (24 N. W. 449).

1780. (1900.) Where different trials have been had, resulting in verdicts for plaintiff, and new trials have been denied by the trial court, the verdict and judgment in the last trial will not be overruled and set aside, unless the evidence is clearly insufficient to support them. *Missouri P. R. Co. v. Fox*, 60 Neb. 531 (83 N. W. 744).

1781. (1900.) Where a case has been tried different times, resulting in a verdict in favor of one and then the other of the parties to the litigation, the verdict of the jury in the last trial should not be disturbed unless there is a clear lack of sufficient evidence to support it. *Brownell v. Fuller*, 60 Neb. 558 (83 N. W. 669).

1782. (1903.) A much stronger case is necessary to warrant the supreme court in interfering with a second verdict and judg-

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ment on the merits by reason of alleged error in setting aside a prior verdict and granting a new trial, than where a motion for a new trial has been denied. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624 (94 N. W. 822).

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Ruling on motion.

1783. (1885.) When a motion to discharge an attachment for the reason that the facts stated in the affidavit are untrue, has been heard on affidavits in support as well as in resistance, decided thereon by the trial court, brought to the supreme court on error, and it appears from an examination of such affidavits that there is a conflict of evidence, the order of the trial court will not be disturbed unless the preponderance of evidence against it is clear and decisive. *Mayer & Schurman v. Zingre*, 18 Neb. 458 (25 N. W. 727).

1784. (1892.) In reviewing an order discharging an attachment, the evidence being conflicting, the same presumption prevails in favor of the correctness of the ruling complained of, as in cases of finding and judgment upon a formal trial. *Smith v. Boyer*, 35 Neb. 46 (52 N. W. 581).

1785. (1893.) When a motion to discharge an attachment on the ground that the facts stated in the affidavit are untrue is heard upon conflicting affidavits, the decision of the trial court on the motion will not be disturbed unless it is clearly against the weight of the evidence. *Whipple v. Hill*, 36 Neb. 720 (55 N. W. 227; 38 Am. St. Rep. 742; 20 L. R. A. 313).

1786. (1896.) Where a motion to discharge an attachment, because plaintiff's affidavits are untrue, is heard on conflicting evidence, the ruling on the motion will not be disturbed unless it is clearly against the weight of evidence. *Nebraska Moline Plow Co. v. Klingman*, 48 Neb. 204 (66 N. W. 1101).

1787. (1896.) Where the evidence on a motion is so confusing that is cannot be determined whether there was error in overruling it, the ruling will be sustained. *Haley v. McCarty*, 48 Neb. 883 (67 N. W. 857).

1788. (1901.) On a motion to dissolve an attachment, the supreme court will not interfere with the action of the lower court, if, in sustaining the attachment, the affidavits offered in support thereof state facts which under our statute authorize the writ. *Landis v. Newton*, 1 Unof. 561 (95 N. W. 791).

1789. (1903.) On disputed questions of fact tried on ex-parte affidavits in support of a motion to dissolve an attachment, the findings of the trial court will not be disturbed unless clearly against the weight of the evidence. *Fremont Brewing Co. v. Pekarek*, 4 Unof. 531 (95 N. W. 12).

Findings of court.

1790. (1876.) The findings of a court, when substituted for a jury, are entitled to the same weight as the verdict of the latter. *Seymour v. Street*, 5 Neb. 85; (1879) *Graham v. Kibble*, 9 Neb. 182 (2 N. W. 455); (1904) *Wantz v. Squires*, 5 Unof. 248 (97 N. W. 1058).

1791. (1878.) In order to justify a reversal of the finding of the court below, on a question of fact, such finding must be shown to be clearly wrong. *Callahan v. Callahan*, 7 Neb. 38; (1888) *Bookwalter v. Lansing*, 23 Neb. 291 (36 N. W. 549); (1902) *Hare v. Winterer*, 64 Neb. 551 (90 N. W. 544); (1902) *Franklin County Bank v. Everett*, 3 Unof. 379 (91 N. W. 495); (1903) *Stocker v. Coddington*, 4 Unof. 229 (93 N. W. 680).

1792. (1879.) In cases tried to the court without a jury, the finding on questions of fact is entitled to the same respect in the supreme court, on appeal, as would be accorded to the verdict of a jury under like circumstances. *Cheney v. Eberhardt*, 8 Neb. 423; (1884) *Hartley v. Dorr & Co.*, 15 Neb. 451 (19 N. W. 632); (1885) *McLaughlin v. Sandusky*, 17 Neb. 110 (22 N. W. 241); (1885) *Bank of Cass County v. Morrison*, 17 Neb. 341 (22 N. W. 782; 52 Am. Rep. 417); (1886) *Roggencamp v. Seeley*, 19 Neb. 170 (26 N. W. 625); (1894) *Burlingim v. Warner*, 39 Neb. 493 (58 N. W. 132); (1901) *Booth v. Kessler*, 62 Neb. 704 (87 N. W. 532); (1904) *Gaffey v. Northwestern Mutual Life Ins. Co.*, 71 Neb. 304 (98 N. W. 826).

1793. (1880.) To justify a reversal of the finding and judgment of a trial court upon questions of fact the plaintiff in error must at least show a clear preponderance of testimony against such finding and judgment. *Young v. Pritchett*, 10 Neb. 352 (6 N. W. 414); (1902) *Buck v. Hogeboom*, 2 Unof. 853 (90 N. W. 635).

1794. (1880.) Where a question of fraud in fact is brought up for review, the supreme court is decidedly adverse to interfering with the decision below, whether made by the court or by a jury; nor will it do so unless clearly satisfied that injustice

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has been done. *Weinland v. Cochran*, 9 Neb. 480 (4 N. W. 67).

1795. (1893.) The supreme court, though trying a case *de novo* on appeal, will not disturb the finding of the district court unless the finding and decree cannot be reconciled with any reasonable construction of the testimony. *Gadsden v. Phelps*, 37 Neb. 590 (56 N. W. 314); (1894) *Swartz v. Duncan*, 38 Neb. 782 (57 N. W. 543); (1902) *Druse v. Davey*, 3 Unof. 16 (90 N. W. 644).

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1796. (1895.) Where the right of plaintiff to recover was not affirmatively established by the proofs in the district court, its judgment in favor of the defendant will not be disturbed in the supreme court. *Windsor v. Thompson*, 44 Neb. 228 (62 N. W. 460).

1797. (1895.) The finding of the trial court in deciding a challenge to a juror for cause will not be set aside by the supreme court unless it is clearly wrong. *Bayse v. State*, 45 Neb. 261 (63 N. W. 811).

1798. (1906.) Under the present statute, and our rules governing appeals in equity cases, the supreme court is in no manner bound by the view of the trial court as to the sufficiency or the weight of the evidence, where it consists wholly of affidavits, depositions, and other written testimony. *Omaha Loan & Bldg. Ass'n v. Hendee*, 77 Neb. 12 (108 N. W. 190).

1799. (1906.) The findings of a court in a case tried to the court without the intervention of a jury are entitled to the same weight as the verdict of a jury, and will not be set aside when there is evidence to support them. *Citizens Ins. Co. v. Herpolsheimer*, 77 Neb. 232 (109 N. W. 160).

1800. (1906.) To overrule the action of a trial judge denying an application for a change of venue on the grounds of bias and prejudice of the trial judge against a litigant, the evidence offered in support of the fact of such prejudice must be clear and convincing, and strong enough to overthrow the presumption of the impartiality of the court. *State v. Smith*, 77 Neb. 824 (110 N. W. 557).

——— **Sufficiency of evidence.**

1801. (1876.) The findings and judgments of a court of record will always be presumed to rest upon sufficient evidence, unless the contrary be clearly shown by the record. *Singleton v. Boyle*, 4 Neb. 414.

1802. (1877.) A mere difference of opinion between the reviewing court and the court below, as to the weight of evidence, ought never be deemed sufficient to reverse a judgment. *Young v. Hibbs*, 5 Neb. 433; (1889) *Morse v. Raben*, 27 Neb. 145 (42 N. W. 901); (1896) *City of Harvard v. Crouch*, 47 Neb. 133 (66 N. W. 276).

1803. (1877.) Where the finding of the court is clearly against the weight of evidence, the judgment will be set aside. *Roberts v. City of Lincoln*, 6 Neb. 352; (1897) *Southard v. Behrns*, 52 Neb. 486 (72 N. W. 860); (1897) *American Fire Ins. Co. v. Buckstaff Bros. Mfg. Co.*, 52 Neb. 676 (72 N. W. 1047); (1898) *Kokes v. State, ex rel. Koupal*, 55 Neb. 691 (76 N. W. 467); (1899) *Symns Grocery Co. v. Snow*, 58 Neb. 516 (78 N. W. 1066); (1900) *Ackerman v. Ackerman*, 61 Neb. 72 (84 N. W. 598); (1902) *Frerking v. Thomas*, 64 Neb. 193 (89 N. W. 1005).

1804. (1879.) Findings of inferior tribunals upon questions of fact will not be interfered with unless found to be clearly against the weight of evidence. And this rule applies to all cases, whether they come here by petition in error or on appeal. *Armstrong v. Freeman*, 9 Neb. 11 (2 N. W. 353).

1805. (1880.) Where the case made is one of fact only, in order to justify the reversal of the finding of the court below, the supreme court must find the testimony to be clearly against the finding. *Hellwig v. Mortgage Security Co.*, 10 Neb. 611 (7 N. W. 275).

1806. (1881.) The findings of trial courts upon questions of fact will not be interfered with, unless clearly unsupported by the evidence. *Courtnay v. Price*, 12 Neb. 188 (10 N. W. 698); (1883) *Charles v. Ashby*, 14 Neb. 251 (15 N. W. 222); (1884) *Hartley v. Dorr & Co.*, 15 Neb. 451 (19 N. W. 632); (1885) *McLaughlin v. Sandusky*, 17 Neb. 110 (22 N. W. 241); (1893) *Flannagan v. Edwards*, 36 Neb. 359 (54 N. W. 565); (1894) *Davis v. Hilbourn*, 41 Neb. 35 (59 N. W. 379); (1895) *Citizens State Bank of Chadron v. Bellangee*, 45 Neb. 203 (63 N. W. 363); (1899) *Plattsmouth Water Co. v. Smith*, 51 Neb. 579 (78 N. W. 275); (1901) *State, ex rel. Gieseke, v. Moores*, 63 Neb. 301 (88 N. W. 490); (1901) *Buck v. Oeldeman*, 1 Unof. 798 (96 N. W. 117); (1902) *Payne v. Liebee*, 3 Unof. 448 (91 N. W. 851); (1903) *Thomas v. Janesofsky*, 5 Unof. 101 (97 N. W. 332).

1807. (1883.) Even in equity cases the supreme court will not disturb a finding of

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fact, unless it is found to be clearly against the weight of evidence. *Aultman v. Patterson*, 14 Neb. 58 (15 N. W. 350).

1808. (1884.) Where a jury is waived the finding of a court will not be set aside as being against the weight of evidence unless it is clearly wrong. *Evans v. De Roe*, 15 Neb. 630 (20 N. W. 99).

1809. (1890.) Rule that a finding will not be disturbed which has sufficient evidence to sustain it, has not the usual application in a case tried upon depositions. *Delorac v. Conna*, 29 Neb. 791 (46 N. W. 255).

1810. (1893.) In determining whether a finding of fact is sustained by the evidence, the court may disregard incompetent testimony which was admitted in evidence. *McConnell v. First Nat. Bank of Lincoln*, 38 Neb. 252 (56 N. W. 1013).

1811. (1901.) On an appeal to the supreme court in an equitable action, the judgment will be reversed if essential findings of fact are wholly unsupported by the evidence. It will also be reversed, if essential special findings are in conflict with a general finding and the former are sufficiently supported by the evidence. *Carpenter Paper Co. v. News Pub. Co.*, 63 Neb. 59 (87 N. W. 1050).

1812. (1901.) The rule that findings of the district court will not be disturbed upon appeal if there is evidence to sustain them does not apply with the same force to a case heard almost entirely upon depositions which involve transactions in another state, so that the trial judge could have had no advantage from general local knowledge of the parties, the witnesses and the subjects of controversy. *Gibson v. Hammang*, 63 Neb. 349 (88 N. W. 500).

1813. (1901.) On an appeal to the supreme court, in a case in which an important question is that of value, and in which there is not sufficient evidence in the record to permit of its adjudication, the judgment of the district court will be reversed and a new trial awarded. *Merchants Nat. Bank of Omaha v. McDonald*, 63 Neb. 363 (88 N. W. 492; 89 N. W. 770).

1814. (1902.) Where any matter of which a trial court took judicial notice is incompetent or improper to be considered, the supreme court will reject it on appeal in determining whether the order complained of is sustained by sufficient evidence. *State v. Faucett*, 64 Neb. 496 (90 N. W. 250).

1815. (1902.) An order of the district court based upon written evidence, and also the evidence of a witness upon oral examination in the presence of the court, will not be reversed if the evidence of such witness, if believed, will support the order, unless such evidence is clearly inconsistent with the established facts in the case. *Male v. Dahlgrin*, 66 Neb. 524 (92 N. W. 632).

1816. (1902.) The supreme court may, on appeal pass upon the competency of evidence admitted, in determining whether the decree is supported by sufficient evidence. *Cheston v. Wilson*, 2 Unof. 674 (89 N. W. 764).

1817. (1903.) Where a finding is based largely upon depositions or written testimony, as to which the trial judge has no special advantage over the reviewing court, the rule that his findings will be adhered to unless clearly wrong does not apply with the same force. *Faulkner v. Simms*, 68 Neb. 299 (94 N. W. 113).

1818. (1906.) In appeals in equity cases, the supreme court will examine the evidence and arrive at an opinion of the facts established, uninfluenced by the conclusion arrived at by the trial court, except in so far as a presumption in support of such conclusions is derived from the opportunity which the trial judge has of seeing and hearing the witnesses, and of judging their candor, their knowledge of the facts, their intelligence, and bias, or partiality, if any is exhibited. *Roe v. Howard County*, 75 Neb. 448 (106 N. W. 587).

Conflicting evidence.

1819. (1878.) In a case brought to the supreme court on appeal, where no question of law is involved, and the testimony is conflicting and pretty evenly balanced, the finding of the court will not be disturbed. *Callahan v. Callahan*, 7 Neb. 38.

1820. (1879.) Where there is conflicting testimony, the supreme court will not disturb a finding or decree, if there is evidence to sustain it on each material point. *Burt v. Baldwin*, 8 Neb. 487; (1882) *Bell v. Sherer*, 12 Neb. 409 (11 N. W. 861); (1883) *Galley v. Galley*, 14 Neb. 174 (15 N. W. 318); (1884) *Smith v. Dean*, 15 Neb. 432 (19 N. W. 642); (1885) *Bond v. Dolby*, 17 Neb. 491 (23 N. W. 351); (1885) *Doolittle v. Wheeler*, 18 Neb. 136 (24 N. W. 451); (1885) *Sapp v. Roberts*, 18 Neb. 299 (25 N. W. 96); (1886) *Traphagen v. Sheldon*, 19 Neb. 75 (26 N. W. 928); (1886) *Kuder v. Twidale*, 20 Neb. 390

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(30 N. W. 263); (1886) *Powers v. Powers*, 20 Neb. 529 (31 N. W. 1); (1887) *McConahey v. McConahey*, 21 Neb. 463 (32 N. W. 300); (1887) *Uecker v. Koehn*, 21 Neb. 559 (32 N. W. 583; 60 Am. Rep. 849); (1887) *Holmes v. Shimer*, 22 Neb. 207 (34 N. W. 371); (1888) *Smith v. Mesarvey*, 22 Neb. 756 (36 N. W. 137); (1888) *Witter v. Hoover*, 24 Neb. 605 (39 N. W. 619); (1889) *Schroeder v. Baker Mfg. Co.*, 27 Neb. 45 (42 N. W. 761); (1890) *Mordhorst v. Nebraska Telephone Co.*, 28 Neb. 610 (44 N. W. 649); (1891) *Hoagland v. Van Etten*, 31 Neb. 292 (47 N. W. 920); (1891) *First Nat. Bank v. Hollerin*, 31 Neb. 558 (48 N. W. 392); (1891) *Worthington v. Worthington*, 32 Neb. 334 (49 N. W. 354); (1892) *Blodgett v. McMurtry*, 34 Neb. 782 (52 N. W. 706); (1892) *Oleson v. City of Plattsmouth*, 35 Neb. 153 (52 N. W. 848); (1892) *Rudolph v. Davis*, 35 Neb. 157 (52 N. W. 841); (1893) *Metropolitan B. & L. Ass'n v. Van Pelt Bros.*, 36 Neb. 3 (53 N. W. 1031); (1893) *Westover v. Lewis*, 36 Neb. 692 (54 N. W. 961); (1893) *McConnell v. McConnell*, 37 Neb. 57 (55 N. W. 292); (1893) *Filley v. Scollard*, 37 Neb. 749 (56 N. W. 615); (1893) *Huebner v. Sesseman*, 38 Neb. 78 (56 N. W. 697); (1893) *McConnell v. First Nat. Bank of Lincoln*, 38 Neb. 252 (56 N. W. 1013); (1894) *Zarrs v. Keck*, 40 Neb. 456 (58 N. W. 933); (1894) *Sloman v. Spellman*, 42 Neb. 165 (60 N. W. 387); (1894) *Leighton v. Clarke*, 42 Neb. 427 (60 N. W. 875); (1894) *Howell v. Schlotfelt*, 42 Neb. 448 (60 N. W. 884); (1895) *Wells v. David City Improvement Co.*, 43 Neb. 366 (61 N. W. 623); (1895) *Lihs v. Lihs*, 44 Neb. 143 (62 N. W. 457); (1895) *Steinkraus v. Korth*, 44 Neb. 777 (62 N. W. 1110); (1895) *Hooper v. Castetter*, 45 Neb. 67 (63 N. W. 135); (1895) *Thompson v. Field*, 45 Neb. 146 (63 N. W. 364); (1895) *Carstens v. Eller*, 45 Neb. 515 (63 N. W. 839); (1895) *Thompson v. Luke*, 45 Neb. 561 (63 N. W. 828); (1895) *Hough v. Stover*, 46 Neb. 588 (65 N. W. 189); (1896) *Wakefield v. Connor*, 47 Neb. 225 (66 N. W. 286); (1896) *State, ex rel. Cooley, v. Spirk*, 47 Neb. 337 (66 N. W. 404); (1896) *Buffalo County Nat. Bank v. Gilcrest*, 47 Neb. 897 (66 N. W. 850); (1896) *Baylis v. Parmele*, 48 Neb. 619 (67 N. W. 449); (1896) *Davidson v. Crosby*, 49 Neb. 60 (68 N. W. 338); (1896) *Council Bluffs Canning Co. v. Omaha Tinware Mfg. Co.*, 49 Neb. 537 (68 N. W. 929); (1896) *King v. Murphy*, 49 Neb. 670 (68 N. W. 1029); (1896) *Greer v. Winter*, 49 Neb. 705 (68 N. W. 1021); (1897) *McGinnis v. Kyd*, 51 Neb. 282 (70 N. W. 910); (1897) *Central Neb. Nat. Bank v. Cline*, 51 Neb. 63 (70 N. W. 512); (1897) *Commercial Bank of St. Louis v. Eastern Banking Co.*, 51 Neb. 766 (71 N. W. 1024); (1897) *Griswold v. Hazels*, 52 Neb. 64 (71 N. W. 972); (1897) *Western Cornice Mfg. Works v. Leavenworth*, 52 Neb. 418 (72 N. W. 592); (1898) *Amoskeag Savings Bank v. Robbins*, 53 Neb. 776 (74 N. W. 261); (1898) *Walker v. Smith*, 54 Neb. 31 (74 N. W. 390); (1898) *Abraham v. City of Fremont*, 54 Neb. 391 (74 N. W. 834); (1898) *Combination Gas-Machine Co. v. King*, 56 Neb. 179 (76 N. W. 547); (1898) *First Nat. Bank v. Hahn*, 56 Neb. 679 (77 N. W. 50); (1898) *Gates v. Johnson*, 56 Neb. 808 (77 N. W. 407); (1897) *Renland v. Waugh*, 52 Neb. 358 (72 N. W. 481); (1899) *Des Moines Ins. Co. v. Davis*, 57 Neb. 372 (77 N. W. 778); (1899) *Holbert v. Chilvers*, 58 Neb. 665 (79 N. W. 623); (1900) *Burwel Irrigation Co. v. Lashmett*, 59 Neb. 605 (81 N. W. 617); (1900) *Blue Valley Lumber Co. v. Conro*, 61 Neb. 39 (84 N. W. 402); (1900) *Buck v. Stuben*, 61 Neb. 70 (84 N. W. 595); (1900) *Ross v. McManigal*, 61 Neb. 90 (84 N. W. 610); (1901) *Orient Ins. Co. v. Hayes*, 61 Neb. 173 (85 N. W. 57); (1901) *Watson v. Cowles*, 61 Neb. 216 (85 N. W. 35); (1901) *Meisner v. Moore*, 61 Neb. 405 (85 N. W. 395); (1901) *Gurske v. Kelpin*, 61 Neb. 517 (85 N. W. 557); (1901) *McCullough v. Dovey*, 61 Neb. 675 (85 N. W. 893); (1901) *Boyd v. Mulvihill*, 61 Neb. 878 (86 N. W. 922); (1902) *Snyder v. Rogers*, 63 Neb. 436 (88 N. W. 681); (1902) *Smith Premier Typewriter Co. v. Mayhew*, 65 Neb. 65 (90 N. W. 939); (1903) *German Ins. Co. v. Shader*, 68 Neb. 1 (93 N. W. 972; 60 L. R. A. 918); (1903) *Faulkner v. Simms*, 68 Neb. 299 (94 N. W. 113); (1903) *Saxton v. Harrington*, 68 Neb. 446 (94 N. W. 605).

1821. (1894.) The decision of a district court, made on conflicting evidence, that a fair and impartial trial of a case cannot be had in the county where brought because of the bias and prejudice existing in such county against one of the parties to such suit, will not be disturbed by the supreme court, if supported by competent evidence. *Omaha So. R. Co. v. Todd*, 39 Neb. 818 (58 N. W. 289).

1822. (1894.) The finding of the district court, as to the actual place of residence of a defendant served with summons by leaving a copy thereof at his usual place of residence, will not be disturbed when such

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finding has been made on consideration of conflicting evidence. *Heaton v. Thayer*, 42 Neb. 47 (60 N. W. 318).

1823. (1897.) The rule that the appellate court will not disturb the finding of a trial court made upon conflicting testimony applies to orders confirming judicial sales. *Creighton University v. Riley*, 50 Neb. 341 (69 N. W. 943).

1824. (1901.) Where in a controversy over an application for the appointment of a receiver a question of fact on conflicting evidence arises, and is determined by the trial court, its finding thereon, when warranted by the evidence, will be followed in reviewing the case on appeal. *Buck v. Stuben*, 63 Neb. 273 (88 N. W. 483).

1825. (1903.) The statements that the reviewing court will not "weigh conflicting evidence," that it "will not review findings on conflicting evidence," and that "findings on conflicting evidence are conclusive," as announced *obiter* in several prior decisions, disapproved. *Faulkner v. Simms*, 68 Neb. 299 (94 N. W. 113).

1826. (1903.) In passing on findings of fact upon appeal, the reviewing court should go over all the evidence and reach its own conclusion thereon, giving such weight to the determination of the trial court as to credibility of witnesses and its finding on conflicting evidence as, under all the circumstances of the case, the nature of the evidence before the trial court, and that court's special opportunities, if any, for reaching a correct solution, such finding may be entitled to. *Faulkner v. Simms*, 68 Neb. 299 (94 N. W. 113).

1827. (1903.) If the evidence before the trial court is entirely written and relates to matters as to which the trial judge is in no better position to reach a correct solution than the supreme court, the rule that a finding on conflicting evidence will not be disturbed, has no application, and the supreme court should be governed by its own conclusion as to the weight of the evidence. *Faulkner v. Simms*, 68 Neb. 299 (94 N. W. 113).

1828. (1903.) A finding on conflicting evidence, if clearly wrong, will be set aside, notwithstanding there may be some competent evidence in support thereof. *Faulkner v. Simms*, 68 Neb. 299 (94 N. W. 113).

1829. (1903.) Where, in an action before a justice of the peace, the evidence was conflicting and it cannot be said that his judgment was clearly wrong, the order of the district court, on a proceeding in error, sustaining such judgment, will be affirmed. *Bullard v. Laughlin*, 4 Unof. 697 (96 N. W. 159).

1830. (1906.) The findings of the trial court on conflicting evidence in an action at law will not be disturbed on appeal unless manifestly wrong. *Rownd v. Hollenbeck*, 77 Neb. 120 (108 N. W. 259).

——— **Decision on motion for new trial.**

1831. (1876.) An order of the court below overruling a motion for a new trial for the reason that the verdict of the jury was against the weight of evidence, will not be disturbed, unless it be very clearly so. *Blackburn v. Ostrander*, 5 Neb. 219; (1895) *Central City Bank v. Rice*, 44 Neb. 594 (63 N. W. 60).

1832. (1883.) When the conduct or appearance of a juror during the trial is relied on to show prejudice, its effect must necessarily be left almost exclusively to the judgment of the presiding judge. *Republican V. R. Co. v. Boyse*, 14 Neb. 130 (15 N. W. 364).

1833. (1886.) Upon a motion to set aside the verdict of a jury in which questions of fact are involved, the court hearing the motion becomes the judge of such questions of fact and his decision thereon must be final unless clearly and manifestly wrong. *Sang v. Beers*, 20 Neb. 365 (30 N. W. 258).

1834. (1888.) Where the county court, in a proceeding instituted under the provisions of section 602 of the civil code, upon sufficient evidence, sets aside a judgment rendered thereon, as having been obtained by fraud, and its decision is sustained by the district court upon proceedings in error, the findings of such courts will not be molested upon questions of fact. *Mordhorst v. Reynolds*, 23 Neb. 485 (37 N. W. 80).

1835. (1888.) Where an affidavit is filed that affiant had conversation with a juror during progress of a trial, which is denied by the juror named, and court below finds there was no misconduct of juror, supreme court will not set aside verdict. *Everton v. Esgate*, 24 Neb. 235 (38 N. W. 794).

1836. (1894.) Where a new trial is asked for on the ground of misconduct of a juror or of the prevailing party, the finding of the trial court in support of the verdict will not be set aside unless the evidence of misconduct is of a clear and convincing character. *Omaha Fair & Exposition Ass'n*

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v. Missouri P. R. Co., 42 Neb. 105 (60 N. W. 330).

1837. (1895.) The findings of a trial court as expressed by its rulings upon a motion for new trial, when based upon conflicting evidence contained in affidavits filed in support of the motion, will not be disturbed unless clearly and manifestly wrong. *Kent v. Green*, 43 Neb. 673 (62 N. W. 71).

1838. (1894.) A stronger case will be required for interference by the supreme court on account of an order setting aside a verdict resulting in a second trial on the merits of a cause than where the motion therefor is denied. *Bigler v. Baker*, 40 Neb. 325 (58 N. W. 1026); (1895) *Webber v. Kirkendall*, 44 Neb. 766 (63 N. W. 35).

1839. (1903.) Where a new trial is asked for on the ground of misconduct of the jury, the finding of the trial court on that question, based on conflicting evidence, will not be disturbed by a court of review. *Matoushek v. Dutcher*, 67 Neb. 627 (93 N. W. 1049).

1840. (1904.) Where there is a conflict in the evidence before the trial court, on an application for a new trial on the ground of fraud, newly discovered evidence, and the like, the supreme court will not disturb the findings of the trial court thereon unless such findings are manifestly wrong. *Edge v. Edge*, 5 Unof. 589 (99 N. W. 644).

Findings of referee.

1841. (1892.) The report of a referee upon questions of fact has the same effect as the verdict of a jury, and will not be set aside as being against the weight of evidence unless it is clearly wrong. *State, ex rel. Wilcox, v. Crabtree*, 35 Neb. 106 (52 N. W. 842).

1842. (1893.) The findings of fact in the report of a referee will not be disturbed, unless manifestly contrary to the weight of the evidence. *State v. Commercial & Savings Bank*, 37 Neb. 174 (55 N. W. 640).

1843. (1896.) Findings of fact reported by a referee stand in the same position as the verdict of a jury; and in reviewing the action of a district court in setting aside such a report, the same rules will be observed as in reviewing an order setting aside a verdict. *School District No. 1 v. Bishop*, 46 Neb. 850 (65 N. W. 902).

1844. (1902.) The findings of fact of a referee, on conflicting evidence, confirmed by the district court after hearing on exceptions thereto, will not be disturbed on appeal. *Creedon v. Patrick*, 3 Unof. 459 (91 N. W. 872).

H. Harmless Error.

Failure to award nominal damages not error, see *Damages*, § 5.

Right of party not prejudiced to review, see *ante*, §§ 178, 179.

Prejudice as grounds of review in general.

1845. (1877.) It is not every error that calls for a reversal of a judgment. To have this effect the error must appear to have been prejudicial to the party seeking to take advantage of it. *Dillon v. Russell & Holmes*, 5 Neb. 484; (1877) *Mercer v. James*, 6 Neb. 406; (1884) *Everett v. Hobleman*, 15 Neb. 376 (19 N. W. 452); (1884) *Burlington & M. R. R. Co. v. Chicago Lumber Co.*, 15 Neb. 390 (19 N. W. 451); (1886) *Village of Ponca v. Crawford*, 18 Neb. 551 (26 N. W. 365); (1886) *Gibson v. Sullivan*, 18 Neb. 558 (26 N. W. 368); (1886) *Hutchinson v. State*, 19 Neb. 262 (27 N. W. 113); (1886) *Clay v. Tyson*, 19 Neb. 530 (26 N. W. 240); (1886) *Western Horse Ins. Co. v. Putnam*, 20 Neb. 331 (30 N. W. 246); (1887) *Pollard v. Turner*, 22 Neb. 366 (35 N. W. 192); (1887) *Forbes v. Thomas*, 22 Neb. 541 (35 N. W. 411); (1888) *Hamilton v. Ross*, 23 Neb. 630 (37 N. W. 467); (1888) *Mulligan & Co. v. Butcher*, 23 Neb. 683 (37 N. W. 596); (1889) *Chamberlain v. Brown*, 25 Neb. 434 (41 N. W. 284); (1891) *Cowles v. Thompson*, 31 Neb. 479 (48 N. W. 145); (1891) *Ackerman v. Bogan*, 33 Neb. 515 (50 N. W. 435); (1892) *First Nat. Bank of North Bend v. Miltonberger*, 33 Neb. 847 (51 N. W. 232); (1892) *St. Paul Fire Ins. Co. v. Gotthelf*, 35 Neb. 351 (53 N. W. 137); (1892) *Rosenbaum v. Russell*, 35 Neb. 513 (53 N. W. 384); (1893) *Lau v. Grimes Dry Goods Co.*, 38 Neb. 215 (56 N. W. 954); (1897) *Merchants Savings Bank v. Noll*, 50 Neb. 615 (70 N. W. 247); (1898) *Union Life Ins. Co. v. Haman*, 54 Neb. 599 (74 N. W. 1090); (1899) *Davidson v. Gretna State Bank*, 59 Neb. 63 (80 N. W. 256); (1900) *Buck v. Stuben*, 61 Neb. 70 (84 N. W. 595); (1900) *State v. German Savings Bank*, 61 Neb. 87 (84 N. W. 599); (1901) *First Nat. Bank of Sutton v. Grosshans*, 61 Neb. 575 (85 N. W. 542); (1901) *Ulrich v. McConaughey*, 63 Neb. 10 (88 N. W. 150); (1901) *Treat v. Hughes*, 1 Unof. 158 (95 N. W. 351); (1901) *Ledwith v. Campbell*, 1 Unof. 695 (95 N. W. 838); (1902) *Kelley v. Wehn*, 63 Neb. 410 (88 N. W. 682); (1902) *Clark v. Wolf*, 2 Unof. 290 (96 N. W. 495); (1902) *Baldwin v. Burt*, 2

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Unof. 377 (96 N. W. 401); (1902) *City of South Omaha v. Meyers*, 3 Unof. 699 (92 N. W. 743); (1904) *Richards v. Enlow Cattle Co.*, 5 Unof. 327 (98 N. W. 659).

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Errors not affecting substantial right.

1846. (1891.) A judgment will not be reversed for errors committed on the trial which do not affect the substantial rights of the party complaining. *Trester v. Missouri P. R. Co.*, 33 Neb. 171 (49 N. W. 1110); (1900) *Lancashire Ins. Co. v. Bush*, 60 Neb. 116 (82 N. W. 313).

1847. (1893.) A decree granting appellant the relief sought by him below will be affirmed regardless of its merits. *Hoops v. McNichols*, 38 Neb. 76 (56 N. W. 721).

1848. (1894.) The mere refusal of the court to require the service of a stenographic reporter for the trial of a cause is not reversible error, although it may become such if thereby prejudice is shown to have resulted to the party whose request in this regard has been denied. *Home Fire Ins. Co. v. Johnson*, 43 Neb. 71 (61 N. W. 84).

1849. (1900.) The failure to award nominal damages is not reversible error, where it does not affect a substantial right or entitle the plaintiff to costs. *Heater v. Pearce*, 59 Neb. 583 (81 N. W. 615).

1850. (1901.) An order confirming a sale will not be reversed for technical irregularities which could not have been prejudicial to substantial rights of any of the parties. *Gray v. Eurich*, 2 Unof. 194 (96 N. W. 343); (1901) *Gray v. Naiman*, 2 Unof. 196 (96 N. W. 343).

1851. (1902.) A judgment will not be reversed in order to permit recovery of nominal damages, unless recovery of such damages will establish or preserve some right or entitle the plaintiff to costs. *School District v. Burress*, 2 Unof. 554 (89 N. W. 609).

1852. (1904.) The sustaining of an objection to jurisdiction in the appellate court on appeal from a justice of the peace, on the ground that the appeal bond is defective, is harmless error, where the objection was pending for at least twelve days, and appellants made no offer or application to be allowed to furnish a sufficient bond. *State Savings & Loan Ass'n v. Johnson*, 70 Neb. 753 (98 N. W. 32).

1853. (1904.) Error will not lie from an order discharging an attachment when there is nothing in the record to show that any action was ever taken under the writ. *Sand Hills Commercial Co. v. Phillips Bros. & Rennau*, 5 Unof. 330 (98 N. W. 718).

1854. (1906.) Where the court, instead of taxing the fees, enters a judgment therfor in favor of the attorneys by name, it is a mere error of form and not of substance, and does not constitute reversible error. *Chambers v. Chambers*, 75 Neb. 850 (106 N. W. 993).

1855. (1906.) When the evidence is insufficient to suport an alleged counterclaim, the defendant cannot complain of errors in the giving or refusing of instructions having reference to it. *Cuatt v. Ross*, 76 Neb. 57 (106 N. W. 1044).

1856. (1907.) A complaint that the instructions covering a particular theory of one of the defendants are erroneous will not be considered where the record shows that the result of the trial would have been the same whatever the finding as to that particular theory. *Home Savings Bank v. Stewart*, 78 Neb. 624 (110 N. W. 947).

1857. (1907.) In an application for a vacation of certain judgments, under the provisions of section 602 of the code, several defenses were interposed; a demurrer to one of these defenses was overruled, but such ruling in nowise interfered with a full and complete hearing on the merits; the evidence adduced would have necessitated a denial of the application, had the demurrer been sustained; the court denied the application. *Held*, That the error, if any, in overruling the demurrer was error without prejudice. *Citizens Ins. Co. v. Herpolsheimer Implement Co.*, 78 Neb. 707 (111 N. W. 606).

1858. (1907.) The decree of the district court dismissing plaintiff's cause of action will be affirmed, where the record discloses that the only relief sought would have been against a nominal defendant who did not appear in the action and upon whom the record fails to show service of process. *Elmore v. McMillen*, 79 Neb. 621 (113 N. W. 165).

Errors not affecting result.

1859. (1887.) A new trial will not be granted where it appears as matter of law that upon the conceded facts the result must be the same. *Mann v. Welton*, 21 Neb. 541 (32 N. W. 599).

1860. (1888.) Where a petition for intervention states no fact entitling the proposed intervenor to become a party, failure

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of the court to rule upon such petition, although erroneous, will not justify reversal of judgment. *Welborn v. Eskey*, 25 Neb. 193 (40 N. W. 959).

1861. (1901.) A party who pleads an estoppel is not prejudiced by any ruling of the court in relation thereto if the facts sought to be suppressed are not asserted at the trial or permitted to influence in any way the decision assigned as error. *Plummer, Perry & Co. v. Rohman*, 62 Neb. 145 (87 N. W. 11).

1862. (1904.) A plaintiff in error is not entitled to have a judgment of the district court reversed because the rights of a part of the defendants are not adjudicated, when no right of recovery exists in his favor against any of them. *Emanuel v. Barnard*, 71 Neb. 756 (99 N. W. 666).

Errors in cases of decisions correct on merits.

1863. (1893.) Where counter affidavits are used, and the application for a continuance is denied, the judgment will not be reversed for that reason, where the showing of the party making the application, when considered alone, is insufficient to entitle him to a continuance. *Barton v. McKay*, 36 Neb. 632 (54 N. W. 968).

1864. (1893.) A judgment containing a finding that a temporary injunction was properly allowed will not be reversed where such finding does not prejudicially affect the rights of the party complaining, and the judgment is otherwise correct. *Westover v. Lewis*, 36 Neb. 692 (54 N. W. 961).

1865. (1895.) Where the evidence shows that plaintiff has no interest in the land, questions of law suggested by him on error from a judgment in favor of defendant will not be examined. *Wildman v. Shambaugh*, 43 Neb. 371 (61 N. W. 578).

1866. (1895.) The court will not review a judgment of the district court upon allegations of error where the successful party is clearly entitled to judgment on the pleadings and evidence. *Orgall v. Chicago, B. & Q. R. Co.*, 46 Neb. 4 (64 N. W. 450); (1897) *Manning v. Connell*, 52 Neb. 315 (72 N. W. 270); (1898) *United States School-Furniture Co. v. School District No. 87*, 56 Neb. 645 (77 N. W. 62); (1899) *First Nat. Bank of Crete v. Smith*, 57 Neb. 454 (77 N. W. 1033); (1899) *Vernon v. Union Life Ins. Co.* 58 Neb. 494 (78 N. W. 929); (1901) *Sloan v. Citizens' Nat. Bank of Des Moines*, 1 Unof. 295 (95 N. W. 480); (1902) *Albion Milling Co. v. First Nat. Bank of Weeping Water*, 64 Neb. 116 (89 N. W. 638); (1903) *Carlson v. Jordan*, 4 Unof. 359 (93 N. W. 1130); (1904) *Hawke v. Kerr*, 72 Neb. 848 (101 N. W. 1023); (1905) *First Nat. Bank of Omaha v. Dye*, 73 Neb. 300 (102 N. W. 614); (1905) *In re Estate of Nelson*, 75 Neb. 298 (106 N. W. 326).

1867. (1898.) Where it appears from the record that a case was dismissed for want of jurisdiction, that question will be examined, though the record would on the merits sustain a general finding for defendant. *Hesser v. Johnson*, 57 Neb. 155 (77 N. W. 406).

1868. (1899.) Where a petition fails to state a cause of action and a trial results in a verdict and judgment in favor of the defendant, no error committed by the court in submitting the issues to the jury will warrant a reversal. *Chapel v. Franklin County*, 58 Neb. 544 (78 N. W. 1062).

1869. (1902.) When a writ of error is taken from the order of a justice of the peace requiring a garnishee after judgment to pay money into court, and the district court reverses the judgment of the justice because the answer of the garnishee would not support the same, and thereupon enters an order discharging the garnishee, such order will not be reversed upon petition in error in the supreme court on the ground that the district court should have held the case for trial, since no other judgment could be rendered by the district court against the garnishee, and if it was error to enter such judgment without setting the case down for trial it was error without prejudice. *Rider v. Lawritson*, 65 Neb. 1 (90 N. W. 951).

1870. (1905.) When the answer fails to state a defense, but admits the plaintiff's cause of action, and the verdict and judgment are supported by the petition, errors occurring at the trial and in the giving and refusal of instructions are without prejudice. *Miller v. Loverene & Browne Co.*, 74 Neb. 557 (105 N. W. 84).

1871. (1906.) Where an examination of the pleadings filed and the evidence offered in support thereof shows that the party complaining procured a judgment more favorable to him than the law and the evidence warranted, alleged errors of the trial court in receiving testimony and in giving and refusing instructions will not be examied. *Taylor v. Hunter*, 76 Neb. 304 (107 N. W. 571).

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1872. (1906.) When the verdict returned by the jury is the only one justified by the evidence, errors in the giving and refusing of instructions are not prejudicial. *Ramold v. Clayton*, 77 Neb. 178 (108 N. W. 980).

1873. (1906.) Where the verdict returned is the only one which could be sustained under the evidence, errors assigned in giving or refusing instructions will not be discussed. *Morrow v. Laverty*, 77 Neb. 245 (109 N. W. 150).

1873*a*. (1907.) Where a general demurrer is sustained to an answer and judgment by default entered on the allegations of the petition for want of further plea by defendant, error in sustaining the demurrer should be held to be without prejudice, if, on the pleadings as they stood with the answer on file, plaintiff was entitled to judgment for a sum not less than that for which judgment was taken. *United States Supply Co. v. Vlasnik*, 80 Neb. 53 (113 N. W. 813).

1873*b*. (1908.) The verdict of the jury should not be set aside as being contrary to the instructions of the court, where the evidence does not establish the fact submitted so clearly that it should have been determined by the court as a matter of law. *Albert v. Young*, 80 Neb. 677 (114 N. W. 936).

Presumption as to effect of error.

1874. (1894.) When a party litigant has, by an evasion of the adverse ruling of the court, intentionally and wilfully introduced evidence of facts improper for consideration by the jury, it must be presumed that such improper evidence has had a prejudicial effect, and the verdict should accordingly be set aside. *Bank of Commerce v. Goos*, 39 Neb. 437 (58 N. W. 84; 23 L. R. A. 190).

Burden to show prejudice from error.

1875. (1893.) Where an amendment has been permitted by which the given name of the plaintiff is changed, no prejudice will be presumed from the mere fact of the change. Resulting prejudice, if any there was, must be made affirmatively to appear. *Manning v. Viers*, 38 Neb. 32 (56 N. W. 719).

1876. (1899.) To warrant the reversal of a judgment it must affirmatively appear from the record that the ruling with respect to which error is alleged was prejudicial to the rights of the party complaining. *Dobry v. Western Mfg. Co.*, 58 Neb. 667 (79 N. W. 559).

Error favorable to party complaining.

1877. (1884.) Probable errors, but which are altogether favorable to the plaintiff in error, will not be considered. *Vindquest v. Perky*, 16 Neb. 284 (20 N. W. 301); (1886) *Stough v. Stefani*, 19 Neb. 468 (27 N. W. 445).

1878. (1884.) A discrepancy between the amount sworn to in the affidavit, and the amount of plaintiff's claim named in the order of attachment which is favorable to the defendant cannot be assigned for error by him. *Tessier v. Crowley*, 16 Neb. 369 (20 N. W. 264).

1879. (1889.) Where a district court remanded a cause tried in the county court and taken on error to the district court, to the county court to certify in the judgment that a certain party was surety, *Held*, That while the district court had authority to modify the judgment in that regard, the surety in whose favor the judgment was modified could not complain of the procedure. *Kiewit v. Carter*, 25 Neb. 460 (41 N. W. 286).

1880. (1889.) An instruction in a party's favor not ground for reversing judgment against him. *Chicago, K. & N. Ry. Co. v. Wiebe*, 25 Neb. 542 (41 N. W. 297); (1897) *Hanover Fire Ins. Co. v. Stoddard*, 52 Neb. 745 (73 N. W. 291); (1895) *McClary v. Stull*, 44 Neb. 175 (62 N. W. 501).

1881. (1889.) Defendant cannot object that the judgment in favor of plaintiff is not as favorable as it should be. *Noolkamper v. Wyatt*, 27 Neb. 565 (43 N. W. 357).

1882. (1891.) Where a verdict is returned for the plaintiff in an action upon contract, the defendant cannot complain that the verdict is not justified by the evidence because, under the contract, plaintiff should have recovered a larger sum, or nothing. *Ackermann v. Bryan*, 33 Neb. 515 (50 N. W. 435).

1883. (1893.) A judgment will not be disturbed because of an instruction submitting to the jury an issue not within the pleadings, where the only effect of such an instruction must have been in favor of the party complaining. *Fitzgerald v. Meyer*, 37 Neb. 50 (55 N. W. 296).

1884. (1893.) Conflicting charges, one of which misstates the law to the prejudice of the successful party, cannot be availed of as error by the defeated one. *Farwell v. Cramer*, 38 Neb. 61 (56 N. W. 716).

1884*a*. (1895.) The charge of the court

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should be confined to questions in issue, although a judgment will not be reversed on account of an instruction directed to a matter foreign to the issues which merely imposes upon the successful party an additional and unnecessary burden, and in no wise prejudicial to the party complaining. *McClary v. Stull*, 44 Neb. 175 (62 N. W. 501).

1885. (1896.) A defendant against whom judgment has been rendered cannot complain because the court instructed the jury to deduct from the damages recoverable by plaintiff the amount of a set-off not pleaded by defendant. *Butler v. Greene*, 49 Neb. 280 (68 N. W. 496).

1886. (1899.) Where the evidence would have sustained a verdict for the entire amount claimed by plaintiff, the allowance of a counter-claim, if error, *held* not an error of which defendant could complain. *Blue Valley Lumber Co. v. Neuman*, 58 Neb. 80 (78 N. W. 374).

1887. (1900.) Where an instruction on contributory negligence is given, which requires a greater degree of care and caution to be exercised than is necessary under the true rule, the giving thereof is not prejudicial to the party alleging contributory negligence. *Missouri P. R. Co. v. Fox*, 60 Neb. 531 (83 N. W. 744).

1888. (1903.) An instruction whose effect, as claimed by plaintiff, was to withdraw one of two defenses from the jury, could not prejudice the plaintiff nor, upon a general verdict for defendant on both defenses, does it enable the reviewing court to say the verdict is contrary to instructions. *Williams v. Shepherdson*, 4 Unof. 608 (95 N. W. 827).

1889. (1905.) A party cannot complain of an instruction that is more favorable to him than he deserves, although it is technically erroneous under the issues. *Darr v. Donovan*, 73 Neb. 424 (102 N. W. 1012).

1890. (1905.) Where in an action upon a promissory note the defendant denies liability and also sets up a counter-claim the fact that the jury finds for him on his defense to the note, but fails to allow his counter-claim, affords no reason for setting aside the verdict at the plaintiff's request, since as to him this is error without prejudice. *Harwood v. Breese*, 73 Neb. 521 (103 N. W. 55).

Pleadings.

1891. (1897.) Error in requiring plaintiff to elect between two counts is harmless, where the evidence discloses that the count abandoned could not lead to a recovery. *Boyer v. Richardson*, 52 Neb. 156 (71 N. W. 981).

1892. (1899.) One cannot predicate error on the refusal to require the pleading of the opposite party to be made more definite and certain where prejudice has not resulted from the ruling. *Chicago, B. & Q. R Co. v. Oyster*, 58 Neb. 1 (78 N. W. 359).

1893. (1899.) It is not prejudicial error to deny plaintiff permission to file a supplemental petition, where he subsequently obtains the benefit of all matters therein pleaded. *Bourgeois v. Gapen*, 58 Neb. 364 (78 N. W. 639).

1894. (1901.) 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 cannot predicate error because of the inconsistent pleading. *Green v. Tierney*, 62 Neb. 561 (87 N. W. 331).

1895. (1903.) Where a motion to strike out matter introduced as an offset on the part of the plaintiff has been overruled by the court and exceptions taken to such action, the subsequent sustaining of a demurrer to the same matter on the ground that it does not constitute a defense, is not prejudicial error. *White v. Whitney*, 68 Neb. 739 (94 N. W. 1012).

1896. (1903.) Where the ruling of the trial court upon a motion to require a more specific statement in a pleading does not appear to have resulted in prejudice to the complaining party, such ruling will afford no ground of complaint. *Childs v. Ferguson*, 4 Unof. 65 (93 N. W. 409).

1897. (1904.) An erroneous ruling overruling a demurrer is error without prejudice, where the pleading assailed is afterwards amended, and the cause submitted and determined on the amended pleading. *Brown v. Brown*, 71 Neb. 200 (98 N. W. 718; 115 Am. St. Rep. 568).

1898. (1906.) A plea in abatement was stricken on plaintiff's motion. The defendants then incorporated the same matter, with a plea to the merits, in the answer and fully litigated such matter. *Held*, That they were not prejudiced by the ruling on

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the motion to strike. *Simmons v. Kelsey*, 76 Neb. 124 (107 N. W. 122).

——Amendments.

1899. (1900.) It is not reversible error to refuse a request to amend a pleading, when the undisputed evidence would not sustain a verdict upon the amended pleading. *Schlageck v. Widhalm*, 59 Neb. 541 (81 N. W. 448).

——Striking out.

1900. (1880.) Although error may be commited by the trial court in refusing to strike out of a pleading irrelevant or redundant matter, yet the judgment will not be reversed where it is apparent, upon a general review of the whole case, that no material injury has resulted from such error. *Harral v. Gray*, 10 Neb. 186 (4 N. W. 1040); (1895) *Omaha Fire Ins. Co. v. Berg*, 44 Neb. 522 (62 N. W. 862); (1898) *Lincoln Mortgage & Trust Co. v. Hutchins*, 55 Neb. 158 (75 N. W. 538).

1901. (1897.) On appeal from an order striking an amended petition from the files, on the ground that it is the same as the original, the court will first examine the amended petition to ascertain if it was substantially the same as the original. If not, it was error to strike it from the files. It will next ascertain whether the amended petition stated a cause of action. If so, the error was prejudicial to the plaintiff. *Wheeler v. Barker*, 51 Neb. 846 (71 N. W. 750).

1902. (1898.) An action was brought on a foreign judgment. The defendant pleaded matter by way of set-off or counter-claim, which was on motion stricken from the answer, and the court refused leave to file an amended answer containing the same matter. The transcript of the proceedings leading to the judgment sued on was on the trial introduced in evidence and disclosed an adjudication adverse to the defendant of all the matters so stricken out. *Held*, That the rulings on the pleadings whereby the defendant was prevented from alleging such matters, if erroneous, were not prejudicial to the defendant. *Lonergan v. Lonergan*, 55 Neb. 641 (76 N. W. 16).

——Variance.

1903. (1897.) Immaterial variance between pleading and proof is not ground for reversal. *Lubker v. Grand Detour Plow Co.*, 53 Neb. 111 (73 N. W. 457); (1899) *Vix v. Whyman*, 58 Neb. 190 (78 N. W. 497); (1899) *Knight v. Finney*, 59 Neb. 274 (80 N. W. 912).

1904. (1903.) A variance between *allegata et probata* will not be held to be prejudicial, requiring a reversal of the judgment, where it appears that the party complaining was not actually misled or surprised to his disadvantage. *Ittner Brick Co. v. Killian*, 67 Neb. 589 (93 N. W. 951).

——Error cured by instructions.

1905. (1906.) Assignments based on rulings upon objections to an amendment to the reply and motions directed against the amended reply examined, and *held* that the errors, if any, in such rulings were cured by the charge to the jury. *Fike v. Ott*, 76 Neb. 439 (107 N. W. 774).

Ruling on motion for security for costs.

1906. (1895.) Prejudice does not result from an order overruling a motion to require plaintiff to give additional security, where a valid judgment including costs goes against defendant. *Watson v. Roode*, 43 Neb. 348 (61 N. W. 625).

1907. (1897.) Refusal to require a nonresident plaintiff to give security for costs is not reversible error where, on final hearing, the costs are properly taxed to defendant. *Hard v. Hard*, 51 Neb. 412 (70 N. W. 1122).

1908. (1898.) After judgment had been entered for defendant an order requiring plaintiff, on a motion filed before trial, to give security for costs, *held* not prejudicial error where plaintiff did not comply with the order. *Elliott v. Carter White-Lead Co.*, 53 Neb. 458 (73 N. W. 948).

Ruling on application for continuance.

1909. (1891.) Where the trial does not take place until the time specified in a motion to continue until that time, the error, if any in overruling the motion is cured. *Baldwin v. Rhea*, 33 Neb. 319 (50 N. W. 1).

1910. (1896.) Prejudicial error will not result from denying a continuance where the application was based on the absence of a witness who appeared and testified. *Imhoff v. Richards*, 48 Neb. 590 (67 N. W. 483).

1911. (1897.) The overruling of an application for continuance of a cause, based on the absence of a witness, is without prejudice when the person whose presence was desired was in court during the trial, placed on the witness stand, and was examined by the parties. *Hartford Fire Ins. Co. v. Corey*, 53 Neb. 209 (73 N. W. 674).

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Selection and impaneling of jury.

1912. (1884.) If a challenge to an incompetent juror is overruled, and he is afterwards peremptorily challenged and excluded, and the record fails to show that the party exhausted his peremptory challenges, the error in overruling the challenge for cause will be without prejudice. *Burnett v. Burlington & M. R. R. Co.*, 16 Neb. 332 (20 N. W. 280); (1891) *Nowotony v. Blair*, 32 Neb. 175 (49 N. W. 357).

1913. (1887.) Where objections are made to certain jurors, and the record fails to show that the party exhausted his peremptory challenges, the objections will be unavailing in the supreme court. *Curran v. Percival*, 21 Neb. 434 (32 N. W. 213); (1894) *Jenkins v. Mitchell*, 40 Neb. 664 (59 N. W. 90; (1895) *Brumback v. German Nat. Bank of Beatrice*, 46 Neb. 540 (65 N. W. 198); (1904) *Chicago, B. & Q. R. R. Co. v. Krayenbuhl*, 70 Neb. 766 (98 N. W. 44).

1914. (1897.) Improper excusing of a juror for cause will not justify a reversal of a judgment, where the party complaining did not exhaust his peremptory challenges. *Smith v. Meyers*, 52 Neb. 70 (71 N. W. 1006).

1915. (1904.) The mere fact that a talesman who served as a juror was summoned by a bailiff who was afterwards called and testified as a witness for the successful party is not assignable for error. *Felsch v. Babb*, 72 Neb. 736 (101 N. W. 1011).

Admission of evidence.

1916. (1879.) Where the strict rules of cross examination of a witness are violated, but it is evident that no injury resulted therefrom, it is a non-prejudicial error, and the judgment will not be disturbed. *Cropsey v. Averill*, 8 Neb. 151.

1917. (1879.) The admission of immaterial evidence against objection, where the court can clearly see that it could not have prejudiced the party, is not a ground for granting a new trial. *Eiseley v. Milchow*, 9 Neb. 174 (2 N. W. 372).

1918. (1888.) Error cannot be predicated upon the ruling of a trial court admitting or excluding immaterial testimony, when it is apparent that no prejudice could result to either party, whatever the ruling might be. *Brooks v. Dutcher*, 22 Neb. 644 (36 N. W. 128); (1891) *Bartlett v. Cheesebrough*, 32 Neb. 339 (49 N. W. 360); (1891) *Daly v. Melendy*, 32 Neb. 852 (49 N. W. 926); (1895) *Peoria Mfg. Co. v. Huff*, 45 Neb. 7 (63 N. W. 121); (1896) *Graham v. Frazier*, 49 Neb. 90 (68 N. W. 367); (1897) *Hanover Fire In Co. v. Stoddard*, 52 Neb. 745 (73 N. W. 291 (1898) *Atkins v. Seeley*, 54 Neb. 688 (74 W. 1100); (1898) *Burnet v. Cavanagh*, Neb. 190 (76 N. W. 578); (1898) *Omaha N Bank v. Robinson*, 56 Neb. 590 (77 N. 73); (1898) *McClellan v. Hein*, 56 Neb. 6 (77 N. W. 120); (1899) *Albright v. Pete* 58 Neb. 534 (78 N. W. 1063); (1899) *Housen v. Broehl*, 59 Neb. 48 (80 N. 264); (1900) *Nebraska Telephone Co. Jones*, 60 Neb. 396 (83 N. W. 197); (190 *Missouri P. R. R. Co. v. Fox*, 60 Neb. 531 N. W. 744); (1900) *Wittenberg v. Mol neaux*, 60 Neb. 583 (83 N. W. 842); (190 *McCormick Harvesting Machine Co. v. Joh son*, 1 Unof. 310 (95 N. W. 612); (190 *Lindell v. Deere, Wells & Co.*, 66 Neb. (92 N. W. 164); (1903) *Draper v. Tucke* 69 Neb. 434 (95 N. W. 1026).

1919. (1893.) A judgment will not set aside because an expert witness w permitted to answer a hypothetical que tion assuming a fact unsupported by t evidence, where such fact was the on hypothesis of the question, not combin with others based upon evidence, and t answer could not mislead the jury. *Hew v. Eisenbart*, 36 Neb. 794 (55 N. W. 252).

1920. (1894.) An answer of a witne which should have been stricken out as n responsive is not prejudicial where it is n calculated to mislead the jury and is n harmful to the rights of the party w moved to strike it out. *Peaks v. Lord*, Neb. 15 (60 N. W. 349).

1921. (1897.) A judgment should not reversed for the erroneous admission evidence upon a proposition not controvert in the supreme court. *Sloan v. Wherry*, Neb. 703 (71 N. W. 744).

1922. (1900.) A reversal can not based upon the permitting of a witness answer an improper question where t answer was not unfavorable to the co plaining party. *Peterson v. Martin*, 60 N 577 (83 N. W. 831).

1923. (1901.) When incompetent e dence is admitted to prove a fact not oth wise conclusively established, and it do not affirmatively appear from the reco that the incompetent evidence did not affe unfavorably to the objecting party, the v dict returned by the jury, the error in mitting such evidence will be deemed pre dicial and the judgment reversed. *Publishing Co. v. World Publishing Co.*, Neb. 732 (87 N. W. 945).

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——Evidence not affecting result.

1924. (1894.) The court will not reverse a judgment for personal injuries because of improper hypothetical questions put to medical experts for the sole purpose of proving the permanency of the injuries where the verdict is so small as to render it evident that the jury had not found the injuries to be permanent. *Lincoln Pressed Brick Co. v. Buuckner*, 39 Neb 83 (57 N. W. 749).

1925. (1895.) The erroneous admission of immaterial testimony will not be ground for reversal where it is clear from the whole record that the verdict must have been the same had the objectionable evidence been excluded. *Terry v. Beatrice Starch Co.*, 43 Neb. 866 (62 N. W. 255); (1896) *Farmers Loan & Trust Co. v. Memminger*, 48 Neb. 17 (66 N. W. 1014); (1900) *Bennett v. McDonald*, 60 Neb. 47 (82 N. W. 110); (1900) *Walsh v. Peterson*, 59 Neb. 645 (81 N. W. 853).

1926. (1895.) The admission of evidence which, though not competent, is immaterial affords no grounds for the reversal of a decree in equity. *Blazer v. Rogner*, 45 Neb. 588 (63 N. W. 846).

1927. (1901.) Where a verdict is directed in favor of one of the parties to an action and no issue is submitted to the jury, the admission of evidence in the progress of the trial will not be reviewed on appeal. *Simons v. Fagan*, 62 Neb. 287 (87 N. W. 21).

1927*a*. (1907.) Incompetent testimony concerning a matter about which there is no dispute is not ground for reversal. *Jacobsen v. City of Omaha*, 80 Neb. 56 (113 N. W. 792).

——In cases tried without jury.

1928. (1882.) When a trial is to the court without a jury, alleged error for wrongful admission of evidence cannot be considered in error proceeding. *Anderson v. Buchanan*, 20 Neb. 272 (29 N. W. 935); (1888) *Willard v. Foster*, 24 Neb. 205 (38 N. W. 786); (1888) *Richardson v. Doty*, 25 Neb. 424 (41 N. W. 282); (1890) *Ward v. Parlin*, 30 Neb. 376 (46 N. W. 529); (1892) *Stabler v. Gund*, 35 Neb. 648 (53 N. W. 570); (1893) *Liverpool & London & Globe Ins. Co. v. Buckstaff*, 38 Neb. 146 (56 N. W. 695; 41 Am. St. Rep. 724); (1894) *Whipple v. Fowler*, 41 Neb. 675 (60 N. W. 15); (1895) *Chadron Banking Co. v. Mahoney*, 43 Neb. 214 (61 N. W. 594); (1895) *Sharmer v. McIntosh*, 43 Neb. 409 (61 N. W. 727); (1895) *Pearce v. McKay*, 45 Neb. 296 (63 N. W. 851); (1895) *Tolerton v. McClure*, 45 Neb. 368 (63 N. W. 791); (1895) *Scroggin v. Johnson*, 45 Neb. 714 (64 N. W. 236); (1896) *Stover v. Hough*, 47 Neb. 789 (66 N. W. 825); (1896) *King v. Murphy*, 49 Neb. 670 (68 N. W. 1029); (1897) *Phœnix Ins. Co. v. Walter*, 51 Neb. 182 (70 N. W. 938); (1898) *Bell v. Walker*, 54 Neb. 222 (74 N. W. 617); (1898) *Alling v. Nelson*, 55 Neb. 161 (75 N. W. 581); (1898) *Lunney v. Healey*, 56 Neb. 313 (76 N. W. 558; 44 L. R. A. 593); (1899) *National Masonic Accident Ass'n v. Burr*, 57 Neb. 437 (77 N. W. 1098); (1899) *Schmelling v. State*, 57 Neb. 562 (78 N. W. 279); (1900) *Omaha Nat. Bank v. Kiper*, 60 Neb. 33 (82 N. W. 102); (1901) *Sheibley v. Dixson County*, 61 Neb. 409 (85 N. W. 399); (1901) *Metcalf v. Bockoven*, 1 Unof. 822 (96 N. W. 406); (1902) *Smith Premier Typewriter Co. v. Mayhew*, 65 Neb. 65 (90 N. W. 939).

1929. (1885.) The question of the admissibility of evidence on the ground of relevancy cannot be raised in a cause tried to a court without a jury. *Enyeart v. Davis*, 17 Neb. 228 (22 N. W. 449).

1930. (1887.) In an action for divorce, tried to the district court without a jury, the fact that incompetent evidence was admitted over the objection of the party complaining, will not of itself require a reversal of the decree, if upon the whole case there was sufficient competent evidence admitted to sustain it. *McConahey v. McConahey*, 21 Neb. 463 (32 N. W. 300).

1931. (1889.) When a cause is tried to the court without the intervention of a jury, the judgment will not be reversed on the ground of the admission of immaterial or incompetent evidence, if sufficient material and competent evidence was introduced and admitted to sustain the finding of the court. *Richardson v. Doty*, 25 Neb. 420 (41 N. W. 282); (1893) *Dewey v. Allgire*, 37 Neb. 6 (55 N. W. 276; 40 Am. St. Rep. 468); (1895) *Lihs v. Lihs*, 44 Neb. 143 (62 N. W. 457); (1895) *Monroe v. Reid*, 46 Neb. 316 (64 N. W. 983); (1898) *Wager v. Wagoner*, 53 Neb. 511 (73 N. W. 937); (1898) *Stenger Benevolent Ass'n v. Stenger*, 54 Neb. 427 (74 N. W. 846); (1898) *Harvey v. First Nat. Bank of Omaha*, 56 Neb. 320 (76 N. W. 870); (1899) *New Hampshire Trust Co. v. Korsmeyer Plumbing & Heating Co.*, 57 Neb. 784 (78 N. W. 303); (1900) *Bolin v. Fines*, 60 Neb. 443 (83 N. W. 740); (1900) *Duffy v. State, ex rel. Edson*, 60 Neb. 812 (84 N.

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W. 264); (1901) *Armstrong v. Mayer*, 1 Unof. 119 (95 N. W. 483); (1902) *Bowman v. Wright*, 65 Neb. 661 (92 N. W. 580); (1903) *O'Brien v. Kluever*, 4 Unof. 571 (95 N. W. 595); (1907) *Palmer v. McFarlane*, 78 Neb. 788 (111 N. W. 794).

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1932. (1890.) Where a jury is waived and the cause tried to the court, the objections to evidence will not be ground for the reversal of the judgment, provided the judgment is based on lawful and proper evidence. *Bilby v. Townsend*, 29 Neb. 220 (45 N. W. 619).

1933. (1895.) Where incompetent testimony is given on the trial of an equity case the supreme court, in reviewing such case on appeal, will presume that such testimony was not considered by the district court. *Buckingham v. Roar*, 45 Neb. 244 (63 N. W. 398); (1897) *McKee v. Bainter*, 52 Neb. 604 (72 N. W. 1044); (1897) *Smith v. Perry*, 52 Neb. 738 (73 N. W. 282); (1898) *Portsmouth Savings Bank v. Riley*, 54 Neb. 531 (74 N. W. 838); (1898) *Knight v. Darby*, 55 Neb. 16 (75 N. W. 48); (1898) *Thomas v. Nebraska Moline Plow Co.*, 56 Neb. 383 (76 N. W. 876); (1899) *Schmelling v. State*, 57 Neb. 562 (78 N. W. 279); (1899) *Chicago, B. & Q. R. Co. v. First Nat. Bank of Omaha*, 58 Neb. 548 (78 N. W. 1064); (1902) *Triska v. Miller*, 3 Unof. 463 (91 N. W. 870); (1903) *Dewey v. Allgire*, 37 Neb. 6 (55 N. W. 276); *Arabian Horse Co. v. Bivens*, 4 Unof. 823 (96 N. W. 621); (1906) *Citizens Ins. Co. v. Herpolsheimer*, 77 Neb. 232 (109 N. W. 160); (1907) *Palmer v. McFarlane*, 78 Neb. 788 (111 N. W. 794).

1934. (1900.) On the hearing of a motion to dissolve an attachment, error cannot be predicated upon the admission of improper evidence. It is presumed that the trial judge, in arriving at a conclusion, considered only proper and competent evidence, and disregarded that which was improper. *Merrifield v. Farmers Nat. Bank*, 59 Neb. 602 (81 N. W. 611).

1935. (1901.) It is a settled rule of the supreme court that a judgment will not be reversed simply because the trial court, sitting without a jury, erred in admitting incompetent or immaterial evidence; but this rule has no application in a case in which it appears that such evidence is the sole basis of the findings and judgment assailed. *Merchants Nat. Bank v. McDonald*, 63 Neb. 363 (88 N. W. 492; 89 N. W. 770).

1936. (1903.) When trial has been by the court without a jury reversible er cannot be predicated on the admission evidence, in the absence of an adequ showing by bill of exceptions that impro evidence was actually considered by court as the basis of its findings, nor u an exercise of the court's discretion allowing proper evidence in the case to brought out on the redirect examination a witness. *Byrnes v. Eley*, 70 Neb. 283 N. W. 298).

1936*a*. (1908.) In a case tried to a co without a jury, the admission of impro evidence is not in itself ground for revers and, where the supreme court finds it necessary to consider the evidence to wh objection is made, it will not review question raised by the objection to s evidence. *Blondel v. Bolander*, 80 Neb. (114 N. W. 574).

——— Defects supplied or objection moved subsequently.

1937. (1893.) Error committed in admission in evidence of a written ins ment, without proof of its execution, cured where such proof is afterwards m before the party offering the instrument rested his case. *Jones v. Loree* 37 Neb. (56 N. W. 390).

1938. (1896.) Where an instrument admitted without sufficient proof of its ecution, subsequent proof may cure error. *Houck v. Linn*, 48 Neb. 227 (66 W. 1103).

1939. (1896.) Error in receiving the timony of a witness who has not been sho to possess the requisite knowledge of subject involved, is cured when by me of the cross-examination a sufficient foun tion is laid for such testimony. *Chic B. & Q. R. Co. v. Shafer*, 49 Neb. 25 (68 W. 342).

——— Facts otherwise established.

1940. (1880.) Where the record o mortgage on land in this state executed another state without the necessary cer cate is erroneously admitted in evidence actual notice of the mortgage by the p chaser be shown, the judgment will not reversed. *Irwin v. Welch*, 10 Neb. 479 N. W. 753).

1941. (1881.) Where a letter-press c of a writing is erroneously admitted in dence, if without it the undisputed evide is ample to support the verdict, it is er without prejudice, and not a suffici ground for the reversal of a judgment.

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laney v. Errickson, 11 Neb. 533 (10 N. W. 451).

1942. (1882.) Where testimony proving the facts complained of was introduced without objection, error cannot be predicated upon objections to the same testimony afterwards introduced. *Republican V. R. Co. v. Hayes*, 13 Neb. 489 (14 N. W. 521).

1943. (1895.) Prejudicial error does not result from introducing in evidence a petition verified by oath of plaintiff where he testified to the same statements during the trial and was cross-examined. *Burgess v. Burgess*, 44 Neb. 16 (62 N. W. 242).

1944. (1896.) Error cannot be predicated on the admission of evidence, where ample evidence of the same nature was admitted without objection. *Hickman v. Layne*, 47 Neb. 177 (66 N. W. 298); (1897) *Learn v. Upstill*, 52 Neb. 271 (72 N. W. 213); (1897) *Hanover Fire Ins. Co. v. Stoddard*, 52 Neb. 745 (73 N. W. 291); (1898) *Barr v. Post*, 56 Neb. 698 (77 N. W. 123); (1900) *Scott v. Flowers*, 60 Neb. 675 (84 N. W. 81.) [Overruled on rehearing. 61 Neb. 620]; (1900) *Bee Publishing Co. v. World Publishing Co*, 59 Neb. 713 (82 N. W. 28); (1902) *Jones v. Wattles*, 66 Neb. 533 (92 N. W. 765).

1945. (1897.) Error, if any, in admitting writings in evidence without a proper foundation, *held* harmless, where their contents were properly proved by parol testimony. *Meyer v. Shamp*, 51 Neb. 424 (71 N. W. 57).

1946. (1899.) In the trial of a case without a jury the admission of incompetent evidence is not ground for reversal of a judgment supported by sufficient competent evidence. *Gage County v. King Bridge* Co., 58 Neb. 827 (80 N. W. 56); (1905) *Sweet v. State*, 75 Neb. 263 (106 N. W. 31).

1947. (1901.) Where a contract is conclusively established by competent evidence, which is undisputed, the admission of incompetent evidence to establish such contract is error without prejudice. *Standard Oil Co. v. Goodman Drug Co.*, 1 Unof. 443 (95 N. W. 667).

1948. (1903.) Where the facts upon which the opinion of an expert witness is based, are stated, and the conclusion is one which must necessarily be drawn from such facts, error in permitting an opinion upon theultimate fact to be determined by the jury to be given in evidence is without prejudice. *Chicago, R. I. & P. R. Co. v. Holmes*, 68 Neb. 826 (94 N. W. 1007).

1949. (1904.) In determining whether the evidence before the court below was sufficient to support the judgment, the supreme court will not regard errors of the trial court in admitting incompetent evidence if it appear from the whole record that, upon the evidence conceded to be competent, no other conclusion could be reached than the one reached by the trial court. *Dennison v. Christian*, 72 Neb. 703 (101 N. W. 1045; 117 Am. St. Rep. 817).

1950. (1906.) The reception of incompetent evidence tending to establish a certain fact is not prejudicial error when the same fact is conclusively established by competent evidence. *Fike v. Ott*, 76 Neb. 439 (107 N. W. 774).

1951. (1906.) Where both competent and incompetent evidence is received as to the value of property, the latter placing the valuation no higher than the former, and neither is contradicted, and the value as found by the jury is less than that warranted by the competent testimony, the admission of the incompetent evidence is harmless error. *Pullman Palace Car Co. v. Woods*, 76 Neb. 694 (107 N. W. 858).

1951*a*. (1907.) Where, after the introduction in evidence of an abstract of title under section 66, ch. 73, Comp. St. 1905, the original records referred to in such abstract are received and show the same facts, no error in the introduction of the abstract can be assigned. *Munger v. Yeiser*, 80 Neb. 285 (114 N. W. 166).

——— **Facts admitted or assumed.**

1952. (1892.) The admission of testimony to prove a fact admitted by the pleadings is error without prejudice, for which a judgment will not be reversed. *Consaul v. Sheldon*, 35 Neb. 247 (52 N. W. 1104); (1895) *Chadron Banking Co. v. Mahoney*, 43 Neb. 214 (61 N. W. 594); (1900) *Wittenberg v. Mollyneaux*, 60 Neb. 583 (83 N. W. 842).

1953. (1896.) In the trial of an action for personal injuries a hypothetical question containing inquiries relating to facts expressly assumed was held not prejudicial to defendant. *Chicago, R. I. & P. R. Co. v. Archer*, 46 Neb. 907 (65 N. W. 1043).

1954. (1898.) In a suit on the official bond of a coroner the introduction in evidence of a copy of such bond is not preju-

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dicial error, where the execution, delivery, and approval of said bond are admitted by the answer. *Maul v. Drexel*, 55 Neb. 446 (76 N. W. 163).

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——— Error cured by withdrawal, striking out or instructions to jury.

1955. (1894.) Admission of improper evidence is cured by an instruction withdrawing it from the jury. *American B. & L. Ass'n v. Mordock*, 39 Neb. 413 (58 N. W. 107); (1894) *Nelson v. Jenkins*, 42 Neb. 133 (60 N. W. 311); (1899) *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239 (78 N. W. 521); (1900) *Missouri P. R. Co. v. Fox*, 60 Neb. 531 (83 N. W. 744); (1900) *Scott v. Flowers*, 60 Neb. 675 (84 N. W. 81).

1956. (1898.) Error cannot be predicated upon admission of evidence in support of an issue withdrawn from the jury by an instruction. *American Fire Ins. Co. v. Landfare*, 56 Neb. 482 (76 N. W. 1068); (1901) *Faulkner v. Gilbert*, 62 Neb. 126 (86 N. W. 1074).

1957. (1901.) Where testimony as to immaterial matters is closely connected with, and not easily separated from, that of the same witness going to material and important issues, any error in admitting such testimony is cured by an instruction which clearly and explicitly directs the jury to ignore it and properly defines the issue to be tried. *Schrandt v. Young*, 62 Neb. 254 (86 N. W. 1085).

1958. (1905.) An error of the trial court in the admission of evidence, which is insufficient to support an allegation of the petition, may ordinarily be cured by striking the testimony from the record and especially withdrawing it from the consideration of the jury by an instruction. *McKibben v. Day*, 74 Neb. 424 (104 N. W. 752).

Exclusion of evidence.

1959. (1899.) The exclusion of evidence, if not prejudicial to the complaining party, furnishes no ground for the reversal of a judgment. *Spirk v. Chicago, B. & Q. R. Co.*, 57 Neb. 565 (78 N. W. 272).

——— Ineffective evidence.

1960. (1884.) In an equity case, brought to the supreme court on error, where there were two defenses sought to be set up in the answer, one of them so badly pleaded, that no finding, or judgment thereon, for the defendant could be sustained, but the other defense being sufficiently set up in the answer and sustained by the evidence, and there being a general finding and judgment for defendants, *held*, that the judgment would not be reversed for the erroneous exclusion of testimony offered by the plaintiff upon and applicable only to the defense so, badly and insufficiently, set up in the answer, although such testimony ought to have been admitted. *Union Nat. Bank v. Harrison*, 16 Neb. 635 (21 N. W. 446).

1961. (1892.) No defense having been shown against the account, error of the court in restricting the cross-examination of certain witnesses as to the consideration for the assignment *held* not prejudicial. *Barnett v. Ellis*, 34 Neb. 539 (52 N. W. 368).

1962. (1894.) No question for review arises upon a ruling sustaining an objection to an answer immaterial to the issues on trial. *Dunphy v. Bartenbach*, 40 Neb. 143 (58 N. W. 856); (1901) *Brown v. Silver*, 2 Unof. 164 (96 N. W. 281).

1963. (1897.) It is not reversible error for a court to reject an offer of competent and relevant evidence if the evidence rejected, when considered with all other evidence bearing on the issue to which it was directed, would not support the conclusion sought to be established by the rejected evidence. *Whitney v. Gretna State Bank*, 50 Neb. 438 (69 N. W. 933).

1964. (1898.) The exclusion of testimony which does not tend to establish either a cause of action or defense is not ground for reversal. *Blodgett v. McMurtry*, 54 Neb. 69 (74 N. W. 392).

1965. (1902.) Error in holding witness incompetent and refusing all her testimony is immaterial, if the testimony offered, together with the proofs received, shows no right of action. *Thomas v. Thomas*, 64 Neb. 581 (90 N. W. 630).

——— Exclusion under wrong objection.

1966. (1891.) Rejection upon untenable ground, of testimony otherwise inadmissible, is error without prejudice. *Daly v. Melendy*, 32 Neb. 852 (49 N. W. 926).

1967. (1896.) Where evidence excluded under a general objection was for any reason properly excluded, the ruling will not be reversed because the objection was too general. *Imhoff v. Richards*, 48 Neb. 590 (67 N. W. 483).

——— Facts otherwise established.

1968. (1894.) The exclusion of evidence of a fact fully established by other competent and uncontradicted evidence is not

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reversible error. *Barr v. City of Omaha*, 42 Neb. 341 (60 N. W. 591); (1898) *Barr v. Post*, 56 Neb. 698 (77 N. W. 123); (1901) *Schrandt v. Young*, 62 Neb. 254 (86 N. W. 1085).

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1969. (1896.) In an action on a note which was claimed to have been wrongfully withheld from the intervening defendant the rejection of testimony offered by plaintiff to show that the note was executed in the name of the wife to keep the husband's creditors from attacking it is not reversible error where evidence of a like character and to the same effect of that excluded was admitted, both prior or subsequent to the time of such exclusion. *Halbert v. Rosenbalm*, 49 Neb. 498 (68 N. W. 622).

1969a. (1897.) It is not error to exclude from evidence a written instrument, the making and contents whereof are admitted by the pleadings. *Holt County v. Scott*, 53 Neb. 176 (73 N. W. 681).

1970. (1899.) It is not reversible error to exclude documentary evidence which has already been introduced. *Shull v. Barton*, 58 Neb. 741 (79 N. W. 732).

1971. (1900.) Where questions on cross-examination are asked for the purpose of eleciting certain information in the nature of a contradiction of the testimony in chief, and ruled out on objections, and the evidence sought is afterwards established by other uncontradicted evidence, error cannot be predicated on the ruling of the court regarding such cross-examination. *Missouri P R. Co. v. Fox*, 60 Neb. 531 (83 N. W. 744).

1971a. (1904.) It is not prejudicial error to exclude from evidence a paper copied into the pleadings by one party and admitted by the other. *Epley v. Lovell*, 5 Unof. 251 (97 N. W. 1027).

——Error cured by subsequent admission or instruction to jury.

1972. (1882.) When the evidence of a witness is erroneously excluded, if it be subsequently admitted, the error is not a ground for reversing the judgment. *Dietrichs v. Lincoln & N. W. R. Co.*, 13 Neb. 361 (13 N. W. 624); (1891) *Hammond v. City of Harvard*, 31 Neb. 635 (48 N. W. 462); (1891) *Larabee v. Klostermann*, 33 Neb. 150 (49 N. W. 1102); (1894) *Home Fire Ins Co. v. Johnson*, 43 Neb. 71 (61 N. W. 84); (1895) *Farmers & Merchants Ins. Co. v. Malone*, 45 Neb. 302 (63 N. W. 802); (1896) *Columbia Nat. Bank v. Rice & Co.*, 48 Neb. 428 (67 N. W. 165); (1896) *Denise v. City of Omaha*, 49 Neb. 750 (69 N. W. 119); (1897) *Union P. R. Co. v. Evans*, 52 Neb. 50 (71 N. W. 1062); (1897) *Atwood v. Marshall*, 52 Neb. 173 (71 N. W. 1064); (1901) *Union State Bank v. Hutton*, 1 Unof. 795 (95 N. W. 1061).

1973. (1889.) Where, upon the examination in chief of a defendant, a question is propounded to him the answer to which is excluded upon objection of the plaintiff, a reviewing court will not inquire whether the trial court erred in excluding the evidence if it appears that the witness was afterwards interrogated, and testified fully upon the subject upon which he was interrogated. *Musselman v. Barker*, 26 Neb. 737 (42 N. W. 759).

1974. (1890.) At the trial certain interrogatories in the cross-examination of defendant's witnesses were overruled by the court, which evidence was subsequently presented to the jury in other forms without an offer of proof having been made to the court indicating the substance of the evidence to be offered and its relevancy to the issues; *held*, not error to the plaintiff's prejudice. *Smith v. Crete, M. & W. R. Co.*, 29 Neb. 142 (45 N. W. 287).

1975. (1894.) Improper exclusion of examination of witness is cured by subsequently admitting what is substantially the same. *Jonasen v. Kennedy*, 39 Neb. 313 (58 N. W. 122).

1976. (1894.) Error in sustaining objections to questions as leading is cured, where the evidence sought to be elicited is given by the same witness in response to other questions. *Houck v. Linn*, 48 Neb. 227 (66 N. W. 1103).

1977. (1900.) Where a witness is asked on cross-examination concerning a certain matter, to which objection is made, and the objection sustained, and the witness is afterwards called as a witness in chief by the party cross-examining, and the same questions asked and answered, no error can be predicated on the ruling in the cross-examination of such witness. *Missouri P. R. Co. v. Fox*, 60 Neb. 531 (83 N. W. 744).

1978. (1906.) Where a litigant relies upon the common law of a sister state, he is not prejudiced by the rejection of evidence to prove such law, where the court embodies such law in an instruction to the jury as a part of the law of the case. *Pull-*

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man Palace Car Co. v. Woods, 76 Neb. 694 (107 N. W. 858).

1979. (1906.) Where the entire answer of a witness to a question is excluded, but substantially the same matter, so far as competent, is received in answer to a subsequent question, the error in excluding the former answer, if any, is cured, *Union P. R. Co. v. Connolly*, 77 Neb. 254 (109 N. W. 368).

Dismissal, nonsuit, or direction of verdict.

1980. (1896.) Where a trial court has entered an involuntary nonsuit and judgment of dismissal, for want of evidence by plaintiff there, it is error without prejudice, and not reversible where, by the evidence, defendant was entitled to have a verdict. *Zittle v. Schlesinger*, 46 Neb. 844 (65 N. W. 892).

1981. (1897.) Where the evidence justifies the court in directing a verdict for defendant, the entry of a nonsuit is error without prejudice to plaintiff. *Thompson v. Missouri P. R. Co.*, 51 Neb. 527 (71 N. W. 61).

Instructions.

See, also, *Trial*, VII.

1982. (1883.) An error in an instruction to the jury which could not have prejudiced the party complaining of it is not a ground for a new trial. *Converse v. Meyer*, 14 Neb. 190 (15 N. W. 340).

1983. (1883.) Although a verdict supported by proof will not be disturbed because of an erroneous instruction on an abstract proposition of law on a point not in the case, yet where the evidence is conflicting and evenly balanced, and there is testimony on the other side entitled to equal consideration, the verdict will be set aside and a new trial granted. *Harrison v. Baker*, 15 Neb. 43 (14 N. W. 541).

1984. A verdict will not be set aside for the giving of an instruction uncalled for by the evidence, if not prejudicial to the rights of the party complaining. (1883) *O'Hara v. Wells*, 14 Neb. 403 (15 N. W. 722); (1886) *Brown v. Rogers*, 20 Neb. 547 (31 N. W. 75); (1891) *Labaree v. Klostermann*, 33 Neb. 150 (49 N. W. 1102); (1894) *Hurlburt v. Hall*, 39 Neb. 889 (58 N. W. 538); (1896) *Burlington & M. R. R. Co. v. Gorsuch*, 47 Neb. 767 (66 N. W. 831); (1898) *McClellan v. Heim*, 56 Neb. 600 (77 N. W. 120); (1902) *Canon v. Farmers Bank*, 3 Unof. 348 (91 N. W. 585).

1985. (1892.) An oral instruction directing the jury to "disregard this testimony entirely on this point" where no testimony had been given was not prejudicial error. *Consaul v. Sheldon*, 35 Neb. 247 (52 N. W. 1104).

1986. (1893.) A judgment will not be reversed for the giving of erroneous instructions, where it appears that the party complaining was not prejudiced thereby. *Powder River Live Stock Co. v. Lamb*, 38 Neb. 339 (56 N. W. 1019); (1894) *Carstens v. McDonald*, 38 Neb. 858 (57 N. W. 757); (1894) *Roggencamp v. Hargreaves*, 39 Neb. 540 (58 N. W. 162); (1894) *Violet v. Rose*, 39 Neb. 660 (58 N. W. 216); (1894) *Roberts v. Drehmer*, 41 Neb. 306 (59 N. W. 911); (1894) *Liberty Ins. Co. v. Ehrlich*, 42 Neb. 553 (60 N. W. 940); (1895) *Stein v. Vannice*, 44 Neb. 132 (62 N. W. 464); (1896) *Kaufmann v. Cooper*, 46 Neb. 644 (65 N. W. 796); (1896) *Beavers v. Missouri P. R. Co.*, 47 Neb. 761 (66 N. W. 821); (1896) *Burlington & M. R. R. Co. v. Gorsuch*, 47 Neb. 767 (66 N. W. 831); (1897) *Storz v. Finklestein*, 50 Neb. 177 (69 Neb. 856); (1898) *Flower v. Nichols*, 55 Neb. 314 (75 N. W. 864); (1898) *Maul v. Drexel*, 55 Neb. 446 (76 N. W. 163); (1899) *Van Housen v. Broehl*, 59 Neb. 48 (80 N. W. 264); (1899) *Pennsylvania Co. v. Kennard Glass & Paint Co.*, 59 Neb. 435 (81 N. W. 372); (1902) *Deering & Co. v. Walter*, 2 Unof. 364 (96 N. W. 517); (1903) *Leidigh v. Keever*, 5 Unof. 207 (97 N. W. 801).

1987. (1894.) Where a jury has been fully instructed on a given point, it is wholly unnecessary to give another instruction covering the subject, and to do so may be sufficient cause for reversal; but it will not have that effect where it is clear that the jury were not thereby misled. *Carstens v. McDonald*, 38 Neb. 858 (57 N. W. 757).

1988. (1894.) A judgment will not be reversed because of conflicting instructions when that instruction least favorable to the party complaining was more favorable than the law warrants. In such case the conflict in the instructions and the error therein are not prejudicial. *Luce v. Foster*, 42 Neb. 818 (60 N. W. 1027).

1989. (1895.) Where plaintiff fails to recover on his cause of action, his objections to instructions relating to the measure of damages will not be considered. *Olsen v. Meyer*, 46 Neb. 240 (64 N. W. 954).

1990. (1898.) Instructions relating to the right to recover, and having no bearing

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on the *quantum* of damages, cannot be complained of by the plaintiff when the verdict was in his favor, and unsatisfactory only in its amount. *Hankins v. Majors*, 56 Neb. 299 (76 N. W. 544).

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1991. (1901.) An instruction as to the measurement by which recovery may be had, even though incorrect, is harmless error, if upon that issue the jury found against any recovery whatever. *Bank of Stockham v. Alter*, 61 Neb. 359 (85 N. W. 300).

1992. (1902.) The giving of an instruction which is fairly within the issues raised by the pleadings and the evidence produced on the trial, and which the record shows did not mislead the jury, though not technically correct, is error without prejudice. *Allen v. Hall*, 64 Neb. 256 (89 N. W. 803).

1993. (1902.) Where it appears from the nature of a verdict that the jury must have found in favor of one party on a certain point, ordinarily an erroneous instruction as to such point, is error without prejudice, as to such party; but where the case is submitted on an erroneous theory, and matters are submitted to the jury which are exclusively for the court, and the verdict does not necessarily imply a finding on such point for such party, an erroneous instruction thereon will be held to be prejudicial error. *Hinman v. Austin Mfg. Co.*, 65 Neb. 187 (90 N. W. 934).

1994. (1902.) Where the charge to the jury, given on the court's own motion, contains a misstatement of the law, the question on review will be whether such misstatement misled the jury, and if it probably did, the judgment will be reversed. *Royal Neighbors of America v. Wallace*, 66 Neb. 543 (92 N. W. 897).

1995. (1902.) Where the jury has specially found there was no damage caused, it is immaterial whether instructions as to a justification of the alleged injury are supported by the pleadings. *Axthelm v. Chicago, R. I. & P. R. Co.*, 2 Unof. 444 (89 N. W. 313).

1996. (1903.) Erroneous instructions upon the subject of contributory negligence are without prejudice if the plaintiff's evidence does not disclose contributory negligence and no evidence sufficient to establish it was adduced by the defendant. *City of South Omaha v. Fennell*, 4 Unof. 427 (94 N. W. 632).

——Failure to mark as given or refused.

1997. (1895.) Where there is no difficulty in determining from the record what instructions were in fact given, the supreme court will treat them as though marked as required by statute. *Shafer v. Briggs*, 46 Neb. 445 (64 N. W. 1079).

1998. (1897.) A judgment should not be reversed for the court's failure to mark an instruction given or refused, where the party complaining noted his exception on the margin, though it was accompanied by a special exception of the failure of the court to mark the instruction given or refused. *Eickhoff v. Eikenbary*, 52 Neb. 332 (72 N. W. 308).

1999. (1898.) The failure to write the word "given" on an instruction read to the jury is not sufficient grounds for reversing a judgment when such failure was not prejudicial to the losing party. *Home Fire Ins. Co. v. Decker*, 55 Neb. 346 (75 N. W. 841).

——Verdict correct on the merits.

2000. (1883.) It is the duty of a court to instruct the jury in the law of the case, whether requested to do so by counsel or not, and when it fails to do so, and the jury find a verdict which, upon a view of the whole case, is clearly wrong, such verdict will be set aside and a new trial ordered. But otherwise when, upon a general view of the case, the verdict seems to be right. *Sandwich Mfg. Co. v. Shiley*, 15 Neb. 109 (17 N. W. 267).

2001. (1886.) Where verdict is the only one that should have been returned under the evidence it will not be set aside even though the court may have given an instruction upon a matter not in issue in the case. *Knowlton v. Mandeville*, 20 Neb. 59 (29 N. W. 248).

2002. (1891.) Where the proof fails to show that the party is entitled to recover damages, a failure of the court to instruct as to the proper measure of damages is not an error for which the case will be reversed. *Burcham v. Griffeth*, 31 Neb. 778 (48 N. W. 824).

2003. A judgment will not be reversed for error committed in the giving of an instruction when the verdict is the only one that should have been returned under the evidence. (1871) *Meredith v. Kennard*, 1 Neb. 312; (1883) *Lamb v. Hotchkiss*, 14 Neb. 102 (15 N. W. 324); (1891) *Western Union Tel. Co. v. Lowrey*, 32 Neb. 732 (49 N. W. 707); (1893) *First Nat. Bank of Denver v. Scott*, 36 Neb. 607 (54 N. W. 987); (1893) *Jansen v. Williams*, 36 Neb. 869 (55 N. W. 279; 20 L. R. A. 207); (1894) *Jefferies v. Cashman*, 42 Neb. 594 (60 N. W. 895);

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(1895) *Stratton v. Dole*, 45 Neb. 472 (63 N. W. 875); (1896) *State v. Hill*, 47 Neb. 456 (66 N. W. 541); (1898) *Locke v. Shreck*, 54 Neb. 472 (74 N. W. 970); (1899) *Booknau v. Clark*, 58 Neb. 610 (79 N. W. 159); (1901) *Dodds v. McCormick Harvesting Machine Co.*, 62 Neb. 759 (87 N. W. 911); (1901) *Tootle, Hosea & Co. v. Otis*, 1 Unof. 360 (95 N. W. 681); (1901) *Stull v. Stull*, 1 Unof. 399 (96 N. W. 193); (1902) *Columbus State Bank v. Carrig*, 3 Unof. 592 (92 N. W. 324); (1902) *Beer v. Dalton*, 3 Unof. 694 (92 N. W. 593); (1903) *Gatzemeyer v. Peterson*, 68 Neb. 832 (94 N. W. 974); (1903) *Kielbeck v. Chicago, B. & Q. R. Co.*, 70 Neb. 571 (97 N. W. 750); (1903) *U. P. Steam Baking Co. v. Omaha St. R. Co.*, 4 Unof. 396 (94 N. W. 533); (1903) *City of South Omaha v. Fennell*, 4 Unof. 427 (94 N. W. 632); (1903) *American Order of Protection v. Stanley*, 5 Unof. 132 (97 N. W. 467); (1904) *Henry v. Dussell* 71 Neb. 691 (99 N. W. 484).

2004. (1901.) Where, in an action for damages, under the undisputed facts, a verdict for a less amount than that actually found would be unwarranted, error in the instructions relative to the assessment of damages, as to the defendant, is error without prejudice. *Chicago, R. I. & P. R. Co. v. Sizer*, 1 Unof. 32 (95 N. W. 498).

2005. (1901.) Where the evidence is undisputed on a given point, a finding thereon in accordance with such evidence will not be disturbed because of any error in the giving or refusing to give instructions on such point. *Standard Oil Co. v. Goodman Drug Co.*, 1 Unof. 443 (95 N. W. 667).

2006. (1902.) Where, from the nature of the verdict, it is apparent that the jury found there was no breach of contract, whatever error there may be in an instruction as to the measure of damages for a breach of such contract, is error without prejudice, as to the party claiming such damages. *Lomax v. Holbine*, 65 Neb. 270 (90 N. W. 1122).

2007. (1902.) Where an instruction assumes to define the whole law of the case, and omits a material element from the definition given, it is reversible error, which may be relied upon, although no proper instruction has been requested by the party seeking to take advantage of the defect, unless such instruction is justified because the evidence requires a finding adverse to the defendant upon the issue as to such fact. *City of South Omaha v. Hager*, 66 Neb. 803 (95 N. W. 13).

——— Refusal of requests.

See, also, *Trial*, §§ 597-606.

2008. (1880.) The refusal of the court to give the jury a suitable instruction, when it is clear that such refusal could not possibly have prejudiced the party tendering it, is no cause for reversing the judgment. *Ryan v. State Bank*, 10 Neb. 524 (7 N. W. 276); (1891) *Gamble v. Wilson*, 33 Neb. 270 (50 N. W. 3).

2009. (1895.) The refusal to give a correct instruction relating solely to the measure of damages is not prejudicial error, where the jury by a verdict for the defendant has shown that it was not brought to a consideration of the measure of damages. *Montgomery v. Willis*, 45 Neb. 434 (63 N. W. 794); (1902) *Gullion v. Traver*, 64 Neb. 51 (89 N. W. 404).

2010. (1896.) It is no sufficient ground for the reversal of a judgment that an immaterial instruction asked by the plaintiff in error was refused. *Newman v. Ryne*, 48 Neb. 362 (67 N. W. 189).

2011. (1898.) A cause will not be reversed for the refusal of a proper instruction where an instruction fully as favorable to the complaining party covering the same point has been given by the court on its own motion. *Howard v. Board of Supervisors of Clay County*, 54 Neb. 443 (74 N. W. 953).

2012. (1907.) Error cannot be assigned for the refusal of an instruction, the substance of which is contained in instructions given by the court of his own motion. *Hudson v. Truman*, 78 Neb. 840 (112 N. W. 325).

——— Cure by other instruction.

See, also, *Trial*, §§ 607-612, 670, 671.

2013. (1882.) If one of the paragraphs misstate the law upon a material point, such error will not be cured by another paragraph which states the law correctly, because the jury would be left in doubt as to which paragraph was correct. *Wasson v. Palmer*, 13 Neb. 376 (14 N. W. 171); (1888) *Fitzgerald v. Meyer*, 25 Neb. 77 (41 N. W. 123); (1891) *School District v. Foster*, 31 Neb. 501 (48 N. W. 267); (1893) *First Nat. Bank of Denver v. Lowrey*, 36 Neb. 290 (54 N. W. 568); (1895) *Richardson v. Halstead*, 44 Neb. 606 (62 N. W. 1077); (1895) *Burlington v. Baders*, 45 Neb. 673 (63 N. W. 919); (1898) *Missouri P. R. Co. v. Fox*, 56 Neb. 746 (77 N. W. 130).

2014. (1893.) Error in conflicting and misleading instructions is not rendered harmless by the fact that the general tenor of the charge is more favorable to the de-

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feated party. *Chicago, B. & Q. R. Co. v. Anderson*, 38 Neb. 112 (56 N. W. 794); (1894) *Carson v. Stevens*, 40 Neb. 112 (58 N. W. 845; 42 Am. St. Rep. 661); (1901) *Town of Denver v. Meyers*, 63 Neb. 107 (88 N. W. 191); (1901) *Chicago, B. & Q. R. Co. v. Johnston*, 1 Unof. 314 (95 N. W. 614); (1902) *Knight v. Denman*, 64 Neb. 814 (90 N. W. 863); (1903) *Chicago, R. I. & P. R. Co. v. Sporer*, 69 Neb. 8 (94 N. W. 991); (1903) *Parkins v. Missouri P. R. Co.*, 4 Unof. 13 (96 N. W. 683).

2015. (1898.) If in a paragraph of a charge of a court to a jury there is contained a misstatement of the law upon a material point of the issue, the error is not cured by a correct statement thereof in another or other paragraphs. *Crosby v. Ritchey*, 56 Neb. 336 (76 N. W. 895); (1899) *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1 (78 N. W. 359).

2015*a*. (1899.) An erroneous instruction is not cured by merely giving another instruction on the same subject stating the rule correctly. *Williams v. McConaughey*, 58 Neb. 656 (79 N. W. 549).

2016. (1899.) Where a court has given an instruction in which there is expressed the existence of certain facts, or its opinion that they do exist, in a case wherein there is a conflict in the evidence relative to said facts, the error is not cured by submitting special interrogatories of their establishment, or the contrary, and the further instruction that the jury is not to be influenced in the determination of the special queries by the fact that the court has given the former instruction which embodied its opinion on the subject. *Morton v. Harvey*, 57 Neb. 304 (77 N. W. 808).

2017. (1900.) Instructions are to be considered together, to the end that they may be properly understood, and when so construed, if, as a whole, they fairly state the law applicable to the evidence, error cannot be predicated upon the giving of the same. *Hoffine v. Ewings*, 60 Neb. 729 (84 N. W. 93).

2018. (1902.) The giving of correct instructions will not cure the error of one which invades the province of the jury as to determining the weight of evidence. *Skow v. Locke*, 3 Unof. 176 (91 N. W. 204).

2019. (1902.) Where the correct amount sued for is repeatedly stated in a lengthy set of instructions, one that the jury should under certain circumstances find for the plaintiff in "the full amount sued for, to wit: $2,969.20 with interest," etc., is not prejudicial error, though the full amount sued for was only $1,384.20 and interest, where the verdict is expressly for the latter amount and certain interest which is expressly computed and stated in the verdict. *Doe v. United States of America*, 3 Unof. 405 (91 N. W. 519).

——— Cure by remittitur.

2020. (1901.) Where alleged errors in rulings at the trial all go to the amount of certain damages assessed, and a remittitur of such damages is required for other reasons, such errors are no ground for reversal of the judgment. *Herpolsheimer v. Funke*, 1 Unof. 471 (95 N. W. 688).

2021. (1901.) Error in instructing the jury to include interest in their verdict, there being no prayer therefor in the petition, may be cured by remittitur. *Rawlings v. Anheuser-Busch Brewing Ass'n*, 1 Unof. 555 (95 N. W. 792).

Submission of issues or questions to jury.

2022. (1897.) Where an answer to a question for a special finding would be immaterial, it is not prejudicial error to render judgment on the general verdict without first requiring a special finding in answer to the question. *Doane v. Smith Bros. Loan & Trust Co.*, 51 Neb. 280 (70 N. W. 909).

Misconduct of counsel.

2023. (1891.) To authorize the appellate court to set aside a verdict and grant a new trial on account of statements made in summing up by counsel for the prevailing party, or the refusal of the court to strike out such statements and instruct counsel not to repeat them, the statements must have been of such a character as may reasonably be supposed to have influenced the jury. *Daly v. Melendy*, 32 Neb. 852 (49 N. W. 926).

2024. (1897.) Generally a judgment will not be reversed for improper remarks of counsel, where the jury is directed to disregard the statements, and the misconduct is not repeated. *Golder v. Lund*, 50 Neb. 867 (70 N. W. 379).

2025. (1900.) Where there is reason to believe that the jury may have been influenced in any degree in favor of the prevailing party by the misconduct of his counsel in arguing the cause, the verdict should be set aside, and a new trial awarded; otherwise, where it is not preju-

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dicial. *Ashland Land & Live Stock Co. v. May*, 59 Neb. 735 (82 N. W. 10).

2026. (1901.) When counsel, in their overzeal in the argument of a case to a jury, depart from the record, a sharp and prompt rebuke from the trial judge will ordinarily cure the error. *Brown v. Silver*, 2 Unof. 164 (96 N. W. 281).

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Misconduct of court.

2027. (1899.) Error of the trial judge in examining witnesses and in making remarks *held* cured by an admonition to the jury to disregard such conduct. *Omaha Brewing Ass'n v. Bullnheimer*, 58 Neb. 387 (78 N. W. 728).

2028. (1901.) Remarks of the trial judge with respect to an issue as to which a verdict was directed, having no apparent connection with the only issue left to the jury, are not ground for reversal of a judgment. *Hillebrand v. Nelson*, 1 Unof. 783 (95 N. W. 1068).

Conduct and deliberations of jury.

2029. (1895.) Misconduct of a juror, not prejudicial to the party complaining, is not available error on review. *Vaughn v. Crites*, 44 Neb. 812 (62 N. W. 1098).

2030. (1899.) In an action against a railroad company for wrongfully causing the death of plaintiff's intestate misconduct of jurors in visiting and examining the locality of the accident, without permission of the court or knowledge of the parties, is not ground for setting aside the verdict, where it is disclosed that such view did not influence the finding. *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1 (78 N. W. 359).

2031. (1899.) That the jury ignored irrelevant proof, *held* not ground for reversing a judgment based on the verdict. *Blue Valley Lumber Co. v. Neuman*, 58 Neb. 80 (78 N. W. 374).

Verdict.

See, also, *Trial*, IX.

Cure of excessive verdict by remittitur, see *post*, §§ 2103-2113.

2032. (1897.) When a verdict is sufficient to authorize a judgment, and there is no substantial variance between it and the judgment, the case will not be reversed for an informality in the verdict. *Baum Iron Co. v. Union Savings Bank*, 50 Neb. 387 (69 N. W. 939).

2033. (1898.) Although a verdict is rendered in plain disregard of instructions, the judgment will not be reversed where the instructions were erroneous, and the verdict the only one which could properly be returned under the evidence. *Dern v. Kellogg*, 54 Neb. 560 (74 N. W. 844).

2034. (1903.) Informality in a verdict rendered in obedience to a peremptory instruction, is not prejudicial if the judgment is such as would properly have been rendered if the error had not been committed. *Heagney v. Case Threshing Machine Co.*, 4 Unof. 753 (99 N. W. 260).

——— Special findings.

2035. (1889.) When upon a trial to a jury immaterial or improper questions for special findings are submitted to a jury at the request of a party afterward complaining, and the jury is discharged without answering such questions, *held* error without prejudice. *Missouri P. R. Co. v. Vandeventer*, 26 Neb. 222 (41 N. W. 998; 3 L. R. A. 129).

2036. (1895.) A special finding, though clearly unsustained by the evidence, must be disregarded when the fact established by it is clearly irrelevant to the issues on trial. *Citizens Nat. Bank of Grand Island v. Wedgwood*, 45 Neb. 143 (63 N. W. 375).

Judgment.

2037. (1898.) On review a judgment against two defendants, where a several judgment might have been proper, may be affirmed as to one defendant though the court had no jurisdiction of the other. *Bates-Smith Investment Co. v. Scott*, 56 Neb. 475 (76 N. W. 1063).

2038. (1901.) Where the evidence sustains the findings, and the findings sustain a formal judgment rendered thereon, such judgment will not be reversed because of an erroneous conclusion of law deducted from the findings of fact, such conclusion being merely an expression of opinion by the trial court. *Rosso v. Milwaukee Harvester Co.*, 2 Unof. 212 (96 N. W. 213).

2039. (1903.) A decree will not be reversed because it fails to conform to evidence appearing in the record but not admissible under the pleadings. *Omaha Oil & Paint Co. v. Greater America Exposition*, 4 Unof. 275 (93 N. W. 963).

——— Wrong reason for correct decision.

2040. (1898.) A judgment should not be reversed for a correct ruling, though an erroneous reason was given. *Pease Piano Co. v. Cameron*, 56 Neb. 561 (76 N. W. 1053); (1900) *State, ex rel. Emerson, v. Dickinson*, 59 Neb. 753 (82 N. W. 16);

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(1900) *Crawford Co. v. Hathaway*, 60 Neb. 754 (84 N. W. 271); (1902) *Kelley v. Wehn*, 63 Neb. 410 (88 N. W. 682); (1903) *School District of Omaha v. McDonald*, 68 Neb. 623 (97 N. W. 584).

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2041. (1903.) Unless there is material error in the record brought to the supreme court for review, the judgment of the trial court will be affirmed regardless of the theory upon which it was defended. *Woodmen Accident Ass'n v. Hamilton*, 70 Neb. 30 (97 N. W. 1017).

2042. (1907.) The action of a trial court in withdrawing a cause of action from the consideration of the jury will not be held erroneous on account of the reason given therefor by the court, if the withdrawal is proper for any reason. *Kohler v. Hughbanks*, 79 Neb. 320 (112 N. W. 577).

Decision on motion for new trial.

2043. (1887.) Where a cause is tried to a jury and their verdict is set aside and a new trial granted, and the second trial results in substantially the same verdict, upon which a judgment is rendered by the trial court, and for the reversal of which proceedings in error are prosecuted in the supreme court, a petition in error being also filed by defendant in error, by which he seeks to have judgment rendered on the first verdict, the action of the district court will not be disturbed, it being apparent that the last verdict was sufficient to cover the damage proven on either trial. *Omaha, N. & B. H. R. Co. v. O'Donnell*, 22 Neb. 475 (35 N. W. 235).

2044. (1904.) Where a second trial results in the same or a like verdict as the first one, error cannot be predicated on the order granting the new trial, because the party complaining cannot be said to have been injured thereby. *Kleutsch v. Security Mutual Life Ins. Co.*, 72 Neb. 75 (100 N. W. 139).

I. Error Waived in Appellate Court.

Failure to appear.

2045. (1882.) Where the appellant fails to appear and point out any error in the judgment appealed from, and no error is apparent, the judgment will be affirmed. *Leech v. Philpott*, 12 Neb. 577 (12 N. W. 116).

Delay in urging objections.

2046. (1882.) After a cause is submitted to the supreme court on the merits, it is too late to raise the objection that the bill of exceptions was not presented to the adverse party for correction and amendment before being signed by the judge. *Aitkins v. Aitkins*, 13 Neb. 271 (13 N. W. 285).

2047. (1902.) The objection that there is a defect of parties, in the supreme court, must be made before the case is finally submitted on its merits or it will be considered waived. *Bianki v. Greater America Exposition*, 3 Unof. 656 (92 N. W. 615)

Failure to urge objections in brief or argument.

2048. (1888.) An assignment of error not insisted on at the argument, nor in the brief, will not be considered. *Towne v. Sparks*, 23 Neb. 142 (36 N. W. 375); (1891) *Scott v. Chope*, 33 Neb. 41 (49 N. W. 940); (1894) *Gill v. Lydick*, 40 Neb. 508 (59 N. W. 104); (1894) *Glaze v. Parcel*, 40 Neb. 732 (59 N. W. 382); (1894) *Gulick v. Webb*, 41 Neb. 706 (60 N. W. 13; 43 Am. St. Rep. 720); (1894) *Peaks v. Lord*, 42 Neb. 15 (60 N. W. 349); (1894) *Reed v. Wood*, 42 Neb. 496 (60 N. W. 909); (1895) *Erck v. Omaha Nat. Bank*, 43 Neb. 613 (62 N. W. 67); (1895) *Burgess v. Burgess*, 44 Neb. 16 (62 N. W. 242); (1895) *Madsen v. State*, 44 Neb. 631 62 N. W. 1081); (1896) *Kaufmann v. Cooper*, 46 Neb. 644 (65 N. W. 796); (1896) *Johnson v. Gulick*, 46 Neb. 817 (65 N. W. 883; 50 Am. St. Rep. 629); (1896) *City of Kearney v. Smith*, 47 Neb. 408 (66 N. W. 538); (1897) *Hamer v. McFeggan*, 51 Neb. 227 (70 N. W. 937); (1897) *Adams-Smith Co. v. Hayward*, 52 Neb. 79 (71 N. W. 949); (1897) *McCord v. Hamel*, 52 Neb. 286 (72 N. W. 220); (1898) *Blodgett v. McMurtry*, 54 Neb. 69 (74 N. W. 392); (1898) *Herzke v. Blake*, 54 Neb. 465 (74 N. W. 959); (1899) *Humpert v. McGavock*, 59 Neb. 346 (80 N. W. 1038); (1900) *Mandell v. Weldin*, 59 Neb. 699 (82 N. W. 6); (1901) *Elkhorn Valley Bank v. Marley*, 61 Neb. 583 (85 N. W. 846); (1901) *Martin v. Kearney County*, 62 Neb. 538 (87 N. W. 351); (1901) *Brown v. Collins*, 2 Unof. 149 (96 N. W. 173); (1902) *Moore v. Jacobs*, 64 Neb. 72 (89 N. W. 1134); (1902) *Mayhew v. Knittle*, 64 Neb. 395 (89 N. W. 1037); (1902) *Brown v. Houghton*, 2 Unof. 425 (89 N. W. 251); (1902) *Western Union Tel. Co. v. Church*, 3 Unof. 22 (90 N. W. 878); (1902) *Zimmerman v. Kearney County Bank*, 3 Unof. 323 (91 N. W. 497); (1903) *Portsmouth Savings Bank v. City of Omaha*, 67 Neb. 50 (93 N. W. 231); (1903) *Bemis v. McCloud*, 4 Unof. 729 (96 N. W. 214); (1903)

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Harnett v. Holdrege, 5 Unof. 114 (97 N. W. 443); (1904) *Nelson v. Brisbin*, 5 Unof. 496 (98 N. W. 1057); (1905) *Sweet v. State*, 75 Neb. 263 (106 N. W. 31).

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2049. (1890.) An assignment of error based upon the overruling of objections to twenty-two questions, no ground of objection being suggested in brief or argument, and the errors not being apparent of themselves, was overruled by the supreme court *pro forma*. *Filley v. Walker*, 28 Neb. 506 (44 N. W. 737).

2050. (1894.) Assignments of error not specifically called to the attention of the court by brief or argument will be deemed waived, although a party in his brief states generally that he does not desire to waive any assignment. *Bishop v. Middleton*, 43 Neb. 10 (61 N. W. 129; 26 L. R. A. 445).

2051. (1902.) Where there are several findings, made by the trial court, which appear to be sustained by the evidence, each of which will sustain the decree and the plaintiff in error in his brief and argument in the supreme court complains of but one of them, the decree will be affirmed without passing upon the findings complained of. *Mayhew v. Knittle*, 64 Neb. 395 (89 N. W. 1037).

2052. (1903.) An appellant should present in his briefs all the grounds upon which he seeks a reversal or modification of the decree appealed from; he will not be permitted to seek a modification as to matters not challenged in his briefs, when defeated in an attempt to secure reversal of the entire decree. *Batty v. City of Hastings*, 69 Neb. 511 (95 N. W. 866).

2052*a*. (1907.) Points not presented in the supreme court will be deemed to be waived. *Northwest Thresher Co. v. Eddyville State Bank*, 80 Neb. 377 (114 N. W. 291).

J. Decisions of Intermediate Courts.

In general.

2053. (1894.) Where an appeal from the county board has been tried in the district court without pleadings the supreme court will not examine the evidence on error to ascertain what issues were litigated. *Haskell v. Valley County*, 41 Neb. 234 (59 N. W. 680).

K. Subsequent appeals.

Opinions and decisions as *res adjudicata*, see *Courts*, §§ 72-114.

Scope and extent to review.

2054. (1802.) Where the issues have been fully presented in a former case and a decision had upon the merits, and the cause remanded with directions in what manner to render judgment, and there has been a substantial compliance therewith, the judgment will be sustained. *School District No. 6 v. School District No. 9*, 13 Neb. 166 (12 N. W. 921).

2055. (1901.) Where a decree in equity is reversed and remanded for want of sufficient evidence and on a second trial *de novo* additional evidence is introduced, a second appeal will be considered on the record then presented. *First Nat. Bank of Sutton v. Grosshans*, 61 Neb. 575 (85 N. W. 542).

2056. (1902.) Where no new question is presented on a second appeal, the decree will be affirmed. *Gadsden v. Thrush*, 63 Neb. 881 (89 N. W. 403). [Reversed on additional point. 191 U. S. 451.]

2057. (1904.) Where, on a new trial in the district court, the parties have introduced new evidence, together with that taken on the former trial, the supreme court, on a second appeal will examine the record and evidence in order to determine controverted questions of fact. *Hamilton Nat. Bank v. American Loan & Trust Co.*, 72 Neb. 81 (100 N. W. 202).

2058. (1905.) Where a case has been reversed and remanded, with directions to the trial court to submit certain issues to the jury, and the case is tried a second time on the same issues made by the pleadings on the first trial, the supreme court, on a second appeal, will examine and pass upon the correctness of the instructions of the trial court in submitting to the jury the issues which the court was directed to try and determine, notwithstanding a claim made on behalf of the defendant in error that error in such instruction is without prejudice to the plaintiff in error because of a former adjudication of such issues asserted by the defendant in error. *Morrill v. McNeill*, 74 Neb. 291 (104 N. W. 195).

2059. (1906.) The supreme court, on a second appeal of the same case, will not reexamine questions of law presented and determined on the first appeal unless the opinion first expressed is manifestly erroneous. *Brewster v. Meng*, 76 Neb. 560 (107 N. W. 751).

Former decision as law of the case in general.

2060. (1885.) A previous ruling by the appellate court, upon a point distinctly made, may be only authority in other cases,

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to be followed or affirmed, or to be modified or overruled, according to its intrinsic merits, but in the case in which it is made it is more than authority; it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves. *Hiatt v. Brooks*, 17 Neb. 33 (22 N. W. 73); (1885) *O'Donahue v. Hendrix*, 17 Neb. 287 (22 N. W. 548); (1886) *Leighton v. Stuart*, 19 Neb. 546 (26 N. W. 198); (1886) *Nelson v. Bevins*, 19 Neb. 715 (28 N. W. 331); (1888) *Chicago, B. & Q. R. Co. v. Hull*, 24 Neb. 740 (40 N. W. 280); (1888) *O'Brien v. Gaslin*, 24 Neb 559 (39 N. W. 449); (1897) *Meyer v. Shamp*, 51 Neb. 424 (71 N. W. 57); (1898) *Omaha Life Ass'n v. Kettenbach*, 55 Neb. 330 (75 N. W. 827); (1900) *School District v. Fiske*, 61 Neb. 3 (84 N. W. 401); (1903) *Edney v. Baum*, 70 Neb. 159 (97 N. W. 252); (1904) *Supreme Court of Honor v. Tracy*, 72 Neb. 742 (101 N. W. 1021); (1905) *Porter v. State*, 73 Neb. 792 (103 N. W. 669); (1905) *First Nat. Bank of Plattsmouth v. Gibson*, 74 Neb. 236 (105 N. W. 1081); (1905) *Lowe v. Prospect Hill Cemetery Ass'n*, 75 Neb. 85 (106 N. W. 429); (1906) *Topping v. Cohn*, 77 Neb. 310 (109 N. W. 151). [Modified. *City of Hastings v. Foxworthy*, 45 Neb. 676.]

2061. (1886.) Matters that have been adjudicated in a former suit will not be considered in a second action. *Nelson v. Bevins*, 19 Neb. 715 (28 N. W. 331).

2062. (1889.) A judgment or ruling of the supreme court in a case or point distinctly and finally made will be held to be the law of the case in which made throughout its course of litigation; without regard to the number of times it may be brought before the court, or to the intrinsic merits of such judgment or ruling. *Meyer v. Shamp*, 26 Neb. 729 (42 N. W. 757).

2063. (1895.) Where a judgment has been reversed on appeal and the case remanded generaly and the same questions are presented on retrial, the appellate court on a second appeal may re-examine and reverse its former rulings. *City of Hastings v. Foxworthy*, 45 Neb. 676 (63 N. W. 955; 34 L. R. A. 321). [Modified. 52 Neb. 624; 55 Neb. 330; 59 Neb. 349.]

2064. The determination of questions presented to the supreme court, in an appellate proceeding, becomes the law of the case, and, ordinarily, will not be re-examined when the cause is again brought up for review. (1896) *Fuller v. Cunningham*, 48 Neb. 857 (67 N. W. 879); (1895) *Ripp v. Hale*, 45 Neb. 567 (64 N. W. 454); (1896) *Coburn v. Watson*, 48 Neb. 257 (67 N. W. 171); (1899) *Richardson Drug Co. v. Teasdall*, 59 Neb. 150 (80 N. W. 488); (1899) *Wittenberg v. Mollyneaux*, 59 Neb. 203 (80 N. W. 824); (1899) *Home Fire Ins. Co. v. Johansen*, 59 Neb. 343 (80 N. W. 1047); (1899) *Hayden v. Frederickson*, 59 Neb. 141 (80 N. W. 494); (1900) *Leavitt v. Bell*, 59 Neb. 595 (81 N. W. 614); (1900) *Motley v. Motley*, 60 Neb. 593 (83 N. W. 830); (1900) *Nebraska Savings & Exchange Bank v. Brewster*, 59 Neb. 535 (81 N. W. 441); (1900) *Todd v. Houghton*, 59 Neb. 538 (81 N. W. 508); (1900) *Barker v. Wheeler*, 60 Neb. 470 (83 N. W. 678; 83 Am. St. Rep. 541); (1900) *School District v. Fiske*, 61 Neb. 3 (84 N. W. 401); (1901) *Barton v. Shull*, 62 Neb. 570 (87 N. W. 322); (1901) *City of Omaha v. Bowman*, 63 Neb. 333 (88 N. W. 521); (1901) *Holt v. Schneider*, 61 Neb. 370 (85 N. W. 280); (1901) *Chicago, B. & Q. R. Co. v. Yost*, 61 Neb. 530 (85 N. W. 561); (1902) *Gadsden v. Thrush*, 63 Neb. 881 (89 N. W. 403); (1903) *Connecticut Trust & Safe Deposit Co. v. Fletcher*, 5 Unof. 1 (96 N. W. 988); (1903) *Merrill v. Van Camp*, 4 Unof. 794 (96 N. W. 617); (1904) *Hamilton Nat. Bank v. American Loan & Trust Co.*, 72 Neb. 81 (100 N. W. 202); (1905) *Ridgley v. United States Fidelity & Guaranty Co.*, 73 Neb. 874 (103 N. W. 669); (1905) *First Nat. Bank of Plattsmouth v. Gibson*, 74 Neb. 236 (105 N. W. 1081); (1905) *New Omaha Thomson-Houston Electric Light Co. v. Rombold*, 73 Neb. 259 (102 N. W. 475; 106 N. W. 213).

2065. (1899.) When the evidence is substantially the same as on a former appeal, the weight and effect to be given such evidence must be considered as foreclosed by the former decision on that point. *Mead v. Tzschuck*, 57 Neb. 615 (78 N. W. 262).

2066. (1900.) It is not permissible for an appellate court, on a subsequent appeal of a cause, to reconsider and correct an erroneous decision made by it in the same case on a former appeal. *Wittenberg v. Mollyneaux*, 60 Neb. 583 (83 N. W. 842).

2067. (1901.) Decisions on review become the law of the case and settle conclusively the points adjudicated. *Anheuser-Busch Brewing Ass'n v. Hier*, 61 Neb. 582 (85 N. W. 832).

2068. (1901.) The decision of questions presented to the supreme court in reviewing the proceedings of the district court be-

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comes the law of the case and, for the purposes of the litigation, settles conclusively the points adjudicated. *Smith v. Neufeld*, 61 Neb. 699 (85 N. W. 898).

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2069. (1905.) When a question in controversy has been once finally decided, it becomes the law of the case, and is binding on the parties and those claiming under or through them in all subsequent stages of the litigation. *Lowe v. Prospect Hill Cemetery Ass'n.* 75 Neb. 85 (106 N. W. 429).

2070. (1906.) An appellate court, on a second appeal of a case, will not ordinarily re-examine questions of law presented by the first appeal, but where the case was on the first appeal remanded generally for a new trial and the same questions are presented on the second trial, the appellate court is not bound to follow opinions on questions of law presented on the first appeal and may re-examine and reverse its rulings on such questions, and should do so when the opinion first expressed is manifestly incorrect. *Eccles v. Walker*, 75 Neb. 722 (106 N. W. 977).

2071. (1906.) The determination of questions presented to the supreme court in its review of the proceedings of an inferior tribunal become the law of the case, and ordinarily will not be re-examined in a subsequent review of the proceedings of the inferior tribunal on a second trial or hearing of the cause. *Hargadine v. Omaha B. & T. R. Co.*, 76 Neb. 729 (107 N. W. 864).

2071*a*. (1908.) The decision of the supreme court upon a former hearing of the same case is controlling only as to the actual point then determined. *Schwanenfeldt v. Chicago, B. & Q. R. Co.*, 80 Neb. 790 (115 N. W. 285).

Questions concluded.

2072. (1886.) The rule that a previous ruling by an appellate court upon a point distinctly made is a final adjudication, from the consequences of which the court cannot part nor the parties relieve themselves, is applicable only to legal principles enunciated and rules laid down for the government of the inferior court upon the second trial. It has no reference to decisions on questions of fact solely where the evidence upon the second trial is materially different from that on the first. *Lane v. Starkey*, 20 Neb. 586 (31 N. W. 238); (1900) *Missouri P. R. Co. v. Fox*, 60 Neb. 531 (83 N. W. 744); (1900) *State, ex rel. Seth Thomas Clock Co., v. County Commissioners of Cass County*, 60 Neb. 566 (83 N. W. 733).

2073. (1899.) Decision on former appeal as to ownership of property *held* conclusive upon the parties and their privies. *Klamp v. Klamp*, 58 Neb. 748 (79 N. W. 735).

2074. (1900.) A question once decided by the supreme court in the trial of a case will be held to be the law of the case during its future course of procedure, and will not be overturned unless manifestly incorrect. This rule applies, not only to points expressly decided, but to all questions presented in the record and necessarily involved in the decision rendered. *State, ex rel. Seth Thomas Clock Co., v. County Commissioners of Cass County*, 60 Neb. 566 (83 N. W. 733); (1901) *Oldig v. Fisk*, 1 Unof. 124 (95 N. W. 492); (1903) *Edney v. Baum*, 70 Neb. 159 (97 N. W. 252).

2075. (1900.) The rulings upon the first appeal settle definitely, for the purposes of litigation, all questions adjudicated; but mere expressions of opinion respecting matters not actually involved in the decision have no binding force. *Wittenberg v. Mollyneaux*, 60 Neb. 583 (83 N. W. 842).

2076. (1900.) When after a deed is held on appeal to be testamentary in character and the case remanded, the pleadings are amended and a reformation of the deed prayed for, the opinion will not be deemed *res adjudicata* as to the alleged mistake in the deed. *Pinkham v. Pinkham*, 60 Neb. 600 (83 N. W. 837).

2077. (1901.) Where on review in error proceeding in the supreme court it is held that the evidence on the trial of the case is insufficient to support an allegation in the pleadings, and on retrial of the case the evidence in support of such allegation is substantially the same as in the first trial, the former ruling will be adhered to and followed as the law of the case as to the sufficiency of such evidence. *Bank of Stockham v. Alter*, 61 Neb. 359 (85 N. W. 300).

2078. (1901.) Where it has been held on error proceedings in the supreme court that a petition states a good cause of action, evidence sustaining the allegations of such petition is sufficient to support a verdict and judgment in favor of the plaintiff. *City of Omaha v. Bowman*, 63 Neb. 333 (88 N. W. 521).

2079. (1901.) The law of the case is a rule of expediency which should not be lightly disregarded, but it should be re-

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stricted to such questions as have been presented to, and decided by, the supreme court at the former hearing of the same case and those necessarily involved in such decision and should not apply to a mere expression of opinion in regard to matters not actually involved in the decision, nor should it apply to questions referred to by intimation only and not determined. *First Nat. Bank of Hastings v. Farmers & Merchants Bank*, 2 Unof. 104 (95 N. W. 1062).

2080. (1902.) The rule that a decision of this court is the law of the case, not only as to the points expressly considered in the opinion but as all matters necessarily involved in the judgment rendered, has not the same application where the evidence at successive trials of the same cause is so materially different as to affect the conclusions reached. *State v. Paxton*, 65 Neb. 110 (90 N. W. 983).

2081. (1902.) Where the evidence at a new trial is, or may be presumed to be, materially different from that at a trial already reviewed by the supreme court, in a subsequent review it will investigate the record uninfluenced by the former decision, except so far as questions of law were there adjudicated, which apply equally to the evidence at each trial *State v. Paxton*, 65 Neb. 110 (90 N. W. 983).

2082. (1902.) The rule of the "law of the case," does not apply to questions of fact determined by the supreme court between the same litigants in the same cause of action, when there is a material and substantial change in the testimony reviewed at the different hearings. *Phelps County Farmers Mutual Ins. Co. v. Johnston*, 66 Neb. 590 (92 N. W. 576).

2083. (1902.) As it is the settled practice of the supreme court that a judgment will not be reversed for errors not argued in the briefs of counsel, a decision affirming a judgment does not become a precedent as to any question not argued or expressly presented to the court, and left unnoticed in the opinion, although it might have been raised, and, if raised, have been decisive of the case. *Larson v. First Nat. Bank of Pender*, 66 Neb. 595 (92 N. W. 729).

2084. (1902.) The rule that a prior decision of the supreme court in a given cause is the law of the case in all subsequent proceedings as to matters passed upon or involved in the decision, does not apply to propositions of law upon which the members of the court taking part therein were equally divided. *Baldwin v. Burt*, 2 Unof. 377 (96 N. W. 401).

2085. (1902.) Where the defendants appeal from a decree in favor of the plaintiff, allowing an injunction, which is contingent on the doing of certain acts by the plaintiff, and the decree is affirmed, such decree is conclusive on the parties as to all matters thereby adjudicated, on an appeal from a subsequent order in the same case. *Commercial State Bank of Crawford v. Ketcham*, 3 Unof. 839 (92 N. W. 998).

2086. (1903.) On an appeal in equity the appellee is not concluded as to any matter directly involved in the questions raised by the appellant. As to matters not necessarily involved in the appeal an appellee who enters no cross-appeal should be held concluded. *Clark v. County of Lancaster*, 69 Neb. 717 (96 N. W. 593).

2087. (1905.) The decision of a law question by the supreme court upon the first appeal of a cause will ordinarily be adhered to upon a second appeal as the law of the case. No exception to this rule will be made when the question so determined is one of practice, and the parties have been guided by such decision in the second trial of the case. *Williams v. Miles*, 73 Neb. 193 (102 N. W. 482; 105 N. W. 181; 106 N. W. 769).

2088. (1905.) An amended answer, in an action to recover for injuries from an electric light company by a lineman who alleged negligence in uninsulated wires, on rehearing after a reversal wherein it is admitted such wires were not insulated, it being denied in the original answer, does not put in issue new facts so as to overthrow the law of the case on the former hearing. *New Omaha Thomson-Houston Electric Light Co. v. Rombold*, 73 Neb. 259 (102 N. W. 475; 106 N. W. 213).

2089. (1905.) Where the supreme court has in a proper proceeding declared as a matter of law that a judgment of the district court is valid and cannot be collaterally attacked, such holding will ordinarily be treated as the law of the case in all subsequent proceedings involving the determination of that question. *Parrotte v. Dryden*, 73 Neb. 291 (102 N. W. 610).

2090. (1905.) A point necessarily determined by the supreme court upon appeal becomes the law of the case, and, ordinarily, will not be departed from in the further course of the litigation, unless clearly wrong,

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so that it cannot be supported upon reason or authority. *First Nat. Bank of Plattsmouth v. Gibson*, 74 Neb. 236 (105 N. W. 1081).

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2091. (1905.) When a petition is held by the supreme court to state a cause of action as against a general demurrer, this ruling becomes the law of the case, and will be adhered to upon a second appeal if the cause has been tried in the district court without specific objection to the sufficiency of the petition. *First Nat. Bank of Plattsmouth v. Gibson*, 74 Neb. 236 (105 N. W. 1081).

XVI. DETERMINATION AND DISPOSITION OF CAUSE.

Effect of reversal after writ of restitution in forcible entry and detainer, see *Forcible Entry and Detainer*, § 89.

Liability on supersedeas bond in attachment, see *Attachment*, §§ 364-366.

A. Decision in General.

Remand without decision.

2092. (1888.) Where the issues, after amendment and supplemental petitions are filed, are so confused as to make it uncertain just what the issues are, the case will be sent back to the trial court with leave to replead and a new trial had upon the merits. *Lancaster County Bank v. Gregory*, 24 Neb. 656 (39 N. W. 835).

2093. (1890.) When it appears that all the parties necessary to a proper and complete determination of an equity cause were not before the district court, the supreme court may remand the cause for the purpose of having such parties brought in. *Smith v. Shaffer*, 29 Neb. 656 (45 N. W. 936).

Effect of lack of jurisdiction.

2094. (1894.) Where the supreme court has not acquired jurisdiction of a cause, the only judgment which can be rendered is one dismissing the proceeding. *Garneau v. Omaha Printing Co.*, 42 Neb. 847 (61 N. W. 100).

Consolidated causes.

2095. (1894.) Where several cases with different plaintiffs, presenting different states of fact, were, by agreement, tried together, and by stipulation all the plaintiffs joined in one motion for a new trial and in one petition in error, the proceedigs were indivisible, and the judgment must be affirmed as to all if free from error as to one. *Omaha Fair & Exposition Ass'n v. Missouri P. R. Co.*, 42 Neb. 103 (60 N. W. 330).

Scope of decision.

2096. (1901.) A decision of the supreme court holding that a petition states a cause of action is an adjudication that the facts pleaded will, if admitted or proved, entitle the plaintiff to the relief demanded. *Smith v. Neufeld*, 61 Neb. 699 (85 N. W. 898).

Scope and extent of relief.

2097. (1906.) In case issues of fact, necessary to the determination of a cause, are not passed upon by the court below, but the testimony thereon is full and convincing, the supreme court will find the facts and direct such decree as its determination thereof may require. *Sanely v. Crapenhoft*, 1 Unof. 8 (95 N. W. 352).

2098. (1904.) The supreme court has power to make such orders and disposition of a cause before it as will render a judgment effective. *McCormick v. State*, 71 Neb. 505 (99 N. W. 237).

——— Persons entitled.

2099. (1886.) An appellee who has taken no steps to have a decree reviewed will not on the affirmance of the judgment in the supreme court be entitled to any greater relief than was awarded to him in the court below, unless his rights are so interwoven with those of the appellant that the court in adjudicating the appellant's rights must necessarily grant the appellee additional relief. *Hamilton v. Whitney, Clark & Co.*, 19 Neb. 303 (27 N. W. 125).

2100. (1896.) On appeal, relief can only be obtained by such parties are are appellants. *Rogers v. Central Loan & Trust Co.*, 49 Neb. 676 (68 N. W. 1048).

B. Affirmance.

Error not shown.

2101. (1896.) Where the bill of exceptions has been quashed and the petition in error fails to present a question for review, the judgment below may be affirmed. *Sweeney v. Ramge*, 46 Neb. 919 (66 N. W. 9).

Reversal ineffectual or not beneficial.

2102. (1902.) Where an order appointing a receiver is erroneously made, but is not reviewed until the main case in which the receiver was appointed has been heard on appeal in the supreme court, and on such appeal it is determined that the party applying for the receiver is entitled to the rents and profits of which the receiver took possession, the order will not be reversed or set aside, as such action could not benefit either party to the action and would proba-

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bly result in further litigation and costs. *Sheldon v. Parker*, 66 Neb. 634 (95 N. W. 1015).

Remission of part of recovery.

2103. (1882.) In a proceeding to reverse judgment of an inferior court, where the only error is that costs of protest of note on which suit was brought were included in excess of endorsement on summons, and same is remitted, judgment should be affirmed as to residue, but without costs. *McKay v. Hinman*, 13 Neb. 33 (13 N. W. 15).

2104. (1889.) The verdict of the jury being for too great an amount in favor of the defendant in error, he is required to remit the excess as a condition to the affirmance of the judgment. *Boston Tea Co. v. Prubaker*, 26 Neb. 409 (42 N. W. 399).

2105. (1893.) Where a jury includes in a verdict for a plaintiff a sum for attorney's fees for which defendant should not be held liable, a judgment entered thereon will be reversed upon review in the supreme court unless the plaintiff files a remittitur for said sum. *Jones Nat. Bank v. Price*, 37 Neb. 291 (55 N. W. 1045).

2106. (1894.) Where a verdict is too large and the amount of excess definitely appears from the record for review in supreme court, the party in whose favor the verdict was rendered, in absence of other error, may be permitted to remit the excess and have judgment for balance affirmed. *Omaha & R. V. R. Co. v. Ryburn*, 40 Neb. 87 (58 N. W. 541); (1894) *Haas v. Bank of Commerce*, 41 Neb. 754 (60 N. W. 85); (1895) *Creighton v. Finlayson*, 46 Neb. 457 (64 N. W. 1103); (1897) *School District of Beatrice v. Thomas*, 51 Neb. 740 (71 N. W. 731).

2107. (1896.) Where a judgment was excessive to the amount of eighteen cents, a remittitur for that sum was required as a condition of affirmance. *Andres v. Kridler*, 47 Neb. 585 (66 N. W. 649).

2108. (1896.) Where excess in the amount of recovery is the only error in a record for review, the judgment may be affirmed upon the filing of a remittitur for the proper sum. *Regier v. Shreck*, 47 Neb. 667 (66 N. W. 618); (1904) *Davis v. Hall*, 70 Neb. 678 (97 N. W. 1023).

2109. (1897.) In an action for liquidated damages, where the verdict is excessive, and it is evident that the error in assessing the damages arose from a misconception of the evidence, which probably affected the determination of the other issues, a new trial will be awarded, instead of permitting a remittitur of the excess. *Lenzen v. Miller*, 51 Neb. 855 (71 N. W. 715).

2110. (1897.) An excessive verdict in an action *ex contractu* may be cured by a remittitur, it not appearing that the verdict is the result of the jury's passion or prejudice. *Wainwright v. Satterfield*, 52 Neb. 403 (72 N. W. 359).

2111. (1897.) The statute has not changed the common law rule that an excessive verdict might be cured by a remittitur, except in so far as to entirely vitiate such a verdict, when it is made to appear that it is the result of the jury's passion or prejudice. *Wainwright v. Satterfield*, 52 Neb. 403 (72 N. W. 359).

2112. (1900.) Where it appears that a judgment is based on a verdict which is excessive, though not given under the influence of passion or prejudice, it may be permitted to stand, even in actions *ex delicto*, on condition that the excess be remitted. *Bee Publishing Co. v. World Publishing Co.*, 59 Neb. 713 (82 N. W. 28); (1904) *Chicago B. & Q. R. Co. v. Krayenbuhl*, 70 Neb. 766 (98 N. W. 44).

2113. (1900.) The evidence as to the amount of attorney's fees, improperly allowed as an element of damages being without conflict, uncontradicted, and for one specified sum, *held*, that a remittitur of such excessive sum might properly be allowed. *Trester v. Pike*, 60 Neb. 510 (83 N. W. 676).

——— Reference to determine amount of deduction.

2114. (1881.) In an action of ejectment where the plaintiff in his reply pleaded a tender of the amount paid by the defendant for taxes due on the premises, but the court on the trial excluded proof of the amount *held*, that the judgment in ejectment being right, the supreme court, will order a reference to ascertain the amount due for taxes, and require the payment of the same as a condition of affirming the judgment. *Howard v. Lamaster*, 11 Neb. 582 (10 N. W. 497).

2115. (1888.) One A, being about sixteen years of age, went to reside with B, his brother, and to continue in his service until he was twenty-one years old, when B was to give him a span of horses, wagon and harness. A continued in the service of B until about seven months before

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reaching his majority, when he left his service. In an action by A against B to recover for the value of his services, verdict having been rendered in favor of A for the value of a span of horses, harness, and wagon, *held*, that as A had not remained in the employment of B until he was twenty-one years of age, he could not recover the entire amount agreed upon, but the matter being susceptible of computation, a reference would be ordered to determine the amount of deduction to be made. *Burkholder v. Burkholder*, 25 Neb. 270 (41 N. W. 145).

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C. Modification.

Correction of errors.

2116. (1889.) Where an action was against two or more defendants jointly, and the verdict of the trial jury was in favor of the plaintiff but against one defendant only, and the court by mistake or oversight rendered judgment against both, the mistake being conceded, in the supreme court upon proceedings in error the mistake in the judgment will be corrected without remanding the cause for a new trial. *Youngson v. Pollock*, 25 Neb. 431 (41 N. W. 279).

2117. (1893.) In an action by a partner for an accounting, an error in computation in findings or decree, in other respects correct, will be corrected in the supreme court upon appeal. *Gerber v. Jones*, 36 Neb. 126 (54 N. W. 81).

2118. (1898.) Judgment of affirmance will be modified so as to correct an erroneous computation of the trial court. *Lewis v. Holdrege*, 57 Neb. 219 (77 N. W. 656).

Rendering judgment which lower court should have rendered.

2119. (1872.) If a new trial cannot be awarded, the supreme court will render such judgment as the district court should have rendered, and not remand the cause for judgment. *McCann v. McLennan*, 2 Neb. 286.

2120 (1891.) The supreme court, in reviewing a case on appeal, when the judgment of the district court is for a less sum than the undisputed evidence shows the successful party was entitled to, will enter such a judgment as under the evidence should have been rendered in the court below. *Spence v. Damrow*, 32 Neb. 112 (48 N. W. 880).

2121. (1893.) Upon appeal from a decree the findings of fact which are wholly unsustained by the evidence will be set aside, and thereupon such decree directed or entered as the facts proved clearly warrant. *Furbush v. Barker*, 38 Neb. 1 (56 N. W. 996).

2122. (1900.) Where a decree brought here for review is found to be erroneously computed, the mistake will be corrected here, or the cause will be remanded with directions to the trial court to render the proper judgment. *Leavitt v. Bell*, 59 Neb. 595 (81 N. W. 614).

2123. (1902.) An intervener whose petition does not state facts sufficient to constitute a cause of action, and who does not pray for any judgment which the court has jurisdiction to render, should be dismissed from the action; and if he obtains a judgment with which he is not satisfied, and appeals therefrom, the supreme court will render the judgment of dismissal which ought to have been rendered below. *Iodence v. Peters*, 64 Neb. 425. (89 N. W. 1041).

2124. (1902.) In a suit in equity brought to the supreme court on appeal, that court has full power to render such a decree as it shall find the district court ought to have rendered. Upon a settlement of the matters in controversy by the parties to such action, with the consent of the court, such decree may be rendered as they may agree upon. *Riley Bros. Co. v. Melia*, 3 Unof. 666 (92 N. W. 913).

Granting relief not prayed for in lower court.

2125. (1889.) A brought an action against B for the cancellation of certain notes and to enjoin the transfer of the same upon the ground that they were tainted with usury. On the trial the court found usury in the contract and ordered the cancellation of two of said notes and enjoined the transfer thereof. This decree was afterwards affirmed by the supreme court. Afterwards the mortgagee applied to the court to so modify the decree as to require the mortgagor as a condition of relief to pay the amount which was found to be due. *Held*, That as the granting of such relief had not been sought in the original action and would require a reconstruction of the pleadings, it would be denied. *Wilhelmson v. Bentley*, 27 Neb. 658 (43 N. W. 397).

D. Reversal.

Error as to grounds of decision.

2126. (1898.) A judgment based on an immaterial fact or an erroneous construc-

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tion of a pleading will be reversed, unless the correctness of such judgment is otherwise affirmatively shown. *McConniff v. Van Dusen*, 57 Neb. 49. (77 N. W. 348).

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Error complained of by both parties.

2127. (1904.) Where immaterial evidence containing matters liable to mislead a jury is admitted on behalf of each party, and both bring error petitions into the supreme court, the judgment must be reversed. *Kuhlman v. Cole*, 5 Unof. 302 (98 N. W. 419).

Reversal as to one or more coparties.

2128. (1884.) In an action against two or more, charging them jointly with the commission of a tort or wrong, if the evidence sustains the charge against one, but not against the other, the verdict, as against the latter, will, upon his application, be set aside, and the judgment be permitted to stand as against the party proven guilty of the wrong which caused the damage. *Hayden v. Woods*, 16 Neb. 306 (20 N. W. 345).

2129. (1889.) Where a joint verdict has been rendered against a principal and his agent, and the testimony fails to show the liability of such agent, the verdict may be set aside as to him and permitted to stand as to the principal. *Durrell v. Hart*, 25 Neb. 610 (41 N. W. 551).

2130. (1897.) In an appeal, that the final adjudication may affirm the decree of the trial court in some particular or particulars, as to the rights of one appellant, does not necessitate the affirmance of the decree as an entirety and against all appellants. *Western Cornice & Mfg. Works v. Leavenworth*, 52 Neb. 418 (72 N. W. 592).

Directing further proceedings in lower court.

2131. (1894.) The plaintiff below brought the case to the supreme court on error, complaining of error in the assessment of the amount of recovery. The defendants filed a cross-petition in error, assigning many errors. The defendants having joined in the motion for a new trial, and the verdict being clearly right in its direction against one of the defendants, the court was precluded from examining the questions sought to be presented affecting only the rights of the others; but the plaintiff being entitled to a reversal of the judgment against that one defendant because of error in the assessment of the amount of recovery, the court refused to remand the case for a reassessment of damages only and awarded a new trial of the action. *Porter v. Sherman County Banking Co.*, 40 Neb. 274 (58 N. W. 721).

2132. (1894.) In reversing a decree in favor of plaintiff in an action to rescind a contract, where it is decided upon review that plaintiff is estopped to rescind, the cause may be remanded with leave to him to amend his petition and pray for damages. *Foley v. Holtry*, 41 Neb. 563 (59 N. W. 781).

2133. (1898.) Where there are controverted facts which should be determined by the trial court or by a jury, the cause, upon reversal of the judgment, should be remanded for further proceedings. *Widemair v. Woolsey*, 53 Neb. 468 (73 N. W. 947).

2134. (1899.) Where a plaintiff has mistaken his remedy, but is apparently entitled to some relief, the cause may be remanded with direction to the trial court to permit a reformation of the issues. *Moseley v. Chicago, B & Q. R. Co.*, 57 Neb. 636 (78 N. W. 293).

2135. (1903.) In furtherance of justice, where a finding is set aside on appeal and the former trial was unsatisfactory, instead of entering or directing a new decree, the supreme court will remand the case for further proceedings. *Faulkner v. Simms*, 68 Neb. 299 (94 N. W. 113); (1903) *McCook Irrigation & Water Power Co. v. Crews*, 70 Neb. 109 (96 N. W. 996).

2136. (1904). It is the duty of an appellate court, upon reversing a judgment of an inferior court, to determine whether the circumstances and condition of the case require that the litigation shall be ended, or the case shall be remanded for another trial, with directions as to the further proceedings to be taken, or shall be remanded for the exercise of the discretion of the lower court. *Gadsden v. Thrush*, 72 Neb. 1. (99 N. W. 835).

2137. (1905.) It is not the practice of the supreme court to dismiss a law action upon reversing a judgment of the district court for want of evidence to sustain it. The cause is remanded to the district court for further proceedings. *Chicago, St. P., M. & O. R. Co. v. McManigal*, 73 Neb. 585 (107 N. W. 243).

Rendering final judgment.

2138. (1883.) When upon the trial of a cause in the nature of a suit in equity in

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the district court, a judgment is rendered against the plaintiff in the nature of a nonsuit, and upon appeal to the supreme court it shall appear that the plaintiff had offered competent testimony sufficient to entitle him to a decree *prima facie*, the supreme court will render or order a decree in his favor accordingly. *Great Western Mfg. Co. v. Hunter Bros.*, 15 Neb. 32 (16 N. W. 759).

2139. (1894.) Except where the decision of an appellate tribunal necessitates a trial of an issue for which the constitution guarantees a trial by jury, it rests in the discretion of the appellate tribunal, upon the reversal of a judgment, to enter in the appellate court a proper judgment or to remand the case to the court from which it was appealed, either with directions to enter a specific judgment, for a retrial of particular issues, or for a new trial of the whole case. Such discretion should be exercised in such manner as to best and most surely accomplish the ends of justice. *Porter v. Sherman County Banking Co.*, 40 Neb. 274 (58 N. W. 721).

2140. (1901.) An opinion filed on appeal on consideration of a motion, having fully disposed of the merits of the controversy, and determined the final judgment to be rendered, the final judgment, already determined, will be entered. *Armstrong v. Mayer*, 61 Neb. 355 (86 N. W. 489).

2141. (1901.) On reversing a cause, it is within the discretion of the appellate court to either render such judgment as should have been rendered by the lower court, or to remand the cause for a new trial, or with instructions to enter judgment without a second trial. *Chicago, B & Q. R. Co. v. Yost*, 61 Neb. 530 (85 N. W. 561).

Reinstatement of former verdict.

2142. (1898.) When a verdict in favor of one party is set aside by the district court in the exercise of a sound legal discretion, and a second trial results in favor of the other party, the first verdict will not be reinstated upon a reversal by the supreme court of a judgment based on the second verdict. *Zobel v. Bauersachs*, 55 Neb. 20 (75 N. W. 43).

Stipulation as to disposition of case.

2143. (1898.) The supreme court may remand a cause for further proceedings in disregard of a stipulation fixing the amount for which judgment should be rendered in case of reversal, where subsequent proceedings may have avoided the stipulation in whole or in part. *Kendall v. Garneau*, 55 Neb. 403 (75 N. W. 852).

Scope and effect of reversal.

2144. (1900.) A case which is reversed and remanded with directions to proceed according to law is reversed generally. *Pinkham v. Pinkham*, 60 Neb. 600 (83 N. W. 837).

2145. (1901.) Where a decree was rendered denying one of the litigants any relief and taxing him with half the costs, and it was reversed, it also reversed the decree as to costs. *Olson v. Lamb*, 61 Neb. 484 (85 N. W. 397).

Right of appellant to restitution.

2146. (1900.) When a judgment is vacated by appeal, after having been carried into execution, the appellant is entitled to have restitution. *Jenkins v. State*, 60 Neb. 205 (82 N. W. 622).

2147. (1901.) Where a party has obtained property by a judgment afterward reversed, restitution is a matter of right. *Horton v. State, ex rel. Hayden*, 63 Neb. 34 (88 N. W. 146).

2148. (1903.) It is a general rule that, "upon reversal of a judgment which has been executed, it is the duty of the court to compel restitution," but restitution is not, in all cases, a matter of absolute right; it rests in the sound discretion of the court. *State, ex rel. Hayden, v. Horton*, 70 Neb. 334 (97 N. W. 434).

2149. (1903.) A corporation neglected to issue stock to a subscriber therefor and, by its proper officers, ordered the money which had been paid upon subscription, returned to the subscriber. The subscriber procured a peremptory writ of mandamus, compelling subordinate officers of the corporation to execute papers deemed necessary to secure a return of the money. The order allowing the writ was afterwards reversed. The corporation having gone into bankruptcy is not entitled to an order requiring the relator to return the money, so obtained, to the trustee in bankruptcy. *State, ex rel. Hayden, v. Horton*, 70 Neb. 334 (97 N. W. 434).

——— Compelling restitution.

2150. (1900.) A party who, after vacation of judgment, wilfully fails to comply with a lawful order for restitution, may be proceeded against as for a criminal con-

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tempt. *Jenkins v. State*, 60 Neb. 205 (82 N. W. 622).

2151. (1900.) Upon the reversal of a judgment which has been executed it is the duty of the court to compel restitution. *Hier v. Anheuser-Busch Brewing Ass'n*, 60 Neb. 320 (83 N. W. 77).

2152. (1901.) Where a party to a cause has obtained money or property under or by virtue of a judgment which is afterwards reversed, the court has power to compel restitution by summary proceedings in that cause. *Horton v. State, ex rel. Hayden*, 63 Neb. 34 (88 N. W. 146).

2153. (1901.) Where the record shows that money has been collected or obtained under and by virtue of the judgment afterwards reversed, restitution should be awarded as of course. Where such fact does not clearly appear upon the record, but is made to appear *aliunde*, the proper procedure is by order to show cause why restitution should not be made. *Horton v. State, ex rel. Hayden*, 63 Neb. 34 (88 N. W. 146).

2154. (1903.) Ordinarily an order of restitution will not be made against a solvent party where the result will be to deprive him of an opportunity to be heard in the courts of this state as to the merits of his claim. *State, ex rel. Hayden, v. Horton*, 70 Neb. 334 (97 N. W. 434).

2155. (1905.) In an action to recover money that has been paid to defendant pursuant to a judgment in mandamus which was afterwards reversed, a petition which alleges only the payment of the money in obedience to the writ, and the subsequent reversal of the judgment in mandamus, without allegations of fact showing that the plaintiff is justly entitled to the money in controversy, does not state a cause of action. *Horton v. Hayden*, 74 Neb. 339 (104 N. W. 757.

E. Rendition, Form and Entry of Judgment.

Modification.

2156. (1901.) The jurisdiction of the supreme court to alter or modify its judgments continues during the whole of the term at which its final judgment is rendered unless its mandate is acted upon in the district court. *Horton v. State, ex rel. Hayden*, 63 Neb. 34 (88 N. W. 146).

2157. (1903.) A formal judgment entered in the supreme court upon an attempted voluntary appearance, which gave the supreme court no jurisdiction, is void, and will be so declared, when, at the same term at which the judgment was entered, the facts are brought to the knowledge of the court. *Ritchey v. Seeley*, 68 Neb. 127 (97 N. W. 818).

F. Mandate and Proceedings in Lower Court.

Mandate.

——— Necessity.

2158. (1901.) When the judgment of a district court is reversed, a mandate is the proper and legal mode of communicating the judgment and directions of the supreme court to such district court. *Horton v. State, ex rel. Hayden*, 63 Neb. 34 (88 N. W. 146).

——— Correction in lower court.

2159. (1886.) A mandate to the district court is not an adjudication that can be corrected only by rehearing; when incorrect the district court may and should correct it when the mistake is discovered. *Merriam v. Gordon*, 20 Neb. 405 (30 N. W. 410).

Powers and duties of lower court.

——— Further proceedings in general.

2160. (1899.) When a cause is remanded with directions as to further proceedings, the court below has no power to do anything but carry out the directions thus given it. *Farmers & Merchants Bank of Holstein v. German Nat. Bank of Lincoln*, 59 Neb. 229 (80 N. W. 820); (1904) *Story v. Robertson*, 5 Unof. 404 (98 N. W. 825).

2161. (1901.) In order to prevent conflict, a district court whose judgment has been reversed should defer action until the mandate of the supreme court is before it, although, where both parties proceed without objection, the irregularity in so doing without a mandate on file may not be taken advantage of thereafter. *Horton v. State, ex rel. Hayden*, 63 Neb. 34 (88 N. W. 146).

2162. (1902.) Where upon appeal the judgment of the trial court is reversed, and the cause remanded for further proceedings, the trial court has authority to take such further action in the interest of justice as the law will sanction and a sound discretion dictate or approve. *State v. District Court for Johnson County*, 2 Unof. 385 (96 N. W. 121).

2163. (1904.) Where judgment of the district court in an equity case is reversed on appeal and remanded without direction,

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the trial court is reinvested with discretion to proceed, and its action will be sustained unless there is an abuse of discretion. *Hoagland v. Stewart*, 71 Neb. 102 (98 N. W. 428).

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2164. (1904.) The rule of the supreme court is that, when a case is reversed and remanded generally, the district court is to exercise its discretion in the further proceedings in the cause, unless otherwise specially directed by this court. *Gadsden v. Thrush*, 72 Neb. 1 (99 N. W. 835).

2165. (1907.) A judgment was reversed because of an erroneous conclusion of law drawn from the facts found, and the cause remanded without specific directions. After it was remanded the trial court overruled a motion for judgment on the findings and proceeded to try the case *de novo*, and additional testimony was adduced by either party bearing on one of the vital issues in the case. The trial court, without passing on the evidence adduced at the second trial, adopted the findings made at the first trial and entered a decree thereon. *Held*, Error; the court having proceeded to a trial *de novo* should have found on the evidence adduced at such trial. *Colby v. Foxworthy*, 78 Neb. 288 (110 N. W. 857).

——— Amendment of pleadings.

2166. (1890.) The plaintiff, having died after the cause was submitted to the court, but before judgment, and it being apparent that the defendant had rights in the premises, the cause is remanded to the district court, with leave to the parties to file supplemental pleadings and take further testimony, and for the court to settle the ultimate rights of the parties. *Thompson v. Thompson*, 30 Neb. 489 (46 N. W. 638).

2167. (1899.) Where a judgment in an equitable action is reversed and the cause remanded for further proceedings not inconsistent with the opinion there is no strict and absolute right to file new pleadings in such case. The matter is committed to the sound discretion of the court, and its action in the premises will not be reversible error unless it amounts to an obvious abuse of discretion. *Troup v. Horbach*, 57 Neb. 644 (78 N. W. 286).

2168. (1900.) After reversal for error occurring subsequent to the trial, where the finding or verdict is not disturbed, it is not error, on the cause being remanded, to refuse to permit amended pleadings to be filed. *Missouri, Kansas & Texas Trust Co. v. Clark*, 60 Neb. 406 (83 N. W. 202).

2169. (1900.) Where, in an equitable action, the decree of the trial court is reversed and the case remanded generally, the situation of the parties is the same as at the beginning of the trial, and, in the exercise of a sound discretion vested in the trial court, amendments of the pleadings may be made, not inconsistent with the opinion of the appellate court. *Pinkham v. Pinkham*, 60 Neb. 600 (83 N. W. 837).

2170. (1900.) In a controversy over the title to real estate, appellants claimed as heirs, and appellee as grantee, under a deed of conveyance from the same party. On appeal to the supreme court, the instrument under which appellee claimed was construed to be testamentary in character, passing no present estate. *Held*, After the action was remanded for further proceedings, with directions to proceed according to law, the appellee might properly amend his answer by pleading a mistake in the drafting of the instrument, in that it was stated "this deed is to take effect and be in full force from and after my death," when the true intention and desire of the parties thereto was to reserve to the grantor only a life estate in said premises, and asking for a reformation accordingly. *Pinkham v. Pinkham*, 60 Neb. 600 (83 N. W. 837).

2171. (1904.) Where a cause is remanded, on appeal a plaintiff may amend his petition by alleging any facts that would show any lawful right he claims touching the controversy. *Johnson v. Sherman County Irrigation, Water Power & Improvement Co.*, 71 Neb. 452 (98 N. W. 1096).

2172. (1904.) When the merits of a case have been decided by the supreme court pursuant to the mandate of the supreme court of the United States, amendments of the answer, by introducing new defenses independent of the issues upon which the case has been determined, will not ordinarily be permitted. It is not necessary in this case to determine whether this court has jurisdiction to permit such amendments. *Gadsden v. Thrush*, 72 Neb. 1 (99 N. W. 835).

2173. (1906.) A party cannot try his case by piecemeal; and where a case has been tried and appealed to the supreme court and remanded to the district court, with directions to enter a specified decree, the defendant will not be allowed to amend his answer by alleging facts which existed and of which he had knowledge prior to the trial first had. *Brewster v. Meng*, 76 Neb. 560 (107 N. W. 751).

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——Compliance with mandate.

2174. (1897.) When a judgment of a district court is reversed and the case remanded with instructions to enter a decree in conformity with the opinion, the former decree is not in existence, and hence the district court must enter a new decree and cannot merely modify the former one. *Oliver v. Lansing*, 51 Neb. 818 (71 N. W. 735).

2175. (1901.) Where on an appeal from a decree or findings as to priorities of mortgagees the cause is remanded with specific instructions to ascertain the amount due one claimant after deducting an amount paid to his agent, a finding of such sum and dismissal of the cause by the trial court was proper. *Holt v. Schneider*, 61 Neb. 370 (85 N. W. 280).

2176. (1901.) Where a finding in favor of one of the litigants does not include interest, the trial court does not, by refusing to render judgment for interest, disobey the mandate of the supreme court directing it to render judgment for the amount found due. *State, ex rel. Bullard, v. Norris*, 61 Neb. 461 (85 N. W. 435).

——Enforcement of compliance by mandamus.

2177. (1900.) If the district court mistakes or misconstrues the mandate of the supreme court, its obedience may be enforced by mandamus. *State v. Omaha Nat. Bank*, 60 Neb. 232 (82 N. W. 850); (1901) *State, ex rel. Bullard, v. Norris*, 61 Neb. 461 (85 N. W. 435); (1902) *State, ex rel. Horton, v. Dickinson*, 63 Neb. 869 (89 N. W. 431).

2178. (1903.) The district court should proceed in a case as directed by the mandate of the supreme court. In an action to foreclose a mortgage, the mandate directed the district court to enter a decree in favor of the plaintiff for the amount due on the mortgage. On the case being remanded, certain parties claiming to have acquired an interest in the mortgaged premises pending the appeal were allowed to intervene in the case, and the court refused to enter a decree in favor of the plaintiff, as directed by the mandate, until the rights of the interveners had been heard and determined. *Held*, That the plaintiff was entitled to a mandamus, commanding the district court to proceed in the case as required by the mandate of the supreme court. *State, ex rel. Bradbury, v. Thomson*, 69 Neb. 157 (95 N. W. 47).

New trial.

2179. (1898.) Where a decree in favor of plaintiff foreclosing a mechanic's lien is reversed on an appeal by defendants, and the cause remanded for further proceedings, the situation of plaintiff is the same as if his rights had never been tried. *Badger Lumber Co. v. Holmes*, 55 Neb. 473 (76 N. W. 174).

2180. (1900.) When the reversal of a judgment is grounded on error in the trial occurring anterior to the verdict, the verdict is nullified and the cause, when remanded, stands for trial *de novo*. *State v. Omaha Nat. Bank*, 60 Neb. 232 (82 N. W. 850).

2181. (1900.) When, in an error proceeding, a judgment is reversed for error occurring at the trial, the cause, when remanded, must necessarily be tried *de novo*. *Missouri, Kansas & Texas Trust Co. v. Clark*, 60 Neb. 406 (83 N. W. 202).

2182. (1900.) A trial *de novo* may be had in an equitable action where a case has been reversed and remanded generally. *Pinkham v. Pinkham*, 60 Neb. 600 (83 N. W. 837).

——Scope of issues.

2183. (1897.) On a former appeal of this case the supreme court determined all the issues involved, except the value of a certain block of real estate, reversed the decree appealed from and remanded the case with instructions to the district court to ascertain the value of said block and enter a decree in conformity with the opinion, taxing all the costs to the appellee. *Held*, That the case was not remanded generally for a new trial of all the issues made by the pleadings therein, and the district court did not err in refusing to permit witnesses to be called and examined as to the value of said block, but might ascertain such value from the evidence embraced in the bill of exceptions and made a part of the record of the case on its first trial. *Oliver v. Lansing*, 51 Neb. 818 (71 N. W. 735).

2184. (1899.) Where a decree in equity is reversed and the cause remanded for further proceedings not inconsistent with the opinion filed by the supreme court, the district court, if consistent with such opinion, may permit a reformation of the issues and a trial *de novo*. *Troup v. Horbach*, 57 Neb. 644 (78 N. W. 286).

2185. (1900.) When, in an error proceeding, the judgment of a trial court has

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been reversed, that court should retrace its steps to the point where the first material error occurred; from that point the trial should progress anew. *Missouri, Kansas & Texas Trust Co. v. Clark*, 60 Neb. 406 (83 N. W. 202).

2186. (1904.) Under the practice in the federal courts, the rule seems to be that, when the merits of the case have been once decided by the supreme court upon appeal, the circuit court has no authority, without express leave of the supreme court, to permit new defenses on the merits to be introduced by amendment to the answer. *Gadsden v. Thrush*, 72 Neb. 1 (99 N. W. 835).

2187. (1904.) The rule of the supreme court is that, when a decree in equity is reversed and remanded generally without specific instructions, the lower court is to exercise its discretion in the further disposition of the case, in accordance with the judgment of the supreme court and the law of the case as expressed in the opinion. *Hoagland v. Stewart*, 71 Neb. 106 (100 N. W. 133).

2188. (1904.) Where, upon appeal of a suit in equity, the decree of the trial court in favor of the plaintiff is reversed and the cause remanded for further proceedings upon amended pleadings, nothing has become *res judicata*, or the "law of the case" binding on the trial court, except that the pleadings and evidence on the first appeal did not authorize the decree. *Johnson v. Sherman County Irrigation, Water Power & Improvement Co.*, 71 Neb. 452 (98 N. W. 1096).

2189. (1904.) The precise question decided by the supreme court upon appeal or error cannot be relitigated upon a retrial of the same case in the district court. *Supreme Court of Honor v. Tracy*, 72 Neb. 742 (101 N. W. 1021); (1904) *McBride v. Whitaker*, 5 Unof. 399 (98 N. W. 847); (1905) *Curtis v. Zutavern*, 73 Neb. 45 (102 N. W. 77, 103 N. W. 432).

2190. (1904.) Where a cause is remanded with directions to enter a particular decree the correctness of the decision of the supreme court is not open to inquiry in further proceedings in the cause in the district court. *McBride v. Whitaker*, 5 Unof. 399 (98 N. W. 847).

2191. (1907.) Ordinarily, where the judgment of a trial court is reversed on error and the cause remanded without specific directions, the trial court should retrace its steps to the point where the first material error occurred, and from that point the trial should progress anew, unless from the nature of the error or the connection in which it occurred a trial *de novo* is necessary to correct it. But the foregoing rule is not inflexible, and whether to proceed from the point where the first material error occurred or award a trial *de novo* is within the sound discretion of the trial court, and in the absence of an abuse of such discretion its decision will not be disturbed. *Colby v. Foxworthy*, 78 Neb. 288 (110 N. W. 857).

2191*a*. (1907.) Where the supreme court has determined the questions of fact and fixed the liabilities of the parties in a suit, and remanded the case to the district court, with specific directions to that court to enter its judgment in accordance with the findings and judgment of the supreme court, as set out in its opinion, it is then too late to bring in new parties or to raise new or different issues. *Gund v. Ballard*, 80 Neb. 385 (114 N. W. 420).

G. Jurisdiction and Proceedings of Appellate Court After Remand.

Modification of judgment.

2192. (1900.) The jurisdiction of the supreme court to alter or modify its judgments continues during the whole of the term at which its final judgment is rendered, unless its mandate is acted upon in the district court. But when the mandate of the supreme court is acted upon and carried into effect by the district court the power of the supreme court over its judgment is at an end. *Horton v. State, ex rel. Hayden*, 63 Neb. 34 (88 N. W. 146).

XVII. LIABILITIES ON BONDS AND UNDERTAKINGS.

Nature, construction and validity of obligation.

2193. (1883.) A supersedeas bond is to be construed by the same rules as other written contracts. *Harbach v. Miller*, 14 Neb. 9 (14 N. W. 545).

2194. (1895.) The liability of the signers of an appeal bond, as between them and the judgment creditor, is that of principal debtors. *Flannagan v. Cleveland*, 44 Neb. 58 (62 N. W. 297).

2195. (1896.) Judgment was recovered before a justice of the peace against two makers of a promissory note, who jointly appealed to the district court. The undertaking of the surety on an appeal bond was

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to pay any judgment rendered against the appellants. *Held*, That the surety is liable, notwithstanding judgment in the appellate court was only against one of the appellants. *Johnson v. Reed*, 47 Neb. 322 (66 N. W. 405).

2195*a*. (1901.) 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. *Griswold v. Hazels*, 62 Neb. 888 (87 N. W. 1047).

2196. (1903.) In an action on a bond executed after judgment and pending the transfer of the cause to the supreme court by proceedings in error, conditioned that the obligors "shall pay whatever judgment may be rendered by the court upon dismissal or trial of said appeal," a petition, which merely alleges that the original judgment of the lower court was affirmed and is unpaid, fails to state a breach of the bond. *German Nat. Bank of Beatrice v. Beatrice Rapid Transit & Power Co.*, 69 Neb. 115 (95 N. W. 49).

2197. (1904.) An appeal bond in an action for the foreclosure of a mechanic's lien, in which a personal judgment has been rendered against the obligors, which is conditioned that the appellants will pay all condemnation money, judgment and costs which may be found against him or them on the final determination of the cause in the supreme court, complies with the first subdivision of section 677 of the code, is based upon a sufficient consideration, and is valid. *Maloney v. Johnson-McLean Co.*, 72 Neb. 340 (100 N. W. 423).

Insufficient, void or defective bond.

2198. (1884.) A bond for an appeal from an order of the board of county commissioners disallowing an account is not invalid because signed immediately beneath the penal portion of the bond. *Gage County v. Fulton*, 16 Neb. 5 (19 N. W. 781).

2199. (1902.) An appeal undertaking given under section 1007 of the code of civil procedure is valid and effective, although the only surety by whom it was executed is a non-resident of the county in which the action is pending. *Leidigh v. Pribble*, 64 Neb. 860 (90 N. W. 950).

2200. (1903.) A bond executed in pursuance of a statute is not necessarily rendered void because the statute is afterward pronounced unconstitutional. *Stevenson v. Morgan*, 67 Neb. 207 (93 N. W. 180; 108 Am. St. Rep. 629).

2201. (1903.) The test of the enforceability of an appeal bond, executed under an unconstitutional statute, is whether a consideration exists independent of the statute; if so, and the bond has the other essentials of a common-law contract, it may be enforced. *Stevenson v. Morgan*, 67 Neb. 207 (93 N. W. 180; 108 Am. St. Rep. 629).

2202. (1903.) The principal and sureties upon an undertaking in an appeal, prosecuted, under a void statute, to a court to which in fact no lawful appeal lies, are liable on the instrument, if the court without objection entertains the appeal, and upon a retrial of the issues renders a judgment adverse to the appellant. *McVey v. Peddie*, 69 Neb. 525 (96 N. W. 166).

2203. (1903.) A bond, given in an attempted appeal in an action of forcible entry and detention, conditioned for the payment of rent, is valid as a contract, if the obligor has by reason of the bond retained possession of the premises, though the statute authorizing such appeal is afterwards held unconstitutional. *United States Fidelity & Guaranty Co. v. Ettenheimer*, 70 Neb. 147 (99 N. W. 652); (1905) *Escritt v. Michaelson*, 73 Neb. 634 (103 N. W. 300).

2204. (1906.) An objection in an action on an appeal bond that it is not a statutory bond is unavailing because the obligation would be good at common law. *Locke v. Skow*, 76 Neb. 39 (106 N. W. 1013).

Discharge of sureties.

2205. (1893.) A bank brought an action in a county court on two promissory notes held by it as collateral security, and recovered judgment thereon against the maker. The defendant took an appeal to the district court, the usual statutory bond being executed. While the cause was pending in the appellate court the indebtedness due the bank by the pledgor of the notes was paid, after which one H., to whom the said notes, prior to the bringing of the suit, had also been pledged as collateral security for a debt due him, subject to the claim of the bank, was substituted in place of the bank as plaintiff, who recovered judgment against the maker of the notes. *Held*, That the surety in the appeal bond or undertaking was not released by the substitu-

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tion of H. as plaintiff. *Howell v. Alma Milling Co.*, 36 Neb. 80 (54 N. W. 126; 38 Am. St. Rep. 694).

——— Stipulation for judgment.

2206. (1893.) By an agreement between the parties to an appeal pending in the district court, a judgment was rendered therein against the party appealing, without the knowledge or consent of the surety on the appeal bond. *Held*, In the absence of proof of fraud or collusion between the principal and the creditor, that the stipulation for judgment did not release the surety from liability on the appeal bond. *Howell v. Alma Milling Co.*, 36 Neb. 80 (54 N. W. 126; 38 Am. St. Rep. 694).

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——— Continuance of cause.

2207. (1893.) The mere continuance of a cause in an appellate court by stipulation of the parties, wthout the consent of the surety in the appeal bond will not operate to discharge such surety. *Howell v. Alma Milling Co.*, 36 Neb. 80 (54 N. W. 126; 38 Am. St. Rep. 694); (1896). *Johnson v. Reed*, 47 Neb. 322 (66 N. W. 405).

——— Alteration of undertaking.

2208. (1895.) Where, after an appeal undertaking had been approved by the justice, some of the sureties erased their names therefrom, this did not release them from liability, and consequently did not release their co-sureties, the obligee not knowing of or consenting to the change. The fact that the justice knew of the erasure was not material. It was beyond his power after approving the bond to deprive the obligee of his security. *Bingham v. Shadle*, 45 Neb. 82 (63 N. W. 143).

2209. (1900.) Where an appeal undertaking is changed before its approval by increasing the amount of the penalty therein, without the knowledge or consent of the surety thereon, he is released from liability, if the approving officer had notice of such alteration before the approval. *Schlageck v. Widhalm*, 59 Neb. 541 (81 N. W. 448).

——— Death of principal.

2210. (1898.) The death of the principal in a supersedeas bond, while the cause is pending in the appellate court, does not release the surety from liability, nor is he discharged by the failure to have the action revived. *Bell v. Walker*, 54 Neb. 222 (74 N. W. 617).

2211. (1898.) The liability of a surety in a supersedeas bond is not affected by the failure to present a claim against the estate of his principal. *Bell v. Walker*, 54 Neb. 222 (74 N. W. 617).

2212. (1902.) The rights of a judgment creditor are in nowise changed or modified by reason of the death of the judgment debtor and the sureties on his supersedeas bond can not escape the obligation, or delay its enforcement, because of the death. *Palmer v. Caywood*, 64 Neb. 372 (89 N. W. 1034).

Extent of liability.

2213. (1906.) A surety on a waste bond given to supersede an order of confirmation of a sale in a foreclosure proceeding is not liable to the mortgagee, nor to the purchaser at the sale, for taxes assessed against the property pending the final confirmation of the sale in the supreme court. *United States Fidelity & Guaranty Co. v. Rieck*, 76 Neb. 300 (107 N. W. 389).

2214. (1906.) In the absence of fraud or mistake, or of some circumstances working an estoppel, a surety upon a supersedeas bond can be held only for consequences of the proceeding in which the instrument was given. *American Bonding Co. v. Heye*, 76 Neb. 511 (107 N. W. 591).

Accrual or release of liability.

——— Failure to perfect appeal.

2215. (1895.) The failure to perfect an appeal operates as an affirmance of the judgment as against the signers of an appeal bond. *Flannagan v. Cleveland*, 44 Neb. 58 (62 N. W. 297).

——— Dismissal of appeal.

Effect on liability on appeal bond, see *post*, §§ 2033-2039.

2216. (1883.) By the dismissal of an appeal, either by the court, or by act of the appellant, the appellee is the successful party. *Gudtner v. Kilpatrick*, 14 Neb. 347 (15 N. W. 708).

2217. (1886.) The surety on a bond given for an appeal from a judgment of a justice of the peace is estopped to deny that an appeal had been taken in the case, in contradiction of his undertaking, although the same was filed after the expiration of the time limited for that purpose, and the appeal was dismissed for the reason that the bond was filed out of time. *Adams v. Thompson*, 18 Neb. 541 (26 N. W. 316).

2218. (1888.) Where an appeal by defendant in replevin was dismissed for the

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reason that no judgment was rendered upon the finding that "the right of property and the possession of said property" was in plaintiff, no action can be maintained on the appeal bond, since, there being no judgment, both the attempted appeal, and the bond were void. *Brounty v. Daniels*, 23 Neb. 162 (36 N. W. 463).

2219. (1894.) For the purpose of enabling his principal to prosecute proceedings in error in the supreme court for the reversal of a judgment rendered against him, a surety executed a supersedease bond, conditioned that he would "pay the condemnation money and costs in case such judgment should be affirmed in whole or in part." The surety's principal neglected for more than one year after the rendition of the judgment to institute any proceedings whatever in the supreme court for its reversal. *Held*, That such failure operated as an affirmance of the judgment. *Dunterman v. Storey*, 40 Neb. 447 (58 N. W. 949).

2220. (1898.) The dismissal of a petition in error from an appellate court, without an examination of the merits of the assignments, operates as an affirmance of the judgment sought to be reviewed. *Bell v. Walker*, 54 Neb. 222 (74 N. W. 617).

2221. (1902.) A party who obtains a dismissal of an appeal on the ground that his adversary failed to comply with an order requiring him to furnish a resident surety on an appeal undertaking is not, in an action upon such undertaking, estopped from asserting that the bond is valid and binding upon the non-resident surety by whom it was executed. *Leidigh v. Pribble*, 64 Neb. 860 (90 N. W. 950).

2222. (1903.) Where appellee procured a dismissal of the appeal on the ground that the undertaking was void, he is estopped to afterwards maintain a suit on such undertaking. *United States Fidelity & Guaranty Co. v. Ettenheimer*, 70 Neb. 144 (97 N. W. 227; 113 Am. St. Rep. 783).

Actions.

——Right of action.

2223. (1898.) A party who, upon a consideration acknowledged therein, had caused to be prepared and had subscribed a written instrument assigning all his interest in a judgment which he held and which had been appealed from, and had caused such assignment to be filed in the action wherein the appeal had been taken, cannot be heard to urge in argument, to sustain his own right of recovery on the appeal bond in another action, that the assignment was incomplete for the reason that, affirmatively, no acceptance by the assignee of the assignment had been proven. *Crum v. Stanley*, 55 Neb. 351 (75 N. W. 851).

2224. (1904.) The "condemnation money" mentioned in the conditions of a bond given under the first subdivision of section 677 of the code is "found against the defendant" when the judgment of the district court appealed from is affirmed by the supreme court. *Maloney v. Johnson-McLean Co.*, 72 Neb. 340 (100 N. W. 423).

——Conditions precedent.

2225. (1895.) The fact that the judgment debtor has property out of which the judgment could be satisfied is no defense in an action against the signer of an appeal bond. *Flannagan v. Cleveland*, 44 Neb. 58 (62 N. W. 297).

2226. (1895.) The issuing of an execution and its return unsatisfied is not a condition precedent to the right of a judgment creditor to maintain an action against the signer of an appeal undertaking executed to enable the judgment debtor to appeal. *Flannagan v. Cleveland*, 44 Neb. 58 (62 N. W. 297); (1896) *Johnson v. Reed*, 47 Neb. 322 (66 N. W. 405); (1899) *Ayres v. Duggan*, 57 Neb. 750 (78 N. W. 296); (1902) *Palmer v. Caywood*, 64 Neb. 372 (89 N. W. 1034).

2227. (1895.) The provsions of section 511 of the code of civil procedure are not applicable to a judgment rendered against the signers of an undertaking on appeal. *Flannagan v. Cleveland*, 44 Neb. 58 (62 N. W. 297).

2228. (1902.) Where the judgment debtor has died pending review, the judgment creditor can not be required to look to the estate of the deceased, although solvent, for satisfaction of the judgment, before maintaining a suit on the supersedeas bond. *Palmer v. Caywood*, 64 Neb. 372 (89 N. W. 1034).

2229. (1902.) It is not required that the judgment creditor shall, on affirmance of the judgment, exhaust the property of the judgment debtor, before bringing suit on the bond given to operate as a supersedeas pending the review of the proceedings resulting in the judgment by the appellate court. *Palmer v. Caywood*, 64 Neb. 372 (89 N. W. 1034).

——Defenses.

2230. The signers of an undertaking in appeal are estopped in a suit upon such

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undertaking from making the defense that no appeal was in fact perfected. (1883) *Gudtner v. Kilpatrick*, 14 Neb. 347 (15 N. W. 708); (1886) *Adams v. Thompson*, 18 Neb. 541 (26 N. W. 316); (1894) *Dunterman v. Storey*, 40 Neb. 447 (58 N. W. 949); (1895) *Flannagan v. Cleveland*, 44 Neb. 58 (62 N. W. 297).

2231. (1901.) A obtained judgment in the district court against B, a corporation, upon which execution issued and was returned unsatisfied; subsequently, B brought the case to the supreme court on error and filed a supersedeas bond in the district court, which was duly approved; afterwards, on A's motion, the district court made an order requiring additional sureties on the supersedeas bond, and providing that on failure of B to comply with such order within ten days, the supersedeas bond should be stricken from the files and execution issue on the judgment; the order was not complied with, and, while the proceedings in error were still pending, A brought an action to enforce the judgment against the stockholders of B to the extent of their unpaid stock subscriptions which was still pending at the time of the trial of the present case; the judgment of the district court was afterward affirmed. In an action against the surety on the supersedeas bond, the foregoing facts *held* not to constitute a defense. *English v. Smith*, 1 Unof. 670 (96 N. W. 60).

2232. (1906.) One who executes a bond under circumstances that would estop him to assert its invalidity for want of consideration, cannot, in an action upon the bond, avoid liability on the ground that the plaintiff is estopped to assert that there was any consideration for the bond. *Locke v. Skow*, 76 Neb. 39 (106 N. W. 1013).

——— **Parties.**

2233. (1903.) Under the provisions of section 29 of the code of civil procedure, a joint obligee in an appeal bond may maintain an action thereon in his own name without joining the other joint obligee, only where he alleges and proves that he has purchased the interest of his joint obligee, is the owner of the bond, and the real party in interest therein. *Harker v. Burbank*, 68 Neb. 85 (93 N. W. 949).

——— **Pleading.**

2234. (1893.) In an action on an appeal bond, given by a defendant in replevin the petition, *held* to state a cause of action. *Shoning v. Coburn*, 36 Neb. 76 (54 N. W. 84).

2234*a*. (1898.) In an action on a supersedeas bond, *held* unnecessary to allege the issue and return of an execution *nulla bona*. *Cortelyou v. McCarthy*, 53 Neb. 479 (73 N. W. 921).

2234*b*. (1898.) Petition *held* to state a cause of action on a sueprsedeas bond. *Cortelyou v. McCarthy*, 53 Neb. 479 (73 N. W. 921).

2235. (1906.) A petition declaring on an appeal bond, which contains no allegation showing a breach of its conditions, is subject to demurrer. *Moriarty v. Cochran*, 75 Neb. 835 (106 N. W. 1011).

2236. (1906.) In an action for the breach of the conditions of a bond, one of which was that the defendant would satisfy the judgment, if judgment be rendered against him on appeal, the petition is not open to demurrer because it does not show the breach of another condition actionable independently of the liability to satisfy or perform the judgment. *Locke v. Skow*, 76 Neb. 39 (106 N. W. 1013).

——— **Limitations.**

2237. (1902.) An action on an appeal bond is governed exclusively by section 14 of the code and not barred until after ten years. *Crum v. Johnson*, 3 Unof. 826 (92 N. W. 1054).

——— **Amount of recovery.**

2238. (1895.) The measure of damage recoverable by a judgment creditor in an action on appeal bond is the amount due on the judgment. *Flannagan v. Cleveland*, 44 Neb. 58 (62 N. W. 297).

2239. (1901.) 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. *Griswold v. Hazels*, 62 Neb. 888 (87 N. W. 1047).

——— **Judgment.**

2239*a*. (1896.) In an action on a supersedeas bond, a judgment for the plaintiff should, under section 511 of the code of civil procedure, state which defendant is the principal debtor and which are sureties. *Van Etten v. Kosters*, 48 Neb. 152 (66 N. W. 1106).

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APPEARANCE

ANALYSIS.

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——— Authority of attorney, §§ 8-16.
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In appellate court, see *Appeal and Error*, § 639.

In attachment, see *Attachment*, §§ 76-83.

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Appearance by guardian for ward, see *Guardian and Ward*, § 71.

Appearance in proceedings before justices of the peace, see *Justices of the Peace*, §§ 125-128.

By attorney in partition, see *Partition*, § 22.

Authority to enter appearance for partnership, see *Partnership*, §§ 202, 203.

Definition.

1. (1906.) The word "appear," when used to designate a step taken in litigation by a defendant, means the act or proceeding by which he places himself before the court and submits to its jurisdiction. It does not necessarily imply the actual physical presence either of the party or his attorney before the court. *Thornhill v. Hargreaves*, 76 Neb. 582 (107 N. W. 847).

Right to appear.

2. (1871.) A defendant may appear specially to object to the jurisdiction of the court, either over his person or the subject-matter of the suit, without waiving his right to be heard on these questions in bank. *Porter v. Chicago & Northwestern Ry. Co.*, 1 Neb. 14.

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3. (1880.) A party may appear specially to object to the jurisdiction of the court for want of proper service of summons. *Newlove v. Woodward*, 9 Neb. 502 (4 N. W. 237).

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4. (1884.) A defendant or appellee may appear in court specially and make a motion to dismiss the case, for the want of jurisdiction, or to quash or strike from the files any jurisdictional paper, without thereby making a general appearance in the case. *Cleghorn v. Waterman*, 16 Neb. 226 (20 N. W. 636, 877).

5. (1890.) In an action under sections 51 and 77 of the code of civil procedure, where service was by publication, and the plaintiff's affidavit omitted to state that the defendants, or some of them, resided out of the state, it was competent for the defendant to appear specially in support of a motion challenging the jurisdiction of the court, or to quash a juridical paper without further appearing as a defendant in the case. *Brown v. Rice*, 30 Neb. 236 (46 N. W. 489).

Authority of entering appearance for another.

——In general.

6. (1871.) A party whose agent, not an attorney of the court, has entered his appearance, and who has answered a cross-bill filed in the cause against him and the plaintiff in the original bill, affirms the appearance and becomes a party in the principal suit. *Miller v. Finn*, 1 Neb. 254.

7. (1900.) A chairman of the board of trustees of a village defendant is not empowered to waive the issuance and service of summons, and to enter the voluntary appearance of the defendant in an action, without authority of the village board acting in its corporate capacity as a body politic. *Chicago, B. & Q. R. Co. v. County of Hitchcock*, 60 Neb. 722 (84 N. W. 97).

——Authority of attorney.

See, also, *Attorney and Client*, 41-45.

Authority of county attorney to enter appearance for county, see *Counties*, § 676.

8. (1871.) An attorney of record in a cause in the district court may, when the cause is removed into the supreme court, enter therein the voluntary appearance of his clients, without the issue or service of summons in error. *McDonald v. Penniston*, 1 Neb. 324.

9. (1883.) Although an authority will be presumed when an attorney appears for a defendant not served with process, yet, if the defendant prove that he had no authority, his rights cannot be affected by the attorney's acts. *Kepley v. Irwin*, 14 Neb. 300 (15 N. W. 719).

10. (1883.) The right of an attorney to enter an appearance for a party in an action can be called in question only by the party himself. *Baldwin v. Foss*, 14 Neb. 455 (16 N. W. 480).

11. (1886.) Attorney appearing in a cause by authority of another attorney but which authority is denied by the party, *held*, there being no proof of knowledge of the pendency of the proceedings on the part of said party, that the appearance was unauthorized. *Hurste v. Hotaling*, 20 Neb. 178 (29 N. W. 299).

12. (1888.) Where the sole authority of a court to proceed in an action and render judgment is the general appearance of an attorney for the defendant, such right to appear may be denied, and the judgment vacated; but where service is made upon some of the members of a firm, and an attorney appears for all, the proof should be clear that he was not warranted in appearing for all. *Winters v. Means*, 25 Neb. 241 (41 N. W. 157; 13 Am. St. Rep. 489).

13. (1892.) Where an attorney waives process and appears for a defendant, his authority to do so will be presumed; but the defendant may deny and disprove such authority, in which case he will not be bound by the attorney's appearance. *Kirschbaum v. Scott*, 35 Neb. 199 (52 N. W. 1112).

13*a*. (1893.) Where want of authority to enter appearance is the basis of an action to invalidate a judgment, the burden of proof to show lack of such authority is upon the party asserting the same. *Connell v. Gallagher*, 36 Neb. 749 (55 N. W. 229).

14. (1895.) Whether a warrant of attorney is sufficient under the laws of another state to authorize the appearance entered thereunder, is a question to be determined from the evidence as to the laws of that state. *Snyder v. Critchfield*, 44 Neb. 66 (62 N. W. 306).

15. (1898.) The authority of an attorney who actually enters an appearance will be presumed to justify him in so doing. *Missouri P. R. Co. v. Fox*, 56 Neb. 746 (77 N. W. 57).

16. (1900.) An attorney of a municipal

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ation, without authority therefor, waive the issuance and service of ons and enter the voluntary appear- of the defendant in an action. *Chi- B. & Q. R. Co. v. County of Hitchcock*, b. 722 (84 N. W. 97).

dings constituting appearance.

Ceneral or special appearance.

(1871.) If a defendant seek to call ction any power of the court except e question of its jurisdiction, his ap- ice is general. *Porter v. Chicago & Ry. Co.*, 1 Neb. 14; (1895) *South Nat. Bank v. Farmers & Merchants Bank*, 45 Neb. 29 (63 N. W. 128); *Bankers Life Ins. Co. v. Robbins*, b. 170 (80 N. W. 484).

(1873.) A defendant may appear lly to object to the jurisdiction of the but if, by motion or other form of ation to the court, he seeks to bring wers into action, except on the ques- of jurisdiction, he will be deemed to appeared generally. *Cropsey v. Wig- rn*, 3 Neb. 108.

(1879.) Where a defendant appears lly for the purpose of objecting to the iction of the court over his person, ust restrict his motion to the single on of jurisdiction. *Aultman & Taylor Steinan*, 8 Neb. 109.

(1895.) Whether an appearance is al or special is to be determined by xamination of the substance of the ing, and not by its form. *South Omaha Bank v. Farmers & Merchants Nat.* 45 Neb. 29 (63 N. W. 128); (1900) *ers Life Ins. Co. v. Robbins*, 59 Neb. 80 N. W. 484).

(1895.) An appearance is special its sole purpose is to question the iction of the court. *South Omaha Bank v. Farmers & Merchants Nat.* 45 Neb. 29 (63 N. W. 128).

(1898.) A special appearance must sumed to have been properly overruled the affidavit upon which it was ied does not appear in the record in upreme court. *Life Ins. Clearing Co. tschuler*, 53 Neb. 481 (73 N. W. 942).

(1907.) A defendant may appear ally to object to the jurisdiction of court, but if, by motion or other form pplication to the court, he seeks to its powers into action, except on the ion of jurisdiction, he will be deemed to have appeared generally. *McXillip v. Harvey*, 80 Neb. 264 (114 N. W. 155).

23. (1904.) When a party who had made a special appearance in an action or proceeding moves the court for affirmative relief in his own behalf, he thereby makes a general appearance and subjects himself to the jurisdiction of the court. *Montague v. Marunda*, 71 Neb. 805 (99 N. W. 653).

——— Presence in court room.

24. (1880.) The mere presence of a party, or his attorney, in the court room during trial does not of itself constitute an appearance. *Newlove v. Woodward*, 9 Neb. 502 (4 N. W. 237).

——— Attendance as witness.

25. (1902.) An apearance of a party to testify as a witness is not an apearance to the action. *Commercial State Bank of Genoa v. Rowley*, 2 Unof. 645 (89 N. W. 765).

——— Objection to jurisdiction.

26. (1903.) Ordinarily, if a defendant intends to rely on a want of jurisdiction of the court over his person, he must appear, if at all, for the sole purpose of objecting to the jurisdiction; if he appears for any other purpose, his appearance is general. *Linton v. Heye*, 69 Neb. 450 (95 N. W. 1040; 111 Am. St. Rep. 556).

27. (1904.) Where an appearance is made and objection by motion to the jurisdiction of the court also challenges the jurisdiction over the subject-matter of the controversy and is not well founded, it is a voluntary appearance equivalent to a service of summons. *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 267 (98 N. W. 841).

28. (1904.) The appearance of a defend ant, for the sole purpose of objection, by motion, to the jurisdiction of the court over his person, is not an appearance to the action. *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 267 (98 N. W. 841).

——— Motion to dismiss.

28*a*. (1907.) In an action at law against a non-resident defendant, if service is made upon the defendant in any manner not authorized by law, defendant may appear specially and move to quash the service; but, if he go further and pray for a dismissal of the case, it will be held to be a general appearance in the action, as it invokes the power of the court on a question other than that relating to jurisdiction.

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McKillip v. Harvey, 80 Neb. 264 (114 N. W. 155).

——— Motion for security for costs.

29. (1877.) Moving for security for costs is an admission by defendant of jurisdiction over his person. *Healy v. Aultman & Co.*, 6 Neb. 349.

——— Motion to set aside summons, judgment, or order.

30. (1885.) The appearance of a defendant, against whom a judgment has been rendered on default and on whom constructive service was had, to answer to the merits, as provided for the opening of judgments under section 82 of the code of civil procedure, is a general appearance and waives all irregularities and defects of service by publication, and gives the court jurisdiction over the whole case. *Warren v. Dick*, 17 Neb. 241 (22 N. W. 462).

31. (1888.) A defendant in an action not legally served with process, but against whom a judgment by default has been entered, may appear specially and pray the court to set aside such judgment of default, and upon such default being opened, enter a plea in abatement to the jurisdiction of the court, without being held to have made a general appearance in the action. *Cobbey v. Wright*, 23 Neb. 250 (36 N. W. 506).

32. (1888.) A defendant in an action not legally served with process, but against whom a judgment by default has been entered, may appear specially and pray the court to set aside such judgment of default, and upon such default being opened, enter a plea in abatement to the jurisdiction of the court, without being held to have made a general appearance in the action. *Cobbey v. Wright*, 23 Neb. 250 (36 N. W. 506).

33. (1891.) A motion to quash a summons because of defects therein, or in serving the same, should be confined to the defects complained of. If it go further and pray for a dismissal of the case, it is a general appearance in the action, as it invokes the power of the court on a question other than that relating to jurisdiction. *Bucklin v. Strickler*, 32 Neb. 602 (49 N. W. 371).

34. (1892.) The filing of a motion by a defendant to set aside a judgment, under section 1001 of the civil code, is a general appearance, and waives all objection to jurisdiction over his person. *Leake v. Gallogly*, 34 Neb. 857 (52 N. W. 824).

35. (1896.) Where a decree is rendered upon service had by publication, and defendant subsequently files an answer to the merits, and asks to have the decree opened under section 82, code of civil procedure, such appearance is a waiver of all defects and irregularities in the service. *Scarborough v. Myrick*, 47 Neb. 794 (66 N. W. 867).

36. (1900.) When an administrator appears in a case involving the allowance of a claim against the estate, and asks leave to have the order of allowance vacated and leave to defend, and appeals from the judgment of allowance, such action will be a general appearance in the case and the court thereby obtains jurisdiction. *Dredla v. Baache*, 60 Neb. 655 (83 N. W. 916).

——— Motion for continuance or change of venue.

37. (1884.) A party who by his attorney enters into a written agreement to continue a cause until a subsequent term of the court thereby enters a general appearance in the action. *Bazzo v. Wallace*, 16 Neb. 290 (20 N. W. 315).

38. (1884.) A defendant by filing an affidavit for a change of venue enters a general appearance in the action. *Freeman v. Burks*, 16 Neb. 328 (20 N. W. 207); (1887) *Wagner v. Evers*, 20 Neb. 183 (29 N. W. 298).

——— Quashing attachment or garnishment.

39. (1891.) The filing of a motion to quash an attachment for want of jurisdiction over the person of the defendant and to issue the writ does not constitute a general appearance in an action. *Coffman v. Brandhoeffer*, 33 Neb. 279 (50 N. W. 6).

40. (1895.) A motion to quash a notice of garnishment and the return thereof because they are void and because defendants "do not reside" in the county where the action is brought, is a special and not a general appearance although it contains no recital to that effect. *South Omaha Nat. Bank v. Farmers & Merchants Nat. Bank*, 45 Neb. 29 (63 N. W. 128).

——— Confessing judgment.

41. (1906.) A written offer to confess judgment in favor of the plaintiff, filed by the defendant in an action to recover money, is a general appearance which will give the court jurisdiction over the person of the defendant. *Maryland Casualty Co. v. Bank of Murdock*, 76 Neb. 314 (107 N. W. 562).

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42. (1906.) A paper signed by a defendant in an action, duly entitled and filed wherein he waives process, and confesses the debt, and authorized a judgment against him, constitutes a personal appearance of defendant within the meaning of section 433 of the code, authorizing judgments by confession. *Thornhill v. Hargreaves*, 76 Neb. 582 (107 N. W. 847).

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——Objection to confirmation of sale on foreclosure.

43. (1889.) Where service in a foreclosure is had upon a brother of the nonresident mortgagor, and, after a decree for plaintiff, such brother, in the name of the mortgagor, secures a stay of the order of sale, the mortgagor thereby appeared in the action and is concluded by the decree and sale thereunder. *Franse v. Armbuster*, 28 Neb. 467 (44 N. W. 481; 26 Am. St. Rep. 345).

44. (1901.) A party who asks to be made a party defendant in order to object to a confirmation of foreclosure sale for defect of parties and of service thereby makes a general appearance. *Nelson v. Nebraska Loan & Trust Co.*, 62 Neb. 549 (87 N. W. 320).

45. (1901.) A party appearing in a case for the purpose of moving to vacate an appraisement of real estate for judicial sale and to interpose objections to the confirmation of sale on different grounds, not going to the jurisdiction of the court over the party, thereby makes a general appearance for all purposes of the case. *Nebraska Loan & Trust Co. v. Kroener* 63 Neb. 289 (88 N. W. 499).

——Application to correct record, or time to prepare bill of exceptions.

46. (1882.) An application for extension of time to prepare a bill of exceptions in a general appearance. *Ellis v. Ellis*, 13 Neb. 91 (13 N. W. 29).

47. (1884.) An appearance in a cause before final judgment by motion to correct the record of an interlocutory order, arguing the motion and procuring the correction, is a general appearance. *White v. Merriam*, 16 Neb. 96 (19 N. W. 703).

——Disclaiming interest in subject matter.

48. (1897.) A formal disclaimer, by one made a party defendant to a proceeding *in rem*, of any interest in the subject of the action is not a special appearance for the purpose of challenging the jurisdiction of the court over his person; but is, in substance, a defense requiring the judgment of the court, and amounts to a general appearance. *Fowler v. Brown*, 51 Neb 414 (71 N. W. 54).

——Prosecuting error.

49. (1894.) A party was held to have entered a general appearance in the district court where he prosecuted error thereto, cross-examined a witness whose evidence was being taken by deposition, consented to a trial on the merits of the case and waived a jury. *Ward v. Western Horse & Cattle Ins. Co.*, 42 Neb. 374 (60 N. W. 547).

50. (1903.) Where a judgment of an inferior court is reversed in the district court, for want of jurisdiction of the former to render the judgment, the filing of the petition in error and the prosecution of error from such judgment, does not constitute a general appearance in the district court in the original action, nor confer jurisdiction upon such court to set the case down for trial and render judgment upon the merits. *Bastian v. Adams*, 5 Unof. 32 (97 N. W. 231).

Evidence received in aid of objection.

51. (1895.) For the purpose of ascertaining its jurisdiction where service was by publication and defendant claims that he had no property in the state, it is competent for the court to hear testimony, when the question of jurisdiction is properly raised by the defendant. *Welch* v. *Ayres*, 43 Neb. 326 (61 N. W. 635).

Effect and operation of appearance.

——In general.

52. (1872.) A defendant may appear specially and not waive his right to be heard on the subject-matter. *Porter v. Chicago, & N. W. R. Co.*, 1 Neb. 14.

53. (1899.) A special appearance precludes the party entering such appearance from obtaining any decision on the merits of the controversy. *Bankers Life Ins. Co. v. Robbins*, 59 Neb. 170 (80 N. W. 484).

54. (1900.) An appearance, giving the court jurisdiction to render judgment, in no way militates against the authority of the court to hear and determine an application to vacate a judgment because of an alleged irregularity in obtaining it. *Fisk v. Thorp*, 60 Neb. 713 (84 N. W. 79).

55. (1900.) By appearing in a case, and invoking the powers of the court to set

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aside a judgment as having been irregularly obtained, jurisdiction is given to the court over the parties appearing as to all proceedings had in the case. *Fisk v. Thorp*, 60 Neb. 713 (84 N. W. 79).

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56. (1900.) An administrator, by appearing and asks to have an allowance of a claim against the estate vacated, and appeals from the refusal thereof, his apearance is general and jurisdiction over him is obtained. *Dredla v. Baache*, 60 Neb. 655 (83 N. W. 916).

——— **Waiver of process or notice.**

57. (1896.) Parties who voluntarily appeared and participated in a proceeding cannot complain of the judgment because they did not receive the notice required by law. *Spencer v. Wolfe*, 49 Neb. 8 (67 N. W. 858).

58. (1897.) A defendant by a general appearance in an action thereby waives the issuance and service of summons therein. *Merchants Savings Bank v. Noll*, 50 Neb. 615 (70 N. W. 247).

59. (1898.) A general appearance in an action by a defendant confers jurisdiction over his person, though no summons was ever served upon him. *State, ex rel. Whedon, v. Smith*, 57 Neb. 41 (77 N. W. 384).

60. (1898.) A general appearance waives the objection of failure to sever a conditional order of revivor. *Missouri P. R. Co. v. Fox*, 56 Neb. 746 (77 N. W. 130).

61. (1900.) Ordinarily a defendant may waive the issuance and service of summons in an action, and enter a voluntary appearance in the case, such appearance being equivalent to actual service of summons in the manner provided by statute. *Chicago, B. & Q. R. Co. v. County of Hitchcock*, 60 Neb. 722 (84 N. W. 97).

——— **Effect of unauthorized appearance.**

62. (1900.) The unauthorized appearance in a case, where no process has been served upon a defendant, is wholly void as to such defendant for whom such unauthorized appearance was made. *Chicago, B. & Q. R. Co. v. County of Hitchcock*, 60 Neb. 722 (84 N. W. 97).

Jurisdiction acquired by appearance.

63. (1890.) When defendant appears and agrees to a continuance he confers jurisdiction on the court. *Steven v. Nebraska & Iowa Ins. Co.*, 29 Neb. 187 (45 N. W. 284).

64. (1895.) The question whether or not the district court has jurisdiction of the subject of the action and of his person cannot be raised by one who, in respect to such subject, has voluntarily appeared and presented his claim by proper pleading for adjudication by such court. *Ragan v. Morrill*, 43 Neb. 361 (61 N. W. 590).

65. (1905.) Jurisdiction of a special proceeding is not conferred merely by calling the attention of the court to the fact that an indispensable statutory foundation is wholly lacking. *McCormick Harvesting Machine Co. v Stires*, 73 Neb. 801 (103 N. W. 660).

Waiver of objections.

Waiver of objections to affidavit or notice in attachment by appearance, see *Attachment*, §§ 131-133.

——— **Defect in service or process.**

66. The appearance of a defendant for any other purpose than to challenge the jurisdiction of the court, is a waiver of all defects in the summons. (1876) *Kane v. People*, 4 Neb. 509; (1873) *Cropsey v. Wiggenhorn*, 3 Neb. 108; (1884) *White v. Merriam*, 16 Neb. 96 (19 N. W. 703); (1884) *Thrailkill v. Daily*, 16 Neb. 114 (19 N. W. 595); (1884) *Reed v. Fletcher*, 24 Neb. 435 (39 N. W. 437); (1889) *Vinnedge v. Nicholai*, 28 Neb. 133 (44 N. W. 89); (1897) *Omaha Loan & Trust Co. Saving Bank v. Knight*, 50 Neb. 342 (69 N. W. 933).

67. (1871.) A defendant who has answered, although his answer has been stricken from the files, and who has applied to the court for leave to answer over, has appeared to the action, and cannot object to the form of the process. *Orr v. Seaton*, 1 Neb. 105.

68. (1873.) The jurisdiction of the court attaches to the defendant, when he is legally served with summons, without regard to the defects contained in the petition. *Cropsey v. Wiggenhorn*, 3 Neb. 108.

69. (1874.) If a defendant intend to rely on the want of personal jurisdiction, as a defense to a judgment entered aaginst him, he must appear, if at all, for the sole purpose of objecting to the jurisdiction of the court; if he appear for any other purpose, such appearance is a general and a waiver of all defects in the original process. *Crowell v. Galloway*, 3 Neb. 215.

70. (1884.) December 13, 1881, an action was commenced in the county court of Cuming county for $122. Summons was issued returnable on the 17th of the same month, and within the December term of said court. The defendant appeared gener-

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and made no objection to the summons. That the case stood for trial at the mber term, the general appearance ing the defects in the summons. *Wilde ldt*, 16 Neb. 539 (20 N. W. 849).

(1888.) Where a defendant appears is attorney and answers to the merits he cause and appeals to the supreme , he thereby waives all right as to de- of service. *Reed v. Fletcher*, 24 Neb. 39 N. W. 437).

(1889.) When a defendant appears ally to challenge the court's jurisdic- over him, on the ground of defect in ce of summons, if the objection is over- , an answer to the merits of the case, out further objections to jurisdiction, wed by trial thereon, will be deemed a ral appearance and a waiver of the ob- on. *Walker v. Turner*, 27 Neb. 103, 42 . 918).

(1896.) Where a decree is rendered a service by publication and the de- ant subsequently files an answer to merits, and asks to have the decree ed under section 82 of the code, such arance is a waiver of all defects in the ce. *Scarborough v. Myrick*, 47 Neb. 794 N. W. 867).

(1902.) If a defendant claims that court has acquired no jurisdiction over person, by reason of defects or irregu- ies in the process, or service thereof, course is by special appearance and ob- ons to the jurisdiction; and if he goes ier, and enters a general appearance, voke the powers of the court for any purpose than quashing the pretended ess, or service thereof, the defects are ed. *Baker v. Union Stock Yards Nat.* , 63 Neb. 801 (89 N. W. 269; 93 Am. Rep. 484); (1907) *Stelling v. Peddicord*, eb. 779 (111 N. W. 793).

(1904.) Where one has been irregu- cited to appear before a justice in a eeding brought to revive a dormant ment, and he appears before such just- and pleads to the merits, not saving his ctions to the jurisdiction over his per- by answer, he thereby waives the de- or irregularity in the service, and sub- to the jurisdiction of the court over person. *Keeley Institute of Kansas v. s*, 5 Unof. 612 (99 N. W. 833).

— Jurisdiction.

(1876.) In an action against a public r, brought in a different county from that in which he resides and holds his office, for a wrongful act done by him under color of his office, if he voluntarily appears and pleads to the merits of the case he thereby waives all objections to the jurisdiction of the court. *Kane v. Union P. R. Co.*, 5 Neb. 105. [Overruled: 39 Neb. 158; 41 Neb. 897; 49 Neb. 182.]

77. (1885.) An agreement in open court, by the parties, to the trial of the cause out of the regular term waives the objection to the jurisdiction of the court at such extra term. *Cozine v. Hatch*, 17 Neb. 694 (24 N. W. 389).

78. (1885.) A defendant who resides in a different county from which the action is brought, and denies the jurisdiction of the court over his person, should have the ruling of the court on his objections thereto reviewed on error and not by appeal. By appealing he enters a general appearance. *Lunn v. Haines*, 17 Neb. 560 (23 N. W. 501).

79. (1894.) A defendant by answering as one defense by way of a general denial, does not waive the right to plead as a separate defense such facts as would show that jurisdiction of the person of defendant had been obtained by abuse of process. *Hurlburt v. Palmer*, 39 Neb. 158 (57 N. W. 1019).

80. (1895.) That a corporation has been sued in a county in which it could not be lawfully sued under the statute is a defense which such corporation may waive; and if a corporation is wrongfully sued in a county and answers generally to the merits of the action without either specially appearing and challenging the jurisdiction of the court or without alleging as a defense to the action that such suit was wrongfully brought in said county, then the corporation will be conclusively presumed to have waived such defense. *Exeter Nat. Bank v. Orchard*, 43 Neb. 579 (67 N. W. 833).

81. (1896.) The filing of a paper authorizing certain attorneys to appear for defendant and defend the action, after the filing of an answer pleading want of jurisdiction, does not waive such plea. *Herbert v. Wortendyke*, 49 Neb. 182 (68 N. W. 350).

82. (1897.) A defendant who voluntarily submitted to the jurisdiction of the court cannot be heard afterward, by answer, to question such jurisdiction. *Shabata v. Johnston*, 53 Neb. 12 (73 N. W. 278).

83. (1898.) Unless the petition in an action discloses that the court has no jurisdiction over the defendant, he must chal-

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lenge the court's attention to its lack of jurisdiction by special appearance, and if that be overruled, go no further, but stand upon his special appearance; or, if he pleads to the merits, to avail himself of the want of the court's jurisdiction over him, he must plead that want of jurisdiction as a defense; and if, on overruling his special appearance, he pleads to the merits of the case, omitting as a defense the court's want of jurisdiction, he will be deemed to have waived that objection. *Lowe v. Riley*, 57 Neb. 252 (77 N. W. 758).

84. (1899.) Defendant did not waive lack of jurisdiction, where he appeared specially and objected to jurisdiction, and, upon the overruling of the objection, pleaded in his answer as a defense the court's want of jurisdiction over him. *Barry v. Wachosky*, 57 Neb. 534 (77 N. W. 1080).

85. (1902.) A general appearance without objection waives any defect in jurisdiction of person of defendant. *McCormick Harvesting Machine Co. v. Scott*, 66 Neb. 479 (92 N. W. 599).

86. (1902.) Where a fraternal beneficiary association, having a grand lodge and the principal place of business in this state and doing insurance business therein, is not privileged from being sued in the county where the action is brought, the filing of an answer therein containing an objection to jurisdiction and a plea to the merits is a waiver of the jurisdictional question. *Grand Lodge A. O. U. W. v. Bartes*, 64 Neb. 800 (90 N. W. 901).

87. (1903.) When the lack of jurisdiction does not appear on the face of the record, but must be established by evidence *aliunde*, one may plead to the jurisdiction, or unite a plea to the jurisdiction with other defenses to the action, without waiving his right to insist on a lack of jurisdiction, but this rule does not extend to cases where such plea is joined to a cross-petition or counterclaim, which necessitates a trial on the merits of the issues tendered by plaintiffs. *Linton v. Heye*, 69 Neb. 450 (95 N. W. 1040; 111 Am. St. Rep. 556).

88. (1904.) An appearance for the purpose of objecting to the jurisdiction of the court of the subject-matter of the action, whether by motion or formal pleading, is a waiver of all objections to the jurisdiction of the court over the person of defendant, whether the defendant intended such waiver or not. *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 273 (101 N. W. 1017).

89. (1905.) If a party who contends that a court has no jurisdiction over his person files a motion for a new trial, he thereby concedes that the court has power to act, and will not be afterwards heard to assert the contrary. *Tootle-Weakley Millinery Co. v. Billingsley*, 74 Neb. 531 (105 N. W. 85).

90. (1906.) An objection to the jurisdiction over the subjectmatter is a waiver of objection to jurisdiction over the person. *Brainard & Chamberlain v. Butler, Ryan & Co.*, 77 Neb. 515 (109 N. W. 766).

Pointing out defects in special apparance.

91. (1890.) A person appearing specially for the purpose of objecting to the jurisdiction, it is incumbent upon him to point out the defects upon which he relies. *Brown v. Goodyear*, 29 Neb. 376 (45 N. W. 618); (1905) *Smith v. Delone*, 74 Neb. 594 (104 N. W. 1054); (1903) *Gretch v. Maxfield*, 4 Unof. 256 (93 N. W. 934).

92. (1884.) A defendant who appears specially in a case for the purpose of objecting to the jurisdiction of the court over his person must specifically point out the defect which it is claimed prevents the court from acquiring jurisdiction. *Freeman v. Burks*, 16 Neb. 328 (20 N. W. 207).

93. (1887.) Where a party appears in court and objects by motion to the jurisdiction of the court over his person, he must state specifically the grounds of objection. Technical objections to the jurisdiction of the court, over the person of the defendant, will be unavailing unless they are specific. *Bell Bros. v. White Lake Lumber Co.*, 21 Neb. 525 (32 N. W. 561).

93*a*. (1891.) When a party files a motion objecting to the jurisdiction of the court over his person he must specifically state in his motion the grounds of objection. *Forbes v. McHaffie*, 32 Neb. 742 (49 N. W. 721).

94. (1903.) A person appearing specially, for the purpose of making objections to the jurisdiction over the person, must point out specifically the defects upon which he relies. *Brown v. Goodyear*, 29 Neb. 376 (45 N. W. 618); (1903) *Gretch v. Maxfield*, 4 Unof. 256 (93 N. W. 934).

95. (1905.) Where a party makes a special appearance, objecting to the jurisdiction of the court because of irregularities in

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rvice, it is incumbent upon him to ut the defects upon which he relies. *v. Delane*, 74 Neb. 594 (104 N. W.

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APPELLATE COURT.

peal and Error; Courts.

APPOINTMENT.

articular persons or officers, see spe- pics.

APPORTIONMENT.

ost of bridge between counties, see . §§ 21-30; 39-58.

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ompensation for taking private prop- ee *Eminent Domain*, II.

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nse of public improvements, see *pal Corporations*, VII.

chool funds, see *Schools and School ts*, §§ 34-39.

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APPRAISAL.

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Of property taken on execution, see *Execution*, §§ 72-82.

Of damages for taking land for public road, see *Highways*, § 115.

Of property to be sold at judicial sale see *Judicial Sales*, §§ 47-195.

Of mortgaged property on sale on foreclosure, see *Judicial Sales*.

APPROPRIATION.

Of private property for public use, see *Eminent Domain*.

Of private bridge by county, see *Bridges*, §§ 2, 3.

Of payments, see *Payments*, §§ 27-30.

By state legislature, see *States*, §§ 165-186.

Of water rights in general, see *Water and Watercourses*, V.

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Of way for irrigation purposes, see *Water and Watercourses*, §§ 223-226.

APPURTENANCES.

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ARBITRATION AND AWARD.

ANALYSIS.

UBMISSION.
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Agreement to arbitrate, § 3.
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RBITRATORS AND PROCEEDINGS.
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CROSS-REFERENCES.

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See, also, *Accord and Satisfaction; Compromise and Settlement.*

Arbitration of damages by trespassing animals, see *Animals*, §§ 88-93.

I. SUBMISSION.

Statutory provisions.

1. (1874.) The mode of proceeding by arbitration provided by statute, is not exclusive. An award upon a submission valid at common law, may support an action. *Tynan v. Tate*, 3 Neb. 388.

2. (1897.) The method provided by title 28 of the code of civil procedure for settling differences existing between parties by arbitration is not exclusive. That right existed at common law and has not been taken away by the statute. *Burkland v. Johnson*, 50 Neb. 858 (70 N. W. 388).

Agreement to arbitrate.

Agreement to arbitrate loss under insurance policy, see *Insurance*, § 447.

3. (1896.) Authority to sign an agreement to arbitrate cannot be inferred from acts as special agent having no reference to such arbitration or the subject-matter therein contemplated. *Manufacturers & Builders Fire Ins. Co. v. Mullen*, 48 Neb. 620 (67 N. W. 445).

Requisites and validity.

4. (1897.) Parties who submit their differences to arbitration in pursuance of the provisions of title 28 of the code of civil procedure, must acknowledge their agreement of submission before a justice of the peace, and failure to do so will deprive the district court of jurisdiction to confirm the award made or render judgment thereon on motion of the successful party. *Burkland v. Johnson*, 50 Neb. 858 (70 N. W. 388).

Revocation of submission.

5. (1896.) A party to an arbitration may revoke the submission before an award is made, and where the submission provides for a written award, a revocation may be made after the arbitrators have individually communicated to strangers their respective views, but before they have signed any award. *Butler v. Greene*, 49 Neb. 280 (68 N. W. 496).

6. (1896.) The right to revoke a submission to arbitration, at common law, must be exercised before the making and publication of the award, otherwise it will be considered as avoided. *Connecticut Fire Ins. Co. v. O'Fallon*, 49 Neb. 740 (69 N. W. 118).

7. (1896.) A stipulation for arbitration which does not provide for submitting the matters in dispute to a particular person or tribunal, but to one or more persons to be mutually chosen, is revocable by either party, and will not oust the jurisdiction of the courts having cognizance of the subject of the controversy. *Home Fire Ins. Co. v. Kennedy*, 47 Neb. 138 (166 N. W. 278).

Enforcement.

8. (1893.) Oral agreements of attorneys to arbitrate loss, made out of court, will not be enforced against objections of one, even though policy provide for arbitration. *German-American Ins. Co. v. Buckstaff*, 38 Neb. 135 (56 N. W. 692).

9. (1901.) It is the settled law of this state that a provision in a contract requiring arbitration, whether of disputes arising under the contract generally or only of the amount of any loss or damages sustained by the parties thereto, will not be enforced; nor will refusal to arbitrate be available in an action growing out of the contract. *Schrandt v. Young*, 62 Neb. 254 (86 N. W. 1085).

10. (1902.) An agreement by which parties thereto stipulate in advance not to enforce, by resort to a court of justice, a substantial right which may subsequently be involved in dispute between them, but to submit such right to the decision of a private tribunal, although other questions involved may be reserved for adjudication by the courts, cannot be enforced. *Hartford Fire Ins. Co. v. Hon*, 66 Neb. 555 (92 N. W. 746; 60 L. R. A. 436).

11. (1902.) An agreement between parties to a contract that neither shall main-

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a suit thereon after breach—all dif-ces to be settled by arbitration,—is ut binding force, as tending to oust ourts of their jurisdiction. *Hartford Ins. Co. v. Hon*, 66 Neb. 555 (92 N. W. 60 L. R. A. 436).

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ARBITRATORS AND PROCEEDINGS.

mpetency of arbitrators as witnesses, *Witnesses*, § 57.

er of irregularities.

(1897.) It is competent for parties arbitration had under the provisions le 28 of the code of civil procedure, ive any irregularity in the proceeding does not go to the jurisdiction of rbitrators to act, or the jurisdiction e district court to confirm the award *Burkland v. Johnson*, 50 Neb. 858 . W. 388).

arrnce of arbitrators in award.

(1896.) An agreement to submit rs to two arbitrators having power to e an umpire to act only when they does not authorize one arbitrator the umpire without a showing of ence between the arbitrators, to re-a conclusive award. *Manufacturers & ers Fire Ins. Co. v. Mullen*, 48 Neb. 67 N. W. 445).

(1899.) Under a submission to three ators, the award of two to be bind-a further provision that the award d be in writing, signed by three of rbitrators, *held* not to invalidate an by two of them. *City of O'Neill v.* 57 Neb. 760 (78 N. W. 256).

III. AWARD.

isites of award.

(1883.) In order to make a valid , the arbitrators must pass upon all ial matters submitted to them. *Sides endlinger*, 14 Neb. 491 (17 N. W. 113).

iency of finding.

(1892.) An award will be held void ncertainty when no amount is named in or means indicated by which it can certained. *St. Paul Fire & Marine Ins. Gotthelf*. 35 Neb. 351 (53 N. W. 137).

ment of findings.

An award of arbitrators must state facts found by them, and their con-ns of law separately. (1871) *Murry lls*, 1 Neb. 456; (1885) *Graves v. Sco-* 17 Neb. 593 (24 N. W. 222).

18. (1883.) It is not essential to the validity of an award of arbitrators upon an account, when not required by the terms of this submission, nor requested on the trial, that there be a special finding as to each separate item composing it, but a general finding is sufficient. *Sides v. Brendlinger*, 14 Neb. 491 (17 N. W. 113).

19. (1888.) Where all matters in difference between two parties are submitted to the decision of arbitrators, and such arbitrators, after hearing the evidence, etc., make and file an award in the district court, in which the facts are found separately from the conclusions of law, the judgment of the district court confirming such award will not be reversed, upon the ground that the arbitrators have not stated the facts found and conclusions of law separately. *Westover v. Armstrong*, 24 Neb. 391 (38 N. W. 843).

20. (1897.) An award made by arbitrators chosen and acting in pursuance of title 28 of the code of civil procedure, without a statement of any conclusions of fact or conclusions of law found by them, such requirements not having been waived, is erroneous and a judgment confirming such award may be reversed in a direct proceeding instituted for that purpose. *Burkland v. Johnson*, 50 Neb. 858 (70 N. W. 388).

21. (1897.) It is the duty of arbitrators chosen and acting in pursuance of the provisions of title 28 of the code of civil procedure, to make and state separately the conclusions of fact and conclusions of law reached by them, unless the parties to such arbitration have by their agreement of submission waived such requirement. *Burkland v. Johnson*, 50 Neb. 858 (70 N. W. 388).

22. (1897.) The failure of arbitrators chosen and acting under the provisions of title 28 of the code of civil procedure to make and state the conclusions of fact and law found by them is an irregularity merely, and one that does not render their award void nor oust the district court of jurisdiction to confirm it. *Burkland v. Johnson*, 50 Neb. 858 (70 N. W. 388).

23. (1899.) A single cause of action having been submitted to arbitration, an award whereby the arbitrators "find for the plaintiff, assesses her damages" at a sum named, and "award" her that sum is a sufficient separate finding of facts and of law. *City of O'Neill v. Clark*, 57 Neb. 760 (78 N. W. 256).

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24. (1899.) Under the statute relating to arbitrations, the arbitrators must in their award state separately their findings of fact and conclusions of law; but this requirement is met if the finding be as certain as is required of the verdict of a jury. *City of O'Neill v. Clark*, 57 Neb. 760 (78 N. W. 256).

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Setting aside or modifying.

25. (1876.) Where it is clearly shown that an award of arbitrators has been obtained by fraud, corruption, or other undue means, it should be set aside; but the fact that a party seeking to avoid the award swears that he believes it has been so obtained, is no evidence whatever. The facts and circumstances on which the affiant bases his belief should be set out in detail, and all the evidence on which he relies presented to the court to which the award has been returned. *McDowell v. Thomas*, 4 Neb. 542.

26. (1893.) The fact that neither the witnesses nor the arbitrators were sworn, when no objection is made on that ground, will not invalidate the award. *Greer v. Canfield*, 38 Neb. 169 (56 N. W. 883).

27. (1894.) The finding of the trial court adversely to an arbitrament having been entered into between partners for the settlement of differences between them will not be disturbed when there were such proofs as would justify the conclusion reached as one which might reasonably be attained upon due consideration thereof. *Glade v. White*, 39 Neb. 728 (58 N. W. 286).

28. (1897.) If an award made in pursuance of title 28 of the code of civil procedure may be set aside or modified on motion because of a mistake in computation or allowance of interest by the arbitrators it can only be done when it appears that such a mistake was that of all the arbitrators whose concurrence was necessary to the making of the award. *Burkland v. Johnson*, 50 Neb. 858 (70 N. W. 388).

Confirmation.

29. (1893.) A verbal submission of the matters in controversy between parties, who appear voluntarily, and testify themselves, and produce witnesses in support of their respective claims, will, if fairly conducted, be sustained after the making of the award. *Greer v. Canfield*, 38 Neb. 169 (56 N. W. 883).

30. (1897.) The failure to acknowledge before a justice of the peace the agreement of submission is not an irregularity that the parties to the arbitration may waive; and their ratification of an award made under such defective submission will not invest the district court with jurisdiction to confirm such award. *Burkland v. Johnson*, 50 Neb. 858 (70 N. W. 388).

Presumption as to award.

31. (1883.) Every reasonable intendment is to be made in favor of an award. *Sides v. Brendlinger*, 14 Neb. 491 (17 N. W. 113).

32. (1883.) The legal presumption, unless the contrary appear, is that arbitrators decide all matters submitted to them, and only those. *Sides v. Brendlinger*, 14 Neb. 491 (17 N. W. 113).

33. (1887.) Courts will construe awards favorably and make all reasonable presumptions in favor of their validity. *Bentley v. Davis*, 21 Neb. 685 (33 N. W. 473).

Conclusiveness of award.

34. (1874.) An award by arbitrators acting within the scope of their authority becomes the act of the parties, and decides their rights as effectually as a judgment. *Tynan v. Tate*, 3 Neb. 388.

35. (1887.) Where certain matters in difference were submitted to arbitrators, who made verbal award, which was ratified by the parties entering into a written agreement signed by them and witnessed by said arbitrators, the parties thereby accepted of said award and no action could be brought upon original items of account submitted to said arbitrators without showing some adequate cause for setting the award aside. *Bentley v. Davis*, 21 Neb. 685 (33 N. W. 473).

36. (1887.) Matters not submitted to arbitrators or not considered by them in making award may be sued on as though no such award had been made. *Bentley v. Davis*, 21 Neb. 685 (33 N. W. 473).

37. (1894.) A judgment rendered by a justice of the peace on an award made by arbitrators under the provisions of article 3, chapter 2, Comp. Stats., 1893, is no more conclusive or final than an ordinary judgment at law rendered by such justice, and may be appealed from by either of the parties to such award. *Holub v. Mitchell*, 42 Neb. 389 (60 N. W. 596).

38. (1895.) The right to recover damages from trespassing animals is not barred

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act that arbitrators have made an
nd the assessment, as provided for
erd law, has been paid. *Richardson*
ad, 44 Neb. 606 (62 N. W. 1077).

896.) An award, whether at com-
or under the statute, when regu-
de and published is, in the absence
or mistake, *prima facie* binding
parties thereto, and the burden of
and proving the contrary is upon
seeking to impeach it. *Connecti-*
Ins. Co. v. O'Fallon, 49 Neb. 740
V. 118).

897.) *Held*, In the case at bar,
plaintiff in error had estoped him-
assailing the award made, either
of the failure of the arbitrators to
e conclusions of fact and conclu-
law found by them, or because of
e in computation and allowance of
alleged to have been made by the
rs. *Burkland v. Johnson*, 50 Neb.
N. W. 388).

on awards.

1877.) Arbitrators are proper wit-
o testify concerning what matters
esented before them, and whether
hey had considered all the matters
Hall v. Vanier, 6 Neb. 85; 7 Neb.

(1874.) An award upon a submis-
id at common law will support an
Tynan v. Tate, 3 Neb. 388.

1877.) In an action on an award,
ndant may set up as a defense that
trators considered matters not sub-
o them, or omitted to consider mat-
ch were submitted, and may prove
tters in bar. *Hall v. Vanier*, 6 Neb.
eb. 397.

1893.) Where there is no compe-
dence of an agreement of the par-
n action to submit their matters of
e to arbitrators, it is error to sub-
question of an award to the jury.
American Ins. Co. v. Buckstaff, 38
(56 N. W. 692).

g award as a defense.

1893.) Where matters in contro-
re submitted to arbitrators, proof
nd an award made, and an action
thereon, an answer which fails
that the arbitrators exceeded their
or did not consider some of the
submitted, or did an injustice to
the defendant, fails to state a defense. *Greer v. Canfield*, 38 Neb. 169 (56 N. W. 883).

Evidence.

45. (1874.) In an action to recover the amount of an award by arbitrators chosen by the parties, testimony regarding the submission of the matter to arbitrators is admissible. *Tynan v. Tate*, 3 Neb. 388.

46. (1889.) Where there is a dispute between a contractor and the owner of the building regarding certain parts of the work done and an agreement to submit the same to arbitration, *held* the award did not include matters pertaining to parts of the work, and for materials not included in the agreement. *Doane College v. Lanham*, 26 Neb. 421 (42 N. W. 405).

47. (1892.) *Held*, a finding in the record was an invoice of goods and not an award of arbitrators. *St. Paul Fire & Marine Ins. Co. v. Gotthelf*, 35 Neb. 351 (53 N. W. 137).

48. (1893.) A claim that an award was made on Sunday is not sustained by showing the arbitrators some explanations on that day. *Greer v. Canfield*, 38 Neb. 169 (56 N. W. 883).

49. (1896.) Evidence tending to impeach an award actually made and published, in accordance with the agreement of submission, is inadmissible under a general denial. *Connecticut Fire Ins. Co. v. O'Fallon*, 49 Neb. 740 (69 N. W. 118).

Notice to parties before judgment.

50. (1874.) In rendering a judgment upon an award of arbitrators, it is not absolutely necessary for the court to give notice to either party before proceeding to act upon the award. *Kelly v. Morse*, 3 Neb. 224.

51. (1901.) Where a confirmation and entry of judgment upon an award are in accordance with the express terms of the agreement under which it was made and the court's order submitting the matter to the arbitrators, no notice to the defendant of such confirmation and entry of judgment was necessary. *Shutt v. Hebebrand*, 1 Unof. 571 (95 N. W. 785).

Review.

52. (1876.) A party aggrieved by a judgment affirming or setting aside an award of arbitrators may appeal, but the evidence presented to the court below must be preserved by bill of exceptions, other-

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wise no foundation has been laid on which to predicate an appeal. *McDowell v. Thomas*, 4 Neb. 542.

53. (1885.) Where a cause is submitted to an arbitrator, without suit, under the provisions of title 28 of the civil code, and the arbitrator presents and files his award in the district court, such award may be attacked by a motion to reject and set it aside for any legal and sufficient reasons. *Graves v. Scoville*, 17 Neb. 593 (24 N. W. 222).

54. (1894.) The provisions of sections 991-995 of the code of civil procedure are not applicable to awards made under article 3, chapter 2, Compiled Statutes, 1893. *Holub v. Mitchell*, 42 Neb. 389 (60 N. W. 596).

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ARCHITECTS.

Approval of, as to performance of contract, see *Contracts*, §§ 309-312.

Lien of, on building, see *Mechanics' Liens*, §§ 19, 20.

ARGUMENT OF COUNSEL.

In civil cases, see *Trial*, V.

In criminal prosecutions, see *Criminal Law*, XII, E.

Waiver of error by failure to argue, see *Appeal and Error*, §§ 2048-2052.

Review of rulings of court as to, see *Appeal and Error*, §§ 1704-1706.

Harmless error, see *Appeal and Error*, §§ 2023-2026.

ARRAIGNMENT.

See *Criminal Law*, §§ 148-203.

ARREST.

CROSS-REFERENCES.

See, also, *Escape*.

See, also, *Bail; Recognizance; False Imprisonment*.

Release from, see *Habeas Corpus*.

Release from arrest made under void law, see *Habeas Corpus*, §§ 11, 12.

Rearrest after discharge on habeas corpus, see *Habeas Corpus*, §§ 56, 57.

Homicide in making arrest, see *Homicide*, §§ 34, 35.

Homicide while resisting arrest, see *Homicide*, § 36.

Arrest of garnishee for refusal to answer in garnishment, see *Garnishment*, § 97.

Arrest for failure to support illegitimate child, see *Bastards*, §§ 122, 123.

Order overruling motion for order of arrest as final order, see *Appeal and Error*, § 76.

In civil actions.

1. (1903.) It is not error to refuse, in an action for maliciously procuring plaintiff's arrest in proceedings in aid of execution, an instruction that makes an intention on the part of plaintiff to leave the state a sufficient ground for arresting him. The statute only permits arrest where there is danger defendant will not obey a citation to appear. *Bank of Miller v. Richmon*, 68 Neb. 731 (94 N. W. 998).

By public officer.

2. (1881.) Before an officer can lawfully resort to extreme measures—such as shooting—to prevent an escape from an unathorized arrest for felony, he is required to exercise a high degree of care and diligence in ascertaining whether he has the right man. *Kopplekom v. Huffman*, 12 Neb. 95 (10 N. W. 577); *Huffman v. Koppelkom*, 8 Neb. 344.

3. (1891.) The rule of criminal law is settled that an officer without warrant acts as an individual without police authority unless he witnesses the criminal act; and he must have notice that the crime has been committed, and that the prisoner arrested is the guilty party. *Nelson v. State*, 33 Neb. 528 (50 N. W. 679).

4. (1895.) A sheriff or other police officer, in arresting or preventing the escape of a felon, may use such force as is reasonably necessary, even to the taking of life; but if the felon can be taken, or his escape prevented, without killing the offender, and he be slain, the officer is guilty of at least manslaughter. *Lamma v. State*, 46 Neb. 236 (64 N. W. 956).

5. (1896.) The proper officer may arrest and detain any person found violating any law or legal ordinance, until a warrant can be obtained. *Fry v. Kaessner*, 48 Neb. 133 (66 N. W. 1126).

By private citizen.

6. (1884.) Where a felony has been committed, and there is good cause to believe that a certain party committed the same, a private person may arrest such party until a warrant can be procured.

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Simmerman v State, 16 Neb. 615 (21 N. W. 387).

7. (1902.) Under the provisions of section 284 of the criminal code, a private person may make an arrest without a warrant only in case the offense, for which the person suspected is arrested, has in fact been committed. *Kyner v. Laubner*, 3 Unof. 370 (91 N. W. 491).

Resisting unlawful arrest.

8. (1883.) A person may resist an unlawful attempt at arrest, and if necessary, rather than submit, he may lawfully kill the person making it. *Simmerman v. State*, 14 Neb. 568 (17 N. W. 115).

ARREST OF JUDGMENT.

See *Judgments*, VI.

In criminal prosecution, see *Criminal Law*, §§ 920, 921.

ARSON.

Information.

1. (1892.) In an information for arson in setting fire to a building the ownership thereof may be alleged to be in the party in possession because the offense is against the habitation. Where, however, the offense charged is the burning of certain "stacks of wheat of the value of $300," etc., the names of the owners thereof must be alleged and proved. *Burger v. State*, 34 Neb. 397 (51 N. W. 1027).

2. (1896.) Under section 54 of the criminal code it was erroneous to try defendant upon the charge of burning a schoolhouse, joined with a charge for causing the burning to be done by another. *Wendell v. State*, 46 Neb. 823 (65 N. W. 884).

Evidence.

3. (1899.) On the trial of a person informed agninst for burning property with intent to prejudice an insurance company, where the accused refuses to produce the policies of insurance, secondary evidence is competent to show the contents of the policies, that they were made out and delivered by an authorized agent of the companies, and that defendant was claiming indemnity under them. *Knights v. State*, 58 Neb. 225 (78 N. W. 508; 76 Am. St. Rep. 78).

4. (1907.) Evidence, in a prosecution for arson, showing defendant to have been seen at a place of such distance from the property burned to be most probable that he could not have been near the property when the building was fired will not sustain a conviction. *Heidelbaugh v. State*, 79 Neb. 499 (113 N. W. 145).

Instruction.

5. (1892.) Under a statute which declares, "if any person shall wilfully or maliciously set fire to, or burn or cause to be burned, any barrack or stack of hay, wheat, etc., * * * the property of another, of the value of $30 or upwards," an instruction that if the property "is of some value you will find said Edward Hoagland guilty," is erroneous. *Burger v. State*, 34 Neb. 397 (51 N. W. 1027).

ASSAULT AND BATTERY.

ANALYSIS.

I. CIVIL LIABILITY.
Defenses, §§ 1-6.
Persons liable, §§ 7, 8.
Jurisdiction, § 9.
Process, § 10.
Pleading, §§ 11-15.
Evidence.
——— Admissibility in general, §§ 16-20.
——— Provocation or justification, §§ 21, 22.
——— Character of parties, §§ 23, 24.
——— Weight and sufficiency, §§ 25-29.
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II. CRIMINAL RESPONSIBILITY.

Nature of criminal assault, § 41.
——— Intent, §§ 42, 43.
Assault with intent to do great bodily harm, §§ 44-49.
Defenses, §§ 50-52.
Liability of aider or abettor, § 53.
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Limitation of prosecution, §§ 60, 61.
Weight and sufficiency of evidence, §§ 62-70.
Questions for jury, §§ 71-73.
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CROSS-REFERENCES.

Costs taxed on complainant when case fails, see *Costs*, § 147.

Punishment of child by parent, see *Parent and Child*, §§ 15, 16.

I. CIVIL LIABILITY.

Defenses.

1. (1884.) The act of March 8, 1871, entitled "An act to protect owners and occupants of enclosed and cultivated lands from trepass and damage," does not take away the right of reasonable resistance by the owner to the invasion of such lands. *Fosbinder v. Svitak*, 16 Neb. 499 (20 N. W. 866).

2. (1884.) A person may, with reasonable force, defend his property or premises, as well as his person, when invaded, and the fact that an injury is inflicted upon the invading or attacking party will not make the residing party liable for damages resulting from such injury, if inflicted in the reasonable defense of one's house, lands, or goods. *Fosbinder v. Svitak*, 16 Neb. 499 (20 N. W. 866).

3. (1884.) If a person wilfully trespass upon the cultivated lands of another, and while so trespassing assault the owner thereof, and the owner, while defending his person from such assault, and while being pursued by the assaulting party, inflicts an injury upon the party thus making the assault, the party thus injured cannot recover damages for the injury so received. Neither can he if, in such case, a gun in the hands of the assaulted party is accidentally discharged, and he is injured thereby. *Fosbinder v. Svitak*, 16 Neb. 499 (20 N. W. 866).

4. (1898.) Right of recaption of personalty exists in this state. *Barr v. Post*, 56 Neb. 698 (77 N. W. 123).

5. (1892.) Words of provocation will not justify an assault, but may be ground of mitigation of damages. *Haman v. Omaha Horse R. Co.*, 35 Neb. 74 (52 N. W. 830).

6. (1905.) Where there is no evidence of provocative words, it is error to instruct the jury that mere words of provocation are not sufficient to justify a person in committing an assault and battery upon another, but the words may be considered in mitigation of damages. *Langdon v. Clarke*, 73 Neb. 516 (103 N. W. 62).

Persons liable.

7. (1881.) In an assault and battery, not only he who is the actor or actual perpetrator of the offense, but he also who, being present when the act is done, aids and abets therein, is a principal and liable as such at the suit of the injured party. *Cooney v. Burke*, 11 Neb. 258 (9 N. W. 57).

8. (1889.) A person who unlawfully shoots another and wounds him, whether intentionally or through negligence, is liable for the damages thereby sustained by the party injured. *Carmichael v. Dolen*, 25 Neb. 335 (41 N. W. 178).

Jurisdiction.

9. (1882.) County courts have jurisdiction of actions to recover damages for assault and battery, where the amount sought to be recovered does not exceed $500 *Brauer v. Luntzer*, 12 Neb. 473 (11 N. W. 730).

Process.

10. (1882.) If the amount claimed does not exceed $100, a summons in an action in a county court should be issued and served in the same manner as in cases commenced before a justice of the peace. *Brauer v. Luntzer*, 12 Neb. 473 (11 N. W. 730).

Pleading.

11. (1889.) The words in the petition in an action for damages for an indecent assault, "Did then and there assault the

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with foul and indecent purpose to
ace to her person and by force and
tion to criminally know her, the
intiff," etc., after verdict, *held* suffi-
itkins v. Gladwish, 27 Neb. 841 (44
').

(1889.) Where a petition alleging
defendant made an assault upon the
and by striking and shooting in
omen is filed in May, an amended
stating that defendant being in-
took a pistol from his pocket and
tly and carelessly discharged the
ereby wounding plaintiff, does not
different cause of action. *Car-*
v. Dolen, 25 Neb. 335 (41 N. W.

1897.) A petition charging the de-
with unlawfully beating and wound-
plaintiff on the head with a pitch-
ereby he, plaintiff, "was wounded
nd for a long time will be, sick, and
ered, and will suffer, great bodily
discomfort," states a cause of ac-
such physical and mental suffering
e natural and proximate result of
ng so alleged. *Harshman v. Rose*,
113 (69 N. W. 755).

1897.) It is, in a civil action for
and battery, unnecessary to spe-
ege such damages as are the neces-
usual consequence of the act com-
of. *Harshman v. Rose*, 50 Neb. 113
7. 755).

e.

dmissibility in general.

1882.) Plaintiff, a married woman,
testified that at the time of the
she was *enciente*, and that the bat-
ed her to miscarry, upon her cross-
tion she was asked by defendant's
whether her husband was not in
t of beating her. To which ques-
plaintiff by her counsel objected;
jection was sustained by the court.
error. *Goracke v. Hintz*, 13 Neb.
N. W. 397).

1887.) In an action for damages
indecent assault, evidence as to a
istrict feud in which defendant was
properly excluded. *Atkins v.*
, 27 Neb. 841 (44 N. W. 37).

1889.) In a civil action for dam-
a female plaintiff, for an assault
with intent to have carnal inter-
with her, statements made my the
defendant of and concerning the plaintiff, derogatory to her character, before and after the alleged assault, and too remote therefrom to be deemed a part of the *res gestæ*, were inadmissible in evidence. *Atkins v. Gladwish*, 25 Neb. 390 (41 N. W. 347).

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18*a*. (1896.) In a suit for injuries to one who was ejected from a building and thrown upon the pavement, pleadings in a case through which defendant acquired title to the building were properly excluded. *Mengedoht v. Van Dorn*, 48 Neb. 880 (67 N. W. 857).

19. (1898.) In a civil action for damages for assault and battery evidence that defendant had never been arrested for the assault properly rejected. *Barr v. Post*, 56 Neb. 698 (77 N. W. 123).

20. (1898.) In a civil suit for damages for assault and battery, where plaintiff offers no evidence that he has paid or become liable for services rendered by a physician, it is not error to refuse to permit the physician to be asked, on his cross-examination, whether he has rendered plaintiff a bill for his services and whether he has been paid for such services. *Barr v. Post*, 56 Neb. 698 (77 N. W. 123).

——— **Provocation or justification.**

Provocation as mitigation of damages, see *ante*, §§ 5, 6.

21. (1901.) In this state, evidence of threats made by the injured party is not admissible, in mitigation of damages, in an action for assault and battery. *Mangold v. Oft*, 63 Neb. 397 (88 N. W. 507).

22. (1898.) In a civil suit for assault and battery, where the answer is a general denial, evidence of justification is inadmissible. *Barr v. Post*, 56 Neb. 698 (77 N. W. 123); (1901) *Mangold v. Oft*, 63 Neb. 397 (88 N. W. 507).

——— **Character of parties.**

23. (1898.) In a civil suit for damages for assault and battery the defendant's reputation is not an issue. Accordingly, it is not error for the court to exclude an offer of proof by defendant that he had never used profane language. *Barr v. Post*, 56 Neb. 698 (77 N. W. 123).

24. (1897.) In an action for assault and battery, self-defense being pleaded as a defense to the action, proof that plaintiff was of a quarrelsome disposition and ungovernable temper must be made by proof of gen-

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eral reputation and not by opinions of witnesses based on their individual observation. *Golder v. Lund*, 50 Neb. 867 (70 N. W. 379).

——Weight and sufficiency.

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25. (1881.) Evidence that defendant prevented an onlooker from stopping another person from assaulting plaintiff, is sufficient to warrant a verdict against the defendant as principal in the battery complained of. *Cooney v. Burke*, 11 Neb. 258 (9 N. W. 57).

26. (1896.) Verdict for plaintiff for $957.51 *held* to be sustained by the evidence in a suit for damages for assault and battery, where plaintiff was ejected from a building and thrown upon the pavement in such a manner as to cause protracted and probably permanent mental derangement. *Mengedoht v. Van Dorn*, 48 Neb. 880 (67 N. W. 858).

27. (1897.) Where defendant ordered plaintiff to leave his premises, and on the refusal of the latter to do so, struck him over the head with a pitchfork, a verdict against defendant for assault is justified. *Harshman v. Rose*, 50 Neb. 113 (69 N. W. 755).

28. (1903.) A preponderance of the evidence is sufficient to prove an issue in civil actions for assault and battery. *Clasen v. Pruhs*, 69 Neb. 278 (95 N. W. 640).

29. (1905.) Evidence examined, and *held* sufficient to require the submission of the question of conspiracy to commit an assault to the jury. *Quist v. American Bonding & Trust Co.*, 74 Neb. 692 (105 N. W. 255).

Damages.

Provocation as mitigation of damages, see *ante*, §§ 5, 6.

30. In assessing damages for assault and battery the jury may take into account the character and extent of the injuries, the pain and suffering of plaintiff, loss of time, and the cost of medical attendance. (1890) *McClure v. Shelton*, 29 Neb. 374 (45 N. W. 689); (1892) *Haman v. Omaha Horse R. Co.*, 35 Neb. 74 (52 N. W. 830).

31. (1878.) In a civil action in the nature of *trespass vi et armis* for an assault and battery, an amount of damages equal to the full compensation of the plaintiff for the injury sustained by him cannot be increased by the addition of a fine for the punishment of the defendant. *Boyer v. Barr*, 8 Neb. 68 (30 Am. Rep. 814).

32. (1882.) Verdict of $250 for assaulting and beating an *enciente* so as to produce a miscarriage, is not excessive. *Goracke v. Hintz*, 13 Neb. 390 (14 N. W. 379).

33. (1889.) An instruction in a civil action for assault with intent to have carnal intercourse, "that in entering the amount of plaintiff's damages, should they find in her favor, you may take into account the fact that she has been compelled to employ counsel and spend time and money to vindicate her rights," is erroneous. *Atkins v. Gladwish*, 25 Neb. 390 (41 N. W. 347).

34. (1898.) Damages for two thousand dollars for assault and battery not excessive, under the evidence. *Barr v. Post*, 56 Neb. 698 (77 N. W. 123).

35. (1898.) In a civil suit for damages for assault and battery a direction to the jury to take into consideration any permanent internal injury sustained by plaintiff was justified by the evidence. *Barr v. Post*, 56 Neb. 698 (77 N. W. 123).

36. (1904.) Verdict for $1,025 for broken arm, *held*, excessive under the evidence in an action for assault and battery. *Rees v. Rasmussen*, 5 Unof. 367 (98 N. W. 830).

Instructions.

37. (1889.) An instruction to the jury, in an action for damages by a female plaintiff for an assault upon her with intent to have carnal intercourse, that in case they should find for the plaintiff they might include in their assessment of damages compensation for "loss of good name, honor, and reputation," is not erroneous. *Atkins v. Gladwish*, 25 Neb. 390 (41 N. W. 347).

38. (1890.) Instructions set out in opinion taken together held to state the law correctly. *McClure v. Shelton*, 29 Neb. 370 (45 N. W. 689).

39. (1904.) Instructions examined, and *held* not prejudicial in an action for assault and battery. *Rees v. Rasmussen*, 5 Unof. 367 (98 N. W. 830).

Judgment and review.

40. (1871.) If a new trial be granted, in an action for assault and battery on account of the smallness of the verdict, and another trial take place, at which a larger damage is awarded by the jury, all proceedings after the first verdict will be set aside, and judgment be ordered on that verdict. *Shoff v. Wells*, 1 Neb. 168.

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CRIMINAL RESPONSIBILITY.

lt with intent to commit rape, see

lt with intent to kill, see *Homicide*,

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of criminal assault.

1899.) The term "assault," used qualification, has a clear and estab- import in criminal law. *Smith v.* 8 Neb. 531 (78 N. W. 1059).

ntent.

(1894.) It is not essential to a con- for assault with intent to inflict odily injury, that accused should tended the precise injury which fol- It is sufficient if serious bodily any kind was contemplated by him time of the assault. *Murphey v.* 3 Neb. 34 (61 N. W. 491).

(1908.) No wrong, however serious, erson of another, will alone warrant ction for an assault with intent to great bodily injury; but, when the proved is a natural and necessary ence of the deliberate and inexcus- t of the accused, the presumption is was the result contemplated by him commission of the assault. *Lambert* e, 80 Neb. 562 (114 N. W. 775).

(1908.) It is not essential to a con- for intent to inflict great bodily in- at the accused should have intended ecise injury which followed. It is at if it be shown, beyond a reason- oubt, by the circumstances under it was inflicted, together with its na- nd extent, that great bodily injury ntemplated by the defendant when he the assault. *Lambert v. State*, 80 2 (114 N. W. 775).

(1901.) The intent with which an lone is inferable from the act itself, om the facts and circumstances sur- ng it. *Clary v. State*, 61 Neb. 688 (85 897).

t with intent to do great bodily rm.

(1901.) The words "great bodily in- as employed in section 17*b* of the al code, imply an injury of a graver ore serious character than an ordi- attery. *Likens v. State*, 63 Neb. 249 W. 506).

(1891.) Section 2, chapter 34, Ses- aws 1889, is an attempt to amend criminal code, section 14, without referring thereto, and is unconstitutional; but section 1 of the same provides for a new offense, and is valid. *Stricklett v. State*, 31 Neb. 674 (48 N. W. 820).

46. (1892.) The act defining an assault with intent to do great bodily harm and providing a punishment therefor is not an amendment to the criminal code in the sense used in section 11, article 3 of the constitution. *Smith v. State*, 34 Neb. 689 (52 N. W. 572).

47. (1892.) The first section of the act approved March 30, 1889, entitled "An act to provide for the punishment of persons guilty of an assault upon another with intent to inflict great bodily injury, and for the punishment of persons guilty of an assault upon another with intent to kill the person so assaulted," section 17*b*, criminal code, does not conflict with section 11, article 3 of the constitution, since the crime of assault to inflict great bodily injury, mentioned in said section, is a new and substantive offense, and the act does not constitute an amendment. *Smith v. State*, 34 Neb. 689 (52 N. W. 572); (1899) *Smith v. State*, 58 Neb. 531 (78 N. W. 1059).

48. (1894.) The term "great bodily injury," in criminal code, section 17*b*, is not susceptible of a precise definition, but implies an injury of a graver and more serious character than an ordinary battery; and whether a particular case is within the meaning of the statute is generally a question of fact for the jury. *Murphey v. State*, 43 Neb. 34 (61 N. W. 491).

49. (1894.) A great bodily injury, within the meaning of the statute, does not necessarily mean a permanent injury. *Murphey v. State*, 43 Neb. 34 (61 N. W. 491).

Defenses.

50. (1899.) An assemblage of men on Hallowe'en—night of October 31—engaged in moving, injuring, and destroying property is a mob engaged in violating the law, and the citizen may use such force as is actually necessary to protect his person and property from injury at its hands. *Atkinson v. State*, 58 Neb. 356 (78 N. W. 621).

51. (1903.) A person attacked, or formidably threatened, by three persons acting in concert, may avail himself of the right of self-defense by using commensurate force against the nearest assailant, although it is not from him, but from the others, that

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great bodily harm is apprehended. *Hoy v. State*, 69 Neb. 516 (96 N. W. 228).

52. (1903.) The right of self-defense does not belong alone to persons engaged in the pursuit of their lawful business; it is available to every person, regardless of the nature of his business, who is assaulted, or who, upon just grounds, apprehends an immediate unlawful attack. *Hoy v. State*, 69 Neb. 516 (96 N. W. 228).

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Liability of aider or abettor.

53. (1894.) The defendant may be convicted of assault and battery under an information charging him with aiding another to commit an assault with intent to wound. *Wagner v. State*, 43 Neb. 1 (61 N. W. 85).

Indictment or information.

54. The effect of section 17*b* of the criminal code, relative to an assault with intent to inflict great bodily injury, was to create a new and substantive crime,—one purely statutory,—and it is sufficient in an information to charge the crime in the language of the statute without a statement of the means with which the assault was committed. (1892) *Smith v. State*, 34 Neb. 689 (52 N. W. 572); (1894) *Murphey v. State*, 43 Neb. 34 (61 N. W. 491); (1899) *Smith v. State*, 58 Neb. 531 (78 N. W. 1059).

55. (1901.) A conviction of an assault and battery is improper under an information charging an assault with intent to inflict great bodily injury, where the averments therein do not include a battery. *Alyea v. State*, 62 Neb. 143 (86 N. W. 1066).

56. (1893.) An information for assault and battery alleging that the defendants "did wilfully and maliciously make an assault upon * * * and did then and there unlawfully strike, beat, and wound," etc., is sufficient. *Hodgkins v. State*, 36 Neb. 160 (54 N. W. 86).

57. (1894.) In a prosecution under the provisions of section 17*b*, criminal code, for an assault with intent to inflict great bodily injury, it is sufficient to charge the offense in the language of the statute without stating the means with which the assault was committed. *Murphey v. State*, 43 Neb. 34 (61 N. W. 491); (1900) *Alyea v. State*, 62 Neb. 143 (86 N. W. 1066).

58. (1899.) An information charging that accused "then and there did make an assault upon William P. Wilcox with a certain pistol loaded with gunpowder and one leaden bullet and then and there him did shoot," charges both the assault and the shooting to have been done with a pistol loaded as described. *McVey v. State*, 57 Neb. 471 (77 N. W. 1111).

59. (1899.) An information for an assault with intent to commit great bodily injury, framed under section 17*b* of the criminal code, will sustain a conviction for an assault and battery, when the information discloses, by proper averments, that such minor offense was in fact included in the commission of the one charged. *Mulloy v. State*, 58 Neb. 204 (78 N. W. 525).

Limitation of prosecution.

60. (1895.) On the trial of a prosecution for an assault and battery it is error for the court to charge the jury that it was sufficient if they found the offense was committed within eighteen months prior to the filing of the complaint. *Jolly v. State*, 43 Neb. 857 (62 N. W. 300).

61. (1895.) Under a plea of "not guilty" the defense of statute of limitations may be set up. *Bough v. State*, 44 Neb. 889 (62 N. W. 1094).

Weight and sufficiency of evidence.

62. (1891.) Evidence in a prosecution for criminal assault by a bar-tender upon a woman who was trying to take her husband from a saloon does not support a verdict of guilt. *Roberts v. State*, 32 Neb. 251 (49 N. W. 361)

63. (1894.) Evidence *held* insufficient on which to base a conviction for aiding and abetting an assault with intent to wound. *Wagner v. State*, 43 Neb. 1 (61 N. W. 85).

64. (1894.) No wrong, however serious to the person of another, will alone warrant a conviction for an assault with intent to inflict great bodily injury; but when the injury proved is the natural and necessary consequence of the deliberate and inexcusable act of the accuser, the presumption is that it was with the result contemplated by him in the commission of the assault. Such presumption is, however, one of fact merely; and while the jury may infer the intention alleged without other proof, there is no obligation resting upon them to do so. *Murphey v. State*, 43 Neb. 34 (61 N. W. 491).

65. (1894.) The prisoner, without provocation, struck the prosecutor, an elderly man, a blow with his fist, instantly knocking him down, and kicked him twice or more. The latter, on attempting to arise,

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d that his right leg was broken. e assistance of friends he retreated he street, where, a few minutes was followed by the prisoner, who ruck him, saying, "D—n your old will teach you to keep your nose y business." The prosecutor, who ering and helpless from the effect roken limb, was thrown or pushed risoner from the sidewalk into the here the latter kicked at him sev- es, but the interference of by- prevented the infliction of further *Held*, To sustain the conviction for with intent to inflict great bodily *Murphey v. State*, 43 Neb. 34 (61 1).

895.) Evidence that the accused child on the cheek and neck and ys thereafter the child's nose and e badly swollen and inflamed, sus- verdict of guilt of assault with in- do great bodily harm. *Whitner v.* Neb. 144 (64 N. W. 704).

899.) Evidence examined and *held* nt to sustain a conviction of assault ent to commit great bodily injury. *. State*, 58 Neb. 531 (78 N. W.

901.) A conviction under section e criminal code cannot stand where ence fails to disclose that the ac- aking the assault intended to in- at bodily injury upon the person prosecuting witness. *Likens v.* Neb. 249 (88 N. W. 506).

906.) To sustain a conviction for with intent to inflict great bodily as defined by section 17*b* of the code, the evidence must show an to inflict an injury of a greater and rious character than an ordinary *Bice v. State*, 77 Neb. 159 (108 N.).

906.) Evidence showing a defend- prosecuting witness, in a prosecu- assault, had both been drinking ght in a street on meeting; that had former ill will toward the other ter the quarrel were on friendly fails to show an intent to inflict arm, within the meaning of the stat- *ice v. State*, 77 Neb. 159 (108 N. W.

ns for jury.

1895.) Where an information con- two counts, one of assault with in- tent to commit murder and the second of an assault with intent to do great bodily injury, and there was no evidence to support the charge set forth in the first count, it was error which was calculated to confuse and mislead the jurors, and prejudicial to the parties on trial under the complaint, to submit to the jury the question of the guilt or innocence of such parties of the crime charged in the first count, although they were not convicted of such crime. *Botsch v. State*, 43 Neb. 501 (61 N. W. 730).

72. (1899.) When a citizen assaults one of a mob in the wrongful possession of and taking away his property for the purposes of injuring or destroying it, whether under all the circumstances he was justified in making the assault is a question for the jury. *Atkinson v. State*, 58 Neb. 356 (78 N. W. 621).

72*a*. (1908.) The term "great bodily injury," as used in section 17*b* of the criminal code, implies an injury of a graver and more serious character than an ordinary battery; and whether a particular case is within the meaning of the statute is generally a question of fact for the jury. *Lambert v. State*, 80 Neb. 562 (114 N. W. 775).

73. (1899.) Whether the particular intent elemental of a charge of assault with intent to inflict great bodily injury has been shown is generally a question of fact for the jury. *Smith v. State*, 58 Neb. 531 (78 N. W. 1059).

Instructions.

74. (1901.) It is not error to tell the jury in a prosecution for assault with intent to wound that they have nothing to do with the question of punishment. *Clary v. State*, 61 Neb. 688 (85 N. W. 897).

74*a*. (1908.) In a case where there is competent evidence tending to show that the defendant in making the assault was actuated by motives of hatred, ill will or revenge, it is proper for the court to charge the jury that: "If you should find and believe from all of the evidence, beyond a reasonable doubt, that the defendant assaulted the prosecuting witness, at a time when he had no reasonable apprehension of immediate and impending injury to himself, and to accomplish some unlawful purpose, or from a spirit of retaliation or revenge, then he cannot avail himself of the law of self defense." *Lambert v. State*, 80 Neb. 562 (114 N. W. 775).

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Costs.

75. (1902.) Costs made by the state in a futile effort to prove that an assault was felonious cannot be taxed against the defendant, although convicted of an assault and battery. *Biester v. State*, 65 Neb. 276 (91 N. W. 416).

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ASSESSMENT.

On members of corporations, see *Corporations*, §§ 127-132.

Of damages, see *Damages*, §§ VI, C.

Of damages in condemnation proceeding, see *Eminent Domain*, §§ 149-258.

For highway purposes, see *Highways*, §§ 166-187.

Insurance premiums and assessment, see *Insurance*, §§ 116-141, 739-743.

For street improvements, see *Municipal Corporations*, VII, D.

For taxation, see *Taxation*, §§ 203-416.

ASSETS.

Of bankrupt, see *Bankruptcy*.

Of insolvent banks, see *Banks and Banking*, §§ 64-79.

Of corporations, see *Corporations*, IV.

Of estate of decedent, see *Executors and Administrators*.

Marshaling assets, see *Marshaling Assets and Securities*.

Of partnership, see *Partnership*, II; IV, C.

Collection of assets by receiver, see *Receivers*, §§ 72-75.

ASSIGNMENT.

ANALYSIS.

Property, estates, and interests assignable,
——— Contracts in general, §§ 1-4.
——— Contract for legal services, § 5.
——— Money due or to become due, §§ 6, 7.
——— Future earnings, §§ 8, 9.
——— Right of actions, and judgment, §§ 10, 11.
——— Contract for purchase of land, § 12.
Oral assignment, § 13.
Consideration, § 14.
Recording assignment, § 15.
Assignment to evade exemption, § 16.
Equitable assignments, §§ 17-21.
Operation and effect, § 22.
——— Property included in assignment, §§ 23-28.
Rights and liabilities of parties, §§ 29-35.
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——— Defenses, §§ 36, 37.
——— Parties, §§ 38-42.
——— Evidence, §§ 43-47.
——— Instructions, § 48.

CROSS-REFERENCES.

Assignment of particular instruments or rights, see specific topics.

See, also, *Assignments for Benefit of Creditors; Bankruptcy*.

Of altered note, see *Alteration of Instruments*, § 43.

Effect of check or order as assignment of fund, see *Bills and Notes*, §§ 111-116.

Of bill of lading, see *Carriers*, §§ 52-54.

Assignment of chattel mortgage, see *Chattel Mortgages*, §§ 237-240.

Priority of assignee of chattel mortgage, see *Chattel Mortgages*, §§ 110-112.

Title of assignee in bankruptcy, see *Bankruptcy*, §§ 22-24.

Property assigned to assignee in bankruptcy, see *Bankruptcy*, §§ 14-21.

Right of surety of decedent taking assignment of debt paid, see *Executors and Administrators*, § 106.

If contract of guaranty, see *Guaranty*, § 24.

Of insurance policy, see *Insurance*, § 74.

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e to sell liquor not assignable, see *ting Liquors*, § 156.

igment, see *Judgment*, §§ 814-820.

chanics' lien or claim, see *Mechan-s*, §§ 204-212.

of assignee of mechanics' lien to , see *Mechanics' Liens*, § 241.

ortgages, see *Mortgages*, §§ 251-288.

ment of property by pledgee, see §§ 34-36.

hts under entry of public lands, see *ands*, §§ 144-148.

ense to operate a street railway, see *ailroads*, § 15*a*.

s to action on assigned subscrip-tract, see *Subscription*, § 14.

certificate, see *Taxation*, §§ 742-747.

of parties after assignment of con-sell lands, see *Vendor and Pur-*§§ 175-177, 193-199.

, estates and interests assignable.

ontracts in general.

398.) A contract with a municipal ion for lighting its streets, contain-ipulation that the contractor shall gn such contract without first ob-the consent of the city indorsed in writing, is not assignable, either e or in part; and moneys due or to due thereunder, whether payable as ety or in installments, cannot be as-vithout first obtaining such written *City of Omaha v. Standard Oil* Neb. 337 (75 N. W. 859).

398.) A contract giving a party an in the profits of land purchased her for speculation and imposing a duty to pay the taxes and make clared in the closing sentence "that ulations aforesaid are to bind the executors, administrators, and as-the respective parties," is assign-*lden v. George W. Frank Improve-*., 57 Neb. 67 (77 N. W. 369).

898.) A written contract which, by ns, requires certain services to be l personally by one of the parties and forbids a transfer by said party interest and liabilities to a third annot, in the face of such inhibi-e transferred by assignment to a rty so as to vest in such assignee, s such, a right, in equity, to an ng for the value of services ren-y the said assignee, though such services are of the same general character as those required by the terms of the contract assigned. *Zetterlund v. Texas Land & Cattle Co.*, 55 Neb. 355 (75 N. W. 860).

4. (1906.) A contract with a publisher of a book, whereby one agrees to accept a book when completed at a stipulated price is assignable by such publisher. *Harris v. Paine*, 76 Neb. 523 (107 N. W. 748).

——— Contract for legal services.

5. (1906.) A contract for legal services is personal in its nature and cannot be assigned by one party without the consent of the other. *Corson v. Lewis*, 77 Neb. 446 (109 N. W. 735).

——— Money due or to become due.

6. (1885.) An instrument assigning a claim against a firm for a certain sum less a payment made thereon, leaving a definite balance is an absolute assignment without limitation and conveys a claim for the good will of vendor's business. *Wallingford, Shamp & Co. v. Burr*, 17 Neb. 137 (22 N. W. 350).

7. (1895.) An assignment of moneys not yet earned, but expected to be earned in the future under an existing contract, is in equity valid and enforceable. *Perkins v. Butler County*, 44 Neb. 110 (62 N. W. 308).

——— Future earnings.

8. (1906.) Future earnings or profits under an existing contract either public or private are assignable. *First Nat. Bank of Madison v. School District*, 77 Neb. 570 (110 N. W. 349).

9. (1906.) Whether a city officer may bind the city by assigning his salary prior to the issue of a warrant therefor not discussed or determined. *Gordon v. City of Omaha*, 77 Neb. 556 (110 N. W. 313).

——— Right of action, and judgment.

10. (1903.) The right of action preserved by section 27 of the code is assignable, together with the judgment therein mentioned, in like manner and with like effect as other choses in action. *Wood v. Carter*, 67 Neb. 133 (93 N. W. 158).

11. (1907.) A cause of action by a husband for a loss of services and expenditures for medical attendance, etc., occasioned by a negligent and wrongful injury to his wife, is one which survives and is assignable. *Forbes v. City of Omaha*, 79 Neb. 6 (112 N. W. 326).

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——— Contract for purchase of land.

12. (1891.) An optional contract for the purchase of real estate is subject to assignment by the purchaser. *Rice v. Gibbs*, 33 Neb. 460 (50 N. W. 436). [Overruled on rehearing. 40 Neb. 264.]

Oral assignment.

13. (1903.) Assignment of an interest in a reversion fund may be oral and may be proved by oral testimony. *Curtis v. Zutavern*, 67 Neb. 183 (93 N. W. 400).

Consideration.

14. (1892.) Where there is an absolute assignment of an account so that the assignor parts with his entire interest therein, as between the parties the amount of consideration therefor is not a material inquiry. *Barnett v. Ellis*, 34 Neb. 539 (52 N. W. 368).

Recording assignment.

15. (1902.) An assignment of a real estate mortgage, securing a negotiable promissory note, to the indorsee of such note is an instrument affecting the title to real estate wihin the purview and meaning of Compiled Statutes, chapter 73, sections 16, 46, and hence must be recorded. *Ames v. Miller*, 65 Neb. 204 (91 N. W. 250).

Assignment to evade exemption.

16. (1894.) An assignment of a debt for the purpose of evading exemptions is unlawful. *Bishop v. Middleton*, 43 Neb. 10 (61 N. W. 129; 226 L. R. A. 445).

Equitable assignments.

17. (1885.) A was a subcontractor under B to build certain sections of railroad, which work he sublet to C who filed a statutory lien on the railroad. D in the presence of A presented for acceptance and payment to B a draft or order drawn on him by A in favor of and payable to D in full of all claims. B then stated to A in the presence of D that he would not pay it until all the liens for labor were settled and paid off. C sued out an attachment against A and garnished B. *Held*, That there was an equitable assignment to the amount called for in the order. *Code v. Carlton*, 18 Neb. 328 (25 N. W. 353).

18. (1898.) An agreement of a debtor to pay his creditor's claim out of the moneys of a particular fund, but which gives the creditor no present right in or control over such fund or any part thereof, does not operate as an equitable assignment of any part of such fund to the creditor. *Fairbanks, Morse & Co. v. Welshans & Co.*, 55 Neb. 362 (75 N. W. 865).

19. (1899.) An order drawn on a particular fund creates an equitable assignment thereof, although not accepted by the drawee. *Slobodisky v. Curtis*, 58 Neb. 211 (78 N. W. 522).

20. (1900.) An order for the payment of money which is not immediately effective does not operate as an equitable assignment. *Nebraska Moline Plow Co. v. Fuehring*, 60 Neb. 316 (83 N. W. 69).

21. (1901.) A naked promise to pay existing debts out of a particular fund, does not operate as an equitable assignment thereof. *Phillips v. Hogue*, 63 Neb. 192 (88 N. W. 180).

Operation and effect.

22. (1898.) Detaching an interest coupon from a bond secured by mortgage and transferring it to a third person operate as an assignment *pro tanto* of the mortgage. *New England Loan & Trust Co. v. Robinson*, 56 Neb. 50 (76 N. W. 415; 71 Am. St. Rep. 657).

——— Property included in assignment.

23. (1878.) An assignment of a bill of lading and draft by a consignee of goods conveys his entire interest in the shipment to the assignee. *Wright v. Greenwood Warehouse Co.*, 7 Neb. 435.

24. (1888.) A, who had a contract to build a bridge, entered into an agreement with B as follows: "I assign one-half interest in the within bridge contract of the net proceeds from the contract after all expenses are paid for value of labor and expense and other help, no unnecessary outlay to be added, cost of working and labor to be $2.50 per day." *Held*, That commissions earned by B in negotiating county bonds issued to pay for such bridge were not included in the agreement and that B need not account to A for them. *Daugherty v. Gouff*, 23 Neb. 105 (36 N. W. 351).

25. (1894.) An assignment by a contractor of a contract to transfer freight for a railway company is not merely an assignment of the moneys to be earned, but an assignment of the whole contract, binding the assignee, who accepted benefits under the contract, to discharge the obligations thereof. *Union P. R. Co. v. Douglas County Bank*, 42 Neb. 469 (60 N. W. 886).

26. (1896.) R. & W., being engaged as

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ors in the construction of a public
for D. county, executed an assign-
follows: "To the Board of County
sioners: For value received we
assign all our interest in warrants
hers due us from said county to the
f Commerce, and hereby authorize
nk to receipt for said warrants or
s in our name, and to pay all
s or vouchers to the Bank of Com-
Held, Not to include money sub-
ly earned by R. & W. in the per-
ce of their contract with the county.
. Douglas County, 47 Neb. 9 (66
30).

(1897.) An assignment of a build-
ntract by the contractor was held
rely an assignment of the moneys
ter to be earned, but an assignment
whole contract with its obligations
dens. *State, ex rel. Gray, v. School*
, 51 Neb. 237 (71 N. W. 727).

(1907.) An assignment by an own-
half interest in a partnership busi-
nd a subsequent assignment by the
e, held not to include an amount
o the original assignor as the pur-
rice of the other half interest in
siness. *Barnes v. Sim*, 80 Neb. 211
W. 154). [Modified on rehearing.
213].

(1898.) Where a contract gave de-
an interest in the profits of land
ed by plaintiff for speculation, and
on him the duty to pay taxes and
ales, an assignment by defendant if
ght, title, and interest" in the con-
not an assignment of the contract
consituting a repudiation of its
, but merely an assignment of the
to accrue therefrom. *Alden v.*
W. Frank Improvement Co., 57 Neb.
N. W. 369).

and liabilities of parties.

(1888.) Where one who has a con-
o build a bridge across the Platte
ssigns one-half interest therein to
, such other may, upon the comple-
the contract maintain an action
ivision of the profits. *Daugherty v.*
3 Neb. 105 (36 N. W. 351).

(1894.) The assignees of a contract
sfer freight for a railroad company
ear the burdens of the assignor's
on before he may enjoy the bene-
nion P. R. Co. v. Douglas County
42 Neb. 469 (60 N. W. 886).

31. (1895.) Where a construction partnership that has the contract for building a county court house is dissolved during the progress of the work and one partner continues the work under the firm name, and to secure a loan assigns the reserve held by the county from the payments on the work, the loan being to the individual partner, the assignment is subordinate to the liens of laborers and material-men. *Perkins v. Butler County*, 44 Neb. 110 (62 N. W. 308).

32. (1895.) Where the owner of a mechanic's lien assigns it to another, a statement that there is no set-off or counter-claim as defense, and a guarantee to pay any deduction made from the claim, is a guarantee to make good any deduction by a counter-claim or set-off, and not that the award in a foreclosure will be for the full amount claimed. *Fisherdick v. Hutton*, 44 Neb. 122 (62 N. W. 488).

33. (1898.) The assignee of a non-negotiable chose in action takes it subject to all equities existing between the original parties. *Lewis v. Holdrege*, 56 Neb. 379 (76 N. W. 890).

34. (1899.) An assignee of an account is bound by the contract entered into or ratified by his assignor. *Hoover v. Columbia Nat. Bank*, 58 Neb. 420 (78 N. W. 717).

35. (1904.) If out of the purchase price of a chose in action the assignor has agreed to discharge an obligation against the same, his agreement so to do may be shown by parol, although a contract of assignment making no mention of such agreement or of the purchase price may be in writing. *Bell v. Wiltson*, 5 Unof. 486 (98 N. W. 1049).

Actions.

Issues in action on assigned account, see *Account, Action on*, §§ 19-21.

——— Defenses.

36. (1892.) If there was a defense to the account when assigned, and the assignee is a mere donee, the same defense may be interposed as if the action was by the assignor. If the assignor claims as a *bona fide* purchaser and the rights of creditors are affected, the amount and kind of consideration become material. *Barnett v. Ellis*, 34 Neb. 539 (51 N. W. 368).

37. (1898.) It is proper matter of defense that the alleged assignee of the claim in suit is not the owner thereof or the real

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party in interest. *Henley v. Evans*, 54 Neb. 187 (74 N. W. 578).

——— Parties.

38. (1888.) Where a claim has been assigned to a plaintiff, and he thereby acquires the legal title, but not the beneficial interest, the court may, where it will be in furtherance of justice, upon payment of costs, permit him to acquire the beneficial interest and proceed with the action. *Hoagland v. Van Etten*, 23 Neb. 462 (36 N. W. 755).

39. (1888.) Section 29 of the code is but a statutory enactment of the rule which has prevailed in courts of equity, that an action must be brought in the name of the party beneficially interested in the subject-matter. A mere assignment of a claim, therefore, where the proceeds of the suit are to be paid to the assignor, will not entitle the assignee to maintain the action. He must possess the beneficial interest. *Hoagland v. Van Etten*, 23 Neb. 462 (36 N. W. 755).

40. (1898.) The assignee of a chose in action is the proper and only party who can maintain an action thereon. *Crum v. Stanley*, 55 Neb. 351 (75 N. W. 851).

41. (1903.) An assignor of a chose in action is not a necessary party to an action upon it by the assignee. *Wood v. Carter*, 67 Neb. 133 (93 N. W. 158).

42. (1903.) An attorney to whom claims are unconditionally assigned may prosecute an action in his own name for a recovery on such claims, without joining the original claimants. *Huddleson v. Polk*, 70 Neb. 483 (97 N. W. 624).

——— Evidence.

43. (1888.) In an action for a balance due for the assignment of a contract to furnish curbing to a city, where the defense is fraudulent representations by the assignor, as to the price at which the curbing could be purchased, evidence that the parties had together called upon the agent of a railroad company, who showed them a telegram from a quarry containing quotations of such stone, is admissible. *Riley v. Melquist*, 23 Neb. 474 (36 N. W. 657).

44. (1892.) Evidence produced *held* to sustain a judgment on claim for charges made by a railroad for freight, on the question of assignment thereof. *Rosenbaum v. Russell*, 35 Neb. 513 (53 N. W. 384).

45. (1897.) Evidence *held* to warrant a finding of an absolute assignment of a claim against a railroad for damages for killing live stock. *Grand Island & Wyoming C. R. Co. v. Swinbank*, 51 Neb. 521 (71 N. W. 48).

46. (1903.) An oral assignment in a reversion fund may be proved by oral testimony. *Curtis v. Zutavern*, 67 Neb. 183 (93 N. W. 400).

47. (1905.) Under the facts, *held*, that no competent evidence of an assignment of the judgment by the judgment creditor has been adduced. *Ebel v. Stringer*, 73 Neb. 249 (102 N. W. 466).

——— Instructions.

48. (1888.) In action for balance due on consideration for assignment of grading contract with city, where defense is fraudulent representations by assignor, instructions given held correct. *Riley v. Melquist*, 23 Neb. 474 (36 N. W. 657).

ASSIGNMENT OF ERRORS.

See *Appeal and Error*, X.

In appeal in criminal prosecution, see *Criminal Law*, §§ 1045-1054.

In motion for new trial, see *New Trial*, §§ 131-142.

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ASSIGNMENTS FOR BENEFIT OF CREDITORS.

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ANALYSIS.

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CROSS-REFERENCES.

See, also, *Assignment; Insolvency.*

See, also, *Chattel Mortgages.*

Priority of chattel mortgage over assignment, see *Chattel Mortgages*, §§ 110-112.

Consideration for agreement to accept assigned estate in full payment of claims, see *Contracts*, § 45.

Chattel mortgage distinguished from assignment, see *Chattel Mortgages*, § 20.

Title acquired by assignee in bankruptcy, see *Bankruptcy*, §§ 22-24.

I. REQUISITES AND VALIDITY.

A. Conveyances and Transactions Creating Trust.

Right to make assignment.

1. (1878.) An insolvent debtor may make an absolute assignment of all his property, to a trustee, to be applied in payment of his debts; but in such case it is the duty of the trustee at once to apply the property to the purpose for which the trust was created. *McCleery v. Allen*, 7 Neb. 21 (29 Am. Rep. 377).

2. (1884.) One of two partners, with the consent of the other, may convey real estate of the firm by an assignment in the name of the firm. *Sullivan v. Smith*, 15 Neb. 476 (19 N. W. 620; 48 Am. Rep. 345).

3. (1891.) The right of a debtor, who is unable to pay his debts, to make an assignment of all his property to be equally distributed among his creditors in proportion to their several demands is a right to be upheld when possible and its exercise encouraged; and while he may be estopped to make such disposition of his property by judgment or deed, he cannot be, by mere conduct, or matter of estoppel *in pais*. *Commercial Nat. Bank v. Nebraska Nat. Bank*, 33 Neb. 292 (50 N. W. 157).

Constructive assignment.

4. (1891.) A conveyance of a stock of merchandise, and of realty of the debtor with all claims owing to the debtor, to one for the benefit of all creditors, held to be a deed of assignment. *Clendenning v. Perrine*, 32 Neb. 155 (49 N. W. 334).

5. (1903.) When an insolvent corporation transfers all of its assets to a creditor in settlement of a claim upon which the officers of the corporation are personally liable, and the transfer is for that reason held invalid, the transferee holds the property in trust for all creditors of the corporation, and is entitled to participate in the distribution of the assets. *National Wall Paper Co. v. Columbia Nat. Bank*, 68 Neb. 47 (93 N. W. 1004).

6. (1895.) The act in regard to voluntary assignments refers only to assignments intended as such; that is, when a debtor undertakes to make an assignment under the statute he must make it in accordance with it, otherwise it is no assignment and is void. But the rules relating to the construction of mortgages and other instruments somewhat akin to assignments, but not intended as such, remain unchanged. *Kilpatrick-Koch Dry Goods Co. v. Bremers*, 44 Neb. 863 (62 N. W. 1105).

7. (1898.) A corporation resolved to remove its stock of merchandise to a distant city and effect a consolidation there with another corporation. Afterwards its managing officers determined, in order to avoid trouble with creditors, to retain a portion of the goods, sell them, and apply the proceeds to the payment of debts. No trust was created and no provision made for the

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of the application of the proceeds. hat this arrangement did not con- he goods a trust fund for the pay- creditors *pro rata*. *German Nat. First Nat. Bank*, 55 Neb. 86 (75 N.

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Iortgages as security.

886.) The turning point of cases gages with possession of mortgagee, eld assignment for benefit of credi- that the assignee is held to be a for creditors. *Bonns v. Carter*, 20 6 (31 N. W. 381); *Id.*, 22 Neb. 495 W. 394). [Overruled. 37 Neb. 816; 765; 41 Neb. 35; 41 Neb. 67; 44 Neb. Neb. 119; 48 Neb. 48.]

886.) An instrument in writing, ng to be a chattel mortgage, that ossession of property to mortgagee wer to sell in usual course of busi- an assignment for creditors; and ing been made in conformity to , is void as to creditors. *Bonns v.* 20 Neb. 566 (31 N. W. 381); *Id.*, 495 (35 N. W. 394). [Overruled. 816; 40 Neb. 765; 41 Neb. 35; 41 44 Neb. 863; 45 Neb. 119; 48 Neb.

1891.) Chattel mortgages to pre- reditors, given to secure actual in- ess, in good faith, by an insolvent are valid and do not constitute an ent, though they cover all the debt- operty, the value of which was in excess of the debts secured. *er v. Higman*, 31 Neb. 531 (48 N. W. Am. St. Rep. 527).

1892.) One D., being in failing cir- ces and owing money to numerous s, executed separate chattel mort- o six creditors upon his stock of dise. The said mortgages were t the same time and to secure the le indebtedness of D. to the several ecs. It was the intention of all par- t the mortgagees should prorate in oceeds of the mortgaged property, ntention was evidenced by the fol- recital in each mortgage: "This is t the same time and is to prorate ortgages made to" (here follows a ion of each of the other mortgages). eing no trust created by the mort- the transaction did not amount to gnment for the benefit of creditors. *n v. Isaacs*, 34 Neb. 709 (52 N. W.

12. (1893.) Several chattel mortgages made and delivered simultaneously to secure different creditors of the mortgagor, the delivery being to one of the mortgagees, who in the transaction acts for himself and on behalf of all the other mortgagees, do not constitute an assignment for the benefit of creditors. *Farwell Co. v. Wright*, 38 Neb. 445 (56 N. W. 984).

13. (1893.) Where a chattel mortgage was taken by a creditor of the mortgagor upon all his property, its purpose being not only to secure a debt due the mortgagee, but also to secure other creditors of the mortgagor not named therein, whose rights are not expressly reserved from the operation of the assignment law of this state, such mortgage is void as an irregular, prohibited voluntary assignment. *Stewart v. Stewart*, 36 Neb. 558 (54 N. W. 828).

14. (1893.) Several chattel mortgages made and delivered simultaneously to secure different creditors of the mortgagor, the delivery being to one of the mortgagees, who in the transaction acts for himself and on behalf of all the other mortgagees, do not constitute an assignment for the benefit of creditors. *Jones v. Loree*, 37 Neb. 816 (56 N. W. 390).

15. (1893.) An instrument in the form of a mortgage or bill of sale will not be held to be an assignment for the benefit of creditors unless it creates trust in favor of some person or persons other than the mortgagor or vendor. *Costello v. Chamberlain*, 36 Neb. 45 (53 N. W. 1034).

16. (1894.) A chattel mortgage is not void as constituting a prohibited assignment for creditors solely for the reason that it is made to secure the payment of debts to third persons as well as to the mortgagee. *Davis v. Hilbourn*, 41 Neb. 35 (59 N. W. 397).

17. (1894.) Where several chattel mortgages are made and delivered simultaneously, covering all the property of the mortgagor, to secure different creditors, leaving other creditors unsecured, such transaction does not constitute a voluntary assignment for the benefit of creditors, although there may have been an agreement among the mortgagees to share *pro rata* in the proceeds of the mortgaged property. *Smith v. Phelan*, 40 Neb. 765 (59 N. W. 562).

18. (1895.) Instruments in the form of chattel mortgages will not be held to constitute an attempted assignment for the

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benefit of creditors because of the contemplated reciprocal trusts imposed on each mortgagee in favor of the others; because the mortgages provide that they shall prorate one with another; because at the time the mortgages were made the morgagor was unable to redeem, conveyed all his property by the mortgages to secure debts greater than the value of the property; and because the parties contemplated that the mortgagees should take immediae possession,—nor does the fact that the mortgages contained a power of sale in accordance with the statutory provisions for foreclosure render the transaction an assignment. *Kilpatrick-Koch Dry Goods Co. v. Bremers*, 44 Neb. 863 (62 N. W. 1105).

19. (1898.) A mortgage which does not in its inception contravene the assignment law will not be invalidated by a general assignment for the benefit of creditors, made by the mortgagor within thirty days after the execution of the mortgage. *Blair State Bank v. Stewart*, 57 Neb. 64 (77 N. W. 372).

20. (1899.) Instruments in the form of chattel mortgages will not be held to constitute an attempted assignment for benefit of creditors because of the contemplated reciprocal trusts imposed on each mortgagee in favor of the others; because the mortgages provide that they shall prorate one with another; because at the time the mortgages were made the mortgagor was unable to redeem, conveyed all his property by the mortgages to secure debts greater than the value of the property; and because the parties contemplated that the mortgagees should take immediate possession; nor does the fact that the mortgages contained a power of sale in accordance with the statutory provisions for foreclosure render the transaction an assignment. *Sloan v. Thomas Mfg. Co.*, 58 Neb. 713 (79 N. W. 728).

21. (1899.) A chattel mortgage given by a debtor to several creditors, who by the terms of the instrument are to prorate in the proceeds of the mortgaged property, is not a voluntary assignment under the statute. *Skinner v. First Nat. Bank of Pawnee City*, 59 Neb. 17 (80 N. W. 42).

——— Sale or transfer absolute in form.

22. (1890.) A sale of mercantile business by an insolvent firm to sureties, who were liable for the debts of the firm, is a sale and not an assignment if made in good faith. *Kaufman v. Coburn*, 30 Neb. 672 (46 N. W. 1010).

23. (1890.) Where a firm engaged in the mercantile business, being indebted in about the sum of $18,000, for which A, B and C were separately liable as sureties for about equal portions of said debt, sold their stock of goods, including real estate and other property, to said sureties, who jointly assumed all the debts for which they were severally liable, such transaction was a sale and not an assignment, and if made in good faith would be sustained. *Kaufman v. Coburn*, 30 Neb. 672 (46 N. W. 1010).

24. (1890.) Where members of a firm sell their entire stock of mercantile goods to their sureties of certain indebtedness, the sureties assuming all obligations, it not appearing the sale was for the benefit of any one or more creditors, the sureties became absolutely liable for the debts assumed, whether the property received was sufficient to pay out or not. *Kaufman v. Coburn*, 30 Neb. 672 (46 N. W. 1010).

25. (1893.) Where a merchant in failing circumstances, intending to prefer certain creditors, executed a bill of sale, the vendee paying the preferred claims out of the consideration named in the bill of sale it was *held*, in an action of replevin by the vendee against the sheriff who had seized the goods on an order of attachment in favor of an unsecured creditor, that the transfer was not an assignment for benefit of creditors, that the vendee was the only person beneficially interested, and that the transfer was valid, regardless of whether the bill of sale was intended as a mortgage or an absolute transfer. *Costello v. Chamberlain*, 36 Neb. 45 (53 N. W. 1034).

26. (1894.) The bill of sale herein *held* to be a conveyance to secure or pay *bona fide* debts, and not void for being such a conveyance as to constitute a voluntary assignment within the true meaning or construction of the terms of the provisions of the assignment law. *Meyer v. Union Bag & Paper Co.*, 41 Neb. 67 (59 N. W. 696).

Provision as to application of estate to debts.

27. (1878.) A debtor cannot, when a debt is due, avoid the obligation of immediate payment, nor can he, without the consent of the creditor, extend the period of credit. Therefore, if an assignment contains a provision, from which it appears that the debtor, at the time of its execution,

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to prevent the immediate applica-
his property to the payment of his
will render the instrument void
ace. *McCleery v. Allen*, 7 Neb. 21
Rep. 377).

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rm and Requisite of Instrument.

ral.

1880.) Deeds of assignment of both
personal property for the benefit
tors, to be valid as against the
of the assignor, must be executed
manner of deeds of real estate, as
by sec. 1, ch. 61, Gen. Stat., 872.
v. Hoagland, 10 Neb. 511 (7 N. W.
899) *Sloan v. Thomas Mfg. Co.*, 58
(79 N. W. 728).

1886.) An instrument purporting
chattel mortgage, examined and *held*
assignment; and not being made
ormity to statutes, *held* void as
creditors. *Bonns v. Carter*, 20 Neb.
N. W. 381); *Id.*, 22 Neb. 495 (35 N.

1898.) An objection to the admis-
a deed of assignment in evidence
as not executed or acknowledged in
ner in which a conveyance is re-
be executed and acknowledged is
ral and not sufficiently specific to
fects in the form of execution and
edgment of the instrument. *Maul*
, 55 Neb. 446 (76 N. W. 163).

1899.) The act in regard to volun-
gnments refers only to assignments
as such; that is, when a debtor
es to make an assignment under
te he must make it in accordance
otherwise it is no assignment and
But the rules relating to the con-
of mortgages and other instru-
omewhat akin to assignments, but
nded as such, remain unchanged.
Thomas Mfg. Co., 58 Neb. 713 (79
8).

1900.) A substantial compliance
d conformity to, the statutory pro-
regulating the subject of voluntary
nts for the benefit of creditors is
ion essential to effectuate a valid
of title to the property assigned to
nee named in the assignment. *Mil-
ite*. 60 Neb. 431 (83 N. W. 355).

ledgment.

1880.) The record of an unac-
ged deed of assignment is a nullity,
g no protection to the assignee as
against the creditors of the assignor. *Heelan v. Hoagland*, 10 Neb. 511 (7 N. W. 282).

34. (1896.) An assignment for the benefit of creditors, to be valid, must be in writing and executed and acknowledged in the same manner that an ordinary conveyance of real estate is required to be executed and acknowledged to entitle the latter to record. *Sager v. Summers*, 49 Neb. 459 (68 N. W. 614).

35. (1896.) The comma after the word "acknowledged" in the fourth line of section 6, chapter 6, Compiled Statutes, is an interpolation. *Sager v. Summers*, 49 Neb. 459 (68 N. W. 614).

Attestation.

36. (1896.) A deed of assignment for the benefit of creditors, unless witnessed, is absolutely void. *Sager v. Summers*, 49 Neb. 459 (68 N. W. 614).

Description of property.

37. (1898.) A deed of assignment which describes the property conveyed with sufficient particularity to enable the same to be readily identified is not rendered void by the failure to attach to such deed a copy of the schedule of property referred to therein as being on file in the office of the county judge, and containing a more specific description. *Maul v. Drexel*, 55 Neb. 446 (76 N. W. 163).

C. Reservations.

Effect of reservation in assignment to single creditor, see *Fraudulent Conveyances*, §§ 137-192.

In general.

38. (1878.) The deed of assignment contained a provision for a return to the assignor of the surplus, if any remained, of the assigned property after satisfying the claims of the creditor for whose benefit it was made. *Held*, That this reservation, being merely incidental to the primary object of the assignment, would not render it fraudulent under section 7, chapter 25, General Statutes. *Morgan v. Bogue*, 7 Neb. 429.

39. (1879.) A reservation in an assignment to pay over to the assignor "the rest, residue, and remainder, if any there be after paying said costs, charges, expenses, and debts as aforesaid," does not render an assignment void on its face. *Lininger v. Raymond*, 9 Neb. 40 (2 N. W. 359).

40. (1879.) An assignment for the benefit of creditors of "all the lands, tenements,

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hereditaments, goods, chattels, property, and choses in action, of every name, nature, and description, wherever the same be (except such property as is exempt by law from execution)," is not void on its face. *Lininger v. Raymond*, 9 Neb. 40 (2 N. W. 359).

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41. (1879.) A deed of assignment which purports to convey to the assignee all the assigning partnership's property, except such as is exempt from attachment or execution, is valid, and transfers the title to all the firm property to the assignee. *Miller v. Waite*, 59 Neb. 319 (80 N. W. 907). [Rehearing. 60 Neb. 431.]

D. Preferences.

Preference by bankrupt, see *Bankruptcy*, §§ 25-27.

Preference of individual creditor, see *Fraudulent Conveyances*, §§ 124-166.

Right to prefer creditor in general.

42. (1881.) A debtor, even when in failing circumstances, has the right to pay the *bona fide* demand of one of his creditors to the exclusion of others. *Lininger v. Raymond*, 12 Neb. 19 (9 N. W. 550).

43. (1886.) A debtor, even when in failing circumstances, has the right to pay the *bona fide* demand of one of his creditors, to the exclusion of others. A partnership or firm has the same right so long as the payments are made in good faith to creditors of the partnership. *Deitrich v. Hutchinson*, 20 Neb. 52 (29 N. W. 247).

44. (1890.) Preference, less than thirty days before an assignment, of a creditor who has ground for knowing of his debtors' insolvency, is void. *Banks v. Omaha Barb Wire Co.*, 30 Neb. 128 (46 N. W. 251).

45. (1893.) The assignment law does not deprive insolvent debtors of their common law right to prefer creditors. The law merely prohibits preferences, with certain exceptions named in the act, when made in the assignment itself, and preferences made within thirty days before an assignment actually executed, with notice upon the part of the creditor preferred that the debtor was then insolvent or contemplating insolvency. *Kavanaugh v. Oberfelder*, 37 Neb. 647 (56 N. W. 316).

46. (1894.) A debtor who is insolvent, or in failing circumstances, may pay or secure one or more of his creditors in full, and thus create a preference in their favor, which may have the effect to exclude other creditors, and the question of whether such action was with an honest or with a fraudulent intent or purpose is one of fact and not of law. *Meyer v. Union Bag & Paper Co.*, 41 Neb. 67 (59 N. W. 696).

47. (1896.) An insolvent debtor may pay or secure one creditor to the exclusion of others, and the intention to defraud cannot be inferred from the mere fact that such preference was given. *Dempster Mill Mfg. Co. v. First Nat. Bank of Holdrege*, 49 Neb. 321 (68 N. W. 477).

48. (1901.) An insolvent corporation cannot make a preference of a debt due from it on which the officers and directors are bound as sureties. *National Wall Paper Co. v. Columbia Nat. Bank*, 63 Neb. 234 (88 N. W. 481; 56 L. R. A. 121).

Intention of debtor.

49. (1893.) An intention to defraud cannot be inferred merely from the fact that a preference was given to a certain creditor. *Jones v. Loree*, 37 Neb. 816 (56 N. W. 390); (1894) *Dempster Mill Mfg. Co. v. First Nat. Bank of Holdrege*, 49 Neb. 321 (68 N. W. 477).

Preference by mortgage or other conveyance.

50. (1884.) Under the act of 1877, Compiled Statutes, chapter 6, an assignment for the benefit of creditors must be without preferences. If any preferences are made, that part of the assignment will be held void. But this act does not prevent a debtor, though in failing circumstances, from preferring a creditor by a separate and independent conveyance unconnected with the transaction of making the assignment, even though the preferred creditor be the assignee named in the assignment subsequently made. *Nelson v. Garey*, 15 Neb. 531 (19 N. W. 630).

51. (1885.) The act of the legislature of 1877 relating to voluntary assignments, Compiled Statutes, 1881, chapter 6, did not prevent a debtor in failing circumstances from preferring a creditor by a separate and independent conveyance unconnected with the transaction of making an assignment. *Bierbower v. Polk*, 17 Neb. 286 (22 N. W. 698).

52. (1887.) A debtor has the right to prefer his creditors and to pay or secure those preferred. The execution of chattel mortgages to preferred creditors, if made in good faith to secure *bona fide* debts, even if made to a considerable number of such creditors at or about the same time—no

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ng created—will not constitute an
nt for the benefit of creditors if
tended. *Davis v. Scott*, 22 Neb. 154
N. 353); (1891) *Hershiser v. Hig-*
Neb. 531 (48 N. W. 272; 28 Am. St.
).

(1890.) A mortgage given by an
debtor less than thirty days before
nment, preferring a creditor who
onable grounds for knowing of the
y, is fraudulent. *Banks v. Omaha*
re Co., 30 Neb. 128 (46 N. W. 251).

891.) Two of the creditors of an
, chosen to take charge of the
and secure all, cannot execute
s, giving themselves priority over
s. *St. Louis Wrought Iron Range*
yer, 31 Neb. 543 (48 N. W. 395).

894.) A debtor in failing circum-
may lawfully prefer one or more
reditors and secure such creditors
gage or conveyance absolute, pro-
e transaction is in good faith and
e with intent to defraud other cred-
eyer v. Union Bag & Paper Co., 41
(59 N. W. 696).

E. Fraud.

so, *Fraudulent Conveyances.*

n.

n intention to defraud cannot be in-
erely from the fact that a pref-
as given to one creditor. (1893)
Loree, 37 Neb. 816 (56 N. W. 390);
empster Mill Mfg. Co. v. First Nat.
Holdrege, 49 Neb. 321 (68 N. W.

tion in general.

878.) The continued possession of
signed by the execution debtor up
me of their being seized in execu-
the absence of a showing of good
him who claims under the assign-
conclusive evidence that the as-
was fraudulent, and the statute
11, chapter 25, General Statutes)
the courts so to declare. *Morgan*
7 Neb. 429.

879.) An assignment for the bene-
creditors, being as between them
equitable in its nature, will not
red void, unless it is clearly so.
dt v. McWhirter, 9 Neb. 6 (2 N. W.
Am Rep. 396).

879.) An assignment for the bene-
editors, which authorizes the as-
"sell and dispose of the property,
and generally convert the same into money, upon such terms and conditions as in his judgment may appear just and for the interest of all parties interested," is not void upon its face. *Brahmstadt v. McWhirter*, 9 Neb. 6 (2 N. W. 232; 31 Am. Rep. 396).

61. (1881.) Where the debtor parts with all control of his property, and devotes it absolutely to the payment of his debts without reservation, the advantage to creditors is clear and direct, and although there may be delay in the payment of the debts, still the assignment is not fraudulent and will not be declared void. *Lininger v. Raymond*, 12 Neb. 167 (10 N. W. 716). [Overruled. 13 Neb. 298; 49 Neb. 165.]

62. (1892.) An assignment for the benefit of creditors, as it secures an equitable distribution of the proceeds of the debtor's property among his creditors, will be sustained if possible. *Lancaster County Bank v. Horn*, 34 Neb. 742 (52 N. W. 562). [Overruled. *Bank v. Horn*, 49 Neb. 466.]

63. (1898.) A conveyance or transfer made without any intention to contravene or evade the assignment law, and at any time when an assignment was not contemplated, is valid and will be upheld. *Blair State Bank v. Stewart*, 57 Neb. 64 (77 N. W. 372).

64. (1898.) Whether a deed of assignment is void for reasons which appear on its face is a question of law for the court, and not for the jury, to determine. *Maul v. Drexel*, 55 Neb. 446 (76 N. W. 163).

Transactions before assignment.

65. (1884.) The fact that prior to but on the same day that an assignment for benefit of creditors was made, the assignor executed a chattel mortgage on a portion of his property, to the assignee to secure a debt, if such mortgage was made *bona fide* and without fraudulent intent, will not render it a part of the assignment so as to convey the mortgaged property in trust for creditors. *Nelson v. Garey*, 15 Neb. 531 (19 N. W. 630).

66. (1886.) Where a firm is insolvent the partners cannot by a sale to one partner of their interest, three days before an assignment for the benefit of creditors is made, divest the property of its partnership character so as to defraud partnership creditors. *Morehead v. Adams*, 18 Neb. 569 (26 N. W. 242).

67. (1890.) The prohibited acts must

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have taken place within thirty days before the making of an assignment to invalidate such transfer. *Banks v. Omaha Barb Wire Co.*, 30 Neb. 128 (46 N. W. 251).

68. (1892.) A debtor in failing circumstances and contemplating insolvency may pay or secure an indebtedness created within nine months prior thereto; and a chattel mortgage executed to secure a *bona fide* debt created within said time, will not be held void for the reason that such debtor, within a few hours thereafter, makes a general assignment of all his property, including that mortgaged as aforesaid, for the benefit of his creditors. *Brown v. Williams*, 34 Neb. 376 (51 N. W. 851).

69. (1893.) The fact that a chattel mortgage was executed a few hours previous to the making of a voluntary assignment by the mortgagor for the benefit of creditors is not conclusive evidence of fraud so as to entitle the assignee to recover the mortgaged property as a part of the assigned estate. *Brown v. Farmers & Merchants Banking Co.*, 36 Neb. 434 (54 N. W. 671).

70. (1896.) The fraudulent disposition of a part of his property by one about to make an assignment for the benefit of his creditors will not operate to impair the title of the assignee to the remainder, when such assignment is afterwards made to, and acted upon by, the assignee in good faith. *Deere, Wells & Co. v. Losey*, 48 Neb. 622 (67 N. W. 462).

71. (1898.) Conveyances made more than thirty days before the execution of a deed of voluntary assignment are not within the inhibition of either section 42 or section 43 of the assignment law (Comp. Stats., ch. 6). *Blair State Bank v. Stewart*, 57 Neb. 58 (77 N. W. 372).

Effect of fraud by assignor after assignment.

72. (1894.) Where a valid assignment is made for the benefit of creditors, no fraudulent act of the assignor after the taking effect of such assignment will vitiate it. Nor will a failure on the part of the assignee to account for money or property of the assigned estate have that effect. *Sullivan v. Smith*, 15 Neb. 476 (19 N. W. 620; 48 Am. Rep. 354).

F. Filing, Recording, and Registration.

Recording conveyance to creditor in general, see *Fraudulent Conveyances*, §§ 210-236.

Necessity.

73. (1880.) To convey property as against the creditors of the assignor, the deed of assignment must be recorded within thirty days after its execution. *Heelan v. Hoagland*, 10 Neb. 511 (7 N. W. 282).

74. (1900.) Under the provisions of section 6, chapter 6, Compiled Statutes, 1899, a deed of assignment must be filed for record in the clerk's office within 24 hours after its execution, or it becomes nugatory. *Miller v. Waite*, 60 Neb. 431 (83 N. W. 355).

75. (1903.) The provisions of section 6, chapter 6, Compiled Statutes, 1899, requiring the filing of a deed of assignment for record in the clerk's office of the county in which the assignee resides, within twenty-four hours after its execution, is mandatory. *Huddleson v. Polk*, 70 Neb. 483 (97 N. W. 624).

Foreign assignment.

76. (1894.) Where a resident of Wyoming executes a voluntary assignment for the benefit of his creditor but fails to make and file, within twenty days, an inventory, required by the statutes of Wyoming, the assignees cannot recover from a bank in this state money the debtor had no deposit at the time of the assignment and which the bank applied to a discharge on unmatured notes held by the bank. *Conner v. Omaha Nat. Bank*, 42 Neb. 602 (60 N. W. 911).

77. (1906.) A voluntary assignment for the benefit of creditors, executed in a sister state according to the laws thereof, is ineffectual to convey real property situated in this state, unless it is executed and recorded in such manner as would render it so effectual if made in this state. *Kirkendall v. Weatherley*, 77 Neb. 421 (109 N. W. 757).

Where to record.

78. (1881.) The miscellaneous record is the proper book in which to enter an assignment for the benefit of creditors. *Lininger v. Raymond*, 12 Neb. 167 (10 N. W. 716).

Sufficiency.

79. (1886.) That part of section 6 of chapter 6 of the Compiled Statutes, which requires an assignment of property for the benefit of creditors to be recorded within twenty-four hours after its execution, construed, and the word "execution" held to include the delivery of the assignment and

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rrender of control over it. *Wells v.* 19 Neb. 355 (27 N. W. 229).

(1903.) Evidence examined and *held* fficient to show a compliance with a in the matter of recording an as- nt deed. *Huddleson v. Polk*, 70 Neb. N. W. 624).

of failure to record.

(1892.) An assignment by a debtor onal property for the benefit of cred- ill not be invalid because not re- if filed in the county clerk's office twenty-four hours after being made. *ter County Bank v. Horn*, 34 Neb. N. W. 562). [Overruled. 49 Neb. Neb. 431.]

(1892.) Where the assignee has ctual and exclusive possession of the l property assigned, such possession be disregarded by third parties on und of want of notice. The statute provides for a registry of the instru- *Lancaster County Bank v. Horn*, 34 (52 N. W. 562). [Overruled. *Sager mers*, 49 Neb. 466].

1898.) An assignment of personal for the benefit of creditors should in the office of the county clerk of unty where the assignor resides twenty-four hours after its execu- d is not void because not filed for with the register of deeds within riod. *Maul v. Drexel*, 55 Neb. 446 W. 163).

1899.) The right of an assignee for efit of creditors to maintain an ac- conversion of the assigned property divested by the mere failure to file d of assignment for record within four hours after its delivery. *Miller e*, 59 Neb. 319 (80 N. W. 907). [Re- 60 Neb. 431.]

1903.) The fact that the assignor a sheriff, acting as assignee, to d a deed from record the statutory no excuse for such neglect. *Huddle- Polk*, 70 Neb. 483 (97 N. W. 624).

NSTRUCTION AND OPERATION.

ction in general.

1896.) An assignment, "H. and Y., doing business under the firm nd style of H. & Y., are indebted ry considerable sums of money and come unable to pay and discharge he with punctuality, or in full, and esirous of making a fair and equita- ble distribution of all our property and effects, do hereby convey to the sheriff of Madison county Nebraska, all our partnership personal property of every description whatever. This conveyance is made in trust for the use and benefit of all our creditors and in conformity with an act of the legislature entitled," will not, for the purpose of holding it void, be construed as an assignment for the benefit of the creditors of the individual partners. *Deere, Wells & Co. v. Losey*, 48 Neb. 622 (67 N. W. 462).

87. (1890.) Where property of a debtor was assigned to certain parties with a provision that they should conduct and close out the business for the benefit of creditors, naming all of the latter but three, and they being omitted by mistake; the omitted creditors were entitled to their proportionate share of the proceeds of sales. *Guittard v. Robinson*, 29 Neb. 400 (45 N. W. 476).

Foreign assignments.

88. (1880.) The voluntary assignment in Illinois by a debtor under a statute of that state (Laws 1877, p. 115) of all his property, and the presentation and proof of a creditor's claim in Illinois, is not a bar to such creditor's right of action in Nebraska, there being nothing in the statute of Illinois or in the deed of assignment restricting creditors to their respective dividends, or suspending any other remedy previously open to them. *Gross v. Bunn*, 10 Neb. 217 (4 N. W. 1048).

Right acquired by assignee.

89. (1891.) Title to all of the assignor's property vests in assignee, and includes that used in a banking business, and ostensibly belonging to a corporation which has no existence in fact. *Commercial Nat. Bank v. Nebraska State Bank*, 33 Neb. 292 (50 N. W. 157). [Overruled. *Lancaster County Bank v. Gillilan*, 49 Neb. 165.]

90. (1894.) The assignee of an insolvent corporation takes the property subject to whatever equities existed against the assignor. *Salladin v. Mitchell*, 42 Neb. 859 (61 N. W. 127).

Effect on property assigned.

See, also, *post*, §§ 104,105.

91. (1878.) Property held by an assignee, under a valid assignment for the benefit of creditors, is not subject to attachment or garnishment for the assignor's debts. *Schlueter v. Raymond Bros. & Co.*, 7 Neb. 281.

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92. (1888.) Property of a debtor in the hands of his assignee for the benefit of creditors, is not subject to execution under a judgment against the debtor. *Smith, Frazier & Co. v. Taylor & Co.*, 25 Neb. 260 (41 N. W. 154).

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Effect on relation of creditor and debtor.

93. (1880.) A debtor cannot change his relations to his creditors by a voluntary assignment. *Gross v. Bunn*, 10 Neb. 217 (4 N. W. 1048).

III. QUALIFICATION AND TENURE OF ASSIGNEE.

In general.

94. (1879.) The clerk of a district court may act as assignee, and his approval of his own bond does not render his acts void. But he may be required at any time to give additional security. *Brahmstadt v. McWhirter*, 9 Neb. 6 (2 N. W. 232; 31 Am. Rep. 396).

95. (1891.) Mandamus lies to compel sheriff who has been succeeded as assignee who has been chosen by the creditors to quitclaim to his successor all real estate conveyed by the assignment. *Strunk v. State, ex rel. Lipp*, 33 Neb. 322 (50 N. W. 14).

96. (1898.) Where property is assigned to the sheriff and his successors in office in trust for the benefit of the creditors of the assignor, on the expiration of the term of the then sheriff the execution of the trust devolves upon his successor in office, in case the assignee chosen by the creditors fails to qualify and enter upon the duties of assignee. *Maul v. Drexel*, 55 Neb. 446 (76 N. W. 163).

IV. ADMINISTRATION OF ASSIGNED ESTATES.

See, also, *ante*, § 1.

Authority of assignee in general.

97. (1896.) Except as authorized by statute, the assignee under a voluntary assignment for the benefit of creditors may not assert rights beyond those which the assignor might assert in the absence of the assignment, the assignee, except as otherwise provided, representing the assignor and not the creditors. *Lancaster County Bank v. Gillilan*, 49 Neb. 165 (68 N. W. 352).

98. (1893.) Under the provisions of sections 42 and 43 of the assignment law, the rights of the assignee to recover property fraudulently transferred by the assignor are similar to those of a judgment creditor and must be enforced according to the forms of law. He is not authorized to forcibly seize and take property on the assumption that it was transferred by his assignor in fraud of the rights of creditors. *Brown v. Farmers & Merchants Banking Co.*, 36 Neb. 434 (54 N. W. 671).

Representation of creditor.

99. (1898.) An assignee under a deed of voluntary assignment represents creditors of the assignor only to the extent that he is expressly authorized to do so by statute. *Blair State Bank v. Stewart*, 57 Neb. 58 (77 N. W. 370).

Collection and distribution of assets.

100. (1881.) The assignee is under the control and direction of the district court, and it is the duty of such assignee to collect and apply the whole estate to the payment of the debts as speedily as possible. *Lininger v. Raymond*, 12 Neb. 167 (10 N. W. 716). [Overruled. 13 Neb. 298; 49 Neb. 165.]

101. (1884.) It is necessary for the assignee to take possession of the assigned estate, but so far as the formal act of taking possession is concerned, no stricter rule applies than in case of ordinary purchase. A formal delivery of the keys to storehouses, safe, and shops, accompanied by a pointing out and surrender of possession of stock in pens, horses, harness, wagon, etc., in barns is sufficient. *Sullivan v. Smith*. 15 Neb. 476 (19 N. W. 620; 48 Am. Rep. 354).

102. (1903.) In an action in equity against a grantee who is charged with a trust in favor of all other creditors of the grantor, the court will distribute the assets to all creditors, parties to the suit, in proportion to their respective claims. *National Wall Paper Co. v. Columbia Nat. Bank*, 68 Neb. 47 (93 N. W. 1004).

Custody and management of estate.

103. (1879.) Under the statute the entire proceedings are under the supervision and control of the district court or the judge thereof, and it is the duty of the court or judge, upon proper application, to see that the assignee properly discharges the duties of his trust. *Lininger v. Raymond*, 9 Neb. 40 (2 N. W. 359).

104. (1892.) The funds of an insolvent debtor which come into the hands of the assignee are within the jurisdiction of the

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court, and that court will proceed to
ne the rights of the creditors thereto,
bject to the limitations of the con-
, will grant the proper relief even
extent of recognizing and enforcing
. The jurisdiction of a court of
in such cases is concurrent only.
v. Coburn, 35 Neb. 530 (53 N. W.

ing assignee to turn over property
uccessor.

(1891.) A district court has au-
to issue mandamus to compel a
who has been succeeded as assignee
itors, to quitclaim to his successor
estate conveyed by the assignment,
ection 5, chapter 6, of Compiled
. . Strunk v. State, ex rel. Lipp, 33
2 (50 N. W. 14).

assets.

(1878.) Where an assignment con-
provision authorizing the assignee
pose of the same in any manner
ver as freely and lawfully as the
could do himself, which the said
the second part, trustee as afore-
ay deem advisable to do, tending in
ion to convert the same into money,
benefit of all interested, *held*, that
thorized a sale on credit, and ren-
ne instrument void on its face. *Mc-
v. Allen*, 7 Neb. 21 (29 Am. Rep.

(1881.) After the sale of goods
nade by an assignee, he may, if he
repurchase them for his own pri-
and benefit. *Lininger v. Raymond*,
19 (9 N. W. 550).

of assignee to question sale by as-
nor.

(1882.) Under a voluntary assign-
ne assignee represents simply the
, and not his creditors, respecting
igned property, and hence will not
nitted to urge that a sale of the
previous to the assignment was
ent as to the creditors of the as-
in order to defeat it. *Housel v.*
13 Neb. 298 (14 N. W. 398).

(1898.) A conveyance executed by
gnor before the assignment cannot
iled by the assignee on the ground
was made to hinder, delay, or de-
reditors, unless such creditors have
ly authorized an action to be
for that purpose. *Blair State Bank v. Stewart*, 57 Neb. 58 (77 N. W. 370).

110. (1898.) An assignee under a deed of general assignment cannot, without the written consent of creditors, assail a conveyance made by his assignor, except on the ground that such conveyance was in contravention of section 42 or section 43 of the assignment law (Comp. Stats., ch. 6). *Blair State Bank v. Stewart*, 57 Neb. 64 (77 N. W. 372).

Actions.

——— By assignee.

111. (1883.) The assignor cannot come in as a defendant in an action by a single creditor in attachment proceeding. *Ashton v. Jones*, 14 Neb. 426 (16 N. W. 434).

112. (1885.) An assignee for the benefit of creditors under a valid assignment may maintain an action to set aside a sale of real estate under an attachment levied after the execution and delivery of the deed of assignment, where such sale would impair or defeat his title as assignee. *Smith v. Jones*, 18 Neb. 481 (25 N. W. 624).

113. (1899.) An assignee, for the benefit of creditors, to whom possession of the trust property has been delivered, may maintain an action for conversion against one who wrongfully seizes such property. *Miller v. Waite*, 59 Neb. 319 (80 N. W. 907). [Rehearing 60 Neb. 431.]

113*a*. (1900.) An assignee has such an interest in the property as will maintain an action for conversion. *Miller v. Waite*, 60 Neb. 431 (83 N. W. 355).

114. (1900.) An assignee of property assigned for the benefit of creditors who is in the peaceable and undisputed possession thereof has a possessory title therein sufficient to maintain an action for conversion against those who illegally and without authority obtain possession of such property, and unlawfully convert the same to their own use, even though the deed of assignment be invalid for want of being filed for record within twenty-four hours from its execution, as provided by statute. *Miller v. Waite*, 60 Neb. 431 (83 N. W. 355).

——— Attachment or garnishment against assignee.

115. (1885.) Where property is delivered to a deputy sheriff, under an assignment for creditor, when such officer came to levy an attachment thereon, and he accepted the trust and delivered the same

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to the sheriff, and an assignee is chosen by the creditors, the assignee, in an action of replevin, is entitled to possession of the property as against attachment levied three days after the delivery to the sheriff. *Wells v. Lamb*, 18 Neb. 352 (24 N. W. 682).

116. (1896.) In an action to hold liable as garnishee the assignee of an insolvent firm with respect to property which has come into his hands by virtue of the assignment it is immaterial whether or not the deed of assignment was witnessed, and any ambiguity in such deed will not be so construed as to render it void. *Deere, Wells & Co. v. Losey*, 48 Neb. 622 (67 N. W. 462). [Overruled. *Sagers v. Summers*, 49 Neb. 459.]

——— **Set-off.**

117. (1894.) In a proceeding by an assignee to foreclose a mortgage, the property of an insolvent bank, the purchaser from the mortgagor who is made a defendant therein, may set off against the claim of the assignee an indebtedness due to him from the bank. *Salladin v. Mitchell*, 42 Neb. 859 (61 N. W. 127).

118. (1894.) The defendant, in an action by the assignee to recover money due to an insolvent banking corporation, may set off against the amount owing by him to the bank an indebtedness of the latter to him. *Salladin v. Mitchell*, 42 Neb. 859 (61 N. W. 127).

——— **Parties.**

119. (1891.) Where one who is the sole owner of a banking business, which corporation has never been perfected as a corporation, makes an assignment of all of his property for the benefit of creditors, and one creditor attaches the banking property on the ground that the banking company was the owner thereof, the assignee is a proper party to intervene and is not estopped by representations of the assignor to the effect that the banking business was an organized corporation. *Commercial Nat. Bank v. Nebraska State Bank*, 33 Neb. 292 (50 N. W. 157).

——— **Pleadings.**

120. (1900.) A petition which alleges that plaintiff, as assignee, was in exclusive, open and notorious possession of property assigned for the benefit of creditors, which property was illegally converted by defendants, will resist a demurrer, even though the petition shows on its face that the deed of assignment was not filed for record for ten days after its execution. *Miller v. Waite*, 60 Neb. 431 (83 N. W. 355).

——— **Evidence.**

121. (1881.) Where creditors of an assignor for the benefit of creditors attached the property in the hands of the assignee on the grounds that the assignment was fraudulent, he must show by competent evidence that the assignment was fraudulent as alleged. *Lininger v. Raymond*, 12 Neb. 19 (9 N. W. 550).

V. RIGHTS AND REMEDIES OF CREDITORS.

In general.

122. (1880.) Where a debtor makes a voluntary assignment of all his property under the statute of a foreign state, including lands in Nebraska, as well as a deed of said lands direct to his assignee, and a creditor seeks to recover a personal judgment in Nebraska, such debtor making a voluntary appearance in the action, the sufficiency of such conveyances to pass the title of such lands to the assignee has no relevancy in such action, and it is error to admit such deeds in evidence. *Gross v. Bunn*, 10 Neb. 217 (4 N. W. 1048).

123. (1886.) A creditor under the assignment law of 1877 is not precluded from suing the debtor and recovering upon his claim, but the assigned property will not be liable for the satisfaction of the judgment unless he can have the assignment set aside as being fraudulent against creditors. *Morehead v. Adams*, 18 Neb. 569 (26 N. W. 242).

124. (1887.) Where an insolvent debtor has made an assignment of his property, the proceeds of which have been distributed among creditors, leaving a large amount unpaid, a creditor's bill filed by the assignee, or a creditor who has proved his claim, will inure to the benefit of all creditors who have established their claims against said assigned property. *Fisher v. Herron*, 22 Neb. 183 (34 N. W. 365). [Decree modified. 26 Neb. 130.]

125. (1896.) A creditor who knowingly ignores a voluntary assignment and elects to enforce his claim by attachment, cannot, after an adverse judgment, share in the distribution of the estate of the assignor, where he wilfully refused to file his claim within the time allowed by law. *Commercial Nat. Bank of Omaha v. Lipp*, 46 Neb. 595 (65 N. W. 777).

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1903.) The claims of creditors
l in a hostile attitude to an assign-
not be prorated with the claims of
o have complied with the act, in
ution of the proceeds of the as-
roperty. *Huddleson v. Polk*, 70
(97 N. W. 624).

failure to file claim.

1900.) The failure of a creditor
claim within the time fixed by the
he court, does not warrant another
charged with knowledge to act on
ption that it will not be presented.
Bank of Commerce, 61 Neb. 22 (84
).

1900.) A court may, in its discre-
nit a creditor to share in the as-
an insolvent bank, although his
not filed with the receiver within
which was by a general order
for the presentation of claims.
Bank of Commerce, 61 Neb. 22 (84
).

1890.) Under the assignment law
ate, where the creditor of an as-
ithout any laches on his part, is
from filing his claim within the
ted therefor by the county judge,
afterwards present his claim for
and receive a *pro rata* share with
creditors in the assets unadmin-
the time his claim is filed. *El-
o. v. Estate of Marsh*, 31 Neb. 134
. 639).

1891.) A creditor of an assignor
ugh his own fault, fails to present
n against the estate within the
ted therefor by law, is barred from
ion in any dividends or distribu-
the estate of the assignor. *Clen-
v. Perrine*, 32 Neb. 155 (49 N. W.

ment to assignee.

1891.) Creditors must show not
their claims are valid against the
but that they have been duly pre-
the assignee. *Clendenning v. Per-*
Neb. 155 (49 N. W. 334).

of claims.

1891.) Claims against an as-
tate should be paid by the assignee
direction of the court; but where
ave been paid without a dividend
clared, and the account of the as-
which includes such payments, is
by the court, the error is cured.
Clendenning v. Perrine, 32 Neb. 155 (49 N. W. 334).

Authority of assignee to compromise.

133. (1879.) A provision in an assignment, that an assignee may compromise choses in action when he deems it expedient to do so, gives authority to compromise only doubtful claims. *Lininger v. Raymond*, 9 Neb. 40 (2 N. W. 359).

Superiority of claims or liens to assignment.

134. (1893.) A claimant waives his right to have his claim preferred by neglecting to appeal from the order of a county judge allowing it as ordinary claims and accepting dividends from the assignee. *Anheuser-Busch Brewing Association v. Morris*, 36 Neb. 31 (53 N. W. 1037).

135. (1893.) It is the duty of the county judge, at the same time he audits and allows a claim against an assigned estate, to determine whether or not it is entitled to preference, and if he finds that it is, to order the same paid as a preferred claim. His decision is, in effect, a judgment, which is conclusive, unless appealed from. *Anheuser-Busch Brewing Ass'n v. Morris*, 36 Neb. 31 (53 N. W. 1037).

136. (1896.) The holder of an unrecorded chattel mortgage from the assignor has a right to the mortgaged property superior to that of the assignee, unless the case is one where the statute expressly confers upon the assignee the powers of a creditor. *Lancaster County Bank v. Gillilan*, 49 Neb. 165 (68 N. W. 352).

Estoppel to attack assignment.

136*a*. (1906.) A creditor, by participating in an insolvency proceeding begun in a sister state by a voluntary deed of assignment insufficient in form to be effectual to convey real property situated in this state, may become estopped to impeach a purported title of a purchaser of such property acquired in good faith in the progress of such proceedings. *Kirkendall v. Weatherley*, 77 Neb. 421 (109 N. W. 757).

VI. RIGHT OF ASSIGNOR.

In general.

137. (1883.) The assignor of property, assigned for the benefit of creditors generally, has no such interest in the distribution as will enable him to maintain an action for an injunction to restrain its appropriation by a single creditor through proceedings in attachment. *Ashton v. Jones*, 14 Neb. 426 (16 N. W. 434).

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VII. LIABILITY OF ASSIGNEE.

In general.

138. (1879.) Before the acts of February 15, 1877, Laws 1877, p. 24, the only remedy against an assignee for the benefit of creditors, where he neglected to collect the assets and render them available, or to settle the conflicting claims of creditors and adjust the respective amounts to be paid to each, was by suit in the nature of a bill in equity to enforce a settlement of the accounts of the assignee and a distribution of the assets among the creditors. *Nuckolls v. Tomlin*, 9 Neb. 353 (2 N. W. 875).

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139. (1903.) In an action against a sheriff for failure to file a deed of assignment to him, whereby the property was lost to the general creditors, it may be shown by the defendant in mitigation of damages that there are other creditors entitled to participate in the assets of the insolvent estate, but, to be available, this fact must be affirmatively pleaded in the answer. *Huddleson v. Polk*, 70 Neb. 492 (102 N. W. 464).

140. (1903.) Where a deed of assignment executed in favor of the sheriff, is rendered void by reason of the latter's failure to file it, and the property is thereby lost to the general creditors, the true measure of damage is the *pro rata* share of the creditor with all other creditors who would be entitled to participate in the assets of the insolvent estate had the assignment not been invalidated. *Huddleson v. Polk*, 70 Neb. 492 (102 N. W. 464).

141. (1903.) Where a deed of assignment of an insolvent person, executed in pursuance of the assignment laws in favor of the sheriff as assignee, is rendered void because of the latter's failure to have the same filed and recorded within the time required by law, and, because all of the property of the insolvent is lost to the general creditors, and there is no estate to administer under the provisions of the insolvent act, it is not a prerequisite to the maintenance of an action and the recovery of damages by a creditor, who has suffered loss by the neglect of the sheriff, to have his claim against the insolvent filed with, and approved by, the county court as though the estate was being administered in that tribunal. *Huddleson v. Polk*, 70 Neb. 492 (102 N. W. 464).

142. (1903.) The sureties on the official bond of a sheriff are liable for his misconduct when acting as assignee under the provisions of section 7, chapter 6, Compiled Statutes. *Huddleson v. Polk*, 70 Neb. 483 (97 N. W. 624).

ASSISTANCE, WRIT OF.

ANALYSIS.

Granting at chambers, § 1.
When granted, §§ 2, 3.
When not granted, §§ 4-6.

CROSS-REFERENCES.

Review of settlement of assigned estates, see *Appeal and Error*, § 60.

Order awarding writ of assistance as subject to review, see *Appeal and Error*, § 150.

To put purchaser at judicial sale in possession, see *Judicial Sales*, §§ 552-555.

Granting at chambers.

1. (1901.) A judge at chambers has no jurisdiction to grant a writ of assistance. *Hartsuff v. Huss*, 2 Unof. 145 (95 N. W. 1070).

When granted.

2. (1899.) The remedy by forcible entry and detainer and by writ of assistance in the original case are concurrent, and an injunction will not be allowed to restrain the prosecution of a case in forcible detainer merely because the district court might proceed by writ of assistance. *Green v. Morse*, 57 Neb. 391 (77 N. W. 925; 73 Am. St. Rep. 761).

3. (1902.) A court making a sale under a decree of foreclosure may, when necessary, issue a writ of assistance to put the purchaser in possession. *Magruder v. Kittle*, 2 Unof. 118 (89 N. W. 272).

When not granted.

4. (1902.) It is error to award a writ of assistance against a person who entered upon land *pendente lite*, claiming an independent title, not derived from or in succession to any of the parties to the suit or

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their privies. *Merrill v. Wright*, 65 Neb. 794 (91 N. W. 697; 101 Am. St. Rep. 645).

5. (1902.) One in possession of land under a void tax deed, asserting title thereunder, cannot be disposed under a writ of assistance. *Merrill v. Wright*, 65 Neb. 794 (91 N. W. 697; 101 Am. St. Rep. 645).

6. (1905.) Where on an application for a writ of assistance the party in possession of the premises makes a litigable claim of ownership thereof in fee, and it appears that his rights, if any, are unaffected by the decree of foreclosure and sale sought to be aided thereby, the writ should be refused. *Urlau v. Ruhe*, 73 Neb. 807 (103 N. W. 670; 104 N. W. 1053).

ASSOCIATIONS.

ANALYSIS.

Members, punishment of, §§ 1, 2.
Liability of members for debts, § 3.
Fines against members, § 4.
Actions by or against, § 5.

CROSS-REFERENCES.

See, also, *Colleges and Universities; Corporations; Joint Stock Companies; Partnership.*

Agricultural societies, see *Agriculture.*

Mutual benefit insurance companies, see *Insurance*, §§ 692-776.

Members, punishment of.

1. (1896.) The mere fact that a director had a special interest in the infliction of punishment upon a member of a voluntary association for the violation of its regulations did not, in the absence of objection on the ground of disqualification of such director to act as a trier of the accused, so far invalidate the findings and order of the board of directors, acting within the scope of its powers, that such findings and order, in a collateral proceeding in the district court, ought to be treated as of no force or validity. *Jackson v. South Omaha Live Stock Exchange*, 49 Neb. 687 (68 N. W. 1051).

2. (1896.) Where articles of incorporation of a voluntary association provided that it should be managed through by-laws and by a board of directors having power to punish infractions of the rules, regulations in the form of by-laws are as binding on members as though constituting part of the articles of incorporation. *Jackson v. South Omaha Live Stock Exchange*, 49 Neb. 687 (68 N. W. 1051).

Liability of members for debts.

Liability of member of religious society for debt, see *Religious Societies*, §§ 39-40.

3. (1894.) One is not liable for the debts of a voluntary unincorporated association incurred by it at the time when he was not a member thereof, unless by express contract, based on a good consideration, which must be alleged and proved. *Hornberger v. Orchard*, 39 Neb. 639 (58 N. W. 425).

Fines against members.

4. (1896.) In an action to enjoin the collection of a fine assessed against members of a voluntary association for the violation of its rules, disputed questions of fact cannot, as by a reviewing court, be examined, there being no proper proof of the nature of such evidence. *Jackson v. South Omaha Live Stock Exchange*, 49 Neb. 687 (68 N. W. 1051).

Actions by or against.

5. (1902.) A voluntary association, unincorporated, which is not organized to carry on some trade or business or to hold property in this state, and does not in fact carry on a trade or business or hold property therein, cannot sue or be sued as such. *Cleland v. Anderson*, 66 Neb. 252 (92 N. W. 306).

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ASYLUMS.

ANALYSIS.

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Control and regulation, §§ 1-3.
Status of Home for Friendless, § 4.
Title to property of Home for Friendless, §§ 5, 6.
Institution for blind, for educational purposes, § 7.
Rights of inmates of blind institution, § 8.
Trustees, election of, § 9.
Salary of superintendent, § 10.
Removal of hospital superintendent, §§ 11, 12.

CROSS-REFERENCES.

Application for commitment, see *Insane Persons*, § 18.

Commitment of dipsomaniacs to, see *Insane Persons*, §§ 18a-20.

Commitment of incompetents to, see *Insane Persons*, §§ 18-20.

Compelling approval of officer's bond, see *Mandamus*, § 149.

Control and regulation.

1. (1877.) The institution for the blind is not, within the meaning of section 19, article V of the constitution, an educational institution, and therefore is within the control of the board of public lands and buildings. *State, ex rel. Davis, v. Bacon*, 6 Neb. 286.

2. (1899.) By section 4 of the act establishing the Home for the Friendless (Sess. Laws 1881, p. 247, ch. 52) the Society of the Home for the Friendless was given supervision of the institution subject to the paramount authority of the board of public lands and buildings. *Society of Home for the Friendless v. State*, 58 Neb. 447 (78 N. W. 726).

3. (1899.) The supervision given to the Society for the Friendless over the Home for the Friendless by Laws 1881, ch. 52, was a mere privilege, and not a vested, irrevocable right. It depended upon the statute and was entirely extinguished when section 4 was repealed. *Society of Home for the Friendless v. State*, 58 Neb. 447 (78 N. W. 726).

Status of Home for Friendless.

4. (1899.) The institution established under the authority of the act of February 28, 1881, entitled "An act to establish a home for the friendless in the state of Nebraska, and to provide for the erection and location and government of the same," is a state institution. *Society of Home for the Friendless v. State*, 58 Neb. 447 (78 N. W 726).

Title of property of Home for Friendless.

5. (1899.) Real estate purchased by the board of public lands and buildings upon which to erect a home for the friendless was conveyed to "the state of Nebraska for the use and benefit of the home for the friendless." *Held*, That the clause, "for the use and benefit of the home for the friendless," was not designed to create a trust, but was merely descriptive of the use to which the property should be devoted by the state. *Society of Home for the Friendless v. State*, 58 Neb. 447 (78 N. W. 726).

6. (1899.) In establishing a home for the friendless under the authority of act February 28, 1881, the board of public lands and buildings could not lawfully purchase a building site and take the title thereto to the state in trust for the Society of the Home for the Friendless. *Society of Home for the Friendless v. State*, 58 Neb. 447 (78 N. W. 726).

Institution for blind, for educational purposes.

See, also, *ante*, § 1.

7. (1895.) The institution for the blind at Nebraska City is one for "educational purposes" within the meaning of section 19, article V of the constitution, and is not an asylum. *Curtis v. Allen*, 43 Neb. 184 (61 N W. 568).

Rights of inmates of blind institute.

8. (1895.) The mere fact that persons are blind, poor, and indigent does not entitle them to any privilege in the institution for the blind at Nebraska City, except to receive an education, and incidentally

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aid and support as thereby shall be ered necessary. *Curtis v. Allen*, 43 184 (61 N. W. 568).

tees, election of.

(1895.) Session Laws, 1875, p. 150, on 2, providing for the election by the ature of trustees for the institution he blind, is repugnant to section 10, e V of the constitution, and was by repealed. *State, ex rel. Horne, v. mb*, 46 Neb. 88 (64 N. W. 437).

y of superintendent.

(1899.) House Roll 615 passed by egislature of 1897, appropriating $2,500 ear as salary for the superintendent of ospital for the insane, *held* to express ntention of the legislature. *State v. tt*, 59 Neb. 106 (80 N. W. 499).

Removal of hospital superintendent.

11. (1895.) The provisions of section 7, article 7, chapter 83, Compiled Statutes, for the hearing of charges, before the board of public lands and buildings, against certain state officers, does not repeal the prior provisions for the removal, by the governor for cause, of the superintendent of the hospital for the insane. *State, ex rel. Attorney General, v. Hay*, 45 Neb. 321 (63 N. W. 821).

12. (1895.) A finding that a superintendent of the state hospital for insane had, through his employees and attendants wantonly abused and maltreated patients, and administered sedatives to them in harmful and dangerous quantities, *held* sufficient to sustain an order of the governor removing him from office. *State, ex rel. Attorney General, v. Hay*, 45 Neb. 321 (63 N. W. 821).

ATTACHMENT.

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I. NATURE AND GROUNDS.

A. Nature of Remedy, Causes of Action and Parties.

Nature and purpose of remedy.

1. (1881.) Proceedings in attachment are regulated by statutes, and there must be a substantial compliance therewith to give them validity. *Philpott v. Newman*, 11 Neb. 299 (9 N. W. 94).

2. (1882.) Attachment is merely for the purpose of retaining the prop the custody of the law until it is mined whether the plaintiff is enti recover. *Wescott v. Archer*, 12 N (11 N. W. 491, 577).

3. (1882.) The object of an atta is to obtain sufficient property or cr the debtor to satisfy the judgment may be recovered. *Turpin v. Coats*, 321 (11 N. W. 300).

4. (1894.) Attachment, though times called an ancillary or auxilia ceeding, is nevertheless, in all e respects, a suit. The affidavit of a made to obtain the writ of attachme the affidavit of a defendant, when denying the truth of the averments plaintiff, constitute the pleadings

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proceeding. *Jordan & McCarthy v. Dewey & Stone*, 40 Neb. 639 (59 N. W. 88).

5. (1896.) Attachment is a remedy merely ancillary to the personal action. *Darnell v. Mack*, 46 Neb. 740 (65 N. W. 805).

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Actions in which attachment is authorized.

——On overdue note or bill.

6. (1877.) A debt due upon a note or bill overdue is subject to attachment and garnishment. *Nesbitt v. Campbell*, 5 Neb. 429.

——Implied contract.

7. (1888.) In cases of bailment at common law, there has always been a choice of forms of action between actions on the case and assumpsit. Case lies for breach of duty, and assumpsit for breach of promise. A duty arises out of a promise, and the law implies a promise out of most duties. The code, while abolishing the forms of action, has preserved to a suitor all the rights and remedies known to the law. Therefore, if a promise is implied, either from a breach of duty or from the undertaking of the defendant, an attachment in a proper case will lie. *Hart v. Barnes*, 24 Neb. 782 (40 N. W. 322).

——Action on covenant.

8. (1892.) The action of covenant was in form and substance *ex contractu*, and an action under the code by a covenantee for damage on account of the breach of a covenant of warranty, after eviction under a paramount title, is for a debt arising under a contract, which may be recovered by attachment. *Cheney v. Straube*, 35 Neb. 521 (53 N. W. 479).

——On unliquidated demand.

9. (1883.) A claim for damages in not delivering goods purchased is not such a claim as will authorize the issuance of an attachment against a foreign corporation or a non-resident. *Rouss v. Wright*, 14 Neb. 457 (16 N. W. 765).

10 (1889.) Where a professional person is employed to render certain service in the line of his profession, and the testimony when construed most strongly against him tends to show mere negligence in performing the same, from which his employer suffers damages, such employer will not be entitled to an attachment against the property of such person in an action to recover such damages upon the ground that he had fraudulently contracted the debt. *Rawlings v. Powers*, 25 Neb. 681 (41 N. W. 651).

——Debt not due.

11. (1877.) The right to issue the attachment on a claim not due depends alone upon the fraudulent intent to defraud, hinder or delay creditors. *Seidentopf v. Annabil*, 6 Neb. 524.

12. (1885.) It is not a fatal objection to an attachment that it may be deducible from an examination of the petition or bill of particulars that some part of the amount stated in the affidavit for attachment is not yet due. *Tessier v. Englehart & Co.*, 18 Neb. 167 (24 N. W. 734).

13. (1887.) R. J. & Co. sued M. in the county court and obtained an order of attachment. On motion and hearing the attachment was dissolved. Upon the trial the defendant obtained judgment. Upon error in the district court the judgment dissolving the attachment was reversed, and upon appeal and retrial of the action in the district court, at a subsequent term, the plaintiff obtained judgment. But the court made a special finding, that at the date of the commencement of the action the debt sued on was not due, and thereupon dissolved the attachment. *Held*, Error, and reversed. *Reed v. Maben*, 21 Neb. 696 (33 N. W. 252).

14. (1891.) An attachment on a claim before due can only issue in the exceptional cases mentioned in the statute, and where property is replevied from a sheriff holding it under a writ of attachment issued on a debt not due, it devolves upon the officer to prove that the jurisdictional steps preceding the issuing of the writ have been taken, in order to have the amount of such claim included in the assessment of his damages. *Gamble v. Wilson*, 33 Neb. 270 (50 N. W. 3).

15. (1892.) A county judge has jurisdiction, under section 238 of the code of civil procedure, to grant an attachment on a claim not due, upon the proper affidavit being made and filed, showing the existence of at least one of the statutory grounds or causes for issuing an attachment on a debt before due. *Winchell v. McKinzie*, 35 Neb. 813 (53 N. W. 975).

16. (1893.) An attachment will not issue on an account not due, merely on the ground that defendant is about to sell his stock of merchandise, it appearing that the

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defendant is perfectly solvent with assets greatly in excess of his liabilities. *Caufield v. Bittenger*, 37 Neb. 542 (56 N. W. 302).

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17. (1894.) An action can only be maintained on a debt prior to the maturity thereof in the exceptional cases specified in section 237 of the code. Such an action cannot be prosecuted to judgment, unless a writ of attachment has been allowed, and property seized thereunder. *Cox v. Peoria Mfg. Co.*, 42 Neb. 660 (60 N. W. 933).

18. (1897.) An action may be prosecuted to judgment when therein a writ of attachment has been allowed under which property has been seized, although the obligation sued on did not mature until after the attachment was begun. *Mosher v. Farmers & Merchants Nat. Bank*, 51 Neb 55 (70 N. W. 540).

19. (1907.) A surety who has paid his principal's debt is entitled to attachment against the latter before the debt is due. *Danker v. Jacobs*, 79 Neb. 435 (112 N. W. 579).

——— **Action for tort.**

20. (1875.) An attachment, under the code of Nebraska, cannot be maintained in an action of tort. *Handy v. Brong*, 4 Neb. 60.

21. (1888.) Attachment will not lie in an action for a tort. *Hart v. Barnes*, 24 Neb. 782 (40 N. W. 322).

——— **Revival of judgment.**

22. (1903.) Attachment will not lie in an action to revive a dormant judgment. *Farak v. First Nat. Bank of Schuyler*, 67 Neb. 463 (93 N. W. 682).

Parties.

23. (1382.) An attachment by non-resident partnership in the firm name is not void. The want of legal capacity to sue must be objected to on that ground or it will be waived. *Cady v. Smith*, 12 Neb. 628 (12 N. W. 95).

Persons liable.

24. (1891.) Where the body of a petition states a cause of action against a bank only, though the name of its president appears in the title of the cause, there is no ground of attachment against the president alone. *Bauer v. Deane*, 33 Neb. 487 (50 N. W. 431).

B. Grounds of Attachment.

Necessity of grounds.

25. (1886.) To justify a party in causing an attachment to issue against the property of a debtor, at least one of the causes of attachment mentioned in the statute must exist. *Walker v Haggerty*, 20 Neb. 482 (30 N. W. 556).

Absconding, absence, or concealment.

26. (1879.) Mere temporary absence of a party from the state is not sufficient to justify an attachment under this provision; the party must be a non-resident of the state. *Marsh v. Steele*, 9 Neb. 96 (1 N. W. 869; 31 Am. Rep. 406).

27, 28. (1892.) In a legal sense a party absconds when he hides, conceals, or absents himself clandestinely with the intent to avoid legal process. *Gandy v. Jolly*, 34 Neb. 536 (52 N. W. 376); (1895) *Smith v. Johnson*, 43 Neb. 754 (62 N. W. 217).

29. (1896.) Absence for the purpose of business or pleasure is of itself not such an abandonment of one's place of abode within the state as to authorize the issuance of an attachment against him on the ground of non-residence. *Johnson v. May*, 49 Neb. 601 (68 N. W. 1032).

30. (1896.) One who has acquired a residence in a given place, within the meaning of the attachment law, is presumed to have abandoned his former domicile, and *vice versa*. *Johnson v. May*, 49 Neb. 601 (68 N. W. 1032).

Insolvency of debtor.

31. (1884.) The mere inability of a debtor to pay his debts is not a cause for an attachment. *Parmer v. Keith*, 16 Neb 91 (20 N. W. 103).

32. (1886.) Mere insolvency of the debtor, even if it exist, is not a cause of attachment. *Walker v. Haggerty*, 20 Neb. 482 (30 N. W. 556).

33. (1888.) Mere inability of a debtor to pay his debts is not ground for attachment. *Peru Plow Co. v. Benedict*, 24 Neb. 340 (38 N. W. 824).

Belief that one is a silent partner.

34. (1889.) The fact that a debtor engaged in business claims that a member of another firm is a silent partner with him, and credit is intended for him, is no ground for attachment because the creditor understood the second partnership was the silent partner. *Adams County Bank v. Morgan*, 26 Neb. 148 (41 N. W. 993).

Removal from jurisdiction.

35. (1883.) The mere fact of a removal of property out of the jurisdiction of a court, unless it be done with intent to de-

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fraud creditors, does not give the right of attachment. *Steele v. Dodd*, 14 Neb. 496 (16 N. W. 909).

36. (1883.) The fact that a debtor designs to sell his property, or to remove it beyond the jurisdiction of a court, when not accompanied by an intent to defraud his creditors, is not ground for an attachment. *Hunter v. Soward*, 15 Neb. 215 (18 N. W. 58).

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Fraudulent transfer or disposition of property.

——In general.

37. (1885.) Where the evidence shows plaintiff to be a judgment creditor of the defendant; that the defendant is a non-resident and has the equitable title to certain real estate transferred to defraud such creditor, attachment will issue to hold the property *in statu quo* pending a payment of the judgment. *Kennard, Daniel & Co. v. Hollenbeck*, 17 Neb. 362 (22 N. W. 771).

38. (1888.) Where plaintiff begins an investigation of the affairs of a partnership of which he was a member, and pending such investigation and negotiations of settlement, defendant, who was acting as attorney for the other partner, came into possession of $500 paid to the firm, attachment will lie against such attorney on the ground of fraud. *Warren v. Barsby*, 24 Neb. 811 (40 N. W. 314).

39. (1894.) It is a sufficient ground for attachment that members of an insolvent partnership divide between themselves the firm assets for the purpose of enabling each to claim the portion transferred to him as exempt against the partnership creditors. *Cox v. Peoria Mfg. Co.*, 42 Neb. 660 (60 N. W. 933).

40. (1895.) The goods of a merchant may be attached on the ground of a fraudulent disposal of property, where he expresses an intention to defeat the claim of a creditor, arranges to carry out his purpose, sells his goods rapidly for cash, greatly depletes the value of his stock in a short time, and fails to give a satisfactory account of the money realized. *Reed v. First Nat. Bank of Weeping Water*, 46 Neb. 168 (64 N. W. 701).

41. (1897.) A showing that a merchant sold a one-third interest in a stock of goods for a worthless tract of land, and later sold the remaining two-thirds, whereon the buyer and the owner of the other one-third immediately and at night time divided the goods between themselves, states grounds sufficient to sustain an attachment. *McDonald v. Marquardt*, 52 Neb. 820 (73 N. W. 288).

42. (1897.) Where an attachment was issued on the ground, among others, that the defendant had disposed of his property in whole or in part with intent to defraud his creditors, and, in resistance of a motion to discharge the attachment defendant there was undisputed proof of admission by the attachment defendant that he had made such a transfer of the nature charged that no execution against him could be collected, *held*, that there exists no reason for assuming that the transfer must have been made subsequent to the commencement of the attachment suit in view of the fact that the attachment defendant himself placed no such limitation on his own admissions of the fraudulent transfer in question. *Nebraska Moline Plow Co. v. Fuehring*, 52 Neb. 541 (72 N. W. 1003).

——Transfers as security.

43. (1884.) The fact that persons owning $8,000 worth of property and owing $4,000, mortgaged this property for $4,100 and invested $3,000 in mining stock claimed to be worthless, was not such a fraudulent disposition of this property as to be a ground for attachment. *Thurber v. Sexauer*, 15 Neb. 541 (19 N. W. 493).

44. (1888.) Evidence that shows a debtor to be accustomed to trading any or all of his property, sending the same to different places where he owned implement stores, where he sold machinery at about cost, the fact of his giving an inventory of his stock at one place to one creditor on request will not justify an attachment by another, on a charge that he was disposing of property to defraud creditors. *Reed, Jones & Co. v. Bagley*, 24 Neb. 332 (38 N. W. 827).

45. (1889.) Where, by reason of fire, a merchant became financially depressed and executed a chattel mortgage upon his stock of goods to secure a creditor, and immediate possession not being given, it is not a transfer in fraud of creditors as will warrant the issuance of attachment. *Feder, Nusbaum & Co. v. Solomon*, 26 Neb. 266 (42 N. W. 1).

46. (1890.) A creditor may take adequate security from a failing debtor without being chargeable with seeking to hinder and to delay other creditors, but where a

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debtor, heavily indebted, makes a mortgage upon all his property to one creditor, the security being greatly in excess of the amount of the debt, and the effect will be to prevent other creditors from collecting their claims out of the residue, an attachment on the ground of fraudulent disposition of the property, on the facts stated in the opinion, will lie against the debtor. *Smith v. Boyer*, 29 Neb. 76 (45 N. W. 265; 26 Am. St. Rep. 373). [Rehearing. 35 Neb. 46.]

Non-residence.

47. (1882.) In May, 1881, defendant came to this state from Illinois, with the intention of abandoning his former residence, and commenced the erection of a dwelling on land owned by his wife, who remained in Illinois until October, 1881, when the dwelling was completed. *Held*, That an attachment action commenced in June, 1881, against defendant and his wife, on the ground that they were non-residents, would not lie. *Swaney v. Hutchins*, 13 Neb. 266 (13 N. W. 282).

48. (1896.) The question of residence, within the meaning of the statute regulating attachments, is generally one of intention, determinable from the facts of each case. *Johnson v. May*, 49 Neb. 601 (68 N. W. 1032).

49. (1901.) Where all the parties are non-residents, and plaintiff has no knowledge of any claim ever having been made to any property in this state by the defendant, the mere filing of a deed in this state is not a constructive discovery on the part of plaintiff of fraud in that deed. *Coulson v. Galtsman*, 1 Unof. 502 (96 N. W. 349).

50. (1907.) Where a defendant leaves the state with no definite intention to return, she being undecided as to her future residence, she became a non-resident within the attachment laws. *Webb v. Wheeler*, 79 Neb. 172 (112 N. W. 369).

51. (1907.) It is the actual residence of the debtor, and not his domicile, which determines the status of the parties in attachment proceedings. *Webb v. Wheeler*, 79 Neb. 172 (112 N. W. 369).

Fraud in contracting debt.

52. (1882.) Where one arranges with another to buy stock for him and draw advances on him, and under such contract draws a draft for $2,000, saying he has bought hogs, and the draft is paid, attachment will issue on the hogs. *Young v. Cooper*, 12 Neb. 610 (12 N. W. 91).

Evidence as to grounds.

53. (1895.) In order to sustain an attachment as against the defendant it is sufficient to establish the existence of one or more of the statutory grounds therefor as against him, without regard for the rights of other parties. *Landauer, Kaim & Streng v. Mack & Co.*, 43 Neb. 430 (61 N. W. 597).

54. (1895.) Evidence examined, and held to sustain the statement in the affidavit for attachment on the ground that defendant has sold and disposed of his property with intent to defraud his creditors and to hinder and delay them in the collection of their claims; that he is about to sell and dispose of his property with like fraudulent intent, and is about to remove it with intent to cheat and defraud his creditors. *Landauer, Kaim & Streng v. Mack & Co.*, 43 Neb. 430 (61 N. W. 597).

II. PROPERTY SUBJECT TO ATTACHMENT.

Effect of bankruptcy proceedings on attachment, see *Bankruptcy*, § 7.

Exemption of property from attachment, see *Exemptions*.

Attachment against assignee for creditors, see *Assignments for Benefit of Creditors*, § 115.

Right of attaching creditor to attach conveyance of debtor as fraudulent, see *Fraudulent Conveyances*, §§ 327-329.

Right to attach firm property on individual claim, see *Partnership*, § 165.

Interest in mortgaged property.

55. (1877.) An ordinary creditor may, by proceedings in attachment, subject the interest of a mortgagor of goods and chattels in the hands of the mortgagee to the payment of his debt. The plain, orderly course in such case is by garnishment, whereby such interest can be ordered paid over to the attachment creditor. *Faulkner v. Meyers*, 6 Neb. 414.

56. (1882.) A mortgagee's interest must be such as is for an ascertained right of possession for a definite period, to be attachable. *Peckinbaugh v. Quillin*, 12 Neb. 586 (12 N. W. 104). [Overruled. 14 Neb. 214; 45 Neb. 119.]

57. (1883.) The equity of redempton in mortgaged or pledged personal property,

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even after condition broken, is such an interest as, may be reached by attachment or garnishment before judgment, and by garnishment after judgment in aid of execution. *Burnham v. Doolittle*, 14 Neb. 214 (15 N. W. 606). [Modified. *Chicago L. Co. v. Fisher*, 18 Neb. 334.]

58. (1898.) Where a junior mortgagee is without actual possession of the mortgaged chattels or the right of immediate possession, an officer, under writs of attachment, may lawfully seize the property and by a sale in gross dispose of the mortgagor's reversionary interest. *Locke v. Shreck*, 54 Neb. 472 (74 N. W. 970).

59. (1901.) Where a debtor has fraudulently conveyed his property with the intent to place it beyond the reach of his creditors, his interest therein remains subject to attachment. *Westervelt v. Baker*, 1 Unof. 635 (95 N. W. 793).

Homesteads.

60. (1882.) Lands acquired under the U. S. Homestead Act (U. S. Rev. St., p. 2296) are not subject to attachment for a debt contracted prior to the issuance of the patent. *Smith v. Steele*, 13 Neb. 1 (12 N. W. 830).

Heir's interest in estate.

61. (1902.) An heir who has accepted advancements in full settlement of his share of the estate has not, thereafter, an attachable interest in the property. *Security Inv. Co. v. Lottridge*, 2 Unof. 489 (89 N. W. 298).

Equitable interest in realty.

62. (1894.) If there is no possession of real property by an attachment defendant having an equitable interest therein, no valid levy and sale can be made upon such equitable interest, neither can it under such circumstances be subjected otherwise than by invoking the aid of a court of chancery. *Shoemaker v. Harvey*, 43 Neb. 75 (61 N. W. 109).

Property delivered to bailee or carrier.

63. (1888.) Barrels of intoxicating liquor delivered by the seller to a railroad, but before delivery the buyer cancels the order and never accepts the same, is not subject to attachment by a creditor of the buyer while in storage at the freight house at the place of delivery. *Hershiser v. Delone & Co.*, 24 Neb. 380 (38 N. W. 863).

64. (1895.) Property in the possession of a factor to be sold for the benefit of his principal is not liable to execution or attachment in satisfaction of the debts of the former. *National Cordage Co. v. Sims*, 44 Neb. 148 (62 N. W. 514).

Accounts.

65. (1899.) Under section 214 of the code of civil procedure accounts may be subjected to the lien of an attachment. *Sloan v. Thomas Mfg. Co.*, 58 Neb. 713 (79 N. W. 728).

Negotiable bill or note.

66. (1877.) A negotiable note or bill is not, before maturity, subject to attachment; but, if such note or bill is transfered before maturity, voluntarily or fraudulently, for the purpose of protecting the debt from the creditors of the payee, it may be attached or garnished while the same remains in the hands of such indorsee. *Clough v. Buck*, 6 Neb. 343.

67. (1891.) Attachment may be brought by an indorsee of a promissory note, secured by bill of sale, for property covered by latter. *Gamble v. Wilson*, 33 Neb. 270 (50 N. W. 3).

Property in custody of the law.

68. (1894.) The property of an insolvent bank, prior to the appointment of a receiver therefor or putting the sheriff in possession thereof by order of a court or judge, is not exempt from seizure by attachment or other legal process at the suit of its creditors. *Arnold v. Weimer*, 40 Neb. 216 (58 N. W. 709).

69. (1895.) Chattels garnished in the hands of a mortgagee are in custody of the law and not subject to seizure under a subsequent writ of attachment. *Grand Island Banking Co. v. Costello*, 45 Neb. 119 (63 N. W. 376).

70. (1896.) Even though a sheriff in possession of personal property for its safe keeping pending an application for a receiver is to be deemed to be a receiver, a proposition not determined, the levy of an attachment on a portion of such property without leave of the court is not void in the absence of any objection by the sheriff as custodian, or by the receiver, on that ground. *Ackerman v. Ackerman*, 50 Neb. 54 (69 N. W. 388).

71. (1898.) Assets of an insolvent bank are not subject to attachment at the suit of a creditor while they are in possession of a bank examiner acting under authority of the state banking board. *Andrews v.*

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Steele City Bank, 57 Neb. 173 (77 N. W. 342).

——— **Property in hands of assignee for creditors.**

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72. (1878.) Property held by an assignee, under a valid assignment for the benefit of creditors, is not subject to attachment or garnishment for the assignor's debts. *Schlueter v. Raymond Bros. & Co.*, 7 Neb. 281.

73. (1885.) A firm being in embarrassed circumstances prepared an assignment of their property for the benefit of their creditors, and held the same ready to be delivered to the sheriff. The assignment was prepared about one o'clock A. M. on Monday, and about five o'clock P. M. of said day the deputy sheriff appeared, apparently for the purpose of levying certain attachments on the assigned property. Before any attempt was made to levy the attachments, the assignment was delivered to and accepted by him, and on the next day transmitted to the sheriff, who had the same recorded immediately, the goods being in possession of the deputy sheriff. Three days afterwards other writs of attachment were issued and levied on the property. An assignee having been chosen by the creditors, who brought an action of replevin and obtained possession of the property, *held*, that the assignee was entitled to the possession of the property. *Wells v. Lamb*, 18 Neb. 352 (24 N. W. 682).

III. PROCEDURE TO PROCURE.

A. Jurisdiction and Venue.

In general.

74. (1892.) Where a statutory cause for an attachment in an action on contract is made to appear to a court of original jurisdiction in which an action is pending, by filing the necessary affidavit and giving a sufficient undertaking, such court thereby acquires jurisdiction and may issue an attachment. *Strickler v. Hargis*, 34 Neb. 468 (51 N. W. 1039).

75. (1892.) Where an action upon contract was brought before a justice of the peace, and dismissed and taken by the plaintiff to the district court for review, and while pending in that court an affidavit and undertaking for an attachment were duly filed therein, and an attachment issued thereupon and levied on the defendant's property, such court has jurisdiction and the attachment is to be sustained or discharged as in other cases. *Strickler v. Hargis*, 34 Neb. 468 (51 N. W. 1039).

Jurisdiction of justice of the peace.

76. (1883.) In order to give a justice of the peace jurisdiction in attachment against a non-resident it must appear that the defendant had property in this state, which had been seized or levied upon; and the claim must be one arising upon contract, judgment or decree. *Rouss v. Wright*, 14 Neb. 457 (16 N. W. 765).

77. (1902.) The practice in attachment cases, in the county court, where the amount involved is above the jurisdiction of a justice of the peace, by chapter 20 of the Compiled Statutes, is made the same as that which prevails in the district court, and the county court has full power to hear motions to dissolve attachments and make the proper orders thereon. *Dittman Boot & Shoe Co. v. Graff*, 3 Unof. 165 (91 N. W. 188).

Jurisdiction over defendant.

78. (1894.) On a showing by a defendant in an attachment issued in D. county and served upon him in K. county, that at the time of filing the petition in the action he was a resident of K. county the service was properly quashed on the ground of lack of jurisdiction. *Hoagland v. Wilcox*, 42 Neb. 138 (60 N. W. 376).

79. (1901.) In an action by attachment against a non-resident, there being no personal service and no appearance by the defence, the petition, affidavit, published notices and proceedings down to and including the order of sale, contained as the name of the sole defendant the letters and word O. P. Buchanan. The true name of the person intended to be proceeded against was Porter O. Buchanan. *Held*, That this was a substantial defect and that the judgment in the attachment suit and a sheriff's sale and conveyance of the land of Porter O. Buchanan pursuant thereto were void for want of jurisdiction. *Buchanan v. Edmisten*, 1 Unof. 429 (95 N. W. 620).

Jurisdiction of property.

80. (1892.) An ordinary action must be brought in the county where the defendant resides, or service of summons can be made upon him; but where a debtor absconds and an attachment is issued against his property the action may be brought in the county of his former residence and where the debtor's property may be found. *Gandy v. Jolly*, 34 Neb. 536 (52 N. W. 376).

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81. (1895.) Jurisdiction over property lawfully seized under a writ of attachment is not lost by a failure to serve upon defendant process in the main, pending action. *Darnell v. Mack*, 46 Neb. 740 (65 N. W. 805); (1897) *Rachman v. Clapp*, 50 Neb. 648 (70 N. W. 259).

82. (1895.) An affidavit filed in an action before a justice of the peace to obtain the issuance of a writ of attachment, contained the allegation "that said defendants have absconded with intent to defraud creditors," and the summons issued in the case was returned indorsed "I could not find the defendants within my county," with signature of the officer. *Held*, That the action was properly instituted in the county of the debtor's former residence and where property could be levied upon. *Smith v. Johnson*, 43 Neb. 754 (62 N. W. 217).

Special appearance to object to jurisdiction.

83. (1906.) Where the only ground alleged for the issuance of an attachment is that the defendant is a non-resident, he is not entitled to make a special appearance or to answer, attacking the jurisdiction of the court upon the sole ground that he is not the owner of the property seized under the writ. *Kneeland v. Weigley*, 76 Neb. 276 (107 N. W. 574).

Waiver of objections.

84. (1882.) An attachment by a non-resident partnership in the firm name is not void. The want of legal capacity to sue must be objected to on that ground, or it will be waived. *Cady v. Smith*, 12 Neb 628 (12 N. W. 95).

85. (1902.) Where one of several defendants denies separately plaintiff's allegations and claims in his answer sole ownership of attached property, and plaintiff traverses the claim of ownership and that question is litigated in both county court and on appeal in district court, without objection, it is too late after final judgment in favor of that defendant to assert that the district court was without jurisdiction to determine ownership of the property in that action. *Alpirn v. Goodman*, 3 Unof. 397 (91 N. W. 530).

B. Affidavits.

Construction of ambiguous language in general, see *Affidavits*, §§ 12, 13.

Who may take, and verification.

86. (1898.) An affidavit to procure an attachment, sworn to before a notary public who is plaintiff's attorney, is not a nullity, but an irregularity which cannot be attacked collaterally. *Horkey v. Kendall*, 53 Neb. 522 (73 N. W. 953; 68 Am. St. Rep 623).

86*a*. (1907.) Affidavits taken and subscribed before a notary public, who is also an attorney in the case, cannot be used in support of an attachment issued therein against the objections of the defendant. *Malcom Savings Bank v. Cronin*, 80 Neb. 228 (114 N. W. 158).

87. (1898.) A notary public who is the attorney of one of the parties to an action is not permitted to take the affidavit of his client for the purpose of procuring an attachment. *Horkey v. Kendall*, 53 Neb. 522 (73 N. W. 953; 68 Am. St. Rep. 623).

88. (1898.) While a notary public may not take the affidavit of his client for the purpose of procuring an attachment, the taking of an affidavit as indicated is a mere irregularity, and the affidavit is not a nullity, and its defects may therefore be cured by amendment. *Dobry v. Western Mfg. Co.*, 57 Neb. 228 (77 N. W. 656).

Effect of omitting affiant's name from.

89. (1877.) The omission of affiant's name from body of affidavit not ground for dissolving attachment. *Rudolf v. McDonald*, 6 Neb. 163.

Time for application.

90. (1881.) Where a resident of Illinois, made an assignment of all his property, including lands in this state, for the benefit of creditors, a resident of that state claiming the benefit of the assignment could not maintain an attachment levied after the assignment of the lands in this state. *Green v. Gross*, 12 Neb. 117 (10 N. W. 459).

Knowledge or information.

91. (1883.) In the affidavit for attachment it is only necessary to state that the creditor has good reason to and does believe the defendant has property or funds belonging to the debtor. *Burnham v. Doolittle*, 14 Neb. 214 (15 N. W. 606).

Single affidavit for several orders.

92. (1883.) Several orders of attachment in an action may be issued at the same time, or in succession; but in such case only a single affidavit is necessary. *Thompson v. Stetson*, 15 Neb. 112 (17 N. W. 368).

Necessity and sufficiency of averments.

——As to parties.

93. (1884.) An affidavit for an order of attachment in the following form: (Venue)

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"Charles O. Bates, one of the attorneys for the plaintiff, being duly sworn, on his oath says," etc., *held* sufficient. *Tessier v. Crowley*, 16 Neb. 369 (20 N. W. 264).

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94. (1885.) Where from the record before the court it appears that the person who made the affidavit for an order of attachment is the plaintiff or one of several plaintiffs, the attachment will not be quashed, although the affidavit contains no direct allegation that the affiant is the plaintiff or one of the plaintiffs. *Tessier v. Englehart & Co.*, 18 Neb. 167 (24 N. W. 734).

95. (1880.) An affidavit for an attachment made by the attorney for the plaintiff, wherein he "swears that he is the authorized attorney of the plaintiff in the above entitled action; that he has commenced an action," etc., where it appears from the whole affidavit that the action was brought by the plaintiff, is not void. *Jansen & Co. v. Mundt*, 20 Neb. 320 (30 N. W. 53).

96. (1888.) The statute does not require the affiant to swear that he is the plaintiff, his agent, or attorney, and the court has no authority to inject such words into the statute. *Reed, Jones & Co. v. Bagley*, 24 Neb. 332 (38 N. W. 827).

97. (1893.) An affidavit for attachment is not void, although purporting in its opening clause to be that of a corporation plaintiff, where it sufficiently appears from the whole affidavit that it is that of the agent of the corporation, and that such agent in fact made oath thereto and signed it. *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb. 520 (57 N. W. 161).

98. (1901.) An affidavit for an attachment, from which it does not distinctly appear that the statements it contains are the averments of some natural person making it, is insufficient to justify the issuance of the writ. *Clements & Co. v. Puckett*, 1 Unof. 356 (95 N. W. 796).

99. (1902.) The better practice requires the fact of agency in an affidavit for attachment or garnishment to be sworn to by the affiant and not set out by way of recital merely. *Jeary v. American Exchange Bank*, 2 Unof. 657 (89 N. W. 771).

——— Property of defendant in jurisdiction.

100. (1883.) An affidavit for an attachment that states in effect a claim for which an attachment will lie; that it is just; the amount which the affiant believes the plaintiff ought to recover; and one or more of the grounds for an attachment, need not in addition state that the defendant has property within the jurisdiction of the court subject to attachment. *Grebe v. Jones*, 15 Neb. 312 (18 N. W. 81).

——— Residence of defendant.

101. (1903.) An affidavit for attachment which states that defendant "has removed from the state of Nebraska to the state of Utah, where he now resides," shows sufficiently the non-residence of defendant to give the court jurisdiction to issue an attachment. *Citizens State Bank of Wood River v. Porter*, 4 Unof. 73 (93 N. W. 391).

——— Intent of act of defendant.

102. (1901.) In an affidavit for the procuring of an order of attachment, the intent with which the act complained of is committed is an essential part of the charge and its omission will, upon a motion to discharge the writ, be fatal. *American Exchange Bank v. Puckett*, 1 Unof. 358 (95 N. W. 796).

——— Indebtedness of defendant.

103. (1888.) Affidavit for attachment is sufficient if it state that the total amount of the claim sued on is just; it is not necessary to express belief in justness of each item of claim. *Holland v. Commercial Bank*, 22 Neb. 571 (36 N. W. 113)

——— Nature of demand.

104. (1884.) In stating "the nature of the plaintiff's cause of action" in an affidavit for an attachment, it is not necessary to state the facts constituting the cause of action; a condensed statement of the general nature of the claim is a sufficient compliance with the requirements of section 199 of the code of civil procedure. *Dorrington v. Minnick*, 15 Neb. 397 (19 N. W. 456).

105. (1888.) The affidavit must show a debt or demand arising upon contract. *Hart v. Barnes*, 24 Neb. 782 (40 N. W. 322).

106. (1888.) The affidavit for an attachment must show "the nature of the plaintiff's claim." If the claim appears in the affidavit to be one for which an attachment may issue, but the statement is not as full as may be desired, reference may be had to the petition. *Hart v. Barnes*, 24 Neb. 782 (40 N. W. 322).

107. (1897.) An attachment affidavit must contain a statement of "the nature of

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plaintiff's claim." *Grotte v. Nagle*, 50 Neb. 363 (69 N. W. 973).

108. (1897.) A statement in an affidavit for attachment that the action is one "upon an account for goods sold and delivered by plaintiff to defendant at his request" was sufficient to show that the action was one in which an attachment might issue and to give the court jurisdiction of the attachment suit. The statement that it was on an account was a general description of the plaintiff's claim, and the further words which we have quoted served to designate the kind of an account. *Grotte v. Nagle*, 50 Neb. 363 (69 N. W. 973).

109. (1897.) If the claim appears from the statements of the affidavit to be one for which an attachment is authorized, but its nature is not fully set forth, reference may be had to the petition. *Grotte v. Nagle* 50 Neb. 363 (69 N. W. 973).

——— **Nature of demand—variance.**

See, also, *post*, §§ 258-262.

110. (1884.) A discrepancy between the amount sworn to in the affidavit, and the amount of plaintiff's claim named in the order of attachment which is favorable to the defendant cannot be assigned for error by him. *Tessier v. Crowley*, 16 Neb. 369 (20 N. W. 264).

111. (1897.) It is required in section 199 of the code of civil procedure that in an attachment affidavit there should be set forth "the amount which the affiant believes the plaintiff ought to recover." *Held*, That a slight variance in the amount stated and that actually due is immaterial, and not a fatal defect in the affidavit. *Grotte v. Nagle*, 50 Neb. 363 (69 N. W. 973).

——— **Grounds for attachment.**

112. (1872.) An affidavit for an attachment is sufficient if it be in the words of the statute, and does not set forth the facts on which the allegations thereof are based. *Ellison v. Tallon*, 2 Neb. 14.

113. (1873.) The ground for an attachment may be stated in the affidavit in the language of the statute, without specifying more particularly the facts intended to be alleged. *Tallon v. Ellison*, 3 Neb. 63.

114. (1877.) In an application for the allowance of an attachment in an action on a claim not due, the better practice is to set forth in the affidavit, not merely a repetition of the language of the code, but also a statement of facts and circumstances. *Seidentopf v. Annabil*, 6 Neb. 524.

115. (1879.) An affidavit setting forth the existence of the grounds of attachment in the words of the statute, unaccompanied by any facts showing them to be true, will support the writ. But when such affidavit is met by the positive oath of the defendant in denial, it must be supported by competent evidence. *Hilton v. Ross*, 9 Neb. 406 (2 N. W. 862).

116. (1883.) Affidavit in attachment stating the defendants intention to leave the country, *held*, insufficient. *Hunter v. Soward*, 15 Neb. 215 (18 N. W. 58).

117. (1883.) Although an affidavit setting forth a ground of attachment substantially in the words of the statute will support the writ as long as it stands unchallenged by a denial, when so challenged its truthfulness must be shown by competent proof of facts, or the attachment will fail. *Steele v. Dodd*, 14 Neb. 496 (16 N. W. 909).

118. (1885.) An affidavit that states a debt is due, and the affiant believes justly so, and further that the creditor is about to convert his property into money for the purpose of defrauding creditors, though defective as to form, is sufficient to sustain an attachment. *Tessier v. Reed, Jones & Co.*, 17 Neb. 105 (22 N. W. 225).

119. (1885.) The grounds or causes for the issuance of an order of attachment, being divided and separated into nine groups or subdivisions in the section of the statute providing therefor, each group or subdivision constituted but one ground or cause, and the whole of either one of such groups or subdivisions may be stated in the language of the statute in an affidavit for an order of attachment, although it contains more than one distinct allegation separated from each other by the disjunctive conjunction *or*. When more than one of such groups or subdivisions are used in an affidavit they should be united by the conjunction *and*. *Tessier v. Englehart & Co.*, 18 Neb. 167 (24 N. W. 734).

120. (1893.) The affidavit for attachment on claim past due set out in the opinion, *held*, sufficient. *Whipple v. Hill*, 36 Neb. 720 (55 N. W. 227; 38 Am. St. Rep 742; 20 L. R. A. 313).

121. (1896.) An affidavit for an attachment setting forth the grounds therefor in the language of the statute is sufficient. *Burnham v. Ramge*, 47 Neb. 175 (66 N. W. 277).

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122. (1897.) An attachment affidavit setting forth the nature of the plaintiff's claim, that it is just, the amount which the affiant believes plaintiff ought to recover, and the existence of one or more statutory grounds for the writ in the language of the code of civil procedure is sufficient. *McDonald v. Marquardt*, 52 Neb. 820 (73 N. W. 288).

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Amendments.

123. (1877.) An affidavit for the issuance of an attachment may be amended by leave of the court, even if a motion to quash the proceedings is filed, because of that particular defect. *Struthers v. McDowell*, 5 Neb. 491.

124. (1877.) It is not error for the court to permit the officer before whom the affidavit was made to attach a venue, according to the fact, even after a motion has been filed to dismiss the attachment, on the ground of its omission. *Struthers v. McDowell*, 5 Neb. 491.

125. (1877.) The want of a venue, if taken advantage of by the defendant at the proper time, is a fatal defect, unless cured by amendment. And when the venue is omitted by mistake, it is proper for the court to allow an amendment in accordance with the facts. *Rudolf v. McDonald*, 6 Neb. 163.

126. (1892.) While an amendment of an affidavit for an attachment may be permitted when in furtherance of jutice, even on the hearing of the case, yet no new cause of attachment, which existed when the action was brought, can be brought in by amendment. *Brookmire & Co. v. Rosa*, 34 Neb. 227 (51 N. W. 840).

127. (1893.) An affidavit for an attachment may be amended by leave of court, even after a motion to quash the writ is filed, because of that particular defect. *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb. 520 (57 N. W. 161).

128. (1893.) An affidavit for the issuance of an attachment may be amended by leave of the court even after a motion to quash the proceedings is filed, because of that particular defect. *Clarke Banking Co. v. Wright*, 37 Neb. 382 (55 N. W. 1060).

129. (1903.) The provisions of the code relating to amendments should be liberally contrued, but one cannot amend an affidavit in attachment so as to state a cause of action different from that stated in the original affidavit on which the writ was issued. *Westover & Co. v. Van Dorn Iron Works Co.*, 70 Neb. 415 (97 N. W. 598).

Effect of want of venue.

130. (1872.) In a collateral action, in which the title acquired through a sale based on an order of sale and an order of attachment is drawn in question, the objection, that the affidavit upon which the attachment issued had no venue, will not be entertained. *Crowell v. Johnson*, 2 Neb. 146.

Waiver of defects or objections.

131. (1877.) The defendant in attachment may waive anything when it will cause no substantial injustice to the other creditors, or is not intended to guard their rights, and if he do so, a subsequent attaching creditor can take no advantage of a former by reason of any such waiver. *Rudolf v. McDonald*, 6 Neb. 163.

132. (1883.) An appearance in court, and filing objections to the confirmation of a sale of attached property, is a waiver of defects in the published notice to the defendants. *Helmer v. Rehm*, 14 Neb. 219 (15 N. W. 344).

133. (1896.) While the defendant in an attachment case may waive mere irregularities, he cannot, as against junior attaching creditors, waive a substantial departure from the mode prescribed by law for giving effect to the attachment, nor can he waive defects which prejudice the substantive rights of such creditors. *Deere, Wells & Co. v. Eagle Mfg. Co.*, 49 Neb. 385 (68 N. W. 504).

Curing defects by subsequent affidavits.

134. (1894.) A defect in one affidavit as to jurisdiction in attachment against a non-resident, may be supplied by another, and if enough appears from all, it is sufficient. *Jones v. Danforth*, 71 Neb. 722 (99 N. W. 495).

Reference to petition to supply defects.

135. (1897.) Reference may be had to the petition in the action to supply a defect in the affidavit as to the nature of the demand. *Hart v. Barnes*, 24 Neb. 782 (40 N. W. 322); (1897) *Grotte v. Nagle*, 50 Neb. 363 (69 N. W. 973).

C. Security.

When may be demanded.

136. (1893.) An officer in whose hands an attachment is placed to be levied upon goods of the debtor in the action may, where there is doubt as to the ownership

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of the goods, demand an indemnifying bond from the plaintiff in the attachment. *Mihalovitch, Fletcher & Co. v. Barlass*, 36 Neb. 491 (54 N. W. 826).

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Necessity of when defendant non-resident.

137. (1879.) In case of an attachment against a non-resident defendant no undertaking is required. In such case the statute expressly authorizes the order to be issued without giving an undertaking, and this provision invades no constitutional privilege of such defendant. *Olmstead v. Rivers*, 9 Neb. 234 (2 N. W. 366).

138. (1879.) Section 200 of the code of civil procedure, which authorizes an attachment against the property of a non-resident without an undertaking, is not in conflict with any provision of the constitution of the state or of the United States. *Marsh v. Steele*, 9 Neb. 96 (1 N. W. 869; 31 Am. Rep. 406).

139. (1883.) Where the ground of the attachment is that the defendant is a non-resident, no undertaking is required. *Grebe v. Jones*, 15 Neb. 312 (18 N. W. 81).

140. (1891.) The words "not a resident of the state" and "a non-resident of the state" mean the same thing, and where an affidavit for an attachment shows that the defendant is a non-resident of the state, no undertaking is necessary. *Nagel v. Loomis*, 33 Neb. 499 (50 N. W. 441).

141. (1903.) The filing of a bond is not jurisdictional to the right to have an attachment issued against a non-resident defendant for a debt not due. *Gutterson v. Meyer*, 68 Neb. 767 (94 N. W. 969).

Sufficiency and validity.

142. (1885.) An undertaking in attachment, signed by the attachment plaintiff as principal and a firm or partnership as surety, is *prima facie* good. *Tessier v. Crowley*, 17 Neb. 207 (22 N. W. 422).

143. (1885.) An attorney should not be allowed to become surety on an attachment bond, but if the clerk approve such a bond the surety is bound thereby, and the undertaking held good upon a motion to discharge the attachment. *Tessier v. Crowley*, 17 Neb. 207 (22 N. W. 422).

IV. WRIT OR WARRANT.

Writs in general, see *Process*.

Writ of execution, see *Execution*.

Necessity of written application.

144. (1892.) No written application for an order allowing an attachment, other than the filing of the proper affidavit, is necessary. *Winchell v McKinzie*, 35 Neb. 813 (53 N. W. 975).

Authority to issue.

145. (1888.) Where a county judge grants an attachment on a debt not due, and signs the order officially, it will be presumed that he is judge of the county where the order was made, and that the judge of the district court was absent from such county. *Reed, Jones & Co. v. Bagley*, 24 Neb. 332 (38 N. W. 827).

146. It is presumed that a writ of attachment issued by a district judge was issued in session. *Cox v. Peoria Mfg. Co.*, 42 Neb. 660 (60 N. W. 933).

Time for allowance.

147. (1894.) The plaintiff in an action is entitled to have a writ of attachment issued when he has filed an affidavit stating the necessary facts, in a court where he has instituted an action and had summons issued, which can or may be legally served, if he had the same issued with the true intent that it shall be served. *Hoagland v. Wilcox*, 42 Neb. 138 (60 N. W. 376).

Issuing on Sunday or holidays.

148. (1893.) An order by a district or county judge allowing an attachment in an action on a claim not due is a judicial act within the meaning of section 38 chapter 19, Compiled Statutes, and cannot be made on Sunday or a legal holiday. *Merchants Nat. Bank v. Jaffray*, 36 Neb. 218 (54 N. W. 258; 19 L. R. A. 316*n*).

149. (1893.) Section 38, chapter 19, Compiled Statutes, providing that "no court can be opened nor any judicial business be transacted on Sunday, or any legal holiday," etc., does not prohibit a county judge from issuing, on a legal holiday, an order of attachment on a debt past due, since that is purely a ministerial, and not a judicial act. *Whipple v. Hill*, 36 Neb. 720 (55 N. W. 227; 38 Am. St. Rep. 742; 20 L. R. A. 313).

Parties.

150. (1893.) In an action against two defendants, where grounds of attachment exist against one only, the order of attachment and undertaking are properly entitled in the name of that defendant alone. *Williams v. Eikenbary*, 36 Neb. 478 (54 N. W. 852).

Requisites and validity.

151. (1872.) In an action in attachment a writ duly issued by the clerk, under

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the seal of the court, directed to the sheriff, running in the name of the territory of Nebraska, commanding the officer to attach the goods and chattels, lands and tenements, of the defendant, sufficient to satisfy a sum named,—being the sum mentioned in the affidavit, and costs of seizure,—and also commanding him to safely keep the same to abide the order of the court, and summon all proper parties as garnishees, and also the defendant, to answer the plaintiff's petition, cannot be disregarded, but will be held sufficient to support the jurisdiction of the court and its judgment thereon. *Crowell v. Johnson*, 2 Neb. 146.

152. (1876.) A writ of attachment which does not run in the name of "The People of the State of Nebraska," as required by the constitution, is voidable only; the defect is curable by amendment. *Livingston v. Coe*, 4 Neb. 379.

153. (1881.) An attachment issued by the clerk without an order, on a debt before due, on the sole ground that the defendant is a non-resident of the state, is null and void, and confers no jurisdiction on the court issuing the same. *Philpott v. Newman*, 11 Neb. 299 (9 N. W. 94).

154. (1882.) If a writ of attachment is issued by the proper authority, and substantially complies with the law it is at most only voidable. *Moore v. Fedawa*, 13 Neb. 379 (14 N. W. 170).

155. (1882.) A writ of attachment commencing "The State of Nebraska, Lancaster County," is sufficient without repeating "The State of Nebraska" before the name of the officer addressed. *Moore v. Fedawa*, 13 Neb. 379 (14 N. W. 170).

156. (1884.) The statute relating to attachments does not require the order of attachment to recite the making of the affidavit or the giving of the undertaking required by law. But to do so is good form. *Tessier v. Crowley*, 16 Neb. 369 (20 N. W. 264).

157. (1885.) In an action for goods, wares, and merchandise, it is not a fatal objection to an order of attachment issued therein that the same fails to state the plaintiff's claim, so as to show whether or not the defendant is entitled to the maximum of exemption against the same. *Tessier v. Englehart & Co.*, 18 Neb. 167 (24 N. W. 734).

158. (1890.) Where, upon the proper affidavit being made and filed, an order of attachment upon a debt not due is obtained, such order need not appear on the face of the writ of attachment. *Armstrong v. Lynch*, 29 Neb. 87 (45 N. W. 274).

159. (1892.) The issuing of a writ of attachment by a county judge in an action commenced before him is, in itself, the granting of the order for attachment, and it is unnecessary for him to enter such order upon his docket. *Winchell v. McKinzie*, 35 Neb. 813 (53 N. W. 975.)

160. (1892.) The omission of a county judge to attach the seal of the county to an order of attachment does not render the order void. It is a mere irregularity objectionable only to the defendant. *Winchell v. McKinzie*, 35 Neb. 813 (53 N. W. 975).

Review of refusal to grant.

161. (1877.) In order to review a refusal of the trial court to issue an attachment on a claim not due, the record must show such facts and circumstances as will fairly indicate an intent of defendant to defraud his creditors. *Seidentopf v. Annabil*, 6 Neb. 524.

162. (1877.) The court or judge may, in its discretion, allow or refuse to allow the writ; but if by the abuse of that discretion a party is clearly injured by the disallowance of the writ, the decision may be reviewed on error, but to invoke the reviewing power of the appellate court, the record must contain such facts and circumstances as will fairly indicate the intent of the party. *Seidentopf v. Annabil*, 6 Neb. 524.

V. LEVY, LIENS, CUSTODY AND SALE OF PROPERTY.

Sufficiency and validity of levy.

163. (1887.) When a constable receives an order of attachment and proceeds to levy the same on a part of a stock of goods, and before making the inventory and appraisement other orders of attachment are placed in his hands for execution, he may properly levy upon property of sufficient value to satisfy all of such orders, and make but one return of the inventory and appraisement. In such case he cannot be charged with making an excessive levy, unless the value of the property seized exceeds a proper levy to satisfy all such orders and probable costs; and even in such case the question can only be raised by the parties to the action. As between third parties in a collateral proceeding, the levy would be

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valid. *Connelly v. Edgerton*, 22 Neb. 82 (34 N. W. 76).

164. (1894.) A levy on realty by posting a copy of the order of attachment is not effective against third persons where there is an occupant. *Shoemaker v. Harvey*, 43 Neb. 75 (61 N. W. 109).

165. (1901.) Special statutory provisions respecting the manner in which attachments shall be levied must be strictly pursued, and departure therefrom will render a levy invalid. *Ames v. Parrott*, 61 Neb. 847 (86 N. W. 503; 87 Am. St. Rep. 536).

166. (1901.) The requirement of section 205 of the code of civil procedure that a sheriff levying an attachment go to the place where property of the defendant may be found and declare that by virtue of the order he attaches such property at the suit of the plaintiff, in the presence of two residents of the county, is not complied with by a levy and declaration in the presence of two persons, one of whom is the plaintiff in the attachment. *Ames v. Parrott*, 61 Neb. 847 (86 N. W. 503; 87 Am. St. Rep. 536).

167. (1903.) A levy of attachment by leaving at the attached premises a copy of the writ with a tenant and then going half a mile and getting one appraiser, and then going three-quarters of a mile farther to get another, and then telling them that a levy had been made on the lands in question and swearing them and making the appraisement, does not comply with section 205 of the code, nor make a valid levy, it not appearing that the levy itself was in the presence of any witness. *Citizens State Bank of Wood River v. Porter*, 4 Unof. 73 (93 N. W. 391).

Service of writ or warrant.

168. (1901.) Where a copy of an order of attachment is left with the actual occupant of lands attached, having possession of the premises and apparent authority over and control of the same, the act will be a compliance with the provisions of the statute, requiring that "where the property attached is real property, the officer shall leave with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the order," although such occupant be not the owner or lessee of such premises. *Westervelt v. Hagge*, 61 Neb. 647 (85 N. W. 852; 54 L. R. A. 333).

Care and custody of property.

169. (1896.) It is the duty of an officer who seizes personal property on a writ of attachment to take such property into his actual possession, and to keep it under his control and have it forthcoming to answer the judgment of the court; and for a neglect of this duty such officer and his sureties are liable to the party injured thereby. *Deering & Co. v. Wisherd*, 46 Neb. 720 (65 N. W. 788).

Inventory and appraisement.

170. (1898.) Where, upon the filing of inventory and affidavit, the officer refuses to call appraisers, a writ of mandamus will issue to compel him to perform that duty; and, pending the application for the writ, the attachment creditor may intervene and join with the officer in resisting the application. *First Nat. Bank of Neligh v. Lancaster*, 54 Neb. 467 (74 N. W. 858).

171. (1898.) It is the duty of an officer who has seized under an order of attachment property claimed to be exempt under section 521 of the code of civil procedure to cause such property to be appraised when the attachment defendant, being a resident of the state, the head of a family, and without any homestead exemption, files with such officer, or in the court from which the writ issued, the proper inventory and affidavit. *First Nat. Bank of Neligh v. Lancaster*, 54 Neb. 467 (74 N. W. 858).

Liens.

Effect on lien of mortgagees by attachment, see *Chattel Mortgages*, §§ 120-124.

Liens in garnishment, see *Garnishment*, §§ 50-80.

——— Creation and existence.

172. (1881.) A lien of attachment on real estate takes effect from the date of the levy, and hence a conveyance made thereafter by the owner is not a cloud upon the attachment creditor's title. Therefore a suit to remove such alleged cloud will not lie. *Wright v. Smith*, 11 Neb. 341 (7 N. W. 537).

173. (1885.) Where an attachment is levied upon real estate belonging to a nonresident debtor, or which it is claimed is owned by him, whether held in his own name or not, the attaching creditor acquires a lien upon the interest of the debtor, if any, in the land, which he may enforce after judgment by an action in the nature of a creditor's bill. *Kimbro v. Clark*, 17 Neb. 403 (22 N. W. 788).

174. (1891.) Where an attachment is levied upon real estate belonging to the debtor, whether held in his own name or

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not, the attaching creditor acquires a lien on the interest of the debtor in the land, which he may enforce after he recovers judgment. In such case it is unnecessary to issue an execution before bringing the action. *First Nat. Bank of Columbus v. Hollerin*, 31 Neb. 558 (49 N. W. 392).

175. (1901.) Where an attachment is levied on real estate fraudulently alienated by the attachment debtor and grantor, for the purpose of hindering, delaying and defrauding creditors, even though the legal title of record is in another, the attachment creditor acquires thereby a lien upon the interest of the debtor in the land attached, which he may enforce by appropriate proceedings after recovery of judgment. *Westervelt v. Hagge*, 61 Neb. 647 (85 N. W. 852; 54 L. R. A. 333).

176. (1901.) Where real estate is attached by a creditor of a fraudulent grantee, to whom the legal title has been conveyed in fraud of the rights of the creditors of the fraudulent grantor, and who has no actual interests therein, and who restores and reconveys the real estate to the fraudulent grantor, who voluntarily incumbers the same for the benefit of his creditors, such attachment creditor thereby acquires no valid lien on the property as against such creditors of the grantor under their liens thus acquired. *Westervelt v. Hagge*, 61 Neb. 647 (85 N. W. 852; 54 L. R. A. 333).

177. (1901.) Where an attachment is levied on real estate fraudulently alienated by the attachment debtor and grantor, for the purpose of hindering, delaying and defrauding creditors, even though the legal title of record is in another, the attachment creditor acquires thereby a lien upon the interest of the debtor in the land attached, which he may enforce by appropriate proceedings after recovery of judgment. *Coulson v. Galtsman*, 1 Unof. 502 (96 N. W. 349).

178. (1901.) Where an attachment proceeding is instituted against a defendant, who is a resident of this state, in a county in which such defendant does not reside and cannot be found, and makes no appearance, a levy on a judgment rendered on such proceeding is not a valid lien on the property of the defendant in the county in which such judgment was rendered. *Nelson v. City of Beatrice*, 2 Unof. 47 (96 N. W. 288).

179. (1904.) A creditor by the levy of attachment upon land acquires a specific lien sufficient to support a suit in the nature of a creditor's bill to remove obstructions from the title calculated to make a sale unprofitable, and in such case the issuance of an execution and return *nulla bona* is not a preliminary prerequisite. *Coulson v. Saltsman*, 71 Neb. 495 (98 N. W. 1055).

180. (1905.) The creditor, if he chooses, may, before reducing his claim to judgment, commence an action aided by attachment and seize the estate fraudulently conveyed by his debtor, and after judgment in the attachment suit he may enforce his lien by an action in the nature of a creditor's bill. This course may be pursued, whether the debtor is a resident of the state or a non-resident. *Ainsworth v. Roubal*, 74 Neb. 723 (105 N. W. 248).

181. (1906.) Where an attachment is issued and levy made upon real estate belonging to the debtor, whether held in his own name or not, the creditor acquires a lien upon the interest of the debtor in the land, which he may enforce after the recovery of the judgment, and the fact that the party holding the legal title to the land is a non-resident of the state is immaterial *Kneeland v. Weigley*, 76 Neb. 276 (107 N. W. 574).

——— Interests affected.

182. (1883.) Where an attachment is levied upon real estate belonging to the debtor, whether held in his own name or not, the attaching creditor acquires a lien upon the interest of the debtor in the land which he may enforce after he recovers judgment. *Keene v. Sallenbach*, 15 Neb. 200 (18 N. W. 75).

183. (1890.) Where a sheriff had levied certain writs of attachment upon goods of a debtor, which it was claimed had been transferred to a fraudulent vendee, his interest in the goods within the value of the property levied on would be the amount due upon the writs with legal costs. *Armstrong v. Lynch*, 29 Neb. 87 (45 N. W. 274).

184. (1897.) A creditor who attaches a chose in action acquires only a lien upon the interest which the defendant in the attachment suit had therein at the time the chose in action was seized. *Hartford Life & Annuity Ins. Co. v. Cummings*, 50 Neb. 236 (69 N. W. 782).

185. (1899.) An attachment or judgment lien on land binds only the actual interest of the attachment or judgment debtor. *Chicago, B. & Q. R. Co. v. First*

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Nat. Bank of Omaha, 58 Neb. 548 (78 N. W. 1064).

186. (1889.) The lien attaches only to defendant's actual interest in the property. *Barnes v. Cox*, 58 Neb. 675 (79 N. W. 550).

187. (1903.) When an attachment is rightfully issued and levied upon property of the defendant, it creates a lien in favor of the plaintiff for the amount of his claim and for all costs, whether incident to the action or resulting from the special proceeding. *Rhodes v. Samuels*, 67 Neb. 1 (93 N. W. 148).

——— Rights acquired.

188. (1901.) An attachment lien on land, the legal title to which is in the attachment debtor, is subject to every equity which exists against the debtor at the time of the levy of the attachment and equity will limit the lien to the actual interest of the attachment debtor in such land. *Westervelt v. Hagge*, 61 Neb. 647 (85 N. W. 852; 54 L. R. A. 333).

189. (1901.) Where, pending litigation, after the levy of an attachment on real estate, a lien has been acquired by another on the same property, the person in whose favor the lien is created is charged with notice and takes subject to the rights of the plaintiff in the action wherein the attachment was levied and final judgment rendered. *Westervelt v. Hagge*, 61 Neb. 647 (85 N. W. 852; 54 L. R. A. 333).

190. (1901.) Where, after attachment proceedings on land fraudulently alienated, the real estate is reconveyed and restored to the fraudulent grantor, the lien of the attachment becomes thereby effective and enforceable, the same as though the conveyance in the first instance had not been made. *Westervelt v. Hagge*, 61 Neb. 647 (85 N. W. 852; 54 L. R. A. 333).

191. (1904.) Where a creditor has acquired a specific lien by the levy of an attachment, he is entitled to maintain a creditor's bill to remove obstructions to a sale of the premises, without reference to whether the judgment at law has, during the pendency of such creditor's suit, become dormant. *Coulson v. Saltsman*, 71 Neb. 495 (98 N. W. 1055).

——— Forfeiture and termination.

192. (1894.) The lien acquired by the levy of an attachment upon the property of an insolvent bank is not vacated by the subsequent appointment of a receiver for such bank. *Arnold v. Weimer*, 40 Neb. 216 (58 N. W. 709).

193. (1901.) Evidence examined, and found not to sustain the finding of the trial court that the Grand Island Banking Company lost its attachment lien by laches in failing to prosecute its suit. *Westervelt v. Baker*, 1 Unof. 635 (95 N. W. 793).

194. (1901.) Where an attachment was levied on land on December 2, 1895, and during that time another creditor obtained a judgment and mortgage security on the land, the attaching creditor is not guilty of such laches as will defeat his attachment lien. *Westervelt v. Hagge*, 61 Neb. 647 (85 N. W. 852; 54 L. R. A. 333).

195. (1904.) The lien acquired by attachment or garnishment is not lost by taking a general money judgment against the defendant without an order for the sale of the attached property, where the creditor has used due diligence in the prosecution of a creditor's bill. *Coulson v. Saltsman*, 71 Neb. 495 (98 N. W. 1055).

——— Continuation on appeal.

196. (1894.) Where an order is made discharging an attachment the filing of a petition in error and the filing and approval of a supersedeas bond within the time fixed by the court, not to exceed twenty days, operate to continue the lien of the attachment in force pending error proceedings. The issuance of a summons in error within that time is not necessary for that purpose. *McDonald v. Bowman*, 40 Neb. 269 (58 N. W. 704).

197. (1903.) An error proceeding from an order of a jutice of the peace discharging an attachment preserves and continues the lien of the attachment and brings the ruling of the justice before the district court for review. *Rhodes v. Samuels*, 67 Neb. 1 (93 N. W. 148).

——— Merger with judgment.

198. (1906.) In an action aided by attachment, upon the entry of judgment the attachment lien is merged in that of the judgment, and thereafter the lien is a mere incident to the judgment and ceases to exist when the judgment becomes dormant. *Harvey v. Godding*, 77 Neb. 289 (109 N. W. 220).

Priorities between attachments.

199. (1877.) A subsequent attaching creditor is entitled to no advantage over the first creditor, for the reason that the affi-

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ant's name is omitted from the body of the affidavit. *Rudolf v. McDonald*, 6 Neb. 163.

200. (1878.) The attachment of a note and mortgage debt is in effect a seizure of the same, and in law is regarded as an assignment to the attaching creditor of such note and mortgage, and gives such creditor the same right to enforce the payment of the money from the garnishee as the debtor himself previously had. *Campbell v. Nesbitt*, 7 Neb. 300.

201. (1882.) In a contest between attaching creditors the attachment first levied is entitled to priority. *Moore v. Fedawa*, 13 Neb. 379 (14 N. W. 170).

202. (1888.) Where a sheriff levies an order of attachment in his possession upon personal property, other orders may be levied upon the same property, subject to the prior levy, so long as he retains possession of and dominion over the property so levied upon. And, if the levy is not wrongful, a lien will be created to the extent of the amount represented by the attachments in his hands. But if after such levy the property is taken from his possession in an action of replevin he receives other orders of attachment, no lien will be created upon the property thereby. *Merrill v. Wedgewood*, 25 Neb. 283 (41 N. W. 149).

203. (1891.) An amended petition afterwards filed, which alleges a liability of the defendant to the plaintiff, will not take precedence of liens of other creditors which have attached since filing the original petition. *Bauer v. Deane*, 33 Neb. 487 (50 N. W. 431).

204. (1893.) A determination of priorities under section 946 of the code constitutes an adjudication which cannot be collateraly attacked. *State, ex rel. Austrain & Co., v. Duncan*, 37 Neb. 631 (56 N. W. 214).

205. (1893.) Under section 946 of the code, where several attachments are levied upon the same property, or the same persons are made garnishees in several cases, the justice issuing the order first served may, upon motion of any of the plaintiffs, determine the amounts and priorities of the several attachments; and he has authority to do this as well when the validity of some of the attachments or garnishments is disputed as when their validity is unquestioned. *State, ex rel. Austrain & Co., v. Duncan*, 37 Neb. 631 (56 N. W. 214).

206. (1896.) The institution of an action before the claim is due, and the issuing and levying of an attachment without obtaining an order therefor from a court or judge authorized to issue the same, is a substantial defect of which junior attaching creditors may take advantage. *Deere, Wells & Co. v. Eagle Mfg. Co.*, 49 Neb. 385 (68 N. W. 504).

207. (1903.) Error was prosecuted from only one of several orders sustaining successive attachments and the order reversed and the final judgment affirmed. Pending a review the property attached was sold to the first attaching creditor under an order of sale issued on the judgment of such party, rendered in the attachment suit, and the proceeds applied on that judgment, the other judgments remaining wholly unsatisfied. *Held*, That an action for restitution would not lie against the first in favor of the subsequent attaching creditors, but that an action for money had and received could be maintained to which the defendant might interpose a counterclaim or set-off. *First Nat. Bank of Pawnee City v. Avery Planter Co.*, 69 Neb. 329 (95 N. W. 622. 111 Am. St. Rep. 541).

208. (1903.) Where error was prosecuted from only the first of several orders sustaining successive attachments, and the order reversed, but the final judgment affirmed, and pending review, the property was sold to the first attaching creditor under the final judgment, the statute of limitation did not begin to run against an action by the subsequent attaching creditors for money received, until the first attachment was dissolved. *First Nat. Bank of Pawnee City v. Avery Planter Co.*, 69 Neb. 329 (95 N. W. 622; 111 Am. St. Rep. 541).

Priorities between attachments and other liens or claims.

209. (1871.) Under the attachment law enacted in 1857, a *bona fide* purchaser of lands for value will take the same, free of the lien of an attachment, which has been levied thereon, unless an abstract of such attachment be entered in the register's office of the county. *Adams v. Boulware*, 1 Neb. 470.

210. (1880.) A prior unrecorded deed, passing title to the purchaser in good faith, takes precedence of an attachment, if recorded before a deed based upon the attachment. *Harral v. Gray*, 10 Neb. 186 (4 N. W. 1040).

211. (1885.) Where property is delivered to a deputy sheriff under an assignment for creditor, when such officer came to levy an attachment thereon, and he accepted the

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trust and delivered the same to the sheriff, and an assignee is chosen by the creditors, the assignee, in an action of replevin, is entitled to possession of the property as against attachment levied three days after the delivery to the sheriff. *Wells v. Lamb*, 18 Neb. 352 (24 N. W. 682).

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212. (1895.) The levy of a writ of attachment creates a priority over rights reserved or created by conditions contained in unrecorded notes given by the attachment debtor for the purchase price of the personal property levied upon. *New Home Sewing Machine Co. v. Beak*, 44 Neb. 816 (62 N W. 1092).

213. (1895.) The lien of an attachment levied after the tax list was delivered to the county treasurer is inferior to the lien of the taxes. *Reynolds v. McMillan*, 43 Neb. 183 (61 N. W. 699).

214. (1900.) Where an order for payment of money is not immediately effective if the fund against which it is directed is seized by attachment or garnishee process, the rights of the attaching or garnisheeing creditor are superior to those of the person holding such order. *Nebraska Moline Plow Co. v. Fuehring*, 60 Neb. 316 (83 N. W. 69).

215. (1901.) Where, by a valid attachment, a creditor acquires a lien upon the property of his debtor prior to other creditors, such priority is presumed to continue until it is made affirmatively to appear that his priority has been lost through laches or otherwise. *Westervelt v. Baker*, 1 Unof. 635 (95 N. W. 793).

216. (1904.) Where a mortgagee claims a lien on real estate through a deed filed for record subsequent to the levy of an order of attachment on the same land as the property of the grantor in such deed, the order of attachment and the return of the sheriff showing the levy being duly recorded in the office of the recorder of deeds before the recording of such deed, the mortgagee takes with notice of the rights of the attachment creditor and subject to such infirmities as inhere in the title of the mortgagor. *Naudain v. Fullenwider*, 72 Neb. 221 (100 N. W. 296).

217. (1904.) A prior unrecorded deed passing title to real estate, if made in good faith and for a valuable consideration, will take precedence of an attachment or judgment, if such deed be recorded before the deed based upon such attachment or judgment. *Naudain v. Fullenwider*, 72 Neb. 221 (100 N. W. 296).

Release of exempt property by sheriff.

218. (1882.) Exempt property held by a constable under an order of attachment issued by a justice of the peace, cannot be released under sections 522 and 523 of the code, but may be by order of the justice. *State, ex rel. Tucker, v. Sanford*, 12 Neb. 425 (11 N. W. 868). [Overruled.] 21 Neb. 541; 26 Neb. 240; 27 Neb. 501; 31 Neb. 462; 56 Neb. 422.]

219. (1898.) No statute exists requiring or authorizing the officer to have exempt property appraised before releasing it to the debtor. *Johnson v. Bartek*, 56 Neb. 422 (76 N. W. 878).

Delivery bonds, effect and liability.

——— In general.

Liability and sufficiency of general attachment bond, see *post*, §§ 413-443.

220. (1895.) The mere facts that the clerk of the district court, without authority, approved a delivery bond and directed the sheriff to release the attached property, in the absence of evidence of fraud or deceit practiced by the clerk, were not alone sufficient to render him liable to the plaintiffs in attachment for the loss sustained by reason of the clerk's approval of the bond and the release of the property by the sheriff in obedience to the order of the clerk. *Dewey & Stone v. Kavanaugh*, 45 Neb. 233 (63 N. W. 396).

221. (1896.) A stranger to an attachment suit who executes a redelivery bond under section 206 of the code is bound to deliver the property attached in his hands, or its appraised value in money to answer the judgment in the case. *Cooper v. Davis Mill Co.*, 48 Neb. 420 (67 N. W. 178).

——— Bond.

222. (1894.) The sureties on a redelivery bond are not bound thereby until the bond has been accepted and approved by the officer who levied the writ. The approval need not be indorsed on the bond. *Cortelyou v. Maben*, 40 Neb. 512 (59 N. W. 94).

223. (1894.) Where the officer receiving a forthcoming bond in attachment notifies the defendant that he rejects the bond on account of insufficiency of the sureties thereon, and it does not appear that the attached property was ever surrendered to the defendant, the sureties are not liable in an action on such bond. *Cortelyou v. Maben*, 40 Neb. 512 (59 N. W. 94).

224. (1894.) Where a redelivery bond is rejected, the sureties are not estopped

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from asserting that their principal never received the attached property from the officer. *Cortelyou v. Maben*, 40 Neb. 512 (59 N. W. 94).

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225. (1895.) A delivery bond executed in pursuance of code of civil procedure, section 206, can be approved only by the officer holding the writ of attachment. *Dewey & Stone v. Kavanaugh*, 45 Neb. 233 (63 N. W. 396).

226. (1896.) Section 206 of the code of civil procedure provides that an officer who has levied a writ of attachment shall deliver the attached property to the person in whose posession it was found, upon his execution, with sureties, of an undertaking that the parties to the same are bound in double the appraised value thereof, that the property or its appraised value in money shall be forthcoming to answer the judgment of the court in the action. A stranger to the attachment suit in whose possession the attached property is found, and who has given such an undertaking, cannot, after judgment and order of sale in the attachment case, be heard to assert, in an action upon the undertaking, that he himself and not the attachment defendant was the owner of the property. *Cooper v. Davis Mill Co.*, 48 Neb. 420 (67 N. W. 178).

——— **Effect on attachment.**

227. (1879.) The giving of a delivery undertaking, as provided in section 206 of the code of civil procedure, neither has the effect of dissolving the attachment nor of preventing the defendant from afterwards moving its dissolution as to the whole or a part of the property attached. *Hilton v. Ross*, 9 Neb. 406 (2 N. W. 862).

228. (1895.) A delivery bond executed in pursuance of section 206 of the code does not discharge the attachment. *Dewey & Stone v. Kavanaugh*, 45 Neb. 233 (63 N. W. 396).

Sale of property.

——— **Mode and conduct.**

229. (1880.) When an order of sale, regular on its face and issued by a court of competent jurisdiction, is placed in the hands of an officer, he is not required to examine into the proofs upon which the judgment was rendered to ascertain the existence of any fact passed upon by the court. *Zunkle v. Cunningham*, 10 Neb. 162 (4 N. W. 951).

230. (1883.) The sale of land taken in attachment under an order of court is governed by the same restrictions and regulations as are provided for sales of lands under execution. *Helmer v. Rehm*, 14 Neb. 219 (15 N. W. 344).

——— **Preventing, and vacating.**

231. (1883.) An error in the description of the land in the published notice will justify the vacation of the sale. *Helmer v. Rehm*, 14 Neb. 219 (15 N. W. 344).

232. (1883.) A defendant in an attachment suit cannot have the aid of equity to prevent a sale of the attached property under an order of the court, on a ground that would have been equally available to him in that suit. *Ashton v. Jones*, 14 Neb. 426 (16 N. W. 434).

233. (1885.) Where the county court issued an order of sale for the sale of attached property, after judgment, and it is alleged that the court erred in doing so, the judgment containing no order appropriating the attached property to its payment, the proper proctice would be to move the county court for a return and vacation of the order of sale. *Cozine v. Hatch*, 17 Neb. 694 (24 N. W. 389).

234. (1888.) Where several attachments have issued against a debtor, and notices of garnishment served upon a garnishee, other judgment creditors will be enjoined from selling the property under execution until the determination of the priority of the several claims. *Northfield Knife Co. v. Shapliegh*, 24 Neb. 635 (39 N. W. 788; 8 Am. St. Rep. 395).

——— **Title and right acquired by purchaser.**

235. (1881.) The sale of lands under attachment divests the attachment defendant of title to the property, and is notice to third person of the pendency of the action. *Day v. Thompson*, 11 Neb. 123 (7 N. W 533).

236. (1885.) A purchaser, in good faith, of real estate under an order of sale issued in attachment proceedings will be held to have acquired the title of the judgment debtor even though the judgment may be opened and the defendant permitted to to make his defense under the provisions of section 82 of the civil code. *Warren v. Dick*, 17 Neb. 241 (22 N. W. 462).

237. (1896.) A prior unrecorded deed, passing the legal title, made in good faith for a valuable consideration, will take precedence of a title based on a judicial sale, made under an attachment or execution, if

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such deed be recorded before the evidence of the title based on the judicial sale is recorded. *Sheasley v. Keens*, 48 Neb. 57 (66 N. W. 1010).

238. (1898.) Under a sale of a non-resident's realty seized on attachment, the purchaser acquires a title not subject to collateral attack, though the publication of notice preceding the judgment might have been held defective if it had been property assailed. *Brown v. Bose*, 55 Neb. 200 (75 N. W. 536; 70 Am. St. Rep. 379).

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239. (1905.) One claiming title to personal property through a sale under attachment proceedings in a justice's court must show legal notice to the defendants of the pendency of the action and that the property claimed was attached therein. *Beckwith v. Dierks Lumber Co.*, 75 Neb. 349. (106 N. W. 442).

——— Confirmation of sale.

240. (1881.) When real estate is attached on the ground that defendant has disposed of it with intent to defraud his creditors a third person who purchases the property at the execution sale, cannot resist the confirmation of such sale on the ground that defendant had conveyed the property prior to the levy, since that was a matter of record in the cause at the time he made the purchase. *Bachle v. Webb*, 11 Neb. 423 (9 N. W. 473).

——— Disposition of proceeds.

241. (1893.) A sheriff in possession of a stock of goods, pending their sale for the satisfaction of certain attachments in his hands, having sold a part of said goods, and collected claims due the attachment defendant, paid the proceeds of such sales and collections to the purchaser of the stock, who bought irrespective of such sales and collections. *Held*, In a suit for an accounting between the attachment defendant, who has paid all claims against him, and the recipient of such proceeds and collections, that said attachment defendant is entitled to recover the amount of such proceeds with interest from the time they were received by said purchaser. *McConnell v. First Nat. Bank of Lincoln*, 38 Neb. 252 (56 N. W. 1013).

Costs.

Compensation and fees of levying officer, see *Sheriffs and Constables*, §§ 14-19.

242. (1896.) An officer under a writ of attachment may lawfully return as costs the actual, necessary, and reasonable charges and expenes incurred in taking, removing, and preserving the attached property. *Deering v. Wisherd*, 46 Neb. 720 (65 N. W. 788).

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

See, also, *Garnishment*.

Commencement of action.

See, also, *Actions*, §§ 69-75.

243. (1896.) For the purpose of the attachment an action is commenced when a petition is filed and a summons issued with the *bona fide* intention that it shall be served. *Darnell v. Mack*, 46 Neb. 740 (65 N. W. 805.

244. (1891.) In this state an action is begun in the district court by filing a petition and issuing a summons thereon which is served on the defendant, and an attachment is ancillary thereto. Where, therefore, the petition makes no claim of liability against a defendant, stating no fact from which such liability may be inferred, there is no ground of attachment against him. *Bauer v. Deane*, 33 Neb. 487 (50 N. W. 431).

245. (1891.) An action is considered commenced, so far as the right to issue a writ of attachment is concerned, as soon as the petition is filed in the proper court, and a summons is issued thereon with a *bona fide* intent that it shall be served. *Coffman v. Brandhoeffer*, 33 Neb. 279 (50 N. W. 6).

Notice of action.

246. (1885.) It is not necessary to give a decription of the attached property in the notice of the pending of an attachment suit. Notice of the action is sufficient. *Warren v. Dick*, 17 Neb. 241 (22 N. W. 462).

Appearance.

See, also, *Appearance*.

247. (1888.) Defendants in attachment by appearing and answering to the merits of the action waive the objection of want of service of summons in the action. *Reed v. Fletcher*, 24 Neb. 435 (39 N. W. 437).

Process and service.

Process in general, see *Process*.

248. (1882.) Where an attachment is levied upon the real estate of a non-resident, and service of summons is not made upon him, the court posesses no power to render judgment against him and order a sale of his property to satisfy the same, unless publication has been made as required by law, and the notice should contain a description

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of the property attached. *Wescott v. Archer*, 12 Neb. 345 (11 N. W. 491, 577). [Overruled. 15 Neb. 312; 46 Neb. 740.]

249. (1882.) No summons need be issued on a non-resident debtor in attachment, where he has real estate here. *Wescott v. Archer*, 12 Neb. 345 (11 N. W. 591, 577).

250. (1883.) Where the decription of attached property in a notice by publication includes the property attached, it is not void, although the decription be in general terms. *Grebe v. Jones*, 15 Neb. 312 (18 N. W. 81).

251. (1886.) The rule is well settled that process of garnishment served upon a non-resident of the state, but temporarily within it, is not effectual as an attachment. *Wright v. Chicago, B. & Q. R. Co.*, 19 Neb. 175 (27 N. W. 90; 56 Am. Rep. 747).

252. (1892.) Where an action is instituted by attachment against an absconding debtor in the county from which he absconded, process may be served upon him in any other county of the state, and a judgment rendered on such service will be valid unless he appears and contests the right to maintain the action there. *Gandy v. Jolly*, 35 Neb. 711 (53 N. W. 658; 37 Am. St. Rep. 460).

253. (1895.) Jurisdiction of the defendant cannot be acquired by service by publication, in an action for the recovery of money, under the third clause of section 77 of the code, unless the defendant is a non-resident of the state, or a foreign corporation having property in this state, or debts owning to him, which are sought to be taken by some provisional remedy, or to be appropriated by judicial proceedings. *Welch v. Ayers*, 43 Neb. 326 (61 N. W. 635).

Affidavit for publication.

254. (1872.) An objection that a proper affidavit for publication of notice of the pendency of the suit, cannot be raised in a collateral action attacking the title acquired by the attachment sale. The court obtains jurisdiction by the levy of the attachment, and subsequent irregularities render the judgment in a proper proceeding voidable, but not void. *Crowell v. Johnson*, 2 Neb. 146.

255. (1889.) Where the affidavit for an attachment of real estate and for service upon the defendant by publication shows the essential facts to confer jurisdiction, the court will look at both, and if a defect in the affidavit for publication is supplied in the affidavit for an attachment it will be sufficient. *Miller v. Eastman*, 27 Neb. 408 (43 N. W. 179).

256. (1896.) In an action in a justice court an attachment affidavit alleging that defendant absconded with intent to defraud creditors was sufficient to authorize constructive service, where the officer to whom the summons was directed made a return that he could not find defendant in the county. *Smith v. Johnson*, 43 Neb. 754 (62 N. W. 217).

Limitations.

257. (1901.) Where all the parties are non-residents, the issuance of an attachment and levy upon real estate within four years after a fraudulent transfer will prevent the running of the statute of limitations, if the attachment proceedings are promptly followed up with a creditor's bill. *Coulson v. Galtsman*, 1 Unof. 502 (96 N. W. 349).

Pleadings.

Variance, see, also, *ante*, §§ 110, 111.

258. (1876.) A petition headed "Supreme Court of the State of New York," and filed in a district court of this state, is not sufficiently defective to warrant the dissolution of an attachment issued in the cause. *Livingston v. Coe*, 4 Neb. 379.

259. (1879.) Failure to attach a copy of the instrument sued on, in attachment, can be taken advantage of only by a motion requiring such copy to be given. *Olmstead v. Rivers*, 9 Neb. 234 (2 N. W. 366).

260. (1894.) A creditor in suing on a claim not due and attaching the debtor's goods need not set out in his petition the ground of attachment, but may state it in his affidavit. *Cox v. Peoria Mfg. Co.*, 42 Neb. 660 (60 N. W. 933).

261. (1897.) Where an attachment affidavit varies from an amended petition in the statement of the specific kind of an account in suit, and the defendant, by answering the amended petition and taking part in a trial of the issues joined, has waived the right to further object to the error, if any, in allowing the amended petition to be filed, in which it was claimed that a new cause of action was introduced, in that in the amended petition an account different in its particular character from that pleaded in the original petition was declared upon, *held*, that inasmuch as a reference to the petition would disclose the precise nature of the account, and hence the

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action could be pleaded in bar of a second attachment on the same account, the court did not err in overruling a motion to discharge the attachment on the ground, in substance, that it did not state the nature of plaintiff's claim as contained in the amended petition. *Grotte v. Nagle*, 50 Neb. 363 (69 N. W. 973).

262. (1902.) Where an order of attachment issues in an action, and property is levied upon thereunder, and an amended petition is subsequently filed, which, in addition to the cause of action stated in the original petition, sets forth another and different cause of action, and the first cause of action is dismissed before trial, the attachment is thereby dissolved, and an order for the sale of the attached property, in satisfaction of the judgment rendered on the second cause of action, is erroneous. *Holway v. American Exchange Nat. Bank*, 64 Neb. 67 (89 N. W. 382).

Judgment.

263. (1872.) In a collateral action, a judgment in attachment which recites a finding of a certain sum due the plaintiff, and runs against the property attached on the provisional order, and directs its sale, and does not run against the defendant personally, is not void. *Crowell v. Johnson*, 2 Neb. 146.

264. (1872.) All questions which may be raised upon the proceedings of the sheriff in executing the order of sale are concluded by the confirmation, and cannot be opened in a collateral action. *Crowell v. Johnson*, 2 Neb. 146.

265. (1877.) The true rule of practice is, that where property is seized under an order of attachment, and no question of ownership is raised nor any fraud or collusion charged, final judgment in the action concludes all inquiry, by third persons, concerning the validity or regularity of the proceedings, no matter how erroneous they may have been, provided the court had jurisdiction. *Rudolf v. McDonald*, 6 Neb. 163.

266. (1895.) A finding by a justice of the peace, in an attachment suit, of the sum due plaintiff, an assessment of plaintiff's recovery, and an order of sale of the attached property, is but a judgment in form against defendants, and where the only relief sought is to subject the attached property to the payment of the debt, is sufficient as an entry, both in form and in substance, and is not void. *Smith v. Johnson*, 43 Neb. 754 (62 N. W. 217).

267. (1898.) An attachment based on a false affidavit of defendant's non-residence is void. *German Nat. Bank v. Kautter*, 55 Neb. 103 (75 N. W. 566; 70 Am. St. Rep. 371).

268. (1898.) Where plaintiff in attachment seizes a resident's property as that of a non-resident and sells it under a judgment rendered on contructive service, defendant, in absence of an appearance, may attack such judgment in a later suit by him wherein the attachment plaintiff invokes such judgment as a defense. *German Nat. Bank v. Kautter*, 55 Neb. 103 (75 N. W. 566; 70 Am. St. Rep. 371).

269. (1902.) As between plaintiff who had attached the debtor's property, and the debtor's estate all matters litigated in the attachment suit must be deemed merged in the judgment and order of sale of the attached property. *First Nat. Bank of Madison v. Tompkins*, 3 Unof. 328 (91 N. W. 551).

270. (1902.) A finding and judgment for defendant *ipso facto* discharges an attachment. *Alpirn v. Goodman*, 3 Unof. 397 (91 N. W. 530).

271. (1904.) A judgment rendered without substituted service on the defendant in an attachment case against a non-resident, whose property has been seized in this state, is merely erroneous and not void. *Jones v. Danforth*, 71 Neb. 722 (99 N. W. 495).

Effect of judgment on subsequent purchaser.

272. (1899.) One who by voluntary transfer acquires rights in personal property after a writ of attachment has been levied thereon is bound by an adjudication in the attachment case of the validity of such attachment. *Nagle v. First Nat. Bank of Omaha*, 57 Neb. 552 (77 N. W. 1074).

Deficiency execution.

273. (1889.) Where an action is brought against a non-resident and real estate attached, service by publication had, judgment by default entered, and the property sold and the sale confirmed, the court loses jurisdiction, and it cannot order an execution against other property for a deficiency. *Gue v. Jones*, 25 Neb. 634 (41 N. W. 555); *Noyce v. Jones*, 25 Neb. 643 (41 N. W. 558); *Gilbert v. Jones*, 25 Neb. 644 (41 N. W. 558).

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VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

Moving to quash as appearance in case, see *Appearance*, §§ 39, 40.

Replevin of attachment property, see *Replevin*, §§ 13-17.

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Grounds for quashing, vacating or dissolving.

274. (1877.) An objection that affiant's name was omitted from the body of the affidavit, he having duly signed it at the close, is technical merely, and no ground for dissolving the attachment. *Rudolf v. McDonald*, 6 Neb. 163.

275. (1879.) The failure of the plaintiff to attach a copy of the instrument on which the action is brought to the petition is not a good ground for dissolving an attachment. *Olmstead v. Rivers*, 9 Neb. 234 (2 N. W. 366).

276. (1885.) A cause of action in a petition upon a debt not fraudulently contracted, if coupled with a cause of action upon a debt which was fraudulently contracted, and an order of attachment covering both counts is issued upon an affidavit alleging that "said defendant fraudulently contracted the debt and incurred the obligation for which this suit is brought," *held*, to vitiate such order of attachment and justify its discharge. *Mayer & Schurmann v. Zingre*, 18 Neb. 458 (25 N. W. 727); (1889) *Meyer v. Evans*, 27 Neb. 367 (43 N. W. 109).

277, 278. (1886.) Where it is shown that a debtor transferred certain of his property to his wife for a mere nominal consideration, one of such transfers being shown not to be fraudulent, but the other is unexplained, it is error to discharge an attachment on the ground that the allegation of an attempt to wrongfully convey property is untrue. *Washburn v. McGuire*, 19 Neb. 98 (26 N. W. 709).

279. (1893.) Where a plaintiff brought suit, alleging as a cause of action his ownership of certain notes, then past due, made and delivered to him by the defendant, and at the same time filed an affidavit for attachment in which such notes were made the basis of such claim against the defendant, and caused the property of the defendant to be seized under said attachment, and it afterwards appeared that plaintiff was not the owner of said notes, or any of them, at the time of bringing such suit and instituting such attachment proceeding and seizing said property, *held*, that the attachment should be dissolved, although plaintiff, after the seizure of defendant's property, became the owner of said notes and owned them at the time of the hearing of the motion to discharge the attachment. *Farwell Co. v. Wright*, 38 Neb. 445 (56 N. W. 984).

280. (1893.) An attachment must stand on plaintiff's cause of action as it existed when the affidavit for an attachment was filed and the writ issued; and if the plaintiff, at the date of the issuing of the attachment, does not own the claim for which he seizes the defendant's property, he cannot afterwards, by purchasing such claim, assert it by amendment or otherwise as against the property seized under the attachment and by virtue thereof. *Farwell Co. v. Wright*, 38 Neb. 445 (56 N. W. 984).

281. (1897.) It is not ground for the discharge of an attachment that some portion of the sum stated in the affidavit is not due. *Grotte v. Nagle*, 50 Neb. 363 (69 N. W. 973).

282. (1897.) It is no ground for dissolving an attachment issued against two or more defendants that the property levied on is the individual property of one of them alone. *McDonald v. Marquardt*, 52 Neb. 820 (73 N. W. 288).

283. (1902.) An order of attachment is dissolved by filing an amended petition which sets forth an additional and different cause of action. *Holway v. American Exchange Nat. Bank*, 64 Neb. 67 (89 N. W. 382).

284. (1903.) Where a writ of attachment issues for the whole amount claimed in several causes of action included in the same petition, and afterward, and before trial, some of such causes of action are dismissed by the plaintiff, a motion to dissolve the attachment, based on such dismissal, should be sustained. *First Nat. Bank of Greenwood v. Van Doren*, 68 Neb. 142 (93 N. W. 1017).

Persons entitled to move.

285. (1886.) A mortgagor of personal property upon which an attachment issued against him has been levied, has the right, under the provisions of section 235 of the civil code, to resist the attachment by a motion to discharge the same, upon the ground that the allegations of fraud upon which the order of attachment was pro-

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cured are untrue. *Grimes v. Farrington*, 19 Neb. 44 (26 N. W. 618).

286. (1896.) A debtor who had transferred all his interest in property subsequently attached, to one who is not a party to the attachment suit, cannot, in his own name and right, be permitted, on motion for a dissolution of the attachment, to establish the validity of his transfer. *Kountze v. Scott*, 49 Neb. 258 (68 N. W. 479). [Overruled. *McCord v. Bowen*, 51 Neb. 247.]

287, 288. (1897.) One made defendant to an attachment proceeding may move to discharge the same from the whole or any part of the property, notwithstanding the fact that he had disposed of his entire interest in such property prior to its seizure. *Kountze v. Scott*, 52 Neb. 460 (72 N. W. 585); (1897) *South Park Improvement Co. v. Baker*, 51 Neb. 392 (70 N. W. 952).

289. (1899.) Defendant may move to discharge the attachment though he had disposed of his entire interest in the property. *Symns Grocery Co. v. Snow*, 58 Neb. 516 (78 N. W. 1066).

290. (1899.) A mortgagee of chattels upon which an order of attachment has been levied cannot question the existence of the grounds for issuance of the writ, that right belonging alone to the attachment debtor. *Meyer, Bannerman & Co. v. Keefer*, 58 Neb. 220 (78 N. W. 506).

291. (1906.) The subsequent purchaser of lands on which an order of attachment has been levied cannot question the existence of the grounds for the issuance of the writ; to the attachment debtor alone belongs that right. *Wagner v. Wolf*, 75 Neb. 780 (106 N. W. 1024).

Persons entitled to be heard.

292. (1899.) An attachment defendant who has incumbered the attached property beyond its value is entitled to be heard on a motion to discharge the attachment. *Skinner v. First Nat. Bank of Pawnee City*, 59 Neb. 17 (80 N. W. 42).

Time for attacking attachment.

293. (1877.) To be available a motion to dissolve an attachment because the affiant's name was omitted from the body of the affidavit, must be made before final judgment in the action. *Rudolf v. McDonald*, 6 Neb. 163.

294. (1879.) The defendant may at any time before judgment, upon notice to plaintiff, move to discharge the attachment as to the whole or a part of the property attached. *Hilton v. Ross*, 9 Neb. 406 (2 N. W. 862).

295. (1883.) A defendant may give the undertaking required by section 206 of the code, for the delivery of the attached property, and afterwards move to discharge the attachment. *Wilson v. Shepherd*, 15 Neb. 15 (16 N. W. 826).

296. (1893.) A motion to dissolve an attachment, to be available, must be made before final judgment in the action. Where such a motion has been made and heard before the trial of the cause, and taken under advisement, the court may, after judgment for the plaintiff, rule upon the motion. *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb. 520 (57 N. W. 161).

297. (1895.) A motion to discharge an attachment must be filed before judgment in the action, but if so filed the court may rule thereon after judgment. *Stutzner v. Printz*, 43 Neb. 306 (61 N. W. 620). [Overruled. *Herman v. Hayes*, 58 Neb. 54.]

298. (1897.) Any time before judgment, defendant, upon proper notice, may move to dissolve the attachment, and the fact that the attached property does not belong to him, or is incumbered to its full value, does not bar or estop him from filing the motion. *McCord v. Bowen*, 51 Neb. 247 (70 N. W. 950).

299. (1899.) A court is without authority to hear and determine a motion to discharge an attachment filed before judgment in the action, but not submitted until after payment. *Herman v. Hayes*, 58 Neb. 54 (78 N. W. 365).

Notice of motion.

300. (1896.) A reasonable notice of the hearing of a motion to discharge an attachment is such notice as is meet and fair in view of the circumstances and conditions existent at the time in the matter to be presented. *Sterling Mfg. Co. v. Hough*, 49 Neb. 618 (68 N. W. 1019).

Estoppel to deny defendant's title.

301. (1895.) A plaintiff who levies an attachment on property as that of defendant, cannot deny the latter's title. *Standard Stamping Co. v. Hetzel*, 44 Neb. 105 (62 N. W. 247).

302. (1896.) A plaintiff who has attached property as the property of defendants and obtained writs of garnishment to

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issue on allegations that the garnishee named has in his possession property, etc., owned by or belonging to the defendants, will not be heard to assert that defendants have not sufficient interest to be allowed to defend against the attachments. *Dayton Spice Mills Co. v. Sloan*, 49 Neb. 622 (68 N. W. 1040).

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303, 304. (1897.) An attaching plaintiff is estopped to assert that defendant has not sufficient interest to defend against the attachment. *McCord, Brady & Co. v. Bowen*, 51 Neb. 247 (70 N. W. 950); (1897) *Kountze v. Scott*, 52 Neb. 460 (72 N. W. 585).

Burden of proof on denial of affidavit.

305. (1872.) Preponderance of proof must be in favor of the party suing out the attachment, when affidavits are filed to disprove the charge made in that on which the order issued. *Ellison v. Tallon*, 2 Neb. 14.

306. (1873.) The charge made in an affidavit if denied by the defendant, must be sustained by the plaintiff to the satisfaction of the court; upon the plaintiff, by the denial, is thrown the burden of proof. *Tallon v. Ellison*, 3 Neb. 63.

307. (1886.) Where, on the hearing of a motion to discharge an attachment procured upon an allegation of the fraudulent disposition of property, the averments of such affidavit are denied by the attachment of defendant, the burden of proof to establish the fact charged is upon the plaintiff in the action, and the motion to discharge should be sustained, unless such proof is made by a preponderance of testimony. *Grimes v. Farrington* 19 Neb. 44 (26 N. W. 618).

308. (1889.) Where a defendant moves to dissolve an attachment, and denies the ground thereof, the burden of sustaining the attachment is on the plaintiff. *Olds Wagon Co. v. Benedict*, 25 Neb. 372 (41 N. W. 254).

309. (1892.) When a defendant moves to dissolve an attachment on the ground that the affidavit for the attachment is untrue, and files in support thereof his affidavit denying the fact stated in the original affidavit for attachment, the burden of proof is upon the plaintiff to sustain the attachment by a preponderance of the evidence. *Dolan v. Armstrong*, 35 Neb. 339 (53 N. W. 132).

310. (1894.) Where the allegations of an affidavit for attachment are put in issue by a motion to dissolve, plaintiff is required to establish, to the satisfaction of the court, the truth of the facts alleged. *Citizens State Bank v. Baird* 42 Neb. 219 (60 N. W. 551).

311. (1894.) Where the grounds for the issuing of an attachment are alleged in the language of the statute, and the defendant denies by affidavit the truth of the averments made to obtain such attachment, and moves to dissolve the same, the court before whom the proceeding is pending should by an order require the plaintiff in attachment, within a reasonable, fixed time, to file such affidavits or other evidence as he desires or relies upon to sustain the averments made by him to obtain the issuing of the attachment writ; and the defendant, in a reasonable, fixed time thereafter to file such affidavits or other evidence as he desires or relies upon to traverse, explain, or avoid the case made by the plaintiff's evidence; and the plaintiff in a reasonable, fixed time thereafter, to file such affidavits or other evidence as is applicable in rebuttal. *Jordan & McCarthy v. Dewey & Stone*, 40 Neb. 639 (59 N. W. 88).

312. (1896.) Where the facts stated in an affidavit for an attachment are denied on a motion to dissolve, the burden is cast upon the plaintiff to sustain his charges by proof. *Geneva Nat. Bank v. Bailor*, 48 Neb. 866 (67 N. W. 865).

Evidence.

——— Burden of proof.

313. (1894.) Where a creditor attaches property in the hands of a mortgagee, the burden of proving fraud in the transfer, on a motion to discharge, is upon such creditor. *Landauer v. Mack*, 39 Neb. 8 (57 N. W. 555).

313*a*. (1907.) Where the grounds relied on to support an attachment are positively denied by the oath of the defendant, the burden is upon the plaintiff to prove his grounds for attachment by a preponderance of evidence. *Malcom Savings Bank v. Cronin*, 80 Neb. 231 (116 N. W. 150).

——— Admissibility.

314. (1882.) In an action by a wife for conversion of a millinery stock attached as the property of her husband the fact that goods purchased for the busines at different times, extending over a period of four or five years, and amounting to several thousand dollars, had been shipped to the husband, and all correspondence in relation

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to such goods and purchases had been carried on between the seller and the husband and in his name, affords some evidence, however slight, that the husband was acting in the capacity of owner rather than that of clerk, agent, or manager, and hence is admissible. *Oberfelder v. Kavanaugh*, 21 Neb. 483 (32 N. W. 295).

315. (1893.) Where a plaintiff in attachment claims the debt for which he sues was fraudulently contracted, and, to sustain such claim offers in evidence a statement made by the debtor to his banker, and by the latter communicated to plaintiff, to render such communication admissible it must be identical with the statement made, or the substance of it, and not the banker's conclusion deduced therefrom. *Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb. 800 (56 N. W. 389).

316, 317. (1897.) Whether oral evidence shall be used on the hearing of a motion to discharge an attachment is a matter resting in the discretion of the court trying such proceeding. *Kountze v. Scott*, 52 Neb. 460 (72 N. W. 585); (1897) *Hamer v. McKinley-Lanning Loan & Trust Co.*, 52 Neb. 705 (72 N. W. 1041).

318. (1897.) Section 236, code of civil procedure does not confer on an attaching plaintiff the right to resist a motion to discharge the attachment by oral evidence. *Kountze v. Scott*, 52 Neb. 460 (72 N. W. 585).

319. (1900.) On the hearing of a motion to dissolve an attachment, error cannot be predicated upon the admission of improper evidence. It is presumed that the trial judge, in arriving at a conclusion, considered only proper and competent evidence, and disregarded that which was improper. *Merrifield v. Farmers Nat. Bank of Pawnee City*, 59 Neb. 602 (81 N. W. 611).

——— Sufficiency.

320. (1883.) Affidavits examined, and the order of the district judge discharging the attachment sustained. *Hunter v. Soward*, 15 Neb. 215 (18 N. W. 58).

321. (1886.) Testimony of persons familiar and accustomed to dealing with a defendant that defendant's conduct of his business showed no indication of his intention to defraud his creditors, and of his financial ability to meet his just debts, and a declaration to legally fight the claim in question, is sufficient to dissolve an attachment. *Walker v. Haggerty*, 20 Neb. 482 (30 N. W. 556).

322. (1888.) Where, during the absence of the owner of a stock of goods, the same is attached by creditors, and the clerk who had been left in charge of the store takes out goods to the amount of his claim for wages, there is no evidence of a disposition of property in fraud of creditors, and the attachment should be discharged. *Peru Plow Co. v. Benedict*, 24 Neb. 340 (38 N. W. 824).

323. (1888.) On the trial of a motion to discharge an order of attachment to a judge at chambers, there being evidence tending to prove the absconding of defendant with intent to defraud his creditors, and that he had left the county of his residence to avoid the service of a summons, the same being grounds of attachment alleged in the affidavit for attachment, and the weight of the evidence not being clearly against the finding and judgment of the judge on said motion, the same upheld. *Holland v. Commercial Bank*, 22 Neb. 571 (36 N. W. 113).

324. (1889.) Evidence that shows that a merchant executed a bill of sale to a certain creditor to secure his debt, that the creditor went into immediate possession and was handling the stock to the good interests of both, will not sustain an attachment on the ground of a conveyance in fraud of creditors. *Sloan v. Coburn*, 26 Neb. 607 (42 N. W. 726; 4 L. R. A. 470).

325. (1891.) Evidence to show that a retail grocery dealer, in order to obtain additional credit of a jobber in groceries, misrepresented that he owed no other bills, and owned certain farm lands; and other testimony that he made a statement that he intended executing a bill of sale of the goods to his mother, though he was not indebted to her, is sufficient to sustain an attachment on the ground of fraud. *Askwith v. Allen*, 33 Neb. 418 (50 N. W. 267).

326. (1891.) T. & Co. obtained an attachment against one D. upon a promissory note before the same was due, on the ground that he had fraudulently disposed of his property with intent to defraud his creditors and was about to dispose of his property with that object in view. *Held*, That a clear preponderance of the evidence tended to show that the transaction was *bona fide* and not to defraud creditors. *Tenney v. Diss*, 32 Neb. 61 (48 N. W. 877).

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327. (1891.) Where one who was engaged in the mercantile business, being considerably indebted for goods, traded his stock, which was worth about $2,000, for wild land of questionable value and incumbered, whereupon a creditor to whom he was indebted for goods attached the stock, there is sufficient cause shown for an attachment and the district court erred in discharging it. *Robinson Notion Co. v. Ormsby*, 33 Neb. 665 (50 N. W. 952).

328. (1893.) Where property conveyed by a debtor to his brother, is attached by a creditor on the ground that the conveyance is fraudulent, the attachment should not be dissolved on the affidavit of the purchaser that the purchase was in good faith, in consideration of a loan previously made to the grantor where there was no showing as to the amount of the loan or that affiant desired the conveyance. *Jones v. Biven*, 36 Neb. 821 (55 N. W. 248).

329. (1896.) Evidence, in attachment showing defendant left his place of residence on receipt of telegrams of his wife's mother's illness, and before leaving notifies his creditors of his purpose in leaving and that he would be gone for some time, sustains a finding that, at the commencement of the action, defendants were not non-residents. *Johnson v. May*, 49 Neb. 601 (68 N. W. 1032).

330. (1896.) Evidence examined, and *held* that it fails to show that the defendant fraudulently contracted the indebtedness for which this action was instituted. *Geneva Nat. Bank v. Bailor*, 48 Neb. 866 (67 N. W. 865).

331. (1896.) In an action for attachment on the ground that defendant was about to remove and convert his property to defraud creditors, evidence examined and *held* insufficient to sustain order discharging the attachment. *Kingman & Co. v. Weiser Bros.*, 48 Neb. 834 (67 N. W. 941).

332. (1897.) Evidence *held* to sustain an order discharging an attachment. *Kountze v. Scott*, 52 Neb. 460 (72 N. W. 585).

333. (1897.)) In view of the fact that the names of certain attorneys at law do not appear in the record as attorneys for either party, and of the further fact that there was direct, positive testimony by one of the attorneys that neither of them was an attorney for the plaintiff until long after the commencement of the action in which an attachment issued, no presumption founded upon unsatisfactory circumstantial evidence will be entertained to avoid the effect of such testimony in order that there may be justified the dissolution of the attachment issued at the commencement of the suit by virtue of which such alleged attorneys were garnished as debtors of the attachment defendant. *Nebraska Moline Plow Co. v. Fuehring*, 52 Neb. 541 (72 N. W. 1003).

334. (1899.) In an action of attachment on the ground "that the defendants have sold, conveyed, and otherwise disposed of their property with intent to cheat and defraud their creditors and to hinder and delay them in the collection of their debts, and that defendants are about to sell and convey and dispose of their property with fraudulent intent," an order dissolving the attachment was reversed as being against the clear and decisive preponderance of the evidence. *Symns Grocery Co. v. Snow*, 58 Neb. 516 (78 N. W. 1065).

335. (1903.) Evidence examined, and *held* sufficient to sustain the finding and order of the trial court discharging an attachment. *Werner v. Linsenmeyer*, 4 Unof. 372 (94 N. W. 105).

336. (1903.) Evidence examined, and *held* sufficient to support the judgment of the trial court dissolving an attachment. *Fremont Brewing Co. v. Pekarek*, 4 Unof. 531 (95 N. W. 12).

337. (1907.) Evidence, in an attachment suit by a surety who has paid his principal's note, showing such principal had been indicted for a crime and absconded, and was disposing of his property at a great sacrifice, sustains a finding that he was fraudulently disposing of his property. *Danker v. Jacobs*, 79 Neb. 435 (112 N. W. 579).

Hearing.

——— Nature of hearing.

338. (1896.) A hearing on motion to dissolve an attachment is a "trial" within the meaning of section 279 of the code defining that term, and within the meaning of section 11, chapter 28, Compiled Statutes, fixing the fees of justices of the peace. *Gibson v. Sidney*, 50 Neb. 12 (69 N. W. 314).

——— Continuance.

339. (1896.) The action of the trial court in denying an application for the continuance of a hearing on a motion to dissolve an attachment, examined and af-

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firmed. *Dayton Spice Mills Co. v. Sloan*, 49 Neb. 622 (68 N. W. 1040).

——Reception of evidence.

340. (1902.) Where the defendant, in his motion to dissolve an attachment, denies the truth of the facts stated in the affidavit on which the attachment was obtained, the manner of taking the evidence, on the hearing of the motion, is within the discretion of the court. *Dittman Boot & Shoe Co. v. Graff*, 3 Unof. 165 (91 N. W. 188).

——Right to open and close.

341. (1889.) Where defendant moves to dissolve an attachment and denies the grounds of attachment by affidavit the burden of sustaining the attachment is upon plaintiff, and for that purpose he is entitled to open and close argument. *Olds Wagon Co. v. Benedict*, 25 Neb. 372 (41 N. W. 254).

342. (1894.) The party issuing the attachment is entitled to the opening and closing on the hearing of a motion to dissolve, and on him is the burden of proof. *Jordan & McCarthy v. Dewey & Stone*, 40 Neb. 639 (59 N. W. 88).

Issues and questions determined.

343. (1879.) Where the petition states a good cause of action, the merits of the demand cannot be questioned on a motion to dissolve an attachment issued in the case. *Olmstead v. Rivers*, 9 Neb. 234 (2 N. W. 366).

344. (1891.) While on a motion to dissolve an attachment the merits of a cause of action cannot be questioned, yet this rule will not prevent the defendant on such motion from stating any pertinent fact to explain the transaction out of which the suit arose, even if in doing so he makes it appear that the sum claimed is too large. *Hamilton v. Johnson*, 32 Neb. 730 (49 N. W. 703).

345. (1892.) In the case stated, *held*, that the questions presented, aside from the want of authority of the attorneys to appear, are first, that the action on which the attachment issued arose upon contract; and, second that the garnishees acted in good faith in the garnishment proceedings. *Kirschbaum v. Scott*, 35 Neb. 199 (52 N. W. 1112).

346. (1893.) In the action of an attachment creditor against the debtor the validity of chattel mortgages made by the debtor to other parties cannot as against such mortgagees, be adjudicated. As between plaintiff and defendant alone, upon motion to dissolve the attachment, the defendant can be heard only because of his residuary, contingent interest which may remain after the said mortgages are satisfied. *McCord v. Krause*, 36 Neb. 764 (55 N. W. 215). [Overruled. *McCord v. Bowen*, 51 Neb. 247.]

347. (1894.) The homestead character of real estate is not a proper question to be determined upon a motion to discharge an attachment. *Quigley v. McEvony*, 41 Neb. 73 (59 N. W. 767).

348. (1895.) Where it was alleged in the petition in an attachment case that the defendants acted conjunctively, the first named buying on credit and turning over goods to the second to be disposed of by him for the joint benefit of both, it was proper on a motion to dissolve such attachment to consider whether or not there existed the alleged privity between the defendants. *Standard Stamping Co. v. Hetzel*, 44 Neb. 105 (62 N. W. 247).

349. (1895.) On the hearing of a motion by a defendant to discharge an attachment allowed in an action against him on the ground that he had fraudulently disposed of his property with intent to defraud creditors, the alleged fraudulent transaction being the conveyance by mortgage of certain property, the validity of such mortgage is not put in issue and cannot be determined. *Landauer, Kain & Streng v. Mack & Co.*, 43 Neb. 430 (61 N. W. 597).

350. (1897.) The issue of fact in a proceeding to discharge an attachment is not whether the attachment defendant owns the property, nor whether his grantee has an unimpeachable title or interest therein, but whether the statutory grounds for attachment exist. *South Park Improvement Co. v. Baker*, 51 Neb. 392 (70 N. W. 952).

351. (1897.) The merits of a cause will not be adjudicated on a motion to dissolve an attachment. *McDonald v. Marquardt*, 52 Neb. 820 (73 N. W. 288).

352. (1898.) A judgment sustaining an attachment does not determine whether the property was exempt from seizure. *Johnson v. Bartek*, 56 Neb. 422 (76 N. W. 878).

Dissolution.

353. (1871.) A defendant in an attachment which has been dissolved is entitled to possession of the property taken under

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the writ, without reimbursing the sheriff what he paid to a carrier who had a lien on it, nor what he paid for the safe keeping of it. *McReady v. Rogers*, 1 Neb. 124 (93 Am. Dec. 333).

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354. (1896.) The dissolution of an attachment issued on a claim before due terminates the action; and that a judge, at chambers, after dissolving such an attachment, made an order of dismissal of the main action, if without jurisdiction, and error was not prejudicial. *Dayton Spice Mills Co. v. Sloan* 49 Neb. 622 (68 N. W. 1040).

355. (1903.) Payment of a judgment rendered by a justice of the peace in favor of a party who has prosecuted error from an order discharging an attachment, will not, without payment of attachment costs rightfully incurred, dissolve the lien of the attachment. *Rhodes v. Samuels*, 67 Neb. 1 (93 N. W. 148).

Costs.

356. (1888.) In the taxation of costs, upon the dissolution of an attachment an item of sheriff's fees of $190 for "care, preservation and custody of attached property" is improperly taxed, when the charge was not itemized, nor contained in the sheriff's return, it appearing to have been taken from the fee book of the district court. *Reed v. Smith*, 25 Neb. 64 (40 N. W. 591).

357. (1896.) On the discharge of an attachment the costs and expenses incident thereto should ordinarily be taxed to the party suing out the attachment. *Deering & Co. v. Wisherd*, 46 Neb. 720 (65 N. W. 788).

358. (1903.) The costs of the error proceeding, like other costs incident to the litigation, are secured by the attachment lien, and the attached property may be sold to satisfy the same. *Rhodes v. Samuels*, 67 Neb. 1 (93 N. W. 148).

359. (1903.) When the district court has given its decision, and the order discharging the attachment has been reversed, the justice of the peace is reinvested with complete jurisdiction of the ancillary proceeding, and it is then his right and duty to tax the attachment costs against the unsuccessful party. *Rhodes v. Samuels*, 67 Neb. 1 (93 N. W. 148).

360. (1903.) While error proceeding is pending the justice may try and determine the action, but he is without jurisdiction or authority to make an order taxing the costs of the attachment to either party. *Rhodes v. Samuels*, 67 Neb. 1 (93 N. W. 148).

——— Curing error by subsequent judgment.

361. (1879.) Error in discharging an attachment on motion of defendant, whereby costs are wrongfully visited upon the plaintiff, is not cured by a subsequent final judgment in the action in favor of the defendant. *Hilton v. Ross*, 9 Neb. 406 (2 N. W. 862).

Special finding.

362. (1895.) Where an attachment had previously been dissolved upon a full hearing of the merits, there existed no requirement that upon request, sustained by affidavits, additional special findings should be made, and it was not erroneous on motion to strike out affidavits from the files. *Standard Stamping Co. v. Hetzel*, 44 Neb. 105 (62 N. W. 247).

Delivery bond on appeal.

363. (1879.) The undertaking provided for by "An act to provide for the retention of attached property pending a review on error," etc. (Gen. Stat., 715), passed February 17, 1873, not being necessarily a part of the record of the case, its absence therefrom cannot be taken as proof that it was not in fact given. *Hilton v. Ross*. 9 Neb. 406 (2 N. W. 862).

Supersedeas bond, liability.

Liability on undertaking in general, see *post*, §§ 413-417.

364. (1901.) One who gives a supersedeas bond to hold in force, pending proceedings in error, an attachment and garnishment discharged by order of trial court, can not be heard in defense of a suit on such bond to say that defendant to whom such bond was given had no interest in attached property, or that the attachment and garnishment proceedings were invalid because of irregularity. *Metcalf v. Bockoren*, 1 Unf. 822 (96 N. W. 406).

365. (1901.) Attachment and garnishment proceedings, to supersede order for the dissolution of which, bond in suit was given, examined and *held* voidable only. *Metcalf v. Bockoven*, 1 Unof. 822 (96 N. W. 406).

366. (1901.) Whether one who gives a supersedeas bond to hold in force, pending error proceedings, attachment and garnishment discharged by trial court, can be heard in defense of a suit on such bond to say that such proceedings were void for want of

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jurisdiction, *quære*. *Metcalf v. Bockoven*. 1 Unof. 822 (96 N. W. 406).

Moving for discharge on appeal.

367. (1895.) Where a county court sustains an order for attachment and rendered judgment in the action for plaintiff, and on error the district court reversed the judgment but made no order as to sustaining the attachment and the defendant did not except, he in effect ratified the order of the county court, and the district court was justified in refusing to entertain a motion to discharge it. *Stutzer v. Printz*, 43 Neb. 306 (61 N. W. 620).

Review.

——Questions appealable.

368. (1883.) An order overruling a motion to discharge an attachment is not a final order, as it is subject to review up to the time judgment is rendered. *Wilson v. Shepherd*, 15 Neb. 15 (16 N. W. 826).

369. (1889.) Where a motion to discharge an attachment is sustained, and the plaintiff fails to file an undertaking for the retention of the attached property, while he thereby loses his attachment is a final order, he may have it reviewed on error. *Adams County Bank v. Morgan*, 26 Neb. 148 (41 N. W. 993).

370. (1890.) An order overruling a motion to discharge an attachment is not a final order and cannot be reviewed prior to the rendition of final judgment. *Root v. State Bank*, 30 Neb. 772 (47 N. W. 82).

371. (1901.) When, in an action pending in a justice court, an attachment is issued and levied upon mortgaged property in the possession of a third person who is summoned in garnishment, and the mortgagee intervenes in the suit and obtains an order discharging the attachment at least to the extent of releasing its levy upon the property, he cannot assign for error a further order of the justice requiring the garnishee to pay a sum of money into court for the benefit of the plaintiff in the action. *Wiseman v. Jaco*, 1 Unof. 164 (95 N. W. 367).

372. (1904.) Error will not lie from an order discharging an attachment when there is nothing in the record to show that any action was ever taken under the writ. *Sand Hills Commercial Co. v. Phillips Bros. & Rennau*, 5 Unof. 330 (98 N. W. 718).

——Delivery of property on failure to file bond.

373. (1879.) If no undertaking is given within the required period, an appeal from a discharge of attachment, the officer must deliver the property to the party entitled to the same, and if he refuse to do so he may be compelled by mandamus. *State, ex rel. Rieschick, v. Cunningham*, 9 Neb. 146 (1 N. W. 1011).

374. (1879.) Mandamus will issue to compel redelivery of property after discharge of attachment. *State, ex rel. Rieschick, v. CuCnningham*, 9 Neb. 146 (1 N. W. 1011.)

——Time for appeal.

375. (1879.) Where an attachment is dissolved the court may fix a time, not exceeding twenty days, in which to file a petition in error in the reviewing court and to give the undertaking required by the statute, during which time the attached property shall be held by the officer having possession of the same. *State, ex rel. Rieschick, v. Cunningham*, 9 Neb. 146 (1 N. W. 1011).

——Authority of county judge to sign bill of exceptions.

376. (1891.) Section 236 of the code, which authorizes the filing of a petition in error upon an order of a court discharging an attachment, is general in its application and applies to all courts having jurisdiction in civil actions. Therefore a county judge may sign a bill of exceptions in any case where an attachment has been discharged by him. *Osborne v. Canfield*, 33 Neb. 330 (50 N. W. 167). [Overruled. *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb. 530.]

377. (1893.) A county judge has no power or authority to sign a bill of exceptions preserving the evidence used in the hearing of a motion to discharge an attachment. *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb. 520 (57 N. W. 161).

378. (1895.) A county judge has no jurisdiction to settle a bill of exceptions preserving the evidence adduced on the hearing of a motion to dissolve an attachment. *Michigan Stove Co. v. Miller*, 43 Neb. 332 (61 N. W. 610).

——Presumption as to sufficiency of evidence.

379. (1902.) Where the evidence taken in the county court on a motion to dissolve an attachment is not preserved by a bill of

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exceptions, and is not before the court of review, it will be presumed that the evidence was sufficient to sustain the judgment and order of the lower court. *Dittman Boot & Shoe Co. v. Graff*, 3 Unof. 165 (91 N. W. 188).

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——— Conflicting evidence.

380. (1888.) In a proceeding in attachment, where the defendant denies the truth of the allegations in the affidavit for attachment, and an inquiry is made thereon by the district court upon affidavits filed by both parties, and in which there is a conflict, a reviewing court will not reverse the decision of the district court upon the facts unless the decision was clearly wrong. In such case the same rule must be applied as would be had there been a trial. *Johnson & Co. v. Steele*, 23 Neb. 82 (36 N. W. 358).

381. (1892.) The order of a trial court made on affidavits upon a motion to dissolve an attachment will not be reversed where there is a conflict of evidence unless the ruling is against the clear weight thereof. *Dolan v. Armstrong*, 35 Neb. 339 (53 N. W. 132).

382. (1892.) An order discharging an attachment will not be disturbed by the supreme court in a case where the testimony is conflicting, unless it is clearly against the weight of evidence. *Smith v. Boyer*, 35 Neb. 46 (52 N. W. 581).

383. (1893.) Where a motion to discharge an attachment on the ground that the facts stated in the affidavit are untrue is heard upon conflicting affidavits, the decision of the trial court on the motion will not be disturbed unless it is clearly against the weight of the evidence. *Whipple v. Hill*, 36 Neb. 720 (55 N. W. 227; 38 Am. St. Rep. 742; 20 L. R. A. 313).

384. (1894.) The overruling of a motion to dissolve an attachment of mortgaged chattels, presented by the mortgagor alone, will not be reviewed when upon the hearing of the motion it was shown that the rights of the mortgagor had been foreclosed under the mortgage referred to, and when there is in the record evidence sufficient to justify the conclusion that the mortgage was by the mortgagor executed with intent to defraud or delay his creditors. *Darst v. Levy*, 40 Neb. 593 (58 N. W. 1130). [Overruled in part. *McCord v. Bowen*, 51 Neb. 247.]

385. (1896.) An order discharging an attachment, made upon conflicting evidence, will not be disturbed by a reviewing court, unless the decision is clearly and manifestly wrong. *Geneva Nat. Bank v. Bailor*, 48 Neb. 866 (87 N. W. 865).

386. (1896.) Where a motion to discharge an attachment, because plaintiff's affidavits are untrue, is heard on conflicting evidence, the ruling on the motion will not be disturbed unless it is clearly against the weight of evidence. *Nebraska Moline Plow Co. v. Klingman*, 48 Neb. 204 (66 N. W. 1101).

387. (1896.) In a hearing of a motion to discharge an attachment, one of the grounds of which is the untruth of the allegations of the affidavit for attachment, where the evidence used at the hearing is conflicting, the conclusions of the judge who heard the matters, announced from such evidence, will not be disturbed unless manisfestly wrong. *Sterling Mfg. Co. v. Hough*, 49 Neb. 618 (68 N. W. 1019).

388. (1897.) An order dissolving an attachment made on conflicting evidence will not be disturbed. *Smith v. Bowen*, 51 Neb. 245 (70 N. W. 949).

389. (1900.) In reviewing the ruling of a trial court on a motion to dissolve an attachment, the supreme court will not reverse a decision thereon, if supported by competent evidence, because the evidence is conflicting, unless it is against the clear weight of evidence. *Merrifield v. Farmers Nat. Bank of Pawnee City*, 59 Neb. 602 N. 611).

390. (1903.) On disputed questions of fact tried on *ex-parte* affidavits in support of a motion to dissolve an attachment, the findings of the trial court will not be disturbed unless clearly against the weight of the evidence. *Fremont Brewing Co. v. Pekarek*, 4 Unof. 531 (95 N. W. 12).

——— Judgment on appeal.

391. (1903.) In an error proceeding from an order of a justice of the peace discharging an attachment, the only judgment which the district court is authorized to render and enforce is a judgment affirming or reversing the order of the justice and taxing the costs incident to such proceeding. *Rhodes v. Samuels*, 67 Neb. 1 (93 N. W. 148).

VIII. CLAIMS BY THIRD PERSONS.

Intervention to contest attachment.

392. (1887.) Proceedings irregular and amendable, but not void, cannot be attacked collaterally by third parties. *Connelly v. Edgerton*, 22 Neb. 82 (34 N. W. 76).

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393. (1892.) Where proceedings in attachment are irregular and erroneous, but not void, such errors and irregularities cannot be taken advantage of by third parties in a collateral proceeding. *Winchell v. McKinzie*, 35 Neb. 813 (53 N. W. 975).

394. (1896.) Where two writs of attachment have been levied in different actions on the same property, plaintiff in the later case may intervene in the earlier case to have the priority of the levies adjudicated. *Deere, Wells & Co. v. Eagle Mfg. Co.*, 49 Neb. 385 (68 N. W. 504).

395. (1897.) A judgment creditor whose debtor has recovered in an action of attachment a sum of money from another, which money is in the hands of the clerk of the court, should intervene as a party to the attachment in order to apply such funds to his claim. *Anheuser-Busch Brewing Ass'n v. Hier*, 52 Neb. 424 (72 N. W. 588).

396. (1899.) Where the owner of attached chattels mortgaged them to creditors other than plaintiff in attachment, and the petition in the attachment suit was subsequently amended to state a different cause of action, and the attachment was afterward held good on motion to discharge it, the mortgagees, in an independent action, were not permitted to assail the attachment. *Nagle v. First Nat. Bank of Omaha*, 57 Neb. 552 (77 N. W. 1074).

397. (1902.) The rule that a claimant cannot intervene and have his rights determined in the attachment suit, does not preclude the parties from voluntarily appearing and presenting the issue of ownership under the title of the original action, and when jurisdiction is thus acquired, and a trial had without objection, it is the duty of the court to enter a judgment on the merits. *Haines & Co. v. Stewart*, 3 Unof. 216 (91 N. W. 539).

398. (1902.) The mere fact that a party claims to be the owner of attached property, does not give him the right to intervene in the attachment, and thus have the question of his ownership determined in the attachment suit. *Haines & Co. v. Stewart*, 3 Unof. 216 (91 N. W. 539).

399. (1907.) A third party claiming an interest in or lien on property upon which an attachment has been levied cannot intervene in the attachment suit to question the grounds for the issuance of the writ. *Danker v. Jacobs*, 79 Neb. 435 (112 N. W. 579).

Trial of right of property.

——— Right to jury trial.

400. (1880.) A proceeding under the statute for a trial of the right of property is not in a legal sense a "civil action," and is therefore not properly triable by a jury; but where a jury is impaneled by agreement or at the instance of the plaintiff in error, he cannot complain on that ground. *State, ex rel. McClung, v. Powell*, 10 Neb. 48 (4 N. W. 317).

——— Method of procedure.

401. (1883.) When an order of attachment is issued by a county judge, in a case in which the county court has jurisdiction concurrently with the district court, and chattels, seized upon such attachment, are claimed by a person other than the defendant in such attachment suit, proceedings for the trial of the right of such property should be commenced and conducted under the provisions of sections 486 and 487 of the civil code. *Schell v. Husenstine*, 15 Neb. 9 (16 N. W. 758).

——— Evidence.

Evidence admissible in action on bond, see *post*, §§ 437-440.

402. (1881.) An undertaking to return property in suit by claimant is admissible in evidence. *Noakes v. Switzer*, 12 Neb. 156 (10 N. W. 536).

——— Judgment rendered.

403. (1902.) In proceedings for the trial of the right of property, under section 996 *et seq.*, code of civil procedure, the only judgment a jutice is authorized to render is a judgment for costs. *McCormick Harvesting Machine Co. v. Scott*, 66 Neb. 481 (92 N. W. 599).

——— Conclusiveness of finding or judgment.

404. (1880.) The trial and finding of the right to property levied on in attachment is not conclusive as to ownership of the property and conclusive as to ownership of the property and a creditor, notwithstanding such finding, may still contest his right to such property, and a mandamus will not be granted to compel the officer to comply with the order of the justice. *State, ex rel. Snelling, v. Gillispie*, 9 Neb. 505 (4 N. W. 239).

405. (1882.) Where goods are levied upon under an attachment issued by a justice of the peace, and are claimed by another than the defendant in the attachment,

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and such claimant institutes proceedings for a trial of the right of the property, and judgment is rendered against him, he cannot afterwards maintain replevin against the officer. *Bray v. Saaman*, 13 Neb. 518 (14 N. W. 474).

406. (1902.) A stranger to an attachment suit, in whose possession the attached property is found, who gives a redelivery undertaking under section 930, code of civil procedure, cannot thereafter assert ownership and try the right of property under sections 945 and 996. *Allyn v. Cole*, 3 Unof. 235 (91 N. W. 505).

——— Review.

407. (1902.) The order, on a trial of right of property seized under attachment, under section 996 *et seq.* of the code of civil procedure, to be issued by a justice to the officer, directing restoration of the property, is not a judicial order, from which error will lie, but merely the means of apprising the officer of the result of inquisition. *McCormick Harvesting Machine Co. v. Scott*, 66 Neb. 481 (92 N. W. 599).

408. (1902.) Proceedings before a justice of the peace on trial of right of property, under sections 996, 997 and 998 of the code of civil procedure, are reviewable on error. *McCormick Harvesting Machine Co. v. Scott*, 66 Neb. 479 (92 N. W. 599).

409. (1902.) Upon a reversal in the district court of a judgment of a justice of the peace rendered in proceedings to try the right of property seized under attachment, the district court has jurisdiction to hear and determine the issues, but its jurisdiction to render judgment is limited, as that of a justice of the peace, to a judgment for costs, and a judgment for a release of the property from the levy, and a restoration thereof to the claimant, is unauthorized and void. *McCormick Harvesting Machine Co. v. Scott*, 66 Neb. 481 (92 N. W. 599).

IX. RETURN.

In general.

410. (1883.) After schedule, appraisement and return of the writ, it is error to permit an amendment of the return without any showing, and a cancellation of the return will be set aside. *Griffith v. Short*, 14 Neb. 259 (15 N. W. 335).

411. (1883.) Where the return on the writ of attachment shows a levy upon the property, the calling of appraisers, the appraisement of the property, etc., and states that the appraisement is returned herewith, but fails to describe the property levied upon, such description being fully stated in the appraisement, *held*, that after judgment the return is sufficiently certain. *Grebe v. Jones*, 15 Neb. 312 (18 N. W. 81).

412. (1887.) Where an officer holding an order of attachment receives other orders against the same property before serving the first one, he may make levy under all at the same time and make but one return therefor. *Connelly v. Edgerton*, 22 Neb. 82 (34 N. W. 76).

X. LIABILITY ON BOND OR UNDERTAKING.

Redelivery bond, see *ante*, §§ 220-228.

Nature of action.

Liability on delivery bond, see *ante*, §§ 220-226.

413. (1892.) An action upon an undertaking for an attachment is one arising upon contract, and may be maintained by attachment against the property of a nonresident. The fact that the damages are unliquidated does not change the character of the action. *Withers v. Brittain*, 35 Neb. 436 (53 N. W. 375).

Requisites and validity of bond.

414. (1889.) An undertaking in attachment signed by the sureties alone and not signed by the plaintiff in the action is not void. And where an attachment is wrongfully issued a suit can be maintained on such undertaking, without making the attachment plaintiff a party to the action. *Eckman v. Hammond*, 27 Neb. 611 (43 N. W. 397).

415. (1897.) An attachment bond is valid without the signature of the attaching plaintiff, and where he does not sign the bond he is not liable thereon to defendant in attachment. *Storz v. Finkelstein*, 50 Neb. 177 (69 N. W. 856).

Nature of liability of co-surety.

416. (1871.) A surety on one attachment bond incurs an obligation, several as respects a surety on another attachment bond, when the two are given respectively in several suits, against the same defendants, and the same property is taken upon the same writs. *McReady v. Roger*, 1 Neb. 124 (93 Am. Dec. 333).

Extent of liability.

417. (1871.) A surety on an attachment bond is liable for all damages which the defendant on the writ may sustain, up to

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the redelivery of the property to him, if the attachment is dissolved. *McReady v. Rogers*, 1 Neb. 124 (93 Am. Dec. 333).

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418. (1889.) Where service of summons is had upon an attachment defendant, and he appears to the action, he cannot maintain a suit upon the attachment undertaking upon the ground that the attachment was wrongfully issued, without having obtained a judgment of the court in which the attachment proceeding was pending discharging the attachment. *Eckman v. Hammond*, 27 Neb. 611 (43 N. W. 397).

Defenses.

419. (1893.) The fact that an officer permits judgment to be rendered against him for an alleged wrongful levy, without making a defense, although a circumstance which with others in an action on the indemnity bond given him by the attachment plaintiff, may show fraud, yet in order to do so it must appear that a defense was available. *Mihalovitch, Fletcher & Co., v. Barlass*, 36 Neb. 491 (54 N. W. 826).

420. (1901.) A suit having been brought for the malicious attachment of the plaintiff's property, did not consitute an election of remedies so as to preclude plaintiff from subsequently bringing action on the attachment bond. *Simons v. Fagan*, 62 Neb. 287 (87 N. W. 21).

Parties.

421. (1896.) Where the attachment undertaking was signed by the sureties alone and not by the attachment creditor, an action thereon cannot be maintained against the latter. *Storz v. Finklestein*, 48 Neb. 27 (66 N. W. 1020).

Set-off.

422. (1881.) In an action on an attachment undertaking, an unliquidated claim due from plaintiff may be set off. *Raymond Bros. v. Green & Co.*, 12 Neb. 215 (10 N. W. 709; 41 Am. St. Rep. 763).

423. (1881.) In an action upon an attachment undertaking, against a surety and principal, a demand due the principal from plaintiff, may be set off against him. *Raymond Bros. v. Green & Co.*, 12 Neb. 215 (41 Am. St. Rep. 763).

424. (1903.) Sureties on an attachment undertaking are properly allowed the benefit of legal offsets held by their principal, who was not a party to the action against plaintiff, the principal assenting to such defense and assisting in presenting it. *Waller v. Deranleau*, 4 Unof. 497 (94 N. W. 1038).

425. (1895.) In an action upon an attachment undertaking, a claim due the principal in such bond from the plaintiff is a proper subject of set-off. *Field v. Maxwell*, 44 Neb. 900 (62 N. W. 62).

Damages.

426. (1881.) In an action upon an undertaking for an attachment, the reasonable value of an attorney's services, who procured the dissolution of the attachment, is a proper item of damage. *Raymond Bros. v. Green & Co.*, 12 Neb. 215 (10 N. W. 709; 42 Am. Rep. 763).

427. (1897.) The obligation of a surety in an undertaking in attachment is to pay the obligees thereof the damages sustained by reason of the attachment, "if the order be wrongfully obtained." *Hopewell v. McGrew*, 50 Neb. 789 (70 N. W. 397).

Pleadings.

428. (1877.) It is not enough to state in the petition that the attachment was quashed, and the property released by proceedings in error. *Eaton v. Bartscherer*, 5 Neb. 469.

429. (1877.) In an action on an undertaking in attachment the petition should allege that the order of attachment was wrongfully sued out, or obtained. *Eaton v. Bartscherer*, 5 Neb. 469.

430. (1893.) If an attaching officer, by collusion and fraud, should permit a judgment to be wrongfully rendered against him, these facts may be pleaded to an action on an indemnity bond, together with a statement of the plaintiff in attachment that the property levied upon was that of the debtor in attachment. *Mihalovitch, Fletcher & Co. v. Barlass*, 36 Neb. 491 (54 N. W. 826).

431. (1897.) A petition disclosing that the action was brought by the assignee of a party, a stranger to those described in the attachment bond, and was one for damages which he claimed to have sustained by reason of the seizure under the writ of attachment of property of which he was in possession as such assignee, does not state a cause of action on the bond. *Hopewell v. McGrew*, 50 Neb. 789 (70 N. W. 397).

432. (1903.) Payment is a defense which must be alleged and proved in an action on an attachment undertaking. *Waller v. Deranleau*, 4 Unof. 497 (94 N. W. 1038).

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433. (1904.) In an action on a forthcoming bond given by the defendant in attachment in pursuance of section 206, code of civil procedure, it is necessary to allege and prove an order of the court in the attachment proceedings for the sale of the attached property. *Young v. Joseph Bros. & Davidson.* 5 Unof. 559 (99 N. W. 522).

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Evidence.

——— Burden of proof.

434. (1896.) In a suit on an attachment bond, where the answer denies each allegation of the petition, the burden is on plaintiff to show the execution of the bond and the wrongful issuance of the attachment, proof that the attachment was merely dissolved not being sufficient. *Storz v. Finklestein*, 48 Neb. 27 (66 N. W. 1020).

435. (1897.) In an action on an attachment bond, where the answer is a general denial of the averments of the petition, the burden is upon the plaintiff to show that the attachment was wrongfully issued; that is, that the averments in attachment affidavit as ground for the writ were untrue. *Storz v. Finklestein*, 50 Neb. 177 (69 N. W. 856).

436. (1899). In a suit on an attachment bond, where averments of the petition are put in issue by the answer, the burden is upon plaintiff to establish that the ground stated in the affidavit for attachment did not exist. *Jandt v. Deranleau*, 57 Neb. 497 (78 N. W. 22).

——— Admissibility.

Evidence admissible in trial of right of property, see *ante*, § 402.

437. (1881.) Where a third party claims attached property and the trial of right of property results in his favor, and plaintiff gives an undertaking to the officers as security for damages, such undertaking is admissible in evidence in an action against the signers for damages. *Noakes v. Switzer*, 12 Neb. 156 (10 N. W. 536).

438. (1899.) In an action on an attachment bond the defendants who undertake to make proof of facts justifying a resort to attachment should be permitted to introduce testimony relevant to that issue. *Jandt v. Deranleau*, 57 Neb. 497 (78 N. W. 22).

439. (1903.) An attachment undertaking in the body of which defendants' names appear as obligors although at the bottom appears the name of a banking company of which they were respectively president and cashier, with a penmark erasure through it and the appearance that "by" had originally been written before each of their names, and "Pres." after one and "cashier" after the other, is admissible in evidence in the first instance, leaving the parties to such explanation as they choose to offer. *Waller v. Deranleau*, 4 Unof. 497 (94 N. W. 1038).

440. (1903.) Where it is alleged and sufficiently appears that the plaintiff in the suit on the attachment undertaking, who is there named as "Lucien," is the real defendant and the one whose property was seized under the attachment, it is not sufficient ground for rejecting the evidence of the record in the attachment case that defendant is therein designated as "Lewis," the evidence in the present case showing that he is known as "Lucien," "Lewis," and "Lew." *Waller v. Deranleau*, 4 Unof. 497 (94 N. W. 1038).

Instructions.

441. (1897.) In an action on an attachment bond, where the answer is a general denial, an instruction which permits the jury to return a verdict for the plaintiff if they find that the attachment was merely dissolved, *held* erroneous. *Storz v. Finklestein*, 50 Neb. 177 (69 N. W. 856).

442. (1899.) Where, in an action on an attachment bond because of an alleged wrongful attachment, plaintiff had made no effort to prove the allegation, and the court had refused to admit proofs contradictory thereof by defendants, *held*, erroneous to submit that issue as one of fact, to the jury. *Jandt v. Deranleau*, 57 Neb. 497 (78 N. W. 22).

Directing verdict.

443. (1903.) The fact that plaintiff in a suit on an attachment undertaking did not in terms allege that the damages for which he sued were unpaid, where defendants answered denying the damages and the cause of action, and setting up offsets, and allege no payment, and where the evidence shows throughout that damages have always been denied and are unpaid, does not entitle the defendant to an instruction for a verdict or to a judgment upon the pleadings. *Waller v. Deranleau*, 4 Unof. 497 (94 N. W. 1038).

XI. WRONGFUL ATTACHMENT.

Nature and grounds of liability.

444. (1884.) Malice in an attachment may be inferred from want of probable cause, but this inference may be repelled by

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facts and circumstances. *Parmer v. Keith*, 16 Neb. 91 (20 N. W. 103).

445. (1884.) To maintain an action for malicious attachment there must be a want of probable cause, malice of the defendant, and injury to the plaintiff. *Parmer v. Keith*, 16 Neb. 91 (20 N. W. 103).

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446. (1896.) In the absence of malice, an action for the wrongful suing out of an attachment can be maintained alone on the attachment bond. To maintain an action independently of the statute, and not on the bond, malice in suing out the writ and want of probable cause must be averred and shown. *Storz v. Finklestein*, 48 Neb. 27 (66 N. W. 1020).

Persons liable.

——In general.

447. (1897.) Where a plaintiff in an attachment of goods belonging to a stranger, buys them at the sale, with knowledge of the true ownership, and converts them to his own use, such acts constitute a ratification. *Cole v. Edwards*, 52 Neb. 711 (72 N. W. 1045).

448. (1897.) The plaintiff in an attachment suit has control of the writ and may require the release of the levy. Therefore, where the goods of a stranger have been levied upon, and the plaintiff with knowledge of that fact refuses on demand to release them, such refusal constitutes a ratification of the wrongful levy. *Cole v. Edwards*, 52 Neb. 711 (72 N. W. 1045).

448*a*. (1907.) Where an action is brought without the authority or sanction of the party in whose name it is prosecuted, and an attachment is procured to be issued thereon, such attachment is wrongfully obtained within the meaning of section 200 of the code. *Bauer v. Mitchell*, 80 Neb. 187 (113 N. W. 986).

449. (1898.) If, in an attachment in which the goods of a stranger to the suit have been taken and sold under the writ, the plaintiff, with knowledge of the true ownership of said goods, receives the proceeds of the sale, it constitutes a ratification of the levy. *Omaha Nat. Bank v. Robinson*, 56 Neb. 590 (77 N. W. 73).

——Joint liability of plaintiff and officer.

450. (1884.) When in an action of trespass *de bonis asportatis* against a constable and one who was plaintiff in an attachment suit wherein the property of the plaintiff in the case at bar, who was a stranger to the attachment suit, was wrongfully seized and sold by the said constable as the property of the defendant in said attachment suit, the said constable and original plaintiff answer jointly admitting the taking but denying the ownership of the plaintiff at bar and alleging ownership in the defendant in the attachment suit, the said original plaintiff, co-defendant at bar, will be held to have adopted the taking by the constable and to be jointly liable with him. *Taylor v. Ryan*, 15 Neb. 573 (19 N. W. 475).

451. (1891.) Where the goods of B were wrongfully levied upon and sold on an execution and attachment against A, and the plaintiffs in those actions directed the levy and sale and indemnified the officer, they are jointly liable with him and his sureties for the wrong. *Walker v. Wonderlick*, 33 Neb. 504 (50 N. W. 445).

452. (1894.) Plaintiffs who indemnify and direct the sheriff in a wrongful levy upon, and sale of, the goods of one person under execution and attachment against another, are jointly liable with the officer and his sureties. *Wonderlick v. Walker*, 41 Neb. 806 (60 N. W. 103).

453. (1897.) Where an officer levies writs of attachment on the goods of a stranger, the plaintiffs in the attachment cases will be liable in trover, jointly with the officer, not only when they directed the wrongful levy, but also when they subsequently adopted or ratified his acts. *Cole v. Edwards*, 52 Neb. 711 (72 N. W. 1045).

454. (1901.) A sheriff who, as a condition precedent to the levy of a writ of attachment, demands and receives indemnity from the plaintiff in the suit, acts in so doing in virtue of, and not merely under color of, his office, and the sureties on his official bond are liable for damages resulting from his failure to preserve and properly account for and turn over the security thus obtained. *Comstock-Castle Stove Co. v. Caulfield*, 1 Unof. 542 (95 N. W. 783).

455. (1903.) The seizure of the goods of a third party by the sheriff under an order of attachment is tortious, and attaching creditors who join with the sheriff in resisting an action brought by such third party to recover the goods become trespassers *ab initio*, and jointly and severally liable for a money judgment rendered therein in favor of such third party. *First*

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Nat. Bank v. Avery Planter Co., 69 Neb. 329 (95 N. W. 622; 111 Am. St. Rep. 541).

——— Attorney.

456. (1882.) When an attorney, in an attachment suit, in addition to his ordinary duties in suing out the writ, specially advises and directs the illegal seizure of property, and assists in its conversion by being present at the sale, and bidding off portions of it for his client, his liability is equal to that of the officer by whom the seizure and sale were made. *Peckinbaugh v. Quillin*, 12 Neb. 586 (12 N. W. 104).

——— Justice of the peace, and county judge.

457. (1871.) A probate judge issuing an attachment and a sheriff executing it, are not liable for the taking and conversion of property thereon if they have acted in good faith. *Morgan v. Marsh*, 1 Neb. 361.

458. (1885.) Where an action by attachment is brought before a justice of the peace against a non-resident of the state, and his property attached and sold, the justice will be liable if the cause of action is not founded on contract, judgment, or decree. *Wright v. Rouse*, 18 Neb. 234 (25 N. W. 80).

459. (1897.) A justice of the peace who issues an order of attachment against a resident of the state, without an undertaking therefor first having been executed, is liable for nominal damages to the defendant in such attachment, although the latter suffer no actual injury therefrom. *Head v. Levy*, 52 Neb. 456 (72 N. W. 583).

——— Appraisers.

460. (1884.) Persons summoned by an attaching officer, to appraise the attached goods, cannot on making such appraisement, be held liable as trespassers at the suit of one claiming the attachment was wrongful. *Thrailkill v. Daily*, 16 Neb. 114 (19 N. W. 595).

Jurisdiction.

461. (1892.) An action for a wrongful suing out an attachment under which the property of the debtor was seized, is one for malicious prosecution, and a justice of the peace has no jurisdiction. *Rice v. Day*, 34 Neb. 100 (51 N. W. 464).

Defenses.

462. (1901.) 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*, 62 Neb. 287 (87 N. W. 21).

Damages.

463. (1892.) Where from the issue made by the pleadings, it is in effect admitted that an attachment was wrongfully sued out and levied on the debtor's stock of goods, although they were not removed from the store, such debtor, after the dissolution of the attachment, will be entitled to damages for injury to his business and credit, and a verdict for $350 upon the evidence in the record will not be set aside. *Meyer & Raapke v. Fagan*, 34 Neb. 184 (51 N. W. 753).

464. (1898.) For wrongful injury or destruction of one's financial credit he may recover whatever pecuniary damages he can prove, by competent testimony under proper pleadings, he has sustained thereby. *Kyd v. Cook*, 56 Neb. 71 (76 N. W. 524; 71 Am. St. Rep. 661).

465. (1898.) One's measure of damages for wrongful attachment of his property is, under proper pleadings, all the damages he has sustained thereby. Gains prevented are losses, and these are damages. *Kyd v. Cook*, 56 Neb. 71 (76 N. W. 524; 71 Am. St. Rep. 661).

466. (1898.) A loss of profits is a loss which may be reasonably, naturally, and ordinarily expected to follow from the closing up of a merchant's place of business and the seizure of his goods. *Kyd v. Cook*, 56 Neb. 71 (76 N. W. 524; 71 Am. St. Rep. 661).

467. (1898.) Where a sheriff wrongfully attached a merchant's goods and retained them three months, the merchant, in a suit for damages may prove sales and profits during corresponding months of the previous year as a basis to determine profits lost. *Kyd v. Cook*, 56 Neb. 71 (76 N. W. 524; 71 Am. St. Rep. 661).

468. (1899.) In an action for wrongful attachment of accounts, the face value of the accounts may or may not furnish a measure of damages. *Sloan v. Thomas Mfg. Co.*, 58 Neb. 713 (79 N. W. 728).

469. (1899.) Under sec. 214 of the code accounts may be subjected to the lien of an attachment and hence in an action for a wrongful seizure and retention of possession of property under a writ of attachment, inclusive of accounts, the plaintiff may re-

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cover damages for the wrongful acts in regard to the accounts. *Sloan v. Thomas Mfg. Co.*, 58 Neb. 713 (79 N. W. 728).

Pleading.

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Pleading in general, see *Pleading*.

470. (1889.) A petition alleging that the defendant caused an attachment wrongfully issued against the plaintiff's property, consisting of horses and drays, thereby causing great damage to the plaintiff by loss of business, and injury to the horses by reason of their being kept shut up for forty days, and causing the expenditure of attorney's fees, states a cause of action for malicious attachment. *Jones v. Fruin*, 26 Neb. 76 (42 N. W. 283).

471. (1898.) A petition in a suit for wrongful attachment *held* not demurrable for omitting to give names of persons who refused plaintiff credit because of the attachment. *Kyd v. Cook*, 56 Neb. 71 (76 N. W. 524; 71 Am. St. Rep. 661).

472. (1898.) A petition in an action for wrongful attachment sufficiently specific to permit plaintiff to introduce evidence of loss of credit sustained by him in consequence of the attachment. *Kyd v. Cook*, 56 Neb. 71 (76 N. W. 524; 71 Am. St. Rep. 661).

Evidence.

——— Sufficiency.

473. (1883.) In an action against a justice of the peace for wrongfully issuing an attachment, and where the bill of particulars on the attachment suit and the affidavit therein was read in evidence, an instruction that there was no evidence tending to show that defendant acted negligently, wrongfully or corruptly in issuing the attachment, is erroneous. *Rouss v. Wright*, 14 Neb. 457 (16 N. W. 765).

474. (1889.) To sustain an action for malicious attachment of property, it is necessary to prove want of probable cause, malice, and damage to the plaintiff from the issuing of the attachment. Want of probable cause being shown, the question whether the defendant was actuated by malice is still one of fact for the jury. *Jones v. Fruin*, 26 Neb. 76 (42 N. W. 283).

475. (1897.) Evidence in an action for wrongful attachment *held* to show that the damages assessed by the jury, including $500 for loss of reputation and humiliation, are excessive. *Jensen v. Hallam*, 51 Neb. 492 (70 N. W. 1121).

——— Admissibility.

476. (1884.) On the case set out at length in the opinion, *held*, that the chattel mortgage and note therein referred to were properly admitted, and the instruction therein referred to properly refused. *Taylor v. Ryan*, 15 Neb. 573 (19 N. W. 475).

477. (1887.) In an action against a sheriff for conversion of certain millinery goods claimed to belong to the wife of the attachment debtor, it having been proved that both of them had, up to a certain poin of time, under some authority and in som capacity, exercised control over the said stock of goods and the store in which the same was kept, it is competent on the part of the defendant to prove any fact connected with the business which from its nature must have been known to the wife inconsistent with her claim of ownership. *Oberfelder v. Kavanaugh*, 21 Neb. 483 (32 N. W. 295).

478. (1895.) In an action against an officer for damages for wrongfully selling exempt property, the execution debtor's inventory and affidavit for exemption may be admitted in evidence. *Smith v. Johnson*, 43 Neb. 754 (62 N. W. 217).

479. (1898.) In an action against a sheriff or coroner for conversion of property seized by him under a writ of attachment, the inventory and appraisement made and assigned by such officer in the attachment proceedings are admissible in evidence against him on the question of the value of the property. *Maul v. Drexel*, 55 Neb. 446 (76 N. W. 163).

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ATTORNEY AND CLIENT.

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I. THE OFFICE OF ATTORNEY.

A. Admission to Practice.

Jurisdiction to admit.

1. (1900.) Since the passage of the act of 1895 (ch. 6) the power to license to practice in the courts of Nebraska has been taken from the district courts and lodged exclusively in the supreme court. *In re Admission to the Bar*, 61 Neb. 58 (84 N. W. 611).

2. (1906.) Section 9, chapter 3, Revised Statutes, 1866, was not repealed as a whole by chapter 6, laws 1895, but the power of the district court to admit attorneys of other states to practice in this state was taken away by that act. *In re Burton*, 76 Neb. 752 (107 N. W. 1015).

Capacity and qualifications.

3. (1900.) No one but a citizen of the United States and a resident of the state of Nebraska can be admitted to practice generally in the courts of said state. *In re Admission to the Bar*, 61 Neb. 58 (84 N. W. 611).

4. (1900.) To entitle a person to apply for admission to the bar of the supreme

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court under the provisions of section 2, chapter 7, of the Compiled Statutes, he must, at the time of making his application, have attained to the age of twenty-one years. *In re Admission to the Bar*, 61 Neb. 58 (84 N. W. 611).

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5. (1900.) Attentive study of the law in the office of a practicing attorney for the full period of two years, or regular graduation from the College of Law of the University of Nebraska, is absolutely required; and study in any other law school, or otherwise than in such office, will not be considered. *In re Admission to the Bar*, 61 Neb. 58 (84 N. W. 611).

6. (1900.) The "practicing attorney," in whose office the statute requires the studies of the applicant to be duly pursued, is one who resides and practices in this state. *In re Admission to the Bar*, 61 Neb. 58 (84 N. W. 611).

Right of attorney of another state to appear in case.

7. (1900.) A practicing attorney, in good standing in the courts of record of a sister state, a territory or a foreign country, having an interest in a cause pending in any of the courts of this state, may, in the discretion of such courts, and as a matter of courtesy, be permitted to appear in said court for some of the purposes of such cause. *In re Admission to the Bar*, 61 Neb. 58 (84 N. W. 611).

B. Privileges, Disabilities and Liabilities.

Competency of attorney as juror, see *Jury*, § 201.

Competency of attorney to testify in action against client, see *Witnesses*, §§ 126-142.

Acting for adverse parties.

8. (1889.) Where an attorney was employed to defend a prosecution in bastardy and in violation of his retainer sought to appear for the plaintiff in the action, and was perpetually enjoined from so doing, such retainer and injunction will not prevent him from accepting a retainer and appearing for the plaintiff in a suit for damages resulting from a breach of contract for marriage, the plaintiff and defendant being the same as in the prosecution for bastardy. *Musselman v. Barker*, 26 Neb. 737 (42 N. W. 759).

9. (1895.) An attorney is bound to the most scrupulous good faith, when acting for his client. He must be loyal to the interests intrusted to his care. The members of a firm of attorneys cannot represent opposite sides of the same cause without the knowledge and consent of the clients. *Cox v. Barnes*, 45 Neb. 172 (63 N. W. 394).

10. (1899.) The fact that after an agreement for an amicable suit, the attorney for defendant, as an accommodation to the non-resident attorneys for plaintiff, signed their name to the petition dictated by them, and filed it, does not show that he was attorney for both parties so as to constitute ground for enjoining enforcement of the judgment. *City of Broken Bow v. Broken Bow Water-Works Co.*, 57 Neb. 548 (77 N. W. 1078).

Professional conduct in general.

11. (1885.) An attorney should never allow himself to be placed in the attitude of encouraging litigation; nor should he allow himself to become personally interested in the cause of his client by assuming any personal liability. *Tessier v. Crowley*, 17 Neb. 207 (22 N. W. 422).

12. (1886.) In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts. *State, ex rel. Attorney General, v. Burr*, 19 Neb. 593 (28 N. W. 261).

13. (1891.) The court will not permit one of its officers to resort to questionable means in the prosecution of a case in order to obtain fees not allowed by the laws of the state. *In re Breckenridge*, 31 Neb. 489 (48 N. W. 142).

C. Suspension and Disbarment.

Jurisdiction of courts.

14. (1886.) The supreme court, having power by express statute to grant a license to practice law, has an inherent right to see that the license is not abused or perverted to a use not contemplated in the grant. *State, ex rel. Attorney General, v. Burr*, 19 Neb. 593 (28 N. W. 261).

15. (1906.) The supreme court alone can pass upon the qualifications of applicants for admission to the bar, and has sole power to annul such admission. *In re Disbarment Proceedings of Newby*, 76 Neb. 482 (107 N. W. 850).

16. (1906.) Charges of criminal or immoral conduct calling for disbarment should

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be addressed to the supreme court. *In re Disbarment Proceedings of Newby*, 76 Neb. 482 (107 N. W. 850).

Grounds.

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17. (1886.) If a deceit is practiced by an attorney in his character as such, although not in a suit pending in the court, he may be removed from his office as attorney. The effect of such removal is to deprive the attorney of the right to practice as such in all courts of record of the state. *State, ex rel. Attorney General, v. Burr*, 19 Neb. 593 (28 N. W. 261).

18. (1886.) Where an attorney who has defended a prosecution for murder through the district and supreme courts and his client is found guilty and sentenced to be hanged, and pending appeal to the federal court, such attorney induces a United States commissioner to wrongfully release such convict in a void writ of habeas corpus such conduct is a violation of the official duty of an attorney, and he should be removed from such office. *State, ex rel. Attorney General, v. Burr*, 19 Neb. 593 (28 N. W. 261).

19. (1886.) Where an information, filed against an attorney in disbarment proceedings, alleges that a person was convicted of the crime of murder in the first degree and sentenced to be hanged, which sentence was affirmed by the supreme court, and sending an appeal to the supreme court, the convict was confined in the jail of another county, and the answer of the respondent admits the allegations, it is sufficient to show that the imprisonment was legal, and a release of the person convicted would be unlawful. *State, ex rel. Attorney General, v. Burr*, 19 Neb. 593 (28 N. W. 261).

20. (1886.) Section 5 of chapter 7, Compiled Statutes of 1885, does not control the action of an attorney in conducting "the defense of a person charged with a public offense," but this is limited to such defense in a court upon the trial of the case on its merits, or in a collateral or interlocutory proceeding. It does not permit the use of illegal or fraudulent means to secure the release or escape of a person convicted of crime. *State, ex rel. Attorney General, v. Burr*, 19 Neb. 593 (28 N. W. 261).

21. (1886.) An attorney who has wrongfully induced a United States commissioner to wrongfully issue a writ of *habeas corpus*, thus obtaining the release of one convicted of murder, cannot be heard to say that he was acting in good faith, and that he believed he was proceeding in accordance with law. *State, ex rel. Attorney General, v. Burr*, 19 Neb. 593 (28 N. W. 261).

22. (1886.) Evidence that shows an attorney, by fraud and misrepresentation, induced a United States commissioner into believing that he had power to release a person, convicted and imprisoned for murder, by *habeas corpus*, and procured such writ and the release of such convicted person, is sufficient to find such attorney guilty of such misconduct as will warrant his disbarment. *State, ex rel. Attorney General, v. Burr*, 19 Neb. 593 (28 N. W. 261).

23. (1906.) If the charge upon which disbarment proceedings are based involves professional misconduct in the relations of an attorney at law with the court in which he practices, that court may, upon satisfactory proof, disbar the attorney from practicing before it. *In re Disbarment Proceedings of Newby*, 76 Neb. 482 (107 N. W. 850).

Proceedings.

——— Postponement pending indictment.

24. (1900.) Where disbarment proceedings are founded, in part, upon facts made the basis of a prior pending indictment or information against the same attorney, the court may, where no abuse of discretion is shown, postpone the consideration of the specification in the proceeding to disbar involved in the criminal case until the latter is terminated. *Morton v. Watson*, 60 Neb. 672 (84 N. W. 91).

25. (1906.) If proceedings for disbarment are begun against an attorney at law based solely upon a charge of crime against the laws of this state, which is not admitted by the accuser, the supreme court will not, ordinarily, investigate the facts constituting the alleged crime while the matter is pending upon indictment in the district court. *In re Disbarment Proceedings of Newby*, 76 Neb. 482 (107 N. W. 850).

——— Joinder with contempt proceedings.

26. (1897.) A charge of malpractice against an attorney and counselor at law may be joined with a prosecution for a contempt of court where both charges involve a single transaction. *Blodgett v. State*, 50 Neb. 121 (69 N. W. 751).

——— Sufficiency of evidence.

27. (1900.) Where, in a disbarment proceeding instituted against an attorney, the evidence is fairly conflicting, a finding

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based thereon will not be disturbed on review. *Morton v. Watson*, 60 Neb. 672 (84 N. W. 91).

——— Costs.

28. (1900.) In disbarment proceedings costs cannot be taxed against the informer where he acted in good faith. *Morton v. Watson*, 60 Neb. 672 (84 N. W. 91).

29. (1900.) A person who files a complaint in a disbarment proceeding is in no sense a party to an action, but a friend of the court. *Morton v. Watson*, 60 Neb. 672 (84 N. W. 91).

II. RETAINER AND AUTHORITY.

Attorney as surety on attachment bond, see *Attachment*, § 143.

Authority of attorney to enter appearance, see *Appearance*, §§ 8-16.

Authority of attorney to take acknowledgment of client, see *Acknowledgment*, § 18.

Authority of attorney to take affidavit in case, see *Affidavit*, §§ 8-10.

Authority of attorney to waive summons in error, see *Appeal and Error*, §§ 635-638.

Power of attorney to take affidavit in attachment, see *Attachment*, §§ 86-88.

Validity of affidavit in attachment made by attorney, see *Attachment*, § 95.

Proof of authority.

30. (1889.) Where question of the authority of an attorney to appear in a case was submitted to the trial jury specially, and they found that the appearance of counsel in proceedings, upon which plaintiff's rights were based, was without authority, the finding of the jury was conclusive. *Vorce v. Page*, 28 Neb. 294 (44 N. W. 452).

——— Presumptions and burden of proof.

31. (1883.) Although an authority will be presumed when an attorney appears for a defendant not served with process, yet, if the defendant prove that he had no authority, his rights cannot be affected by the attorney's acts. *Kepley v. Irwin*, 14 Neb. 300 (15 N. W. 719).

32. (1884.) Where an attorney appears for a party and procures a correction of the record, it is presumed that he had authority to do so. *White v. Merriam*, 16 Neb. 98 (19 N. W. 703).

33. (1889.) Where an attorney appears in a cause, the presumption is that he has authority and that presumption continues until the want of such authority is established by proof. *Vorce v. Page*, 28 Neb. 294 (44 N. W. 452).

34. (1892.) Where an attorney waives process and appears for a defendant, his authority to do so will be presumed; but the defendant may deny and disprove such authority, in which case he will not be bound by the attorney's appearance. *Kirschbaum v. Scott*, 35 Neb. 199 (52 N. W. 1112).

35. (1893.) Where action is prosecuted for several co-plaintiffs, under direct employment by only one plaintiff, it will be presumed the latter had authority from his co-plaintiffs to employ counsel for them. *Sprague v. Fuller*, 36 Neb. 220 (54 N. W. 423).

36. (1893.) Where want of authority to appear for a defendant against whom judgment has been rendered is alleged to invalidate such judgment, the burden of proof of such want of authority is upon the party asserting the same. *Connell v. Galligher*, 36 Neb. 749 (55 N. W. 229).

37. (1898.) The authority of an attorney who actually enters an appearance will be presumed to justify him in so doing. *Missouri P. R. Co. v. Fox*, 56 Neb. 746 (77 N. W. 130).

38. (1905.) Where an attorney appears in an action for a defendant, the presumption is that he was authorized to appear. Evidence examined, and *held* not to overcome this presumption. *Ebel v. Stringer*, 73 Neb. 249 (102 N. W. 466).

Termination of relation.

39. (1902.) In the absence of stipulations evidencing a different intent, an employment of an attorney to prosecute a claim to a recovery, terminates with the rendition of a judgment thereon and the exhaustion of the usual legal process upon the judgment. It does not include the prosecution of subsequent actions and proceedings to reach the property of the judgment debtor, or to enforce liability against his sureties upon supersedeas. *Lamb v. Wilson*, 3 Unof. 505 (97 N. W. 325).

40. (1906.) Death or disability, which renders the performance of a contract of attorney and client impossible, annuls the contract. *Corson v. Lewis*, 77 Neb. 446 (109 N. W. 735).

Scope of authority in general.

41. (1881.) An attorney as such, has no authority to give notice to an agent of the

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client, of the termination of the agency. *Tingley v. Parshall*, 11 Neb. 443 (9 N. W. 571).

42. (1901.) A party to a suit is not bound by any step taken by his attorney, in the latter's behalf, in another action. *Hamilton-Brown Shoe Co. v. Milliken*, 62 Neb. 116 (86 N. W. 913).

43. (1902.) Ordinarily, an attorney has no implied authority to bind his principal by the indorsement of negotiable paper. *National Fire Ins. Co. v. Eastern Building & Loan Ass'n*, 63 Neb. 698 (88 N. W. 863).

Delegation of authority.

44. (1886.) An appearance by an attorney by authority of another attorney but which authority is denied by the party, there being no proof of knowledge of the pendency of the proceedings on the part of said party, was unauthorized. *Hurste v. Hotaling*, 20 Neb. 178 (29 N. W. 299).

45. (1890.) A contract for professional services—as that of an attorney—is personal and confidential and cannot be assigned to another without the assent of the client and in case of such assignment without assent, the client may declare the contract at an end and recover certain lands conveyed as a conditional fee, for the prosecution of the action—money expended in the prosecution of the action, however, to be refunded. *Hilton v. Crooker*, 30 Neb. 707 (47 N. W. 3).

Execution of indemnity bond.

46. (1894.) An attorney at law, by virtue merely of his employment as such to prosecute an action, has no authority to execute on behalf of his client a bond to indemnify the sheriff from the consequences of levying upon property claimed by a stranger, the client residing and being at the place where the events took place and there being full opportunity for prompt communication between client and attorney. *Luce v. Foster*, 42 Neb. 818 (60 N. W. 1027).

Confession of judgment.

47. (1887.) Under section 1001, civil code, an attorney may confess judgment for costs. *Stanton & Co. v. Spence*, 22 Neb. 191 (34 N. W. 359).

Commencement and conduct of litigation.

48. (1899.) The authority of counsel to file a pleading for one of the parties to an action cannot be first questioned in the supreme court. *German Nat. Bank of Hastings v. First Nat. Bank of Hastings*, 59 Neb. 7 (80 N. W. 48).

——— Entry of appearance.

Presumption of authority, see *ante*, §§ 31-38.

49. (1871.) An attorney of record in a cause in the district court may, when the cause is removed into the supreme court, enter therein the voluntary appearance of his clients, without the issue of service of summons in error. *McDonald v. Pennistón*, 1 Neb. 324.

50. (1883.) The right of an attorney to enter an appearance for a party in an action can be called in question only by the party himself. *Baldwin v. Foss*, 14 Neb. 455 (16 N. W. 480); (1884) *White v. Merriam*, 16 Neb. 98 (19 N. W. 703).

51. (1888.) Where the sole authority of a court to proceed in an action and render judgment is the general appearance of an attorney for the defendant, such right to appear may be denied, and the judgment vacated; but where service is made upon some of the members of a firm, and an attorney appears for all, the proof should be clear that he was not warranted in appearing for all. *Winters v. Means*, 25 Neb. 241 (41 N. W. 157; 13 Am. St. Rep. 489).

52. (1895.) Whether a warrant of attorney is sufficient under the laws of another state to authorize the appearance entered thereunder, is a question to be determined from the evidence as to the laws of that state. *Snyder v. Critchfield*, 44 Neb. 66 (62 N. W. 306).

53. (1900.) An attorney of a municipal corporation, without authority therefor, cannot waive the issuance and service of summons and enter the voluntary appearance of the defendant in an action. *Chicago, B. & Q. R. Co. v. County of Hitchcock*, 60 Neb. 722 (84 N. W. 97).

——— Dismissal of action.

54. (1901.) An attorney at law employed to bring and prosecute an action has no authority to dismiss such action contrary to the desire and over the objection of his client. *Steinkamp v. Gaebel*, 1 Unof. 480 (95 N. W. 684).

55. (1901.) After his employment had been terminated, an attorney who had been employed to bring an action dismissed it contrary to his client's desire. The statutory period of limitation for actions of that nature had elapsed pending suit. *Held*, That a motion, made at the same term, to set aside the order of dismissal and rein-

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state the case should have been sustained. *Steinkamp v. Gaebel*, 1 Unof. 480 (95 N. W. 684).

——— Conduct of trial.

56. (1873.) Agreements relating to the conduct of a suit, and its proceedings during trial, made by the attorneys in the case in open court and entered upon the record, are binding upon the parties. *McCann v. McLennan*, 3 Neb. 25.

57. (1875.) The attorey has a right to agree to submit the case without argument. *Palmer v. People*, 4 Neb. 68.

58. (1879.) An attorney has general authority from his client in all matters which may reasonably be expected to arise during the progress of a case. He may make agreements as to continuances, evidence, and the conduct of the trial; and if in such matters he enters into any agreement within the scope of his authority his client is bound thereby even though contrary to his interest. *State Bank of Nebraska v. Green*, 8 Neb. 297.

——— Assignment of judgment.

59. (1899.) An attorney cannot, without actual authority from his client, sell and assign his client's judgment. *Henry & Coatsworth Co. v. Halter*, 58 Neb. 685 (79 N. W. 616).

——— Control of execution.

60. (1879.) An attorney under his general authority cannot authorize the clerk to issue execution on a judgment while a supersedeas bond for an appeal was on file in the clerk's office. *State Bank v. Green*, 8 Neb. 297.

61. (1894.) An attorney who has signed an indemnity bond to a sheriff or an execution has no authority to bind his client by an agreement that the proceeds of execution shall be by the sheriff paid to the surety on the indemnity bond, to be held as security against liability thereon. *Luce v. Foster*, 42 Neb. 818 (60 N. W. 1027).

62. (1899.) An attorney, by virtue of his employment to prosecute a case, has no authority to bind his client by an agreement that the purchaser at the judicial sale shall pay the amount of his bid to a third person instead of to the officer making the sale. *Fire Ass'n of Philadelphia v. Ruby*, 58 Neb. 730 (79 N. W. 723).

Receiving payment.

63. (1897.) A debtor dealing with an attorney who holds for collection a claim against him is bound to take notice of the attorney's authority. *Cram v. Sickel*, 51 Neb. 828 (71 N. W. 724; 66 Am. St. Rep. 478).

64. (1897.) Unless specially authorized by his client, an attorney employed to collect a debt has no authority to accept in payment therefor anything but money, nor to release one of two joint debtors in consideration of the other giving security for the debt. *Cram v. Sickel*, 51 Neb. 828 (71 N. W. 724; 66 Am. St. Rep. 478).

65. (1901.) An attorney may have authority to collect a note and mortgage for his principal without having the same in his possession. *Orient Ins. Co. v. Hayes*, 61 Neb. 173 (85 N. W. 57).

66. (1902.) An attorney who has authority to collect a claim from a corporation, and who, in the adjustment thereof, receives a draft from the adjusting agent of such corporation, drawn on the paying agent thereof, for the amount of such claim, has implied authority to bind his principal by an indorsement of such draft, made to enable him to receive the amunt due thereon. *National Fire Ins. Co. v. Eastern Building & Loan Ass'n*, 63 Neb. 698 (88 N. W. 863).

67. (1906.) An attorney may, by virtue of his retainer, receive and receipt for money due his client in a case in which he is employed, and the act will bind his client, unless the party paying it had notice of a revocation of the attorney's authority to act in the case. *Gordon v. City of Omaha*, 77 Neb. 556 (110 N. W. 313).

Settlements, compromises and releases.

68. (1882.) An attorney at law, by virtue of his employment to make collections, has no authority to release a surety on a promissory note without payment; such authority must be proved. *Stoll v. Sheldon*, 13 Neb. 207 (13 N. W. 201).

69. (1883.) The ordinary powers of an attorney do not authorize him to enter into an agreement to take about one-third of the face value of a valid judgment in favor of his client, and accept payment of the same in a debt owing by such attorney. *Hamrick v Combs*, 14 Sep. 381 (15 N. W. 731).

70. (1896.) An attorney employed to collect a debt has not by virtue of his general employment authority to release a debtor except upon payment of the full amount of the debt in money. *Smith v.*

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Jones, 47 Neb. 108 (66 N. W. 19; 53 Am. St. Rep. 519).

71. (1906.) Evidence showing plaintiff left an account for work and labor, with other evidence of authority sustains a finding of authority of such attorney to settle the claims. *Flora v. Chapman*, 77 Neb. 741 (110 N. W. 664).

72. (1907.) A person claiming title derived under a decree of court will not be heard to dispute the authority of the attorney to enter into the stipulation upon which the decree was based. *Peterson v. Ramsey*, 78 Neb. 235 (110 N. W. 728).

73. (1907.) A landlord is estopped to deny the authority of his attorney to compromise and settle a claim for rent, where he accepts and retains the amount received in settlement. *Fenimore v. White*, 78 Neb. 520 (111 N. W. 204).

III. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT.

Advice to client.

74. (1898.) The expression of an opinion as to the probabilities of realizing a certain sum upon the sale of real property is not such an expression of opinion as renders liable an attorney because of a mistake in his estimate. *Reumping v. Wharton*, 56 Neb. 536 (76 N. W. 1076).

Acquiring property adversely to interests of client.

75. (1894.) Land purchased by the attorney of the judgment debtor in his wife's name at the execution sale, is not held in trust for the latter, where he has instructed the attorney not to purchase the land for him. *Washburn v. Osgood*, 38 Neb. 804 (57 N. W. 529).

75a. (1889.) An attorney selling real estate for his client, and representing the title to be good, which representation is relied on, cannot thereafter assert title in himself to any of the real estate so sold. *Little v. Giles*, 25 Neb. 313 (41 N. W. 186).

76. (1898.) An attorney who purchases a judgment against his client can recover thereon only the amount paid. *Olson v. Lamb*, 56 Neb. 104 (76 N. W. 433; 71 Am. St. Rep. 670).

77. (1893.) An attorney may not purchase at judicial sale property in which his client is interested. If he do so the client at his election may treat him as a trustee. But the client by afterwards dealing with the attorney as the owner, may ratify the purchase or estop himself from claiming the benefit thereof. *Olson v. Lamb*, 56 Neb. 104 (76 N. W. 433; 71 Am. St. Rep. 670).

78. (1898.) If the attorney conceal from the client material facts which might affect the client's election, dealings with the attorney on the basis of the latter's ownership, but in ignorance of such facts, will not prevent the client, on learning the facts, from then enforcing the trust. *Olson v. Lamb*, 56 Neb. 104 (76 N. W. 433; 71 Am. St. Rep. 670).

79. (1898.) Where it was shown that an attorney owned one of several liens upon property under foreclosure; that a sale was made and to procure a re-sale he offered to bid a certain sum; that on re-sale he brought for $1,000 less than his offer; that to procure confirmation he remitted $1,000 from his lien; that one of his clients owned a lien of equal priority, and the bid actually made was insufficient to pay this class,—*held* that on accounting the client was entitled to such share of the $1,000 as he would have realized if the bid had been that much higher and no remittitur entered. *Olson v. Lamb*, 56 Neb. 104 (76 N. W. 433; 71 Am. St. Rep. 670).

80. (1905.) Where an attorney at law has bought one-half interest in lands sold by his client, and such sale is set aside on account of the attorneys connected therewith, the vendor may set off the rents and profits which the vendees have collected against the purchase price he is required to return. *Levara v. McNeny*, 73 Neb. 414 (102 N. W. 1042).

81. (1905.) Where the attorney purchases the subject of the suit the client may set aside the purchase at will, unless the attorney shows by clear and conclusive proof that no advantage was taken; that everything was explained to the client, and that the price was fair and reasonable. *Levara v. McNeny*, 73 Neb. 414 (102 N. W. 1042).

82. (1905.) Where an attorney, by statements and representations made to his clients as to the condition and value of their land, the subject of the litigation, procures the sale thereof to be made to a third party for whom he is at the same time acting in that capacity, for an inadequate price, and immediately takes a half interest therein for himself, paying one-half of the consideration, a court of equity will set aside the transaction and the con-

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veyances, and restore the estate to the vendors on the repayment of the purchase price, with interest at seven per cent. per annum. *Levara v. McNeny*, 73 Neb. 414 (102 N. W. 1042).

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Summary remedies of client.

83. (1884.) The jurisdiction of the district court to compel an attorney to pay money into court, which has been collected by the attorney for the client, cannot be questioned; but when the client has received all the money to which he is entitled, the power of the district court ceases, and it cannot in a summary way compel the attorney to pay money into court for other parties claiming a share in the fees retained by the attorney. That question must be settled by an action between themselves. *Baldwin v. Foss*, 16 Neb. 80 (19 N. W. 496).

Action for money collected.

84. (1892.) A petition that alleges defendant has collected a certain sum of money as plaintiff's attorney, and that defendant is entitled to retain a certain sum as fees, the balance being due to plaintiff, states a cause of action. *Fletcher v. Cummings*, 33 Neb. 793 (51 N. W. 144).

85. (1895.) Under an allegation that an attorney received for the use of plaintiff, but not pursuant to a contract between them, money paid by a judgment debtor, which defendant wrongfully detained, it is error to instruct the jury that a reasonable sum may be allowed for professional services, where defendant answers that he retained only the sum due him under a contract with plaintiff. *Wigton v. Smith*, 46 Neb. 461 (64 N. W. 1080).

86. (1896.) In an action solely for money alleged to have been collected by the defendants to whom, as attorneys at law, the collection of the same had been intrusted, a recovery for damages resulting from an unauthorized appearance by defendants as attorneys at law in an action entirely independent of the aforesaid collection cannot be sustained. *Scott v. Kirschbaum*, 47 Neb. 331 (66 N. W. 443).

Actions for negligence.

87. (1898.) In an action against attorneys at law for damages because of their alleged failure to obtain, upon appeal, the modification of a decree in like manner with others of the parties who did appeal, a failure of the evidence to show like conditions *held* to justify the supreme court's refusal to disapprove of an instruction of the district court to find for the defendants in such action for damages. *Reumping v. Wharton*, 56 Neb. 536 (76 N. W. 1076).

IV. COMPENSATION AND LIEN OF ATTORNEY.

A. Fees and Other Remuneration.

Attorneys' fees as damages in attachment, see *Attachment*, § 426.

Provisions for attorneys' fees as affecting negotiability of note, see *Bills and Notes*, §§ 129-131.

Attorneys' fees as costs, see *Costs*, §§ 66-94.

Compensation of county attorney, see *County Attorneys*, §§ 15, 16.

Recovery of attorneys' fees as costs in action on covenant, see *Covenant*, §§ 79, 80.

Allowance in divorce case, see *Divorce*, §§ 144-151.

Validity of conveyance to, in payment of future services, see *Fraudulent Conveyances*, § 67.

Fees paid to attorney in procuring dissolution of injunction as element of damages in action on bond, see *Injunction*, §§ 180, 182, 184, 186-190, 192-194, 196.

Fees on foreclosure of mortgage, see *Mortgages*, §§ 940-946.

Allowance of fee in partition, see *Partition*, §§ 44-47.

Allowance in action to quiet title, see *Quieting Title*, § 122.

Adding attorney's fee as usury, see *Usury*, § 70.

Services under assignment by court.

88. (1888.) The certificate of the judge of the district court, that a claim for compensation to counsel appointed by such court to conduct the defense of a person charged with felony, has "been examined and allowed by the court," is not conclusive upon the county commissioners as to the amount which should be allowed for such services. It is *prima facie* evidence that the amount allowed by the district court is correct, but the county board has the right to re-examine the account and allow so much as they may think just. *Boone County v. Armstrong*, 23 Neb. 764 (37 N. W. 626).

89. (1895.) The claim for attorney's fees for defending an indigent prisoner in the district court and for services in the supreme court upon review must be presented and allowed in the lower court. The

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supreme court has no authority to allow such claims. *Edmonds v. State*, 43 Neb. 742 (62 N. W. 199).

Premature termination of relationship.

90. (1903.) Attorneys who have undertaken to establish, for a contingent fee, a client's right to a fund in court, and who, after rendering valuable services, have been defeated in the district court, and who have furnished a supersedeas bond to retain the fund, and are taking steps to have the decision against their client reviewed on error, are entitled, when their client under these circumstances refuses to pay them and instructs them to proceed no further on her behalf, to prosecute error proceedings in her name, on their own behalf, in order to collect their contingent fee out of the fund still in court, if they can establish their client's right to it. *Counsman v. Modern Woodmen of America*, 69 Neb. 713 (98 N. W. 414).

91. (1906.) If a disability occurs after a special contract for services has been partly performed, this does not prevent the disabled party, if the breach of the contract was made through no fault of his own, but by the act of God or unavoidable casualty, from receiving upon a *quantum meruit* for the reasonable value of the services rendered prior to the disability. *Corson v. Lewis*, 77 Neb. 449 (114 N. W. 281).

Services for which fees may be charged.

92. (1891.) Courts will not aid any attorney to recover for services rendered for the sole object and purpose of obstructing and delaying courts in the administration of justice. Nor is it the legitimate business of an attorney to knowingly aid a litigant in that way, by delaying the trial of an action in which there is no defense. *Van Etten v. Butt*, 32 Neb. 285 (49 N. W. 365).

93. (1895.) Attorneys' fees are not ordinarily recoverable for services rendered in an attempt to dissolve a temporary restraining order pending the hearing of a motion to allow a temporary injunction. *Carnes v. Heimrod*, 45 Neb. 364 (63 N. W. 809).

94. (1898.) Advising with the sheriff as to the proper levying of a writ of attachment is a proper service to a client for which an attorney is entitled to compensation. *People's Nat. Bank v. Geisthardt*, 55 Neb. 232 (75 N. W. 582).

95. (1898.) An attorney who purchases for his own benefit at judicial sale property in which his client is interested will not, in a suit to declare a trust, be allowed compensation for professional services in procuring the sale to be confirmed. *Olson v. Lamb*, 56 Neb. 104 (76 N. W. 433; 71 Am. St. Rep. 670).

96. (1906.) It is not necessary that a claim, the basis of a suit, be reduced to judgment to enable an attorney to recover on *quantum meruit*. *Corson v. Lewis*, 77 Neb. 449 (114 N. W. 281).

97. (1907.) An attorney employed as attorney for an administrator in the administration of the estate, cannot consistently act also as attorney for the adminisrator personally to assist the latter as heir in getting as much out of the estate as possible, and hence is not entitled to compensation for the latter services. *Marshall v. Piggott*, 78 Neb. 722 (111 N. W. 532).

Persons liable.

98. (1891.) The attorney for the plaintiff in a suit for divorce cannot maintain an action for attorney's fees against the husband, in addition to those allowed by the court and paid. *Burnham v. Tizard*, 31 Neb. 781 (48 N. W. 823).

99. (1906.) The estate of a decedent is not ordinarily liable to an attorney for services rendered by him for and at the request of a legatee under decedent's will, in a contest thereof. *St. James Orphan Asylum v. McDonald*, 76 Neb. 630 (110 N. W. 626).

100. (1906.) A decedent's estate is properly chargeable with fees paid to counsel for services rendered in successfully defending the will against attack, and this rule ordinarily should not be departed from in a case where the contest is instituted by the person named in the will as executor, and the defense is conducted by counsel employed on behalf of a legatee. *St. James Orphan Asylum v. McDonald*, 76 Neb. 625 (107 N. W. 979). [Overruled. 76 Neb. 630.]

Value of services.

101. (1891.) The preponderance of the testimony in the case establishes that the defendant employed the plaintiff, a practicing attorney, to prosecute a certain action in the district court of Buffalo county, and that the attorney rendered the services as agreed. There was no agreement as to the amount of fees. *Held*, That the defendant was liable for the reasonable value of the

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services. *Cowles v. Thompson*, 31 Neb. 479 (48 N. W. 145).

Contracts for compensation.

102. (1871.) There is no relation or agency between a party forwarding a written request to counsel for his opinion, and another party by whom the writing is transmitted. *Jamesson v. Butler*, 1 Neb. 115.

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103. (1871.) A written request to counsel for his deliberate legal opinion, justifies him in preparing and forwarding such opinion in writing. *Jameson v. Butler*, 1 Neb. 115.

104. (1905.) A contract between an attorney and client for services to be rendered by the former is not necessarily invalid because a part of the services to be rendered is the procurement of legislative action, nor because such contract provides for a contingent fee and will be enforced unless it appears that it contemplates the use of unlawful or improper means, or that such means were employed in pursuance thereof to attain the object for which the contract was made. *Richardson v. Scott's Bluff County*, 59 Neb. 400 (81 N. W. 309), modified. *Stroemer v. Van Orsdel*, 74 Neb. 132 (103 N. W. 1053).

105. (1905.) The fact that the agent or attorney in carrying out his agreement for services in reference to claims of Indian land purchasers, and as incidental thereto, appears before a committee of both houses of congress and explains the nature of a bill prepared by the secretary of the interior, authorizing him to grant the reduction of the price of such lands agreed upon, does not render such contract void, or preclude the attorney from recovering the compensation expressed therein for his services. *Stroemer v. Van Orsdel*, 74 Neb. 143 (107 N. W. 125).

106. (1905.) An agreement for purely professional services, such as "collecting facts, preparing and submitting to the Indians and proper authorities of the government of the United States arguments upon the merits of the claims of those holding Indian lands purchased from the government for a reduction, and upon the justice and advisability of a reduction, of the purchase price of such lands, as may be necessary and proper to secure such reduction," is valid. *Stroemer v. Van Orsdel*, 74 Neb. 143 (107 N. W. 125).

107. (1905.) If a contract of employment by the year has been entered into for a definite period, continued service same nature rendered from year after this period has expired, with other contract being shown, will sumed to have been performed u original contract. *Fitch v. Martin*, 538 (104 N. W. 1072).

108. (1906.) An attorney at l agrees with an executor or adminis conduct certain legal business of t for a sum named is estopped to d such sum is a reasonable consider the services rendered pursuant agreement. *Estate of Rapp v. Elg* Neb. 674 (110 N. W. 661).

——— Employment by attorney o ant.

109. (1888.) Where an attorne into a contract with a client to an action to final judgment for a s sum, and such attorney employs one to assist him in the case, the c not be liable for fees for such s torney, unless he, in some manner, his employment or retention in *Sedgwick v. Bliss*, 23 Neb. 617 (3 483).

110. (1888.) Where an attorn ing in a particular county brough tion in the district court of anothe and after the filing of the petiti to a firm of attorneys in the coun the action was brought, requesting file the proper pleadings to make sues, and informed them that them to do so his client would them to state the necessary facts, ing, "I will see you paid for your and the client thereupon called u attorneys a number of times, and the necessary papers to make up t and assisted in the trial of the cas procuring a decree for the client, being said by her to them about tract made by her with the attor filed the petition, and they had n edge of such contract, *held*, that t was liable for the fees of the attor ployed to assist in the case. *Sed Bliss*, 23 Neb. 617 (37 N. W. 483).

111. (1902.) A client is not l fees of other counsel employed whom he has retained to conduct unless he authorizes or ratifies ployment. *Dillon v. Watson*, 3 U (92 N. W. 156).

112. (1902.) An attorney ret

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conduct a case which is pending in another county, may properly employ local counsel to attend to necessary formal matters, such as procuring orders, attending calls of the docket, and the like, and charge the fees paid such counsel as expenses, where it appears that the fees paid were less, or at least not more, than the expense which would have been incurred had he gone in person. *Dillon v. Watson*, 3 Unof. 530 (92 N. W. 156).

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Apportionment between attorneys.

113. (1902.) Where a law firm dissolves, and one of the members is subsequently employed under a new contract by a client of the old firm in a case commenced before dissolution, and which has been assigned to such member, a settlement made between the members of fees due to the firm in such case, made with knowledge of such subseuent employment, will be held to have been made in view of such employment, and will not be opened. *Lamb v. Wilson*, 3 Unof. 496 (92 N. W. 167).

114. (1902.) Where a law firm dissolves, assigning undisposed of cases to the several members, and the agreement of dissolution is supported by sufficient consideration, each member who in good faith undertakes to carry out his part of the agreement is entitled to prosecute to completion the cases assigned to him, and services rendered by other members to him in such cases will be held to be gratuitous. *Lamb v. Wilson*, 3 Unof. 496 (92 N. W. 167).

Allowance and payment from funds in court.

115. (1896.) Courts of equity, in dealing with funds brought directly within their control, frequently order payment therefrom of fees to counsel of the respective parties; but that practice rests upon the theory that the proceeding is primarily for the purpose of securing the direction of the court with respect to such fund, and therefore alike beneficial to all parties. *McClary v. Stull*, 44 Neb. 175 (62 N. W. 501).

Actions for compensation.

——Limitations.

116. (1903.) On the facts stated, *held* that an attorney's claim for services was barred by the statute of limitations. *Greek v. McDaniel*, 68 Neb. 569 (94 N. W. 518).

——Defenses.

117. (1898.) The rendition of a bill for services does not estop the person rendering it from claiming and recovering a larger amount in a subsequent action on a *quantum meruit*, when the other party did not accept or acquiesce in the bill, but refused at once to recognize it as correct. *People's Nat. Bank v. Geisthardt*, 55 Neb. 232 (75 N. W. 582).

——Pleading.

118. (1897.) Where it is sought to hold liable a party for attorney's fees earned in the foreclosure of a mortgage held by such party, and the employment of the attorney is dependent on whether or not one who had authorized the commencement of such foreclosure proceedings did so with authority from the mortgagee, the burden of proof is on the attorney to establish such authority, and evidence which tends to negative the existence of such authority in the alleged agent is admissible, under proper pleadings. *Saxton v. Harrington*, 52 Neb. 300 (72 N. W. 272).

119. (1906.) In an action by an attorney to recover from another attorney who retained the former to defend one of the latter's clients in a criminal prosecution, certain money collected by such latter attorney under a lease by the client, executed for attorney's fees, a petition that fails to allege the value of his services, or that he has not received payment from another source is insufficient. *Leyda v. Reavis*, 77 Neb. 695 (110 N. W. 642).

——Evidence.

120. (1889.) Prior to the year 1884 plaintiffs' intestate was the owner of school lands in Gage county and paid taxes thereon. In January of that year defendant in error notified plaintiffs that he was proceeding to recover the amount of taxes paid upon school lands, for a contingent fee of one-half of what he could recover, and offering to make an effort to recover the amount due plaintiffs in error if they so desired. Receiving no answer he soon thereafter addressed them again to the same effect. They telegraphed him to proceed, providing he would do so for a fee of ten per cent. upon the amount recovered. He answered by telegraph, declining their offer, but soon thereafter wrote them a letter saying that he was not in a position to dictate terms, and that he had included their claim with others in his hands for collection, and had presented it to the county board. He frequently notified them of the proceedings which he was taking and finally of his success in recovering the money from the

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county. No objections were made by them to his action, although they were at all times advised of the efforts being made by him in their behalf. In an action instituted by him for one-half of the amount recovered of the county it was *held*, that the evidence fully justified the finding of the district court, that he was entitled to ten per cent. of the amount recovered, and a judgment to that effect was affirmed. *Emery v. Cobbey*, 27 Neb. 621 (43 N. W. 410).

121. (1891.) The question of what were reasonable fees, having been put in issue and determined by the trial court, *held*, that the evidence sustained the judgment. *Rice v. Day*, 33 Neb. 204 (49 N. W. 1128).

122. (1897.) Where plaintiffs sued defendants for attorney's fees, under an alleged special contract of retainer with such defendants as individuals, and defendants allege that the services were rendered under a contract of yearly retainer with a corporation of which they were stockholders, the latter contract is admissible in evidence. *Rosenthal v. Ogden*, 50 Neb. 218 (69 N. W. 779).

123. (1897.) Where the question at issue is whether attorneys' fees charged and retained should have been restricted to ten per cent. of the amount collected, and the parties who employed the attorneys had testified to that restriction, it was error, on cross-examination, to hold that this witness could not be asked if said witness, at the time he had been paid seventy-five per cent. of the collection, had not said to one of the attorneys who had made the collection, that winess would not expect said attorney to do all the work for ten per cent. that said attorney was the doctor, and furthermore, that witness had accepted the proffered check for seventy-five per cent. of the said collection. *McClanahan v. Dingman*, 51 Neb. 628 (71 N. W. 302).

124. (1897.) Where the attorney seeks to recover fees alleged to be due him for the foreclosure of a mortgage, claiming that the mortgagee, with knowledge of the facts, by his silence ratified the acts of such attorney while the foreclosure was progressing, and afterwards, that the mortgagee's ratification was evidenced by his receiving the avails of the foreclosure proceedings, and the defense is that the employment of the attorney was not by the mortgagee, but by one who wished to cut out a subsequent mortgage, evidence which tends directly to establish the fact that such representations were made to the mortgagee as to the purposes of the foreclosure of his mortgage, and that the party benefited would pay the attorney's fees in such foreclosure, is competent in explanation of the failure of the mortgagee to disaffirm the foreclosure proceeding when brought to his knowledge. *Sarton v. Harrington*, 52 Neb. 300 (72 N. W. 272).

125. (1906.) Where one has been arrested on a charge of murder and committed to jail, and while so confined executed a note for attorneys fees to be rendered, evidence disputing such note is sufficient to send that question to the jury. *Gillis v. Paddock*, 77 Neb. 504 (109 N. W. 734).

126. (1907.) In an action by an attorney for fees due under a contract of employment, defended on the ground that the only services contracted for or rendered were on behalf of defendant as administrator, which had been paid for by an allowance out of the estate, the evidence examined and held sufficient to sustain a judgment for defendant. *Marshall v. Piggott*, 78 Neb. 722 (111 N. W. 592).

127. (1907.) Evidence, in an action to recover attorneys' fees, showing plaintiff to have acted under a contract for a specific amount, and certain advancements remain unpaid a verdict for defendant is not sustained. *Jones v. Jones*, 79 Neb. 63 (112 N. W. 325).

——— Instructions.

128. (1891.) In an action by an attorney for compensation, where the employment was denied, the instructions held to correctly state the law of the case. *Cowles v. Thompson*, 31 Neb. 479 (48 N. W. 145).

Payment of fees as fraud against creditors.

129. (1903.) Where property in large amount, without fraudulent intent, has been turned over by an insolvent debtor to his attorneys in consideration of past and future services and a general retainer for himself and wife, any creditor desiring to attack such transfer should do so before services to the full value of the property are rendered. *Farmers & Merchants Nat. Bank v. Mosher*, 68 Neb. 713 (94 N. W. 1003).

B. Lien.

Right to lien.

130. (1877.) An attorney has a lien upon a judgment to the extent of his reasonable fees and disbursements in the suit in which it was obtained. And this right

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is paramount to the rights of the parties in the suit. *Griggs v. White*, 5 Neb. 467.

131. (1886.) An attorney is not entitled to a lien before judgment upon a cause of action for tort, which in case of the death of the parties would not survive. *Abott v. Abott*, 18 Neb. 503 (26 N. W. 361).

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132. (1905.) An attorney has a lien for his compensation for professional services and for his disbursements upon moneys received by him on his client's behalf in the course of his employment, and this right of lien is not affected by the fact that the client is an executor or trustee and the services were rendered and money received on behalf of the estate. *Burleigh v. Palmer*, 74 Neb. 122 (103 N. W. 1068).

Notice.

133. (1889.) An attorney who desires to enforce a claim for his services, must file a lien to that effect; otherwise he cannot enforce a claim against the adverse party. This claim for a lien may be filed with the papers in the case and the adverse party will be chargeable with notice of its existence. *Elliott v. Atkins*, 26 Neb. 403 (42 N. W. 403).

134. (1889.) In order to render a defendant liable to a lien for the services of the plaintiff's attorney, it is indispensable that a claim of lien be filed with the papers or given to such adverse party. Notice of a contract between the plaintiff and his client where no lien is claimed, will not bind the defendant or render him liable for the services of plaintiff's attorney. *Elliott v. Atkins*, 26 Neb. 403 (42 N. W. 403).

135. (1897.) In an action on a policy, an indorsement on the summons that plaintiff will take judgment for attorneys' fees, *held* not a notice of the claim of plaintiff's attorney for a lien of fees, and service of the summons so indorsed did not convey to the company notice of such claim. *Cobbey v. Dorland*, 50 Neb. 373 (69 N. W. 951).

136. (1900.) The lien of an attorney upon his client's papers, books, and money in the hands of the former is effective without notice to anyone. *Cones v. Brooks*, 60 Neb. 698 (84 N. W. 85).

137. (1900.) The lien of an attorney upon the money in the hands of the adverse party is not perfected until notice has been given to the party in possession of the fund. *Cones v. Brooks*, 60 Neb. 698 (84 N. W. 85).

138. (1900.) The notice of a charging or specific lien of an attorney need not be in writing or placed among the files in the case. Any notice that the claim is made and that it will be asserted is sufficient. *Cones v. Brooks*, 60 Neb. 698 (84 N. W. 85).

139. (1902.) As against a client or client's assignee, an attorney engaged in prosecuting a claim before a county board has a lien for his services without filing claim or giving notice, and an assignee, whose rights arise while the matter is pending, takes subject to the attorney's rightful fees. *Maloney v. Douglas County*, 2 Unof. 396 (89 N. W. 248).

140. (1903.) The commencement of proceedings of which the judgment debtor has notice, to enforce an attorney's lien against a judgment, while a sufficient amount of the judgment remains unpaid to cover it, is sufficient notice of the lien to the judgment debtor. *Greek v. McDaniel*, 68 Neb. 569 (94 N. W. 518).

Services or fees covered.

141. (1895.) An attorney's lien for services performed in prosecuting an action is not measured by the amount which his client claims to be his due, but cannot exceed the amount in the hands of the adverse party belonging to his client or the amount owing to him, and is not paramount to any proper set-off or other available defense in such action. *Field v. Maxwell*, 44 Neb. 900 (63 N. W. 62).

Subject-matter to which lien attaches.

142. (1880.) An attorney in an action may have a lien for fees due him for services therein on money in the hands of the adverse party, and which is the subject of the litigation; and under certain circumstances may be admitted as a party plaintiff in that action for the purpose of protecting and enforcing such lien. *Reynolds v. Reynolds*, 10 Neb. 574 (7 N. W. 322).

143. (1888.) An attorney has a lien for a general balance of compensation upon money in his hands belonging to his client, and until such lien is discharged he is not liable to a prosecution for the embezzlement of such money. *Van Etten v. State*, 24 Neb. 734 (40 N. W. 289; 1 L. R. A. 669).

144. (1889.) An attorney has a lien for a general balance of compensation on any papers of his client which may come into his possession in the course of his professional employment; upon money in his hands belonging to his client, and in the hands of an adverse party, in an action or

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proceeding in which the attorney was employed, from the time of giving notice of the lien to that party. *Elliott v. Atkins*, 26 Neb. 403 (42 N. W. 403).

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145. (1894.) An attorney's lien cannot be asserted against money appropriated to a client by the legislature while it is in the custody of the state treasurer. *State, ex rel. Sayre, v. Moore*, 40 Neb. 854 (59 N. W. 755; 25 L. R. A. 774).

146. (1900.) An attorney's lien upon his client's papers, books and documents or money depends upon possession, and attaches only to papers, books, documents or money in the hands of the attorney. *Cones v. Brooks*, 60 Neb. 698 (84 N. W. 85).

147. (1900.) An attorney has a charging or specific lien upon money in the hands of the adverse party to an action or proceeding. *Cones v. Brooks*, 60 Neb. 698 (84 N. W. 85).

148. (1900.) An attorney has a general or retaining lien upon all papers, books, documents or money of his client coming into his hands in the course of his professional employment. *Cones v. Brooks*, 60 Neb. 698 (84 N. W. 85).

149. (1901.) The attorney for a defendant in action in which the plaintiff has caused funds in the hands of a third party to be garnished, is not entitled to an attorney's lien on the fund so garnished to secure his fee for services performed in the case. *Phillips v. Hogue*, 63 Neb. 192 (88 N. W. 180).

150. (1906.) An attorney may have a lien upon the claim of his client in an action for personal injury. *Corson v. Lewis*, 77 Neb. 449 (114 N. W. 281).

151. (1907.) Under section 8, chapter 7, Compiled Statutes, providing for attorneys' liens, the judgment in favor of the prosecutrix in a bastardy proceeding is subject to the lien of her attorneys for professional services in obtaining such judgment. *Taylor v. Stull*, 79 Neb. 295 (112 N. W. 577).

Priorities.

152. (1873.) The lien of an attorney, upon a judgment obtained by him, to the extent of his reasonable fees and disbursements, is paramount to any rights of the parties in the suit or to any set-off. *Boyer v. Clark*, 3 Neb. 161; (1891) *Rice v. Day*, 33 Neb. 204 (49 N. W. 1128).

Assignment of judgment.

153. (1892.) The assignee of a judgment takes it subject to the rights of an attorney who has filed a lien in due form for services rendered in procuring such judgment. *Yates v. Kinney*, 33 Neb. 853 (51 N. W. 230).

154. (1907.) An assignment of a judgment after the filing of an attorney's lien does not affect such lien, and the assignee takes the judgment subject to the attorney's lien. *Taylor v. Stull*, 79 Neb. 295 (112 N. W. 577).

Assignment of claim.

155. (1877.) Where attorneys have rendered services in a case, but have filed no notice of a lien, the mere assignment of their account to parties claiming a lien will not authorize the latter to enforce such claim against the debtor. *Griggs v. White*, 5 Neb. 467.

156. (1906.) A contract for legal services is personal in its nature and cannot be assigned by one party without the consent of the other. *Corson v. Lewis*, 77 Neb. 446 (109 N. W. 735).

Release of lien.

157. (1905.) Where an attorney has filed a lien for professional services rendered in the case, and his client agrees to pay a certain amount in consideration of the release of the lien, and suit is brought upon such agreement, the question of the amount of services performed by the attorney or the terms of the original employment are immaterial, and evidence respecting these matters was properly rejected by the court. *Burleigh v. Palmer*, 74 Neb. 122 (103 N. W. 1068).

Protection against settlement between parties.

158. (1877.) Where a defendant against whom judgment has been recovered has notice of an attorney's lien, he cannot evade the payment of the sum actually due for such services by payment to the creditor of the amount of the judgment. *Griggs v. White*, 5 Neb. 467.

159. (1902.) Three plaintiffs, who were heirs of a deceased party, and who had joined with each other in an action to set aside the probated will and declare the same revoked, may dismiss the case as to themselves upon payment of their proportionate share of accrued costs even though they had entered into contracts with attorneys to prosecute their suit for a portion of whatever recovery may be had *Williams v. Miles*, 63 Neb. 851 (89 N. W. 455).

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——Remedies of attorney.

160. (1886.) An attorney cannot intervene to continue suit which has been settled by parties pending litigation. *Lavender v. Atkins*, 20 Neb. 206 (29 N. W. 467).

161. (1887.) Where, in an action for divorce and alimony, an order is made by the court in which the cause is pending, requiring a sum of money to be paid into court as and for attorney's fees, and afterwards the parties to the action, by collusion and fraud and for the purpose of defrauding the attorney for plaintiff out of the allowance made for his compensation, with notice of an attorney's lien thereon in his favor, enter into an alleged settlement by which the cause is to be dismissed and the order for alimony satisfied, such fraudulent settlement will be set aside, on motion of the attorney entitled to the money, and the amount found due ordered to be paid into court by the defendant. *Aspinwall v. Sabin*, 22 Neb. 73 (34 N. W. 72; 3 Am. St. Rep. 258).

162. (1887.) The original plaintiff is not a necessary party to a motion by her attorney to set aside settlement of case after an allowance of attorney fees had been made to her, on ground of fraud *Aspinwall v. Sabin*, 22 Neb. 73 (34 N. W. 72; 3 Am. St. Rep. 258).

162*a*. (1894.) Where defendant in an action to quiet title obtains from plaintiff a quitclaim deed to the land and a dismissal of the action, with notice that before the suit was brought plaintiff deeded to his attorney, for services to be rendered, and undivided one-half interest in the real estate, the attorney may have the cause reinstated, and the court may grant him, as to his interest, the relief sought before dismissal, though he began the original action in his client's name, verified the petition, and failed to record his deed. *Chamberlain v. Grimes*, 42 Neb. 701 (60 N. W. 948).

163. (1903.) The proper method of procedure to set aside a settlement in fraud of an attorney's lien, is for the attorney to file an intervening petition and have the amount and extent of his lien judicially determined before any other steps are taken for its enforcement. *Jones v. Duff Grain Co.*, 69 Neb. 91 (95 N. W. 1).

164. (1903.) Where a judgment to which an attorney's lien has attached has been compromised between plaintiff and defendant in fraud of the attorney's rights, such settlement and compromise may be set aside at the suit of the attorney defrauded. *Jones v. Duff Grain Co.*, 69 Neb. 91 (95 N. W. 1).

Protection against set-off between parties.

165. (1889.) A & B, practicing attorneys, recovered a judgment for C against D, under an agreement with their client that they were to have one-half the amount of recovery, and they filed an attorney's lien for that amount. D recovered a judgment against the client of A and B, and brought an action to set off one judgment against the other; and without making an issue in the pleadings upon the amount claimed to be due A & B sought to reduce it. *Held*, That in the absence of an issue in the pleadings upon that point, the attorneys had a lien for the amount agreed upon. *Ward v. Watson*, 27 Neb. 768 (44 N. W. 27).

166. (1895.) The lien of an attorney is inferior to any proper set-off or other available defense of the adverse party. *Field v. Maxwell*, 44 Neb. 900 (63 N. W. 62).

167. (1902.) G. obtained judgment against the firm of C. & F. for eight hundred dollars. On the rendition of the judgment, W. and P., attorneys for G., filed their claim for an attorneys' lien on the judgment and gave notice thereof. Afterwards, F., one of the partners, commenced an action against G. on a note made to him by G., alleging that both C., the other member of the firm, and G., the judgment creditor, were insolvent, and that he alone was responsible. He asked that any judgment entered against G. on the note might be set off against the judgment entered in favor of G. against C. & F. W. and P. intervened and asked that their attorneys' lien be protected. *Held*, That to the extent of their lien the attorneys should be protected and that to that extent the set-off could not be allowed. *Finney v. Gallop*, 2 Unof. 480 (89 N. W. 276).

Enforcement.

168. (1881.) To entitle an attorney to be admitted as a party plaintiff in an action for the purpose of protecting and enforcing his lien, it must appear that fees are due him for services in that case. *Oliver v. Sheeley*, 11 Neb. 521 (9 N. W. 689).

169. (1886.) On appeal of the original suit, an attorney cannot litigate his lien for fees under his contract with his client. *Lavender v. Atkins*, 20 Neb. 206 (29 N. W. 467).

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170. (1897.) An attorney's lien cannot be enforced where there is not anything to which such lien can attach. *Yeiser v. Lowe*, 50 Neb. 310 (69 N. W. 847).

171. (1900.) Petition in suit to enforce an attorney's lien examined, and found to state facts sufficient to support the action. *Cones v. Brooks*, 60 Neb. 698 (84 N. W. 85).

172. (1900.) An attorney can not enforce, by action, his general or retaining lien upon a note, bond or other obligation to pay money. *Cones v. Brooks*, 60 Neb. 698 (84 N. W. 85).

173. (1902.) Whether or not the contract of employment with attorneys to prosecute a will contest on a contingent fee for the plaintiffs operated to give to them such a lien on, or interest in, the cause of action as to permit them to prosecute the action to final judgment for the enforcement and protection of their own rights by virtue of the contract, is not determined. *Williams v. Miles*, 63 Neb. 851 (89 N. W. 455).

174. (1902.) The liability of plaintiffs moving to dismiss their action of contest of a probated will, to attorneys, who had a contract to prosecute such action to the end on a contingent fee, and who had expended considerable money in the prosecution of the suit, for the value of their services can not be litigated or determined on a motion to dismiss. *Williams v. Miles*, 63 Neb. 851 (89 N. W. 455).

175. (1903.) An attorney at law having a lien on a judgment may intervene in proceedings to revive such judgment, and is entitled to a revivor thereof in his own name to the extent of his lien, *Greek v. McDaniel*, 68 Neb. 569 (94 N. W. 518).

176. (1903.) That the court, in proceedings to revive a judgment to protect an attorney's lien thereon renders a judgment in favor of the attorney and against the judgment debtor for the amount of the lien, instead of entering an order of revivor in the name of the attorney, to that extent is without prejudice to the judgment debtor. *Greek v. McDaniel*, 68 Neb. 569 (94 N. W. 518).

177. (1903.) It is not error for the trial court to overrule a motion for an execution to enforce the collection of an attorney's lien before the nature and extent of such lien had been judicially determined. *Jones v. Duff Grain Co.*, 69 Neb. 91 (95 N. W. 1).

ATTORNEY GENERAL.

CROSS-REFERENCES.

See, also, *Attorney and Client; County Attorneys.*

Right to enjoin common carrier from violating rate law, see *Carriers*, § 125a.

1. (1878.) The claim on which the action was brought was for the recovery for services performed by the plaintiffs as attorneys in an action against the state, under an employment by the attorney general, by which they were to have a fee of $10,000, contingent upon a judgment being finally recovered favorable to the state, which was obtained. *Held*, That there was no law authorizing the employment, and if actually made was void, and all services performed under it gratuitous, imposing no legal obligation on the state to pay for them. *Bradford v. State*, 7 Neb. 109.

2. (1887.) The attorney general is the law officer of the state, and is required to prosecute or defend any suit in the supreme court in which the state is a party or interested; therefore, where a majority of the board of transportation of the state adopted a resolution asking the supreme court to continue a case pending therein against a railroad company to compel such company to conform its rates and charges to an order previously made by said board, *held*, that the board had no authority to control the action of the attorney general in the management of the case. *State, ex rel. Board of Transportation, v. Fremont, E. & M. V. R. Co.*, 22 Neb. 313 (35 N. W. 118).

3. (1889.) The word "clerk," in section 24, article V of the constitution, is used in the same sense as at common law, viz., a person employed in an office, who writes or registers in proper form the transactions of the tribunal or body to which he belongs. *In re Appropriations*, 25 Neb. 662 (41 N. W. 643).

4. (1889.) The prohibition against "clerk hire" in the office of the attorney general does not preclude the legislature from providing for a deputy or assistant

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attorney general. *In re Appropriations*, 25 Neb. 662 (41 N. W. 643).

5. (1889.) A stenographer is one skilled in the art of writing in shorthand, by using abbreviations or characters for whole words, and does not come within the common law definition of the word clerk. *In re Appropriations*, 25 Neb. 662 (41 N. W. 643).

AUCTIONS AND AUCTIONEERS.

Representations.

1. (1903.) Representations made by an auctioneer without the knowledge or direction of the owner are not binding on the latter. *Korbel v. Skocpol*, 70 Neb. 45 (96 N. W. 1022).

AUDITOR.

Of state, see *State*, §§ 26-32, 52, 91-93.

AUTHENTICATION.

Of affidavits, see *Affidavits*, §§ 18-24.

Sufficiency of, of officer taking depositions, see *Depositions*, §§ 57-59.

Of certificate of officer taking depositions, see *Depositions*, § 35.

Of documentary evidence in civil actions, see *Evidence*, §§ 352-386.

Of bill of exceptions by clerk, see *Exceptions, Bills of*, §§ 138-153.

AUTREFOIS CONVICT.

See *Criminal Law*, §§ 89-112.

AVULSION.

Of streams, see *Water and Watercourses*, §§ 71-73.

AWARD.

See *Arbitration and Award*.

Of contracts for public improvements, see *Municipal Corporations*, §§ 267, 268.

Award of damage for condemnation of private property, see *Eminent Domain*.

BAGGAGE.

Liability of carrier for baggage of passengers, see *Carriers*, IV, F.

Baggage check as evidence, see *Carriers*, § 369.

BAIL.

ANALYSIS.

Nature and purposes, §§ 1, 1a.
Right to release on bail, §§ 2, 3.
Requisites and validity of recognizance, §§ 4-17.
Construction and operation, § 18.
Amount of bail, § 19.
——— Increase or reduction, §§ 20-23.
Deposit in lieu of bail, § 24.
Breach or fulfillment of condition, §§ 25-28.
Extent of liability, § 29.
Discharge of sureties, §§ 30, 31.
Relief from liability or forfeiture, §§ 32-38.
——— Arrest or surrender of principal, § 39.
Action on recognizance, §§ 40-42.

CROSS-REFERENCES.

See, also, *Arrest*.

In bastardy proceedings, see *Bastards*, §§ 44, 45.

Nature and purposes.

1. (1888.) The purpose of a recognizance is to secure the attendance of the party recognized at the hearing. *State, ex rel. Pepper, v. Speice*, 24 Neb. 386 (38 N. W. 837).

1a. (1885.) A recognizance for the appearance of a person charged with an offense is an obligation of record, and becomes such when taken and filed in the court to which it is returnable. *King v. State*, 18 Neb. 375 (25 N. W. 519).

Right to release on bail.

2. (1894.) The right to give bail pending proceedings by petition in error in the supreme court, after conviction for a felony,

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is not absolute, but rests in the discretion of the court. Bail will be allowed in the supreme court upon a showing of probable error calling for a reversal of the judgment. *Ford v. State*, 42 Neb. 418 (60 N. W. 960).

3. (1894.) The provision of section 9, article I of the constitution, that all persons shall be bailable by sufficient sureties, is merely the declaration of an existing right, and has reference to bail as understood at common law, and in accordance with the practice before the constitution was adopted. *Ford v. State*, 42 Neb. 418 (60 N. W. 960).

Requisites and validity of recognizance.

4. (1880.) A recognizance proper should not be signed, but when it is properly taken and certified, the signatures of the recognizors may be treated as surplusage and the instrument *held* valid. *Irwin v. State*, 10 Neb. 325 (6 N. W. 370).

5. (1880.) A recognizance that stated it to be in the sum of three hundred dollars and certified by M. as J. P. is not violated by such signature; but the failure to designate the denomination of the debt, and the official character of the officer certifying it, renders it void. *Irwin v. State*, 10 Neb. 325 (6 N. W. 370).

6. (1885.) Where a county judge, acting as an examining magistrate, requires the accused to enter into a recognizance for his appearance at the next term of the district court, and such recognizance is given with sureties which are approved by such county judge, the endorsement of such approval upon the recognizance is not required to be attested by the seal of the county judge. *Holmes v. State*, 17 Neb. 73 (22 N. W. 232).

7. (1885.) A recognizance taken by an examining magistrate and signed by all the obligors, is sufficient and will bind all, whether their names are entered in the body of the same or not, provided it complies with the law in other respects. *Holmes v. State*, 17 Neb. 73 (22 N. W. 232).

8. (1885.) A criminal recognizance requiring a person who has been charged with the commission of a felony and held to bail by an examining magistrate to appear before the district court, is a sufficient compliance with section 307 of the criminal code, if the date fixed in the recognizance for the appearance of the accused is in fact the first day of the next term of said court. *Holmes v. State*, 17 Neb. 73 (22 N. W. 232).

9. (1885.) The criminal code does not require a recognizance taken by a justice of the peace when sitting as an examining magistrate to be entered upon his docket. *King v. State*, 18 Neb. 375 (25 N. W. 519).

10. (1885.) A recognizance proper, unless taken out of court, should not be signed; but when it is properly taken and certified the signatures of the recognizors may be treated as surplusage, and the instrument held valid. *King v. State*, 18 Neb. 375 (25 N. W. 519); (1886) *State v. Moran*, 18 Neb. 536 (26 N. W. 357); (1894) *Shupe v. State*, 40 Neb. 524 (59 N. W. 100).

11. (1886.) A recognizance for the appearance of an accused person to answer to an indictment for felony, taken before and approved by an officer or person unauthorized by law, so that the same fails to be binding under the statute, is void as a common law obligation. *Dickenson v. State*, 20 Neb. 72 (29 N. W. 184).

12. (1888.) A recognizance taken by a justice of the peace on a complaint and proceedings under chapter 37 of the Compiled Statutes, is valid against a security, although was not entered of record on the appearance docket of the district court, under section 383 of the criminal code. *State v. Moran*, 24 Neb. 103 (38 N. W. 29).

13. (1894.) A recognizance executed under section 325 of the criminal code, for the purpose of prosecuting an appeal by one who has been convicted of a misdemeanor, conditioned that he "shall be and personally appear at the next term of the district court in and for Saunders county, on the first day of the term thereof, and abide the judgment of the court, and not depart the court without leave, then this recognizance to be void, otherwise to remain in full force and effect," sufficiently complies with the requirements of the statute and is a binding obligation. *Shupe v. State*, 40 Neb. 524 (59 N. W. 100).

14. (1894.) Under section 388 of the criminal code a recognizance is not invalidated by reason of defects in the form thereof, if it appear from the tenor of the recognizance at what court the party was bound to appear and that the court or officer before whom it was taken had the power to require and take such recognizance. *Shupe v. State*, 40 Neb. 524 (59 N. W. 100.

15. (1894.) A recognizance for an appeal from a conviction for a misdemeanor

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before a justice of the peace is invalid, if the court where, and before which, the prisoner is to personally appear is not stated in the recognizance. *Pill v. State*, 43 Neb. 23 (61 N. W. 96).

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16. (1897.) On appeal from a police magistrate a recognizance failing to designate the court wherein the prisoner is to appear is invalid and confers no jurisdiction on the appellate court to try the case. *Kazda v. State*, 52 Neb. 499 (72 N. W. 853).

17. (1903.) The conditions imposed upon a surety on a recognizance by the provisions of sections 32 and 33, chapter 19, Compiled Statutes, examined, and *held* reasonable and binding. *Bartling v. State*, 67 Neb. 637 (93 N. W. 1047).

Construction and operation.

18. (1885.) By the provisions of the criminal code a recognizance taken by a justice of the peace acting as an examining magistrate becomes an obligation of record when returned by the justice of the peace to the clerk of the district court, and is by him entered of record as required by section 383 of the criminal code. *King v. State*, 18 Neb. 375 (25 N. W. 519).

Amount of bail.

19. (1893.) Bond for $70,000 from one charged with embezzling that amount is not "excessive bail" within section 9, article I, constitution. *In re Scott*, 38 Neb. 502 (56 N. W. 1009).

——— Increase or reduction.

20. (1893.) At the same term at which the bail of a prisoner has been fixed, and before such prisoner has furnished bail at the amount so fixed, the court may enter an order increasing the amount of bail. *In re Scott*, 38 Neb. 502 (56 N. W. 1009).

21. (1893.) An order of the district court fixing the amount of bail a prisoner shall give will not be disturbed by the supreme court in a proceeding by *habeas corpus* for reduction of bail, unless it clearly appears *per se* that the amount is unreasonably great and disproportionate to the offense charged. *In re Scott*, 38 Neb. 502 (56 N. W. 1009).

22. (1893.) In fixing the amount of bail the court or judge may take into consideration the nature of the offense; the penalty which the law authorized to be inflicted should there be a conviction; the probability of the accused appearing to answer the charge against him, if released on bail; his pecuniary condition, and the circumstances surrounding the case. *In re Scott*, 38 Neb. 502 (56 N. W. 1009).

23. (1893.) Upon an application for reduction of bail by a prisoner, after indictment and before trial, the guilt of the accused will be presumed, but evidence may be received to repel that presumption. *In re Scott*, 38 Neb. 502 (56 N. W. 1009).

Deposit in lieu of bail.

24. (1903.) A justice of the peace has no authority to accept money in lieu of the bail required by section 298 of the criminal code; and in case he does so, his bondsmen are not liable for his failure to properly account for the same. *Snyder v. Gross*, 69 Neb. 340 (95 N. W. 636).

Breach of fulfillment of condition.

25. (1885.) Where a person was charged with the commission of an offense, and upon being held to bail by the examining magistrate, entered into a recognizance with sureties for his appearance at the next term of the district court, and subsequently left the state, and committed a crime in another state where he was arrested and imprisoned, and thus by his own voluntary act rendered it out of his power to appear in this state to answer to the crime with which he was charged; *Held*, That these facts would constitute no defense to an action against his sureties upon his recognizance. *King v. State*, 18 Neb. 375 (25 N. W. 519).

26. (1888.) Where a party charged with felony secures a change of venue, and enters in a recognizance for his appearance before district court of county to which venue is changed, and afterwards fails to appear, and his recognizance is forfeited, and amount thereof paid by his surety, the money will belong to the county in which the accused was recognized to appear. *State, ex rel. Pepper, v. Speice*, 24 Neb. 386 (38 N. W. 837).

27. (1902.) A defendant who is released on bail to appear at a certain term of court, which happens to be an equity term and defendant is present several days but does not report his presence nor is he called to report, is not in default. *Hesselgrave v. State*, 63 Neb. 807 (89 N. W. 295).

28. (1902.) In order to default a defendant on a recognizance, that the sureties

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thereon may be held liable, he must be called at some time during the term set for his appearance. *Hesselgrave v. State*, 63 Neb. 807 (89 N. W. 295).

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Extent of liability.

29. (1901.) A recognizance given under section 3 of chapter 37, Compiled Statutes, 1899, is not a bond of indemnity for the payment of the judgment which may be ultimately recovered in the action. The amount of liability on such a recognizance is the penal sum named therein, with interest thereon from the date of the forfeiture. *Myers v. Baughman*, 61 Neb 818 (86 N. W. 507).

Discharge of sureties.

30. (1882.) Arrest of principal, after indictment, releases sureties on recognizance given before examining court. *Smith v. State*, 12 Neb. 309 (11 N. W. 317).

31. (1900.) A recognizance in a bastardy proceeding, conditioned that accused "shall be and appear before the district court on the first day of the next term thereof, and appear thereat from day to day to abide the order of the court," is limited to the term at which it exacts the appearance. A continuance of the cause to a subsequent term of court is not within the contract of the recognizance, and, if made, a non-appearance of accused at the term to which the continuance carries the cause is not a breach of such recognizance. *State v. Murdock*, 59 Neb. 521 (81 N. W. 447); (1902) *Perkins v. Milton*, 64 Neb. 848 (90 N. W. 756).

Relief from liability or forfeiture.

32. (1894.) A second forfeiture of a recognizance, incurred because the principal a second time failed to appear according to the condition of his obligation, will not be vacated and canceled on the return of the principal after such forfeiture, where sufficient excuse is not shown for his failure to appear before the forfeiture taken, and the record shows that the prosecution has been deprived of proofs by the delay. Rule applied. *Noll v. State*, 38 Neb. 587 (57 N. W. 285).

33. (1894.) A forfeiture of a recognizance will be vacated and canceled on the payment of costs, where, after the default and on the same day, the principal voluntarily appears in court in case sufficient cause is shown for his failure to appear according to the obligation of his recognizance. *Rawlings v. State*, 38 Neb. 590 (57 N. W. 286).

34. (1897.) One who has been admitted to bail after a preliminary examination, and who becomes a fugitive, is not, after his return or apprehension, entitled to be discharged because no information was filed against him at the term at which he was recognized to appear, and while he was a fugitive. *Ex parte Trester*, 53 Neb. 148 (73 N. W. 545).

35. (1902.) A recognizance in a criminal action conditioned "that the defendant shall be and appear in this court on the first day of the next term thereof to answer to the charge of rape now pending herein against him, and will not depart the court without leave, and abide the order of the court," is limited to the term at which it exacts the appearance. *Hesselgrave v. State*, 63 Neb. 807 (89 N. W. 295).

36. (1903.) The conditions of a recognizance for the appearance of one accused of a criminal offense are not invalidated by the failure of the term of court at which he was required to appear, on account of an adjournment or continuance of such term. *Bartling v. State*, 67 Neb. 637 (93 N. W. 1047).

37. (1903.) Where, by reason of the prevalence of small-pox in the vicinity of a county seat, the district judge ordered the regular term of the court to be fixed at a later date, the liability of sureties on a bail bond, for the appearance of one accused of a crime, is extended to the next term actually held. *Bartling v. State*, 67 Neb. 637 (93 N. W. 1047).

38. (1903.) The conditions imposed upon a surety on a recognizance by the provisions of sections 32 and 33, chapter 19, Compiled Statutes (Annotated Statutes, secs. 4742, 4743), examined, and *held* reasonable and binding. *Bartling v. State*, 67 Neb. 637 (93 N. W. 1047).

——— Arrest or surrender of principal.

39. (1882.) Arrest of principal, after indictment, releases sureties on recognizance given before examining court. *Smith v. State*, 12 Neb. 309 (11 N. W. 317).

Action on recognizance.

40. (1882.) Action of a recognizance against H. B. S., as principal, and W. H. S. and E. S., as sureties. Summons served on W. H. S. and E. S., but no service on, or appearance by, H. B. S. Judgment against

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H. B. S. and W. H. S., no judgment either for or against E S., *held* erroneous. *Smith v. State*, 12 Neb. 309 (11 N. W. 317).

41. (1885.) Where a recognizance was given for the appearance of a defendant to answer a "charge against him for larceny," *held*, that the fact that the complaint was defective could not be asserted as a defense to an action upon such recognizance after forfeiture. *King v. State*, 18 Neb. 375 (25 N. W. 519).

42. (1901.) An action upon a forfeited recognizance taken under the provisions of section 3, chapter 37, Compiled Statutes, 1899, must be brought in the name of the state, the obligee named in the recognizance. *Myers v. Baughman*, 61 Neb. 818 (86 N. W. 507).

BAILMENT.

ANALYSIS.

Construction of contract, §§ 1, 2.
Care of property and negligence of bailee, §§ 3-15.
——— Inkeeper, § 16.
——— Agister or hirer of animals, §§ 17-26.
Liability of bailee to third person, § 27.
Wrongful use of property by bailee, § 28.
Compensation of bailor for use of property, § 29.
Compensation of bailee for care of property, §§ 30, 31.
——— Lien, §§ 32-41.
Redelivery or recovery of property, §§ 42-45.
Conversion by bailee, §§ 46, 47.
Larceny by bailee, §§ 48, 49.
Actions against third persons, § 50.

CROSS-REFERENCES.

Deposits with particular persons or relations, see specific topics.

Lien of agister for compensation for care of animals, see *Animals*, §§ 18-33.

Property in hands of bailee as subject to attachment, see *Attachment*, §§ 63, 64.

Deposit in banks, see *Banks and Banking*, III, C.

Consignment to common carriers, see *Carriers*.

Liability for mixing grain, see *Confusion of Goods*, § 8.

Election to sue for breach of contract or tort, see *Election of Remedies*, §§ 1, 2.

Loss of property of guest at hotel, see *Innkeepers*, §§ 7-11.

Liability for damages to animals hired from livery stable, see *Livery Stable Keepers*, §§ 3-5.

Pledge of property as collateral security, see *Pledges*.

Estoppel of bailee to deny ownership in himself, see *Estoppel*, § 50.

Execution against property in hands of bailee, see *Execution*, § 31.

Conditional sales, see *Sales*.

Deposit of property with warehouseman, see *Warehousemen*.

Construction of contract.

1. (1890.) The sole effect of section 26, chapter 32, Compiled Statutes, upon an unrecorded conditional lease of personalty, where the lessee is neither judgment creditor nor purchaser without notice, is to place it on an equal footing with conditional sale. *Norton v. Pilger*, 30 Neb 860 (47 N. W. 471).

2. The written instrument, set out in the opinion, construed, and *held* to be a contract of bailment of personal property for hire, and not one of conditional sale or sale of personal property on condition. (1892) *McClelland v. Scroggin*, 35 Neb. 536 (53 N. W. 469); (1900) *Baker v. Priebe*, 59 Neb. 597 (81 N. W. 609).

Care of property and negligence of bailee.

3. (1892.) A gratuitous bailee is liable for injury to property entrusted to his care occasioned by gross negligence. *Burk v. Dempster*, 34 Neb. 426 (51 N. W. 976).

4. (1892.) If a lessee finds personal property in the building, at the time he takes possession, and permits it to remain there without objection, he becomes a gra-

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tuitous bailee thereof. *Burk v. Dempster*, 34 Neb. 426 (51 N. W. 976).

5. (1892.) Where the vendor of a store building obtains gratuitous permission of vendee's lessee to leave a stove in the building for storage, such lessee is liable if he subsequently remove the stove to the lot back of the building where it is damaged. *Burk v. Dempster*, 34 Neb. 426 (51 N. W. 976).

6. (1892.) Although a bailor upon being notified by the gratuitous bailee to remove the property, failed to do so, the bailee cannot place the same in an exposed place where it would likely be injured or destroyed. In such case it was his duty to have the stove removed to a place of storage, and he could have charged the expense thereof to the defendant in error. *Burk v. Dempster*, 34 Neb. 426 (51 N. W. 976).

7. (1896.) A bailee who contracts to keep the property in a particular place is not discharged from damages resulting from his falure to do so because he was compelled to remove it by the owner of the place designated. *Butler v. Greene*, 49 Neb. 280 (68 N. W. 496).

8. (1896.) A special contract of bailment prevails in determining the liabilities of the parties, as against general principles of law applicable in the absence of express agreement. *Butler v. Greene*, 49 Neb. 280 (68 N. W. 496).

9. (1901.) Although when a bailee fails to return the property, as a general rule, the burden is upon him to show that the loss did not occur through his negligence, yet if he establishes that it occurred through inevitable accident or irresistible force, which do not of themselves import negligence, the burden of proving negligence is upon the bailor. *Bissell v. Harris & Co.*, 1 Unof. 535 (95 N. W. 779).

10. (1901.) A bailment without reward of moneys to be held and used for the sole benefit of the bailor, is not a bailment for hire because one motive inducing the bailee to act may have been an expectation that his so doing would assist to hold trade in a town in which he was engaged in business. *Bissell v Harris & Co.*, 1 Unof. 535 (95 N. W. 779).

11. (1902.) Having received property as bailee, the burden is on the bailee to show that it was lost without negligence on his part. *Sulpho-Saline Bath Co. v. Allen*, 66 Neb. 295 (92 N. W. 354).

12. (1902.) Defendant conducted a bath-house, in which was a large swimming pool, patronized by large numbers of people. The dressing rooms in connection with the swimming pool were not provided with locks, but a large number of drawers were provided in the office, in which the customers were requested to place their valuables. The proprietor of the bath-house was a bailee for hire of valuables so deposited, inasmuch as the deposit was a necessary incident to the business in which the bailee made a profit. *Sulpho-Saline Bath Co. v. Allen*, 66 Neb. 295 (92 N. W. 354).

13. (1902.) A bailment is for hire, although no direct hire is paid for the bailment, where it is a necessary incident of a business in which the bailee makes a profit. *Sulpho-Saline Bath Co. v. Allen*, 66 Neb. 295 (92 N. W. 354).

14. (1904.) Where in a city which by ordinance requires fireproof shutters on windows, of brick buildings, one is in possession of property as bailee, and it is destroyed by fire which spread from another building through windows unprotected by fire-proof shutters, he is not liable for the value of such property by reason of the fact that he owned the building and that no fire-proof shutters were provided as required by the ordinance. *Frontier Steam Laundry Co. v. Connolly*, 72 Neb. 767 (101 N. W. 995; 68 L. R. A. 425).

15. (1904.) When a bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for negligence. *Mattern v. McCarthy*, 73 Neb. 228 (102 N. W. 468).

——— **Innkeeper.**

16. (1889.) A hotel clerk who receipts for a valuable registered letter directed to a guest at the hotel, but which is lost before reaching him, is liable to the carrier, who is required by the post office department to bear the loss. *Joslyn v. King*, 27 Neb. 38 (42 N. W. 756; 20 Am. St. Rep. 656; 4 L. R. A. 457).

——— **Agister or hirer of animals.**

17. (1888.) In an action to recover from a bailee of a team of horses, hired from plaintiff, for injuries to the team by reason of driving the same into a wire fence, there being no evidence connecting plaintiff with the existence of the fence, an instruction tending to excuse or justify

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defendant because of the existence of the fence in the road, was properly refused. *Floater v. Ferrell*, 24 Neb. 647 (38 N. W. 732).

18. (1888.) Upon the trial of an action to recover for injuries to a team hired by defendant, it is within the discretion of the court to give or withhold from the jury questions for special findings of fact. *Floater v. Farrell*, 24 Neb. 347 (38 N. W. 732).

19. (1890.) Where one contracts to winter 125 head of cattle, and forty-nine die and the others become very thin and weak, and there is other evidence of neglect, a finding of want of proper care is sustained. *Calland v. Nichols*, 30 Neb. 532 (46 N. W. 631).

20. (1890.) Where there is no express contract as to the kind of feed and degree of care to be given by one who takes cattle to keep through the winter, he is bound to provide reasonable and ordinary feed for such stock, and to use reasonable and ordinary care to protect them from injury; but where a number of such cattle die while in charge of the bailee, the bailee upon stating that fact to the owner—in other words, accounts for the cattle—the burden of proof of negligence is upon the owner. *Calland v. Nichols*, 30 Neb. 532 (46 N. W. 631).

21. (1896.) The hirer of a team is liable to the owner for want of ordinary care in the use of the team. *Prunell v. Minor*, 49 Neb. 555 (68 N. W. 942).

22. (1896.) Evidence showing that defendant hired a team of horses of plaintiff to work on a farm, that the team was in good condition then taken but for want of care became greatly run down and very poor, sustains a finding awarded by the jury. *Prunell v. Minor*, 49 Neb. 555 (68 N. W. 942).

23. (1905.) Under a contract whereby one party thereto agrees to herd and care for certain cattle for an equal share of the increase during a period of three years he is required to use reasonable and ordinary care for, feed and protect the cattle specified therein, and to make him liable for negligence. *Mattern v. McCarthy*, 73 Neb. 228 (102 N. W. 468).

24. (1905.) Where one agrees to herd and care for cattle during a period of three years and agrees to pay the other "just remuneration" for all cattle lost from neglect on his part, such term means the remuneration which the plaintiff would be justly entitled to under the law for the loss of his cattle by the defendant's negligence, and this is the value of the cattle lost. *Mattern v. McCarthy*, 73 Neb. 228 (102 N. W. 468).

25. (1905.) An agreement by an agister to take good care of a herd of cattle entrusted to his charge is equivalent to a contract to take such care of them as an ordinarily skillful and prudent man would take of his own animals under like circumstances. *Darr v. Donovan*, 73 Neb. 424 (102 N. W. 1012).

26. (1905.) When the contract of an agister is for the care and feeding of a particular head of cattle, evidence descriptive of that herd is admissible without special reference to the subject in the pleading. *Darr v. Donovan*, 73 Neb. 424 (102 N. W. 1012).

Liability of bailee to third person.

27. (1893.) Under the Herd Law (Comp. St., ch. 2, art. III) a person having the custody of cattle for the purpose of depasturing the same, although without compensation from the general owner, is liable for damage done by them upon the cultivated lands of another. *Laflin v. Svoboda*, 37 Neb. 368 (55 N. W. 1049).

Wrongful use of property by bailee.

28. (1905.) The measure of damages for the unauthorized use of the property of another by a bailee thereof is not the value that may be produced by the labor and investment of the bailee, combined with such use of the property, but is the value of the use itself and any damage that may be done to the property in so using it, or, if the use amounts to a conversion, then the measure of damages will be the value of the property. *State v. State Journal Co.*, 75 Neb. 275 (106 N. W. 434; 9 L. R. A. [n. s.] 174).

Compensation of bailor for use of property.

29. (1897.) Where money belonging to a daughter is voluntarily left by her in her father's possession, she is not entitled to interest thereon until after a demand for its repayment. *Bell v. Rice*, 50 Neb. 547 (70 N. W. 25).

Compensation of bailee for care of property.

30. (1897.) An involuntary bailee of goods may conserve the same, and recover from the owner what the service is reason-

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ably worth. *Moline, Milburn & Stoddard Co. v. Neville*, 52 Neb. 574 (72 N. W. 854).

31. (1897.) Where an agent of defendant who has property of the latter to sell on commission, surrenders the building he occupies, leaving the defendant's goods in the building, the latter is liable to the owner of the building, as an involuntary bailee, for the difference of its rental value without the goods and what it actually rented for with the goods stored therein. *Moline, Milburn & Stoddard Co. v. Neville*, 52 Neb. 574 (72 N. W. 854).

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——— Lien.

Compensation and lien of warehousemen, see *Warehousemen.*

32. (1896.) A lien does not exist at common law, or by custom, in favor of one who holds property in subordination to the will or control of another. *Moline, Milburn & Co. v. Wood Machine Co.*, 49 Neb. 869 (69 N. W. 405).

33. (1896.) Exclusive possession of chattels by the claimant, whether a factor, warehouseman, or other bailee, is indispensable to the existence or continuance of a lien thereon at common law, or the usage of trade. *Moline, Milburn & Co. v. Wood Machine Co.*, 49 Neb. 869 (69 N. W. 405).

34. (1896.) A lien does not attach in favor of a bailee of goods if inconsistent with the terms of the agreement, express or implied, under which he obtained possession. *Moline, Milburn & Co. v. Wood Machine Co.*, 49 Neb. 869 (69 N. W. 405).

35. (1896.) A contract for the storage and forwarding of goods by which the consignor reserves the right to withdraw, at pleasure, for reshipment the goods stored thereunder, and by which each party reserves the right to draw at sight upon the other for any balance in his favor, the consignee relying upon the personal credit of the consignor, does not create in favor of such consignee a lien for charges pursuant thereto. *Moline, Milburn & Co. v. Wood Machine Co.*, 49 Neb. 869 (69 N. W. 405).

36. (1898.) One bestowing labor and skill on a chattel bailed to him for that purpose, thereby increasing its value, has a lien thereon superior to the lien of a prior chattel mortgage. *Drummond Carriage Co. v. Mills*, 54 Neb. 417 (74 N. W. 966; 69 Am. St. Rep. 719; 40 L. R. A. 761).

37. (1898.) Lien for repairing a buggy *held* superior to a chattel mortgage executed before the repairs were made. *Drummond Carriage Co. v. Mills*, 54 Neb. 417 (74 N. W. 966; 69 Am. St. Rep. 719; 40 L. R. A. 761).

38. (1898.) Rules relating to agisters' liens *held* inapplicable to a lien in favor of one who repairs a chattel bailed to him for that purpose. *Drummond Carriage Co. v. Mills*, 54 Neb. 417 (74 N. W. 966; 69 Am. St. Rep. 719; 40 L. R. A. 761).

39. (1898.) The common law rule creating a lien of one who has bestowed labor and skill on a chattel bailed to him for that purpose, and thereby increasing its value may, by force of special facts or circumstances, override or supersede a prior contractual or statutory lien. *Drummond Carriage Co. v. Mills*, 54 Neb. 417 (74 N. W. 966; 69 Am. St. Rep. 719; 40 L. R. A. 761).

40. (1902.) A lien does not attach in favor of a bailee of goods if inconsistent with the terms of the agreement, express or implied, under which his possession was obtained. *Webster v. Keck*, 64 Neb. 1 (89 N. W. 410).

41. (1902.) An agreement to permit a tenant under an expiring lease to leave his goods *in statu quo* for an agreed sum of $10 payable monthly, with no right to retain the goods to the end of the month, and no right to demand payment on removal reserved by the contract, creates no lien on the goods for unpaid storage. *Webster v. Keck*, 64 Neb. 1 (89 N. W. 410).

Redelivery or recovery of property.

42. (1895.) The rightful owner of goods in possession of a common carrier may enforce his right thereto, although a stranger to the contract of bailment. *Shellenberg v. Fremont, E. & M. V. R. Co.*, 45 Neb. 487 (63 N. W. 859; 50 Am. St. Rep. 561).

43. (1895.) A bailee may yield possession of the property bailed to a stranger to the contract of bailment by taking the risk of establishing that the latter is the rightful owner. *Shellenberg v. Fremont, E. & M. V. R. Co.*, 45 Neb. 487 (63 N. W. 859; 50 Am. St. Rep. 561).

44. (1895.) Where a stranger to a contract of bailment claims property in possession of the bailee, the latter has a remedy by bill of interpleader requiring the claimants to the property to litigate the question of title between themselves. *Shellenberg v. Fremont, E. & M. V. R. Co.*, 45 Neb. 487 (63 N. W. 859; 50 Am. St. Rep. 561).

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45. (1901.) A depository of a trust fund who parts with no consideration and is not misled to his prejudice by reason of the deposit, is bound to restore the fund to the true owner on demand, although such deposit was made by an agent or trustee and, until such demand, the depository had no notice of its real character. *Union Stock Yards Bank v. Campbell*, 2 Unof. 72 (96 N. W. 608).

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Conversion by bailee.

46. (1888.) In cases of bailment at common law, there has always been a choice of forms of action between case and assumpsit. Case lies for breach of duty and assumpsit for breach of promise. The code has preserved to the suitor all the rights and remedies known to the law, and hence, if a promise is implied, either from a breach of duty or from the undertaking of defendant, an attachment in a proper case will lie. *Hart v. Barnes*, 24 Neb. 782 (40 N. W. 322).

47. (1900.) A bailee who fails or refuses to surrender trust property to the owner in accordance with the express or implied terms of the bailment is liable in an action for conversion, unless he can show a prior lawful seizure of the property under judicial process against the owner, or some other legal and valid excuse. *Wood Harvester Co. v. Dobry*, 59 Neb. 590 (81 N. W. 611).

Larceny by bailee.

48. (1898.) The rule excluding evidence of a crime other than that for which accused is being tried *held* applicable to a prosecution for larceny as bailee. *Davis v. State*, 54 Neb. 177 (74 N. W. 599).

49. (1898.) In a prosecution for larcenry by a bailee the gravamen of the charge is the felonious conversion, and the intent may be shown to have been entertained as of the time of the reception of the possession of the property or to have arisen during the continuance of such possession. *Davis v. State*, 54 Neb. 177 (74 N. W. 599).

Actions against third persons.

50. (1906.) A bailee of property having an interest therein under express contract may maintain an action to recover the value thereof against one through whose negligence or failure of duty it is lost. *Union P. R. Co. v. Meyer*, 76 Neb. 549 (107 N. W. 793).

BALLOTS.

See *Elections*, §§ 59-87.

BANK EXAMINERS.

See *Banks and Banking*, § 1.

BANKRUPTCY.

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——— Burden of proving discharge, § 58.
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——— Jurisdiction of state courts, §§ 61-66.
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CROSS-REFERENCES.

See also, *Assignments for Benefit of Creditors; Insolvency; Fraudulent Conveyances.*

Insolvency of corporations, see *Corporations.*

Possession of property by United States marshal.

1. (1877.) In bankruptcy proceedings the possession of the goods by the United States marshal was possession of the court whose officer he was, and it was the right of that court to determine whether that possession was legal or not. *Baker v. Daily*, 6 Neb. 464.

2. (1877.) A marshal of a federal court can waive the right of that court to determine the legality of his possession of property seized in bankruptcy proceeding, and does so waive by failure to answer a replevin suit. *Baker v. Daily*, 6 Neb. 464.

3. (1877.) Where a property is taken by a United States marshall from an alleged bankrupt's vendee, and the state courts replevin the same and assess damages against the marshal, such marshal could have rendered such proceeding improper and erroneous, by proper answer, and showing by what authority he held the same. *Baker v. Daily*, 6 Neb. 464.

Effect of bankruptcy act on insolvency law.

4. (1902.) The bankruptcy act of 1898 does not affect proceedings commenced under the state insolvency law before its passage. *Hood v. Blair State Bank*, 3 Unof. 432 (91 N. W. 701).

Questions determined on application for discharge.

5. (1905.) The question of fraud in conveyances made prior to July 1, 1898, could not be determined in a hearing on application by a bankrupt for his discharge in the bankrupt proceedings. *Shreck v. Hanlon*, 74 Neb. 264 (104 N. W. 193).

Effect of bankrupt proceedings in general.

6. (1902.) As against a conditional vendor of chattels, the filing of a petition in bankruptcy by or against the vendee has the effect of the seizure of the goods upon judicial process against the latter. *Logan v. Nebraska Moline Plow Co.*, 3 Unof. 526 (93 N. W. 1128).

7. (1880.) Where a judgment is recovered on attachment proceedings prior to proceedings in bankruptcy are instituted such attachment and judgment are dissolved by the proceedings in bankruptcy. *Tootle v. Sheldon*, 10 Neb. 44 (4 N. W. 358).

8. (1907.) Whether a debt due from an agent to his principal for rent collected and converted to his own use is one created by fraud, embezzlement, misappropriation, or defalcation while acting in a fiduciary capacity, within section 17 of the bankruptcy act, *quære*. *Stull Brothers v. Beddeo*, 78 Neb. 119 (112 N. W. 315).

9. (1907.) A surety on an injunction bond, given in a suit brought to restrain the enforcement of a judgment, is not released from liability thereon by the discharge of his principal in bankruptcy. *Stull Brothers v. Beddeo*, 78 Neb. 119 (112 N. W. 315).

10. (1906.) One who collects rents as the agent of another is acting in a fiduciary capacity and holds the amount so collected in trust for his principal; or if, without authority so to do, he collects rents due his employer and converts the same, he becomes indebted to his employer to the amount of the rents collected and the debt so created is fraudulently contracted. In either event a discharge in bankrtuptcy does not release him from the debt so contracted. *Stull Brothers v. Beddeo*, 78 Neb. 114 (110 N. W. 861).

Effect on pending actions.

11. (1882.) The only effect of bankruptcy proceedings upon a pending action prior to the discharge is to enable the bankrupt to have the action stayed to agait the decision of the bankrupt court on the question of his discharge. *McCormick v. Raymond*, 13 Neb. 306 (14 N. W. 402).

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12. (1902.) The state court should stay proceedings in a suit pending against a person against whom proceedings in bankruptcy have been commenced, either on his own petition or by his creditors, if the pending suit is founded upon a claim from which a discharge in bankruptcy would be a release. *McIntyre v. Malone*, 3 Unof. 159 (91 N. W. 246).

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Presumption of execution of assignment.

13. (1888.) As soon as an assignee in bankruptcy is appointed and qualified by an instrument under his hand, to assign and convey to the assignee all of the estate of the bankrupt, etc., in a case where the record is silent as to the execution of such instrument, but does show that the bankrupt was subsequently discharged in bankruptcy from his debts, it will be presumed that the judge and register performed their duty, and that such instrument of assignment was executed. *Hale v. Christy*, 24 Neb. 746 (40 N. W. 295).

Property vested in assignee.

14. (1888.) Upon an adjudication of bankruptcy, the appointment of an assignee, and the execution by the judge, or in cases where there is no opposing interest, the register, of an instrument of assignment, all of the estate of such bankrupt, both real and personal, including all judgments owned by him, collectible or non-collectible, except exemptions not necessary to be considered, pass to and become vested in such assignee by virtue of the adjudication in bankruptcy and the appointment of the assignee. *Hale v. Christy*, 24 Neb. 746 (40 N. W. 295).

15. (1902.) An action for tort pending at the time of bankruptcy passes to the trustee of the bankrupt, and a purchaser and assignee thereof claiming under a trustee's sale may satisfy the claim. *Cleland v. Anderson*, 66 Neb. 252 (92 N. W. 306). [Overruled on rehearing. 66 Neb. 276.]

16. (1902.) Under section 70 of the bankruptcy act of 1898 (U. S. Compiled Statutes, 1901, p. 3451), a cause of action which would survive and pass to the personal representative of the plaintiff, so that the avails thereof would be distributed in the administration of the estate, will pass to his trustee in bankruptcy. *Cleland v. Anderson*, 66 Neb. 252 (92 N. W. 306). [Overruled on rehearing. 66 Neb. 276.]

17. (1902.) Where the state statutes make a distinction between a plaintiff's interest in a pending action and his cause of action before suit brought, the making the one assignable in cases where the other is not, the interest of a bankrupt in a pending action, which he might sell and assign, and of which his creditors might have the benefit on administration of the estate, is to be held "property," within the purview of subdivision 5, section 70, national bankruptcy act, rather than a "right of action" under subdivision 6. *Cleland v. Anderson*, 66 Neb. 273 (96 N. W. 212).

18. (1902.) An action for conspiracy whereby plaintiff was "driven out of business as a dealer in lumber," under section 11, chapter 91*a*, Compiled Statutes, 1901, is an action in tort, and does not arise "from the unlawful taking or detention of, or injury to, his property," within the meaning of the federal bankrupt act. *Cleland v. Anderson*, 66 Neb. 276 (98 N. W. 1075).

19. (1902.) A right of action for tort, is not property within the meaning of the national bankrupt act; and, even though an action is pending thereon, such right does not pass to the trustee in bankruptcy. *Cleland v. Anderson*, 66 Neb. 276 (98 N. W. 1075).

20. (1902.) The bankrupt act vests the assignee with title to all property conveyed by the bankrupt in fraud of creditors, and he may recover the interest of the bankrupt in the property, whether any creditor was in position to attack the transfer or not. *Sheldon v. Parker*, 66 Neb. 610 (92 N. W. 923).

21. (1905.) The right of action given by section 11, chapter 91*a*, Compiled Statutes 1903, is for injury to "business, employment or property," and under the national bankruptcy act passes to the assignee in bankruptcy. *Cleland v. Anderson*, 75 Neb. 273 (105 N. W. 1092).

Title and rights acquired by assignee.

22. (1902.) The federal bankruptcy law giving to the trustee the title to all property which the bankrupt could have transferred prior to the filing of the petition or which could have been levied upon for his debts, places the trustee as against an unrecorded conditional sale contract in the position of a judgment creditor. *Logan v. Nebraska Moline Plow Co.*, 3 Unof. 516 (92 N. W. 129).

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23. (1905.) A trustee in bankruptcy succeeds to the bankrupt's title to choses in action, subject to any defense, abatement or counterclaim to which they would have been liable in the hands of the latter. *Nebraska Moline Plow Co. v. Blackburn*, 74 Neb. 246 (104 N. W. 178).

24. (1905.) A party borrowed the amount necessary to pay the purchase price of certain real estate, for the purchase of which he had made an oral contract with the owner, giving his note therefor. To secure the payment of the note it was orally agreed among the vendor, the vendee and the payee of the note that upon payment of the note the title of the real estate should be conveyed to the vendee, but upon default in such payment it should be conveyed to the payee. Afterwards the vendee was adjudged a bankrupt and a trustee appointed for his estate. *Held*, That the vendee took merely the equitable title, subject to a lien in favor of the holder of the note for the amount due thereon, and that the trustee of his estate occupies no more advantageous position. *Beer v. Wisner*, 74 Neb. 437 (104 N. W. 757).

Preferences and transfers by bankrupt.

——— In general.

25. (1905.) Evidence examined, and *held* sufficient to sustain finding that a conveyance of land by a bankrupt to his wife was fraudulent as to creditors. *Shreck v. Hanlon*, 74 Neb. 264 (104 N. W. 193).

26. (1905.) When an insolvent debtor within four months of the adjudication of his bankruptcy transfers to one of his creditors with notice of such insolvency sufficient property to satisfy the debt in full, a preference will be presumed, because such is the natural and logical result of the transaction. *Raley v. Raymond Bros. Clarke Co.*, 73 Neb. 496 (103 N. W. 57).

——— Indirect transfers.

27. (1903.) A creditor will not be permitted to obtain a preference indirectly by transfer of his account, procuring a third party to loan money to the debtor for payment of such creditor, or other colorable device or transaction intended to evade the provisions of the bankruptcy act. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624 (94 N. W. 822).

——— Notice of insolvency.

28. (1902.) Where defendants admit that an assignment of their account against a bankrupt to a purchaser of his stock and business was with the understanding that it was to be used in payment therefor, and that they were to "carry" the purchaser on the account, if it be added that the defendants had notice of the bankrupt's insolvency, the transaction would amount to a preference and must be held to have been so intended. *Hackney v. Hargreaves Bros.*, 3 Unof. 676 (92 N. W. 626).

29. (1903.) A mere knowledge of a creditor that the debtor has other liabilities, or of circumstances which could operate no further than to create a suspicion of possible insolvency, wil not necessarily suffice to constitute a payment or credit to such creditor, a preference within the purview of section 60 of the bankruptcy act. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624 (94 N. W. 822).

30. (1903.) In determining whether a creditor to whom an alleged preference was made, had reasonable cause to believe that his debtor was insolvent, it is not necessary to find that the creditor actually knew or believed that the debtor was insolvent. He is chargeable with notice of such facts as a reasonable inquiry, in view of the circumstances with respect to the debtor's condition which were brought home to him, might fairly be expected to disclose. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624 (94 N. W. 822).

31. (1903.) If the creditor has reasonable ground to believe that the debtor is insolvent, and the obvious effect of receipt of the money under those circumstances is to give him an advantage over other creditors, he is chargeable with notice of intent to prefer. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624 (94 N. W. 822).

——— Absolute transfers in good faith.

32. (1903.) An absolute transfer of an account against the insolvent debtor, in good faith, to one who afterwards buys the latter's stock of goods and obtains credit for such account on the purchase price, without any agreement or understanding that such use was to be made thereof, or that the purchaser of the account was to be protected by the creditor in any way, does not constitute a preference of the creditor to the extent of the money he received on sale of his claim. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624 (94 N. W. 822). [Overruled on rehearing. 68 Neb. 633.]

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——Time of transfer.

33. (1903.) A chattel mortgage executed and delivered more than four months prior to bankruptcy of the mortgagor, is not voidable because not recorded until a subsequent date within such period of four months. *First Nat. Bank of Holdrege v. Johnson*, 68 Neb. 641 (94 N. W. 837).

34. (1903.) If a chattel mortgage is executed more than four months before bankruptcy, which creates no lien on specific chattels, and afterwards, within the four months, while the mortgagor is insolvent, he separates or identifies certain chattels and agrees that the mortgage shall apply to them, the lien is created then for the first time, and constitutes a preference within the meaning of section 60 of the bankruptcy act. *First Nat. Bank of Holdrege v. Johnson*, 68 Neb. 641 (94 N. W. 837).

35. (1903.) Evidence examined, and found insufficient to sustain a judgment in favor of the plaintiff under the provisions of subdivision *f* of section 67 of the national bankruptcy act of 1898. *Johnson v. Anderson*, 70 Neb. 233 (97 N. W. 339).

36. (1905.) Under subdivision *e*, section 67 of the bankruptcy act of July 1, 1898, all conveyances, transfers or assignments of property of a bankrupt made within four months of the filing of the petition for an adjudication in bankruptcy for a past consideration and with the intent and purpose on the part of the bankrupt to hinder, delay and defraud any of his creditors, are void as against the creditors. *Raley v. Raymond Bros. Clarke Co.*, 73 Neb. 496 (103 N. W. 57).

——Consideration.

37. (1903.) A creditor of a bankrupt cannot escape the consequences of the bankruptcy act regarding unlawful preferences by assigning his account to a purchaser of the property of the bankrupt under an arrangement whereby such purchaser offers to assume the liability, and satisfy such account contingent upon the purchase of the bankrupt's property, and where in the sale of such bankrupt's property, as a part of the consideration, such purchaser agrees to and assumes such liability, and reserves from the purchase price an amount sufficient to satisfy the same. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 633 (99 N. W. 675).

Rights of preferred creditor.

38. (1903.) If a secured creditor of a bankrupt, whose security is insufficient, discloses his security in proving his claim before the referee, he may retain his security and share in the dividends as to the overplus. *Kohout v. Chaloupka*, 69 Neb. 677 (96 N. W. 173).

Recovery of and setting aside transfer.

39. (1902.) A trustee in bankruptcy, acting for the creditors of the bankrupt, may maintain an action in the nature of a creditors' bill to set aside a fraudulent conveyance without reducing the claims of the creditors to judgment. In all other things he possesses only such rights and powers as they can exercise for themselves. *Hood v. Blair State Bank*, 3 Unof. 432 (91 N. W. 701).

40. (1902.) Where it is shown in the petition of a trustee in bankruptcy that insolvency proceedings are pending under the state insolvency law, providing for an assignment for the benefit of creditors, his action to set aside alleged fraudulent conveyances and a decree of the state court foreclosing them cannot be maintained. *Hood v. Blair State Bank*, 3 Unof. 432 (91 N. W. 701).

41. (1903.) The trustee in bankruptcy may recover money paid by the bankrupt as a preference, only when the person receiving it had reasonable ground to believe that a preference was intended. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624 (94 N. W. 822).

42. (1903.) Where a creditor of an insolvent in good faith transfers his account to one who afterwards buys the debtor's goods and obtains credit for the account on the purchase price, the remedy of the trustee in bankruptcy of the debtor, is against the purchaser of the stock, who received credit on the purchase price for the account so transferred, in case he had reasonable ground to believe that a preference was intended. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624 (94 N. W. 822). [Overruled on rehearing. 68 Neb. 633.]

43. (1903.) In an action by a trustee in bankruptcy to recover a note from one to whom it had been assigned by the bankrupt's wife pending the bankruptcy proceedings, the evidence held to support the trial court's finding that neither fraud or intended preference was shown in this case. *Hackney v. First Nat. Bank of Lincoln*, 68 Neb. 588 (94 N. W. 805).

44. (1903.) An action by a trustee in bankruptcy to recover a negotiable promis-

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sory note from one to whom it had been transferred by the bankrupt's wife pending bankruptcy proceedings, must develop either fraud or an intended preference to entitle plaintiff to recover. *Hackney v. First Nat. Bank of Lincoln*, 68 Neb. 588 (94 N. W. 805).

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45. (1903.) Where one creditor of a bankrupt has secured a preference in the payment of his claim, the trustee may recover the property, or its value, from such preferred creditor, but he can not pursue the property into the hands of a third party, who is a *bona fide* purchaser, or recover from such third party the value of the property. *Hackney v. First Nat. Bank of Lincoln*, 68 Neb. 594 (98 N. W. 412).

46. (1903.) The trustee in bankruptcy may recover money paid by the bankrupt as a preference only, when the person receiving it had reasonable ground to believe that a preference was intended. *Johnson v. Anderson*, 70 Neb. 233 (97 N. W. 339).

47. (1905.) A trustee in bankruptcy, acting for the creditors of the bankrupt, may maintain an action in the nature of a creditors' bill to set aside a fraudulent conveyance, without reducing the claims of the creditors to judgment. *Shreck v. Hanlon*, 74 Neb. 264 (104 N. W. 193).

Discharge in bankruptcy.

Discharge in, not a bar to creditor's suit, see *Creditor's Suit*, § 3.

Discharge of fraudulent grantee as defense of grantor to creditor's suit, see *Creditor's Suit*, §§ 42, 43.

——— Bar to subsequent suits.

48. (1877.) A certificate of discharge is sufficient evidence of bankruptcy and of the validity of the proceedings therein. *Smith v. Kinney*, 6 Neb. 447.

49. (1877.) When a judgment, upon a debt accrued before the institution of proceedings in bankruptcy, is entered in a state court prior to a decree in bankruptcy, the certificate of discharge is conclusive of the discharge and a bar to further proceedings upon the judgment; and the court will relieve the judgment debtor, in such case, from an execution afterwards issued thereon. *Smith v. Kinney*, 6 Neb. 447.

50. (1882.) It is only the final discharge of a debtor, under the bankrupt law of the United States, that constitutes a good plea in bar of an action. The fact that he has simply been adjudged a bankrupt is not a defense. *McCormick v. Raymond*, 13 Neb. 306 (14 N. W. 402).

51. (1900.) A discharge in bankruptcy is no defense to an action based upon the defendant's fraud while acting as an officer or in any fiduciary capacity. *Gerner v. Yates*, 61 Neb. 100 (84 N. W. 596).

52. (1902.) The question of fraud in conveyances made prior to July 1, 1898, could not be determined in a hearing on application by a bankrupt for his discharge in the bankrupt proceedings, and hence such discharge is not a bar to a pending proceeding to set the conveyance aside. *Paxton v. Scott*, 66 Neb. 385 (92 N. W. 611).

53. (1904.) After plaintiff in attachment has recovered judgment, and an order for the sale of the attached real estate, and has begun an action in equity to set aside a fraudulent convenance of the real estate, the discharge in bankruptcy of the judgment defendant will not defeat such action. *Grandin v. First Nat. Bank of Chicago*, 70 Neb. 730 (98 N. W. 70).

54. (1905.) Where a discharged bankrupt seeks to enjoin the collection of a judgment against him which was not listed in the name of the creditor in the bankruptcy proceedings, he must plead and prove that the creditor had notice or knowledge of such proceedings in time for proof and allowance of the same before he can succeed in the action. *Armstrong v. Sweeney*, 73 Neb. 775 (103 N. W. 436).

——— Presumption of assignment.

55. (1888.) Where record shows discharge of bankrupt, presumption is that assignment was executed. *Hale v. Christy*, 24 Neb. 746 (40 N. W. 295).

——— Effect in general.

56. (1887.) Where one who is indebted to another procures a third person to execute a note and mortgage to the creditor, on false representations, and a concealment of the indebtedness between the parties, the liability created by such fraud is not discharged by bankruptcy proceeding, and the measure of damage the amount of the loss occasioned by the fraud, with legal interest. *Forbes v. Thomas*, 22 Neb. 541 (35 N. W. 411).

57. (1902.) The discharge of a bankrupt is only personal to himself, and does not affect any lien, either by contract or

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by judicial proceedings, against property. *Parton v. Scott*, 66 Neb. 385 (92 N. W. 611).

——Burden of proving discharge.

58. (1885.) One who pleads a discharge in bankruptcy as a defense to an action against him is burdened with establishing such discharge by sufficient evidence. *Gregory v. Edgerly*, 17 Neb. 374 (22 N. W. 703).

Collateral attack on discharge.

59. (1876.) A discharge in bankruptcy has the same effect in law as payment of the debts, and such discharge cannot be assailed for fraud in a collateral proceeding. *Seymour v. Street*, 5 Neb. 85.

60. (1877.) A decree of discharge in bankruptcy can only be impeached in a direct application for that purpose in the court in which it was granted. *Smith v. Kinney*, 6 Neb. 447.

Actions by assignee.

——Jurisdiction of state courts.

61. (1872.) The assignee of a bankrupt under the United States bankrupt law of 1867, can maintain an action in a state court in his own name, for property claimed to belong to the estate of the bankrupt. *Hoover v. Robinson*, 3 Neb. 437.

62. (1902.) The state courts have jurisdiction of an action by a trustee in bankruptcy to set aside an alleged fraudulent conveyance by the bankrupt. *Paxton v. Scott*, 66 Neb. 385 (92 N. W. 611).

63. (1902.) A trustee in bankruptcy must, in certain cases, resort to the courts of the state to recover property of the bankrupt fraudulently conveyed. In such cases he is entitled to all remedies and all relief that would be afforded any other party litigant under the same facts. *Sheldon v. Parker*, 66 Neb. 610 (92 N. W. 923).

64. (1902.) Where a person has been declared a bankrupt under the act of congress approved July 1, 1898, the trustee appointed in that proceeding may maintain an action to set aside a conveyance made by the bankrupt at any time within two years after the estate has been closed, provided the action was not barred by the laws of this state at the time the petition in bankruptcy was filed. *Shreck v. Hanlon*, 66 Neb. 451 (92 N. W. 625); *Sheldon v. Parker*, 66 Neb. 610 (92 N. W. 923).

65. (1902.) The state court in which is pending the suit against a bankrupt is the proper tribunal to which application for a stay pending the bankruptcy proceedings should be made. *McIntyre v. Malone*, 3 Unof. 159 (91 N. W. 246).

66. (1902.) Actions by a trustee in bankruptcy to recover property in the hands of third parties and which he claims as a part of the bankrupt estate, must be prosecuted in the state court unless the defendants in such actions consent that the same may be prosecuted in the federal court. *McIntyre v. Malone*, 3 Unof. 159 (91 N. W. 246).

——Set-off of claim allowed.

67. (1905.) A party against whom a judgment has been rendered in favor of the trustee of a bankrupt may, by proper proceedings in equity, be allowed to offset against the same a claim allowed in its favor against the bankrupt in the bankruptcy proceedings. *Tootle-Weakley Millinery Co. v. Billingsley*, 74 Neb. 531 (105 N. W. 85).

——Pleading.

68. (1903.) The petition of a trustee in bankruptcy, asking to be substituted as party plaintiff in a creditor's bill filed by a creditor of the bankrupt who has filed his claim before the referee in bankruptcy, which does not allege that such creditor has waived his security, is insufficient to entitle the trustee to intervene and be subrogated to the rights of such creditor. *Kohout v. Chaloupka*, 69 Neb. 677 (96 N. W. 173).

69. (1903.) In an action by a trustee in bankruptcy to recover the proceeds of the property of the bankrupt paid over to a creditor on a judgment in completed attachment proceedings in his favor, within four months of, and before the filing of the petition in bankruptcy, it must be alleged in the petition that the preference was received by the creditor having reasonable cause to believe that the bankrupt was insolvent, and, by suffering the attachment proceedings and judgment to be taken against him, thereby intended to make a preference. *Johnson v. Anderson*, 70 Neb. 233 (97 N. W. 339).

70. (1903.) *Held*, That the court in the exercise of a reasonable discretion, properly refused to allow the plaintiff to amend his petition, where the amendment tendered failed to allege that the defendant, to whom a payment was made by the insolvent, within four months before the fil-

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ing of the petition in bankruptcy, had reasonable ground to believe that by such payment the bankrupt intended a preference. *Johnson v. Anderson*, 70 Neb. 233 (97 N. W. 339).

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——— Evidence.

71. (1903.) A schedule of liabilities filed by the bankrupt in bankruptcy proceedings, is not competent evidence on an issue between the trustee and third persons to whom he had made an alleged preference, as to the financial condition of the bankrupt three months before such proceedings were instituted. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624 (94 N. W. 822). [Overruled on rehearing. 68 Neb. 633.]

72. (1903.) In a contest between a trustee in bankruptcy and one sought to be charged as a creditor having received an unlawful preference, the schedule of liabilities filed by the bankrupt in the bankruptcy proceedings is admissible in evidence on the issue of insolvency as tending to prove the insolvency charged. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 633 (99 N. W. 675).

——— Question for jury.

73. (1903.) Evidence examined, and *held* to present a question for the jury whether the specific chattels in controversy were mortgaged in the first instance, or were afterwards within four months of bankruptcy agreed upon as the mortgaged property. *First Nat. Bank of Holdrege v. Johnson*, 68 Neb. 641 (94 N. W. 837).

74. (1903.) Whether a creditor had reasonable cause to believe his debtor insolvent within the purview of section 60 of the bankruptcy act is a question of fact. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624 (94 N. W. 822).

——— Instructions.

75. (1903.) In an action by a trustee in bankruptcy to recover, under section 60 of the bankrupt law, the amount of a preference given within four months of the filing of a petition in bankruptcy, *held* error to instruct the jury that it is sufficient to prove that the defendant had reasonable cause to believe the bankrupt was insolvent "or that it was acquainted with facts as to the condition of said company that would lead to a reasonable doubt of its solvency." *Farmers & Mechanics Bank v. Wilson*, 4 Unof. 606 (95 N. W. 609).

76. (1903.) An instruction, that notice of facts sufficient to lead a prudent man to the conclusion that a debtor "could not meet his obligations as they matured in the ordinary course of business" is notice of the insolvency of such debtor, within the meaning of the bankruptcy act, is erroneous. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624 (94 N. W. 822).

77. (1905.) In an action by a trustee in bankruptcy to set aside an alleged preference to defendant as creditor, the instructions set out in the opinion, *held* not prejudicial. *Hargreaves Bros. v. Hackney*, 74 Neb. 700 (104 N. W. 855).

BANKS AND BANKING.

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——— Jurisdiction and venue, §§ 293, 294.
——— Conditions precedent, §§ 295, 296.
——— Defenses, § 296a.
——— Pleading, §§ 297-299.
——— Limitations, § 300.
——— Evidence, § 301.
——— Instructions, § 301a.
——— Amount of penalty recoverable, § 302.
Insolvency and receivers, §§ 303-305.
——— Assessment of stockholders by comptroller, §§ 306-309.

CROSS-REFERENCES.

Bank checks, see *Bills and Notes.*

Assessment of property for taxation, see *Taxation*, §§ 292, 293.

I. CONTROL AND REGULATION.

Public examiners.

1. (1890.) Under the act of March 29, 1889, requiring banks, corporations, firms, and individuals transacting a banking business to report their resources bilities to the auditor of public and providing for their yearly exa the fees of bank examiners, app the board of state officers under are to be strictly in conformity 8 of the act, and any resolution of the board of state officers p any other rule or rate of compe without authority and void. *Sta Post, v. Benton*, 31 Neb. 44 (47 N

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II. BANKING CORPORATIONS AND ASSOCIATIONS.

A. Incorporation, Organization and Incidents of Existence.

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What constitutes bank.

2. (1902.) In determining whether or not a corporation is a banking institution within the meaning of section 7, article XI*b* of the constitution, the court will look to its articles of incorporation, its declared objects and purposes, the character of the business transacted by it, and even the construction which the officers themselves, in their management of its affairs, place upon its charter powers, if this construction is not unwarranted by the language of its charter. *Hamilton Nat. Bank v. American Loan & Trust Co.*, 66 Neb. 67 (92 N. W. 189).

3. (1902.) To buy and sell commercial paper, to make and negotiate loans, to receive money to be transferred to and paid at other places, to buy and sell exchange upon other cities in this and foreign countries, to receive money on deposit and to pay the same out upon checks or orders, are each banking functions; but it is not necessary, in order to constitute a corporation a banking institution within the meaning of section 7, article XI*b* of the constitution, that it shall exercise all of these functions. *Hamilton Nat. Bank v. American Loan & Trust Co.*, 66 Neb. 67 (92 N. W. 189).

4. (1902.) A corporation filed articles providing, among other things, that the general nature of its business should be to make and negotiate loans, to purchase and sell notes, mortgages, stocks and bonds, to borrow money and issue its own obligations therefor, to receive money on deposit, and to execute trusts. It received money on deposit, and paid the same out on checks; it bought and sold commercial paper; it made and negotiated loans; it bought and sold exchange upon other cities, and also transacted much of the business of a loan and trust company. It designated itself a "loan and trust company." *Held*, That it was a bank, and its stockholders were liable under the provisions of section 7, article XI*b* of the constitution. *Hamilton Nat. Bank v. American Loan & Trust Co.*, 66 Neb. 67 (92 N. W. 189).

——— Individual doing banking business.

5. (1899.) An unincorporated bank, exclusively owned by a private individual, is not a legal entity, though its business be conducted by a president and cashier. *Longfellow v. Barnard*, 58 Neb. 612 (79 N. W. 255; 76 Am. St. Rep. 117).

6. (1899.) An unincorporated bank, exclusively owned by one person, is not a corporation *de facto*, though the business be conducted by a president and cashier. *Longfellow v. Barnard*, 59 Neb. 455 (81 N. W. 307).

Term of existence.

7. (1897.) A finding adverse to the contention that a banking corporation had ceased to exist by lapse of time will be sustained where, on each side, the evidence is of like character with a preponderance in favor of the finding rather than against it. *Shabata v. Johnston*, 53 Neb. 12 (73 N. W. 278).

Reorganization.

8. (1897.) A petition of a creditor of a banking association which discloses that another bank, as successor of said association, had assumed the liabilities upon a sufficient consideration moving from said association, and that the claim of plaintiff was one of said liabilities remaining unpaid, states sufficient facts to entitle to relief as against the bank which assumed the aforesaid liabilities. *Tecumseh Nat. Bank v. Best*, 50 Neb. 518 (70 N. W. 41).

9. (1897.) Evidence *held* insufficient to show that a national bank, succeeding a banking association, assumed the debts of the association. *Tecumseh Nat. Bank v. Saunders*, 50 Neb. 521 (70 N. W. 42).

10. (1898.) Where a partnership bank guarantees payment of a note and transferred it to an incorporated bank of which two of the partners became officers, the defense that the transferee extended the time of payment of the note was *held* not availing to defendants in a suit by the transferee on the guaranty. *Leonhardt v. Citizens Banks of Ulysses*, 56 Neb. 38 (76 N. W. 452).

11. (1898.) Where partners in a bank transfer their assets to an incorporated bank, guarantee payment, and become stockholders and officers of the incorporated bank, a settlement of the liability of the copartnership and the incorporated bank by its managing officers, is voidable at the election of the incorporated bank, unless the full amount due on the guaranty is paid, or the settlement authorized or ratified by the stockholders, the guarantors not

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voting. *Leonhardt v. Citizens Bank of Ulysses*, 56 Neb. 38 (76 N. W. 452).

B. Capital Stock and Dividends.

Issue of stock.

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12. (1878.) O., the president of a bank, informed one R. that they were about to reorganize the bank, and that if he would act as director thereof, and his firm would give the bank all their business as they had done before, and use their influence in its behalf, that they would give him ten shares of the stock. R. accepted the proposition, and was elected and served as a director, and the firm of which he was a member continued to do business with the bank. *Held*, 1st, that the agreement was a sufficient consideration to entitle R. to the ten shares of stock; 2d, that the president professing to act for the bank in the transaction, and the bank receiving the benefits derived from the contract, thereby ratified his action. *Rich v. State National Bank*, 7 Neb. 201 (29 Am. Rep. 382).

Reduction of capital stock.

13. (1902.) Where a bank reducing its captial stock, took up its old stock, and issued new stock for half the amount in exchange and also, without consideration, issued certificates of deposit to the stockholders for an amount equal to the other half of the stock, another bank, which held as collateral a part of the $25,000 of previous stock, and surrendered the same, and accepted in lieu thereof one-half in new stock and one-half in certificates of deposit, stands as to this reduction of stock in the shoes of an ordinary stockholder, and can not recover against the receiver on its deposit certificates. *State v. Bank of Ogallala*, 65 Neb. 20 (91 N. W. 497).

14. (1902.) A bank having a nominal capital stock of $25,000, and an indebtedness besides to the amount of $14,542, its entire assets being only of the value of $21,400, issued certificates of deposit for the amount of $12,500 to its several stockholders, and also $12,500 of new capital stock to take up the former capital stock, *held*, that the certificates of deposit are without consideration, as against a receiver and creditors of the bank, and that without regard to when the creditors became such. *State v. Bank of Ogallala*, 65 Neb. 20 (91 N. W. 497).

Liability for unpaid subscriptions.

Liability for debts of bank, see *post*, §§ 17-32.

15. (1893.) W. and T. were conducting a private bank at L., and on November 1, 1887, organized a corporation with an alleged capital of $50,000 of which they retained a controlling interest. They turned over the deposits and assets of the private bank to the new corporation, for the amount of their stock. *Held*, That the stockholders were liable for the unpaid stock held by each, and for a sum equal to the shares so held by each for all liabilities of the bank accruing while he was a stockholder. *Porter v. Sherman County Banking Co.*, 36 Neb. 271 (54 N. W. 424)

16. (1897.) Compiled Statutes, chapter 8, section 35 (the Banking Act), in so far as it attempts to authorize actions to recover unpaid stock subscriptions before the corporate debts have been judicially ascertained and the corporate property exhausted, is in conflict with the constitution and void. *State v. German Savings Bank*, 50 Neb. 734 (70 N. W. 221).

C. Stockholders.

Directions to receiver to sue stockholders, see *post*, §§ 61-63.

Liability on unpaid subscription, see *ante*, §§ 15, 16.

Liability for debts of bank.

Assessment of stockholders of national bank, by comptroller, see *post*, §§ 306-309

17. (1893.) The stockholders are not liable under the provisions of sections 136, 139, chapter 11, General Statutes, for a debt which was not incurred while the officers of the bank were in default in publishing notice of the condtion of the bank. *Porter v. Sherman County Banking Co.*, 36 Neb. 271 (54 N. W. 424).

18. (1896.) The provisions of section 7, article XI of the constitution, that "every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held, to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder," are enforceable without special supplementary statutory enactments. *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353 (68 N. W. 520).

19. (1907.) The stockholders' liability is not a part of the *res* seized by the receiver. It is a liability for the benefit of the creditors. *Holcomb v. Tierney*, 79 Neb. 660 (113 N. W. 204).

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Liability on indebtedness to bank.

19a. (1907.) Where a stockholder in a bank which is in process of liquidation, who is indebted to the bank, refuses to pay his indebtedness and litigates the question, thereby preventing the distribution of funds on hand, and the litigation is determined adversely to him, he should be charged with interest upon the amount of his indebtedness, as found by the court, down to the time of the entry of judgment, regardless of the fact of the existence of such funds. *Gund v. Ballard*, 80 Neb. 385 (114 N. W. 420).

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Contribution among stockholders.

20. (1899.) Where a stockholder of a state bank advances his own funds to pay the debts of the bank in pursuance of an agreement of the stockholders that each should contribute in proportion to the number of shares of stock held by him, the advancing stockholder may maintain an action against the other stockholders for an accounting and contribution, without having first exhausted the assets of the bank. *Davidson v. Gretna State Bank*, 59 Neb. 63 (80 N. W. 256).

Actions to enforce stockholders' liability.

21. (1898.) The general nature of the relief to be afforded in an action by creditors against stockholders in an insolvent bank, on their unpaid subscriptions, in its main and ordinary elements outlined herein. *German Nat. Bank. v. Farmers & Merchants Bank*, 54 Neb. 593 (74 N. W. 1086.

22. (1898.) An action to enforce individual liability of stockholders of a bank, for corporate debts, is within the equity jurisdiction of the court. *German Nat. Bank v. Farmers & Merchants Bank*, 54 Neb. 593 (74 N. W. 1086.

——Conditions precedent.

23. (1896.) The constitutional requirement (constitution, article XI, section 4, under "Miscellaneous Corporations") that the indebtedness of a corporation shall be ascertained and the corporate assets exhausted before the enforcement of individual liability of stockholders, applies to banking corporations. *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353 (68 N. W. 520); (1898) *German Nat. Bank v. Farmers & Merchants Bank*, 54 Neb. 593 (74 N. W. 1086); (1898) *Hastings v. Barnd*, 55 Neb. 93 (75 N. W. 49).

24. (1902.) The liability of stockholders of a banking institution under section 7, article 11*b* of the constitution, is not an asset of the corporation, but a subject-matter wholly distinct; and a receiver can enforce such liability only at the instance of the creditors, by direction of the court, and then only after the claims of the creditors have been judicially ascertained, and the assets of the corporation exhausted. *Hamilton Nat. Bank v. American Loan & Trust Co.*, 66 Neb. 67 (92 N. W. 189).

25. (1907.) A judicial ascertainment of the liabilities of an insolvent banking corporation, such as is necessary before an action can be maintained to enforce the liability of the stockholders, can only be had in an action where the bank, being a party, has been properly served with notice of the pendency of the proceeding, or where it has voluntarily appeared and submitted to the jurisdiction of the court. *Holcomb v. Tierney*, 79 Neb. 660 (113 N. W. 204).

——Parties.

26. (1898.) The bank, the liability of whose stockholders was sought to be enforced herein, *held* not a necessary party to the action, but not an improper one. *German Nat. Bank v. Farmers & Merchants Bank*, 54 Neb. 593 (74 N. W. 1086).

27. (1898.) An action by creditors of an insolvent bank, against stockholders on unpaid stock should be for the benefit of all the creditors of the corporation against whose stockholders it is commenced. *German Nat. Bank v. Farmers & Merchants Bank*, 54 Neb. 593 (74 N. W. 1086).

28. (1898.) The liability of stockholders in banking corporations under section 7, article 11 of the constitution, must be enforced by or on behalf of all creditors, and against all stockholders liable. A suit by and on behalf of one out of many creditors against certain selected stockholders will not lie. *Hastings v. Barnd*, 55 Neb. 93 (75 N. W. 49).

29. (1898.) It is the settled doctrine of the supreme court that the liability of a stockholder in a banking corporation, under the provisions of section 7, article XI of the constitution, is for the creation of a fund for the benefit of all creditors, and an action to enforce such liability must be prosecuted for the benefit of all the creditors of the corporation against all the stockholders within the jurisdiction of the court. *Pickering v. Hastings*, 56 Neb. 201 (76 N. W. 587).

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30. (1899.) An action for the enforcement of the individual liability of the stockholders of a banking corporation must be prosecuted by one creditor for the benefit of all, or by the receiver of the corporation. *Brown v. Brink*, 57 Neb. 606 (78 N. W. 280).

31. (1899.) A creditor may not intervene in an action brought by the receiver of a bank against a stockholder, at least where it is not made to appear that the receiver is not prosecuting the case in good faith for the best interests of the creditors, or in some way has disregarded or violated the duties of his trust in that regard. *Brown v. Brink*, 57 Neb. 606 (78 N. W. 280).

——— **Pleading.**

32. (1898.) In an action to enforce stockholders liability, an allegation that "the exact amount justly due has hereinbefore been ascertained and the corporate property has been wholly and completely exhausted" was sufficient as against a motion to strike on the ground of indefiniteness. *German Nat. Bank v. Farmers & Merchants Bank*, 54 Neb. 593 (74 N. W. 1086).

D. Officers and Agents.

Acts and statements of officers binding on bank, see *post*, §§ 100-124.

Liability for neglegence of agent in making collection, see *post* §§ 238-243.

Rights and liabilities as to bank and its stockholders.

33. (1897.) Where the cashier of a bank used the bank's funds to purchase stock in another bank, a court of equity may charge the stock with a trust in favor of the bank whose funds were wrongfully used to purchase the stock. *Tecumseh Nat. Bank v. Russell*, 50 Neb. 277 (69 N. W. 763).

34. (1900.) In an action for deceit against the officers of a national bank who published a false report as to its financial condition, upon which plaintiff relied, one of the directors cannot escape liability on the ground that there was no special reliance upon him, if it appear that the plaintiff relied on the report and the entire directorate. *Gerner v. Yates*, 61 Neb. 100 (84 N. W. 596).

35. (1900.) A published report of the financial condition of a bank in which the resources and liabilities are equally inflated is not such a material misrepresentation as will support an action for deceit, unless the condition of the bank is thereby made to appear better than it actually is. *Gerner v. Yates*, 61 Neb. 100 (84 N. W. 596).

36. (1901.) An assistant cashier of a bank is subject to the control and direction of the cashier, but, when he is led to believe that the cashier is violating his own duty, and is taking bank funds for his own use, without authority, the assistant cashier has no right to aid or connive at such misappropriation. *Fiala v. Ainsworth*, 63 Neb. 1 (88 N. W. 135; 93 Am. St. Rep. 420).

37. (1901.) In an action against an assistant cashier of a bank to recover for negligence in knowingly permitting the cashier to misappropriate bank funds, no recovery can be had on certain losses sustained through transactions with other banks whereby the cashier obtains loans in the name of the bank, such loss being too remote. *Fiala v. Ainsworth*, 63 Neb. 1 (88 N. W. 135; 93 Am. St. Rep. 420).

38. (1903.) Where an officer of a bank gives a bond conditioned that he will "honestly, faithfully, and efficiently" perform his duties, he and his sureties are liable for loss resulting from his negligence, even though the directors may not have used due diligence. *Fiala v. Ainsworth*, 68 Neb. 308 (94 N. W. 153).

39. (1904.) The general authority of a cashier of a bank does not authorize him to issue drafts of the bank for himself or for his private use. *Mendel v. Boyd*, 71 Neb. 657 (99 N. W. 493).

40. (1905.) Where the president of a bank was a creditor of a firm who were also debtors of the bank secured an assignment of all of the debtors property in his individual name, and obliged himself to pay the indebtedness to the bank by signing a note in its favor with the debtor, he is primarily liable to the bank for the amount of the bank. *Gund v. Ballard*, 73 Neb. 547 (103 N. W. 309).

41. (1905.) Where a person occupies a fiduciary relation to a bank and its stockholders, and engages in litigation in which his individual interests are in conflict with those he represents in a fiduciary capacity, actual fraud is not essential in order to avoid the proceedings thus had and entered into. *Gund v. Ballard*, 73 Neb. 547 (103 N. W. 309).

42. (1905.) The president and director of a bank cannot enter into a contract with

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the corporation in which he is such an officer to pay a usurious rate of interest on money owing by him to such corporation, and thereby escape the payment of all interest on such indebtedness under the statute denouncing usurious contracts. In such a case a court of equity will not enforce the unlawful usurious contract, but will require the debtor to do equity by paying the legal rate of interest on the principal sum for which he is indebted to the corporation. *Gund v. Ballard*, 73 Neb. 547 (103 N. W. 309).

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——Securities furnished by defaulting officer.

43. (1901.) When a defaulting officer of a bank, for the purpose of replenishing the assets of the bank to enable it to resume business, is allowed to furnish collateral securities for his indorsements upon paper previously sold by him to the bank, representations made by an examiner as to the liabilities of such officer to the bank and the value and condition of the securities already furnished by him, are not binding upon the bank; and one who furnishes collateral securities to such defaulting officer to be so used by him can not rely upon such representations of the examiner as a defense in an action by the bank to foreclose its lien upon such securities. *Tecumseh Nat. Bank v. Chamberlain Banking House*, 63 Neb. 163 (88 N. W. 186; 57 L. R. A. 811).

44. (1901.) Where a defaulting bank officer contracts to furnish collateral security for his indorsement on paper previously sold to the bank by him so as to replenish the assets of the bank after such securities have been furnished and the bank has resumed business, the person furnishing such securities at the request of such defaulting officer with knowledge of the use to be made thereof by him cannot be heard to say that there was no consideration for furnishing the same *Tecumseh Nat. Bank v. Chamberlain Banking House*, 63 Neb. 163 (88 N. W. 186; 57 L. R A. 811).

45. (1901.) A contract of a defaulting bank officer to furnish collateral security so as to enable the bank to resume business, is not illegal. *Tecumseh Nat. Bank v. Chamberlain Banking House*, 63 Neb. 163 (88 N. W. 186; 57 L. R. A. 811).

46. (1901.) Where a defaulting bank officer makes false representations to a third person in order to obtain collateral securities so as to replenish the assets of the bank, and the bank is represented by a majority of its directors who are not in default and who accept such securities from the defaulting officer, such defaulting officer is not an agent of the bank, and his representations as to the liabilities of the bank and the value of the securities already obtained will not be binding upon the bank, so as to enable the person induced to furnish such securities to rely upon the representations as a defense in an action by the bank to foreclose its lien thereon. *Tecumseh Nat. Bank v. Chamberlain Banking House*, 63 Neb. 163 (88 N. W. 186; 57 L. R. A. 811).

——Actions.

Action to enforce liability of national bank officer for publishing false report, see *post*, §§ 275-278.

47. (1901.) In an action on a bond of an officer of a bank for negligence, remote and consequential damages cannot be recovered. *Fiala v. Ainsworth*, 63 Neb. 1 (88 N. W. 135; 93 Am. St. Rep. 420).

48. (1901.) Findings of the trial court, in an action by a bank against its former president for falsifying his account and settlement on his retirement, for the defense sustained *Citizens Bank of Humphrey v. Stockslager*, 1 Unof. 799 (96 N. W. 591).

49. (1903.) Evidence examined, and *held* sufficient to support the verdict for plaintiff in an action on the bond of a cashier of a bank for misappropriation of funds of the bank. *Fiala v. Ainsworth*, 68 Neb. 308 (94 N. W. 153).

50. (1904.) When it appears that a bank cashier has issued drafts to himself, there is no presumption that they were paid for when issued, and the burden is on the party claiming they were thus paid for to prove it. *Mendel v. Boyd*, 71 Neb. 657 (99 N. W. 493).

51. (1905.) Damages resulting to a national bank from the misfeasance or mismanagement of its officers are assets of the bank, and are recoverable only in an action brought by the bank or for the benefit of all the stockholders and creditors thereof. *Yates v. Jones Nat. Bank*, 74 Neb. 734 (105 N. W. 287); *Yates v. Utica Bank*, 74 Neb. 734 (105 N. W. 287); *Yates v. Bailey*, 74 Neb. 734 (105 N. W. 287). [Reversed. 206 U. S. 158, 181.]

Criminal responsibility.

52. (1895.) Where a cashier of a bank is being prosecuted for receiving a deposit

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of $11 with knowledge of the banks insolvency, evidence that the person making the deposit was indebted to the bank by an overdraft, in the sum of $15.30, is admissible for the defense. *Nichols v. State*, 46 Neb. 715 (65 N. W. 774).

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53. (1896.) A cashier, with knowledge of the bank's insolvency, cannot be convicted of a felony under sections 22, 23, chapter 8, Compiled Statutes, for accepting a deposit to apply on the depositor's overdraft. *Nichols v. State*, 46 Neb. 715 (65 N. W. 774).

54. (1897.) A charge that one made a false book-entry in the account of an individual with a bank is not sustained by proof that the entry was in an account with such individual designated as "township treasurer," and the variance is not less fatal because private money of the individual was included in the account referring to him as treasurer. *Williams v. State*, 51 Neb. 630 (71 N. W. 313).

E. Insolvency and Receivers.

Assets of insolvent banks subject to attachment, see *Attachment*, § 71.

Of national banks, see *post*, §§ 303-305.

Application and proceedings for appointment of receiver.

55. (1890.) An application by the attorney general stating that the defendant bank is conducting its affairs in such a manner as to appear to the creditors and the state, that the depositors' interests are being jeopardized; and that it is unsafe for the defendant to longer continue in business, states facts sufficient to warrant the appointment of a receiver. *State v. Commercial Bank*, 28 Neb. 677 (44 N. W. 998).

56. (1896.) The evidence examined, and *held* not to justify the overruling of the motion to vacate the appointment of receiver for a bank. *Neitzel v. Lyons*, 48 Neb. 892 (67 N. W. 867).

57. (1907.) In an action against an insolvent banking corporation for the appointment of a receiver to wind up the affairs of the bank for the benefit of its creditors, notice of the filing and pendency of the action should be given before a receiver is appointed. *Holcomb v. Tierney*, 79 Neb. 660 (113 N. W. 204).

Jurisdiction to appoint receiver.

58. (1890.) The supreme court in a proper case has jurisdiction to appoint a receiver to take charge of and wind up the affairs of a banking corporation organized under the laws of this state. *State v. Commercial Bank*, 28 Neb. 677 (44 N. W. 998).

59. (1892.) The provisions of section 14, chapter 8, Compiled Statutes, known as the banking act, which authorizes the appointment by the supreme court of receivers of insolvent private banks to take charge of and wind up the business thereof, does not conflict with the provisions of section 2, article VI of the constitution. *State v. Exchange Bank of Milligan*, 34 Neb. 198 (51 N. W. 765).

Removal of receiver.

60. (1902.) An adverse ruling on a motion to secure the removal of a receiver, on the ground that he is a stockholder of the corporation and not a suitable person to enforce the stockholders' liability provided for in the case of a banking institution, is not an adjudication of the question whether the corporation is a banking institution, within article XI*b*, section 7 of the constitution, relating to stockholders' liability. *Hamilton Nat. Bank v. American Loan & Trust Co.*, 66 Neb. 67 (92 N. W. 189).

Directions to sue stockholders.

61. (1897.) In a proceeding under chapter 8, Compiled Statutes, to wind up an insolvent bank, a judgment overruling the bank's motion to discharge an order requiring the receiver to sue stockholders for their unpaid subscriptions, is appealable. *State v. German Savings Bank*, 50 Neb. 734 70 N. W. 221).

62. (1897.) In a proceeding under chapter 8, Compiled Statutes, to wind up an insolvent banking corporation, the corporation, even after consenting to the appointment of a receiver, remains an interested party and may be heard to resist an application for an order conferring authority upon the receiver not within the original order appointing him. *State v. German Savings Bank*, 50 Neb. 734 (70 N. W. 221).

63. (1897.) Section 35, chapter 8, Compiled Statutes, conferring upon district courts power to order the receiver of an insolvent bank to enforce the liabilities of stockholders, refers to liabilities upon their stock. *State v. German Savings Bank*, 50 Neb. 734 (70 N. W. 221).

Assets and possession thereof.

64. (1893.) In winding up the affairs of an insolvent bank under the statutes of this state, the receiver of such bank, when so authorized by the supreme court, may take

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such steps as shall be necessary to enable him to secure possession of the assets of such bank, or their value. *State v. Commercial & Savings Bank*, 37 Neb. 174 (55 N. W. 640).

65. (1893.) In a proceeding to obtain possession of the assets of an insolvent bank wrongfully withheld by one of its former officers, such officer cannot require the allowance of a set-off or counter-claim as a condition precedent to the delivery of the possession of such assets. *State v. Commercial & Savings Bank*, 37 Neb. 174 (55 N. W. 640).

66. (1893.) Where persons have, by the fraudulent conduct of themselves or their agents, obtained possession of the assets of an insolvent bank, and are unable to return to the receiver of such insolvent bank the said assets in kind, such persons will be held to strict accountability for the value thereof. *State v. Commercial & Savings Bank*, 37 Neb. 174 (55 N. W. 640).

67. (1893.) It is not necessary in proceedings to obtain possession of the assets of an insolvent bank wrongfully withheld by one of its former officers, to join as parties to the proceeding other individuals for whose benefit the misappropriation took place. *State v. Commercial & Savings Bank*, 37 Neb. 174 (55 N. W. 640).

68. (1899.) A receiver of a state bank appointed in proceedings under the provisions of section 34, chapter 8, Compiled Statutes, takes possession and holds the assets of a bank in favor of, and to assert and guard the claims of, the depositors and other creditors as the paramount and superior claims against the assets. *State v. Bank of Hemingford*, 58 Neb. 818 (80 N. W. 50).

——Sale by receiver.

69. (1899.) A banking corporation, a defendant in an action having for its object the impounding of its assets, their conversion into money, and their application to the payment of its creditors, may be heard to resist application for an order on a receiver to sell its real estate. *State, ex rel. German Savings Bank, v. Fawcett*, 58 Neb. 371 (78 N. W. 636).

70. (1899.) A bank is not estopped from resisting an order directing a receiver to sell the assets of a bank, or appealing therefrom, by having consented to the appointment of the receiver in the first instance, when the order consented to did not fix the terms or conditions or time of the sale. *State, ex rel. German Savings Bank, v. Fawcett*, 58 Neb. 371 (78 N. W. 636).

71. (1900.) An order of court directing a receiver of a bank to sell its assets will not be disturbed where no abuse of discretion is shown. *State v. Nebraska Savings & Exchange Bank*, 60 Neb. 190 (82 N. W. 625).

——Delivery to officers of bank on security.

72. (1903.) Where, pending an application for the appointment of a receiver for a bank, under the provisions of chapter 8, Compiled Statutes, a bond is given to procure the return of the assets of such bank under the provisions of section 35 of said chapter, and such proceedings are dismissed and the assets returned, any creditor who is a beneficiary of such bond may maintain an action at law theron, after the condition is broken to his damage. *Rawson v. Taylor*, 69 Neb. 473 (95 N. W. 1033).

73. (1903.) Where pending an application for the appointment of a receiver for a bank under chapter 8, Compiled Statutes, a bond is given to procure the return of the assets of the bank to its president and vice president, under the provisions of section 35, a delivery of such assets to the vice-president in the presence of the president, is a sufficient return thereof to render the signers of the bond liable. *Rawson v. Taylor*, 69 Neb. 473 (95 N. W. 1033).

74. (1903.) While section 35, chapter 8, Compiled Statutes, provides for the delivery of the assets of an insolvent bank to the officers, stockholders or owners furnishing the bond therein provided for, a delivery thereof to one only of several parties entitled thereto by virtue of the statute, does not relieve the sureties on such bond from liability thereon, where, by their acts, they assent to such delivery and ratify it. *Taylor v. Weckerly*, 69 Neb. 739 (96 N. W. 618).

75. (1906.) By the execution of a bond to the state as provided by section 34, chapter 8, Compiled Statutes, by the officers of an insolvent bank, conditioned upon the full settlement of all the liabilities of such bank, the officers and sureties assume the burdens of the bank's liquidation, and cannot use the assets in paying the expenses thereof to the prejudice of creditors. *Hume v. Miller*, 75 Neb. 800 (106 N. W. 1006).

——Liens against assets.

76. (1894.) The receiver of an insolvent bank takes the assets thereof incumbered

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with all valid liens thereon which attached prior to his appointment. *Arnold v. Weimer*, 40 Neb. 216 (58 N. W. 709).

77. (1894.) The lien acquired by the levy of an attachment upon the property of an insolvent bank is not vacated by the subsequent appointment of a receiver for such bank. *Arnold v. Weimer*, 40 Neb. 216 (58 N. W. 709).

78. (1894.) The property of an insolvent bank, prior to the appointment of a receiver therefor or putting the sheriff in possession thereof by order of a court or judge, is not exempt from seizure by attachment or other legal process at the suit of its creditors. *Arnold v. Weimer*, 40 Neb. 216 (58 N. W. 709).

79. (1898.) Assets of an insolvent bank are not subject to attachment at the suit of a creditor while they are in possession of a bank examiner acting under authority of the state banking board. *Andrews v. Steele City Bank*, 57 Neb. 173 (77 N. W. 342).

Compromise of debts due bank.

80. (1899.) A court appointing a receiver for an insolvent bank may authorize him to settle and compromise a suit instituted by him where it appears that as large a sum will probably be realized in that way as if the litigation was continued, or it is disclosed that the best interests of the estate require that such settlement be effected. *State v. Bank of Rushville*, 57 Neb. 608 (78 N. W. 281).

81. (1902.) The power conferred on the receiver of an insolvent bank by section 35, chapter 8, Compiled Statutes, to "compound all bad or doubtful debts when approved by the court or judge," includes the right to compromise doubtful claims against stockholders of such bank for the double liability imposed upon them by the constitution of this state in section 7, article XI*b*. *State v. German Savings Bank*, 65 Neb. 416 (91 N. W. 414).

82. (1902.) An offer of compromise, made by debtors of an insolvent bank to the receiver thereof, examined, and *held* there was no abuse of discretion on the part of the trial court in directing the receiver to accept it. *Morrison v. Lincoln Savings Bank & Safe Deposit Co.*, 2 Unof. 762 (89 N. W. 996).

Set-off by debtor of insolvent bank.

83. The defendant in an action by the assignee to recover money due to an insolvent banking corporation may set off against the amount owing by him to the bank an indebtedness of the latter to him. (1894) *Salladin v. Mitchell*, 42 Neb. 859 (61 N. W. 127); (1896) *Bernstein v. Coburn*, 49 Neb. 734 (68 N. W. 1021).

84. (1894.) The right of set-off exists in favor of one who has acquired the title to money due from an insolvent bank on a certificate of deposit issued to a third person without a formal assignment by the latter. *Salladin v. Mitchell*, 42 Neb. 859 (61 N. W. 127).

85. (1894.) In a proceeding by an assignee to foreclose a mortgage, the property of an insolvent bank, the purchaser from the mortgagor, who was made a defendant therein, may set off against the claim of the assignee an indebtedness due to him from the bank. *Salladin v. Mitchell*, 42 Neb. 859 (61 N. W. 127).

Right of action by insolvent bank.

86. (1902.) In an action by an insolvent bank to foreclose securities of a note executed by defendant, a demurrer to the answer that attacked the petition on the ground of defect of parties plaintiffs, in that the action should be brought by the receiver, was properly sustained. *Omaha Savings Bank v. Rosewater*, 1 Unof. 723 (96 N. W. 68).

Actions and proceedings by and against receiver.

87. (1894.) On a petition in the supreme court by the receiver of an insolvent state bank for an order requiring Charlotte M. Dickinson and Harriet E. Adams (not theretofore parties to the proceeding) to show cause why a half interest in an electric light plant, which had been conveyed to them by W. H. Dickinson, Sr., the *quondam* proprietor of said bank, should not be converted into assets of said bank, issues were joined and tried to a referee, to whose findings of fact and conclusions of law exceptions were filed by the receiver, upon consideration whereof there are approved and confirmed the following conclusions of said referee: 1. That the state is not a proper party to bring the action in the nature of a creditor's bill to determine the *bona fides* of the conveyances of said one-half of said electric light plant from said W. H. Dickinson, Sr., to said Charlotte M. Dickinson and Harriet E. Adams. 2. That said action should be brought in the

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name of the receiver of said bank, and that the supreme court has not original jurisdiction of such action. *State v. Bank of Wahoo*, 40 Neb. 192 (58 N. W. 863).

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88. (1894.) The receiver of an insolvent bank who intervenes in an action to which said bank is a party, thereby submits himself to the jurisdiction of the court in which such suit is pending, and can only review the judgments and rulings of such court in the same manner as any other litigant. *Arnold v. Weimer*, 40 Neb. 216 (58 N. W. 709).

89. (1897.) The receiver of a bank, appointed under the provisions of section 34, chapter 8, Compiled Statutes, takes charge of the assets of such bank in favor of and to assert and guard the claims of depositors and creditors of the bank as the paramount and superior claims against the assets thereof; and in an action by the receiver or by a purchaser at receiver's sale, on any note or evidence of indebtedness of the assets, a defense thereto cannot prevail which involves the recognition and enforcement of an agreement which, when made, was a fraud on creditors and depositors of the bank, present and future; and this is true notwithstanding the defense might have been entertainable and good against the bank. *Harrington v. Connor*, 51 Neb. 214 (70 N. W. 911).

Distribution of assets, and priorities.

90. (1890.) The property and assets of a banking corporation organized under the laws of this state, after it has ceased to carry on a banking business, are a trust fund for the payment of its debts. The rights of the creditors to a corporate property, so far as it is necessary to meet their demands, are superior to those of the stockholders, or the assignee of an insolvent stockholder. *State v. Commercial Bank*, 28 Neb. 677 (44 N. W. 998).

91. (1899.) In the adjustment and settlement of claims against a state bank which is in the hands of a receiver, those of depositors and other general creditors who trusted the bank in the course and transaction of its legitimate business may be preferred over claims which originated in the pursuit and conduct of a business by the bank in which it had no legal authority or power to engage. *State v. Bank of Hemingford*, 58 Neb. 818 (80 N. W. 50).

92. (1900.) A court may permit a creditor to share in the assets of an insolvent bank, though his claim was not filed within the time limited. *State v. Bank of Commerce*, 61 Neb. 22 (84 N. W. 406).

93. (1907.) Where a receiver is appointed without notice to an insolvent bank, except such as is implied from being dispossessed of its property, and the receiver proceeds by direction of the court, without objection, to convert the assets of the bank into cash and pays the proceeds out to the creditors, the proceeding is not void to the extent that the status of the property involved is open to collateral attack. *Holcomb v. Tierney*, 79 Neb. 660 (113 N. W. 204).

93*a*. (1907.) Where certain stockholders of a bank in process of liquidation employ counsel to litigate for them their contention as to the distribution of a fund which is already in existence in the hands of the trustees or managing directors, and subject to distribution to the parties entitled thereto, as their respective rights may be determined by the court, they will not be entitled to recover their attorneys' fees out of such fund. *Gund v. Ballard*, 80 Neb. 385 (114 N. W. 420).

——— **Interest.**

93*b*. (1907.) Where the managing directors or trustees of a bank in process of litigation have in their hands funds of the bank, and the distribution of such funds is prevented by litigation or otherwise, and the custom of responsible banks in the community where they reside is to pay interest upon such deposits, and said funds were in fact bearing interest at and prior to the time such trustees obtained the custody of the same, and said trustees withdraw the moneys from such bank and deposit them in a bank in which one of the trustees is a stockholder, without interest, such trustees will be held personally liable for the customary rate of interest paid by responsible banks in such community for deposits of like character. *Gund v. Ballard*, 80 Neb. 385 (114 N. W. 420).

Compensation of trustees.

93*c*. (1907.) The mere fact that managing directors or trustees of a bank in process of liquidation have not been active in interposing defenses to an action by one of their number against the bank upon an individual claim will not defeat their right to a reasonable compensation for services rendered and responsibility assumed in clos-

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ing up and settling the other affairs of said bank. *Gund v. Ballard*, 80 Neb. 385 (114 N. W. 420).

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III. FUNCTIONS AND DEALINGS.

A. Banking Franchises and Powers, and their Exercise in General.

Property and conveyances.

94. (1899.) Where an unincorporated bank is exclusively owned by a private individual the assets of the bank represent merely the portion of the owner's capital invested in banking, and he may lawfully dispose of them to pay or secure the just claims of any of his creditors. *Longfellow v. Barnard*, 58 Neb. 612 (79 N. W. 255; 76 Am. St. Rep. 117).

95. (1899.) The assets of an unincorporated bank may be lawfully disposed of by the owner to secure or pay the just claims of any of his creditors. *Longfellow v. Barnard*, 59 Neb. 455 (81 N. W. 307).

Purchasing and holding stock in other corporations.

96. (1893.) A banking corporation, organized under the laws of this state, has no power to become a stockholder in an insurance company. *Bank of Commerce v. Hart*, 37 Neb. 197 (55 N. W. 631; 40 Am. St. Rep. 479; 20 L. R. A. 780).

97. (1903.) A savings bank organized under the laws of this state may acquire title to shares of stock of another corporation, where such stock is taken in compromise or discharge of the indebtedness of an insolvent debtor, and where no circumstances casting suspicion on the transaction are shown, but it fairly appears that the directors of the bank acted in good faith and in the belief that the acceptance of the stock was for the best interest of the bank. *Hill v. Shilling*, 69 Neb. 152 (95 N. W. 24).

98. (1903.) After acquiring the stock of another corporation, a savings bank becomes subject to any liability thereon the same as other stockholders. *Hill v. Shilling*, 69 Neb. 152 (95 N. W. 24).

Authority to act as surety.

99. (1901.) 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. *Sturdevant Bros. & Co. v. Farmers & Merchants Bank of Rushville*, 62 Neb. 472 (87 N. W. 156).

B. Representation of Bank by Officers and Agents.

Knowledge of officer as affecting *bona fides* of purchase of note, see *Bills and Notes*, § 235.

Liability for negligence of agent in making collection, see *post*, §§ 238-243.

Authority of officers in general.

100. (1878.) Like other agents, the president of a bank must act within the scope of his authority, in order to bind his principal, unless his acts have been ratified. *Kennedy v. Otoe County Nat. Bank*, 7 Neb. 59.

101. (1878.) As a rule, the officers of a bank are held out to the public as having authority to act according to the usage and course of business of such institutions, and their acts, within the scope of their authority, bind the bank in favor of persons having no knowledge to the contrary. *Rich v. State National Bank*, 7 Neb. 201 (29 Am. Rep. 382).

102. (1902.) A bank is not chargeable with notice of the fraudulent act of its employee, outside the scope of his authority and furtherance of his own personal designs, solely because he is an employee. *Jones v. First Nat. Bank of Lincoln*, 3 Unof. 73 (90 N. W. 912).

103. (1902.) As a general rule, acts done by an officer of a bank away from its place of business, and not authorized or ratified, are not binding upon it. *Jones v. First Nat. Bank of Lincoln*, 3 Unof. 73 (90 N. W. 912).

103*a*. (1906.) Where a customer enters a bank for the purpose of doing business with the bank and talks with the president of such bank, and during their conversation nothing is said to indicate the contemplated transaction was intended as an individual transaction with such officer, the bank is bound by the acts of the officer. *Heim v. First Nat. Bank of Humboldt*, 76 Neb. 831 (107 N. W. 1019).

104. (1902.) The acts of a bank officer, outside the usual scope of his authority, in a matter to which it is no party and of which it is not chargeable with notice, do not bind the bank. *Jones v. First Nat. Bank of Lincoln*, 3 Unof. 73 (90 N. W. 912).

Assumption of debt.

105. (1878.) No officer of a bank can bind it by a promise to pay a debt which

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the corporation does not owe, and was not liable to pay, unless the bank authorized or has ratified the act; but ratification is equivalent to original authority to act in the matter, and corporations are bound in the same manner as natural persons. *Rich v. State Nat. Bank*, 7 Neb. 201 (29 Am. Rep. 382).

106. (1894.) The president of a national bank in signing its name to a subscription paper obligating the bank to donate two hundred dollars to certain parties on condition that they would erect a paper mill in the city of K., was not acting within the scope of his authority, and hence the bank, in the absence of an authorization or ratification by it of the president's act, was not bound by the agreement made. *Robertson v. Buffalo County Nat. Bank*, 40 Neb. 235 (58 N. W. 715).

Execution of replevin bond.

107. (1901.) 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. *Sturdevant Bros. & Co. v. Farmers & Merchants Bank*, 62 Neb. 472 (87 N. W. 156).

108. (1903.) The signing of a replevin bond as surety thereon by the cashier of a bank, acting for the corporation, in an action between third parties in which the bank to all outward appearances has no interest, is not an act within the apparent scope of the authority of the cashier in the performance of his duties as such officer. *Sturdevant Bros. & Co. v. Farmers & Merchants Bank of Rushville*, 69 Neb. 220 (95 N. W. 819).

109. (1903.) The execution by the cashier of a banking corporation, on behalf of his principal, of a replevin undertaking as surety, in an action between third parties, although it may not be illegal under any and all circumstances, is so much out of and beyond the general scope of the business of such corporation and the authority of the cashier, as to require those dealing with the corporation and accepting and acquiescing in such undertaking as sufficient under the law, to see to it that the bank was empowered and the cashier authorized to execute such an undertaking. *Sturdevant Bros. & Co. v. Farmers & Merchants Bank of Rushville*, 69 Neb. 220 (95 N. W. 819).

Compromise of debts due bank.

110. (1893.) The cashier of a banking corporation has, by virtue of his office, no authority to accept, in payment and discharge of a debt due the bank, certificates of the capital stock of an insurance company. *Bank of Commerce v. Hart*, 37 Neb. 197 (55 N. W. 631; 40 Am. St. Rep. 479; 20 L. R. A. 780).

111. (1893.) The acts of the directory of a banking corporation, in dealing with and investing the funds of the stockholders, to bind the bank, must be confined to the expressed purposes for which the bank was incorporated, and to purposes necessarily incidental thereto in the successful conduct of its legitimate business. The directors have no authority to ratify an act of the cashier whereby he accepts stocks in an insurance company in payment of a debt owing the bank. *Bank of Commerce v. Hart*, 37 Neb. 197 (55 N. W. 631; 40 Am. St. Rep. 479; 20 L. R. A. 780).

Release of surety.

112. (1877.) A cashier of a bank, by virtue of his office, is not authorized to release a surety upon a note or bill belonging to the bank without payment. *Merchants Bank v. Rudolf*, 5 Neb. 527.

Representations and admissions.

113. (1877.) Statements made by a cashier at casual interviews away from the bank as to payments having been made upon its securities, are not binding upon the bank. *Merchants Bank v. Rudolf*, 5 Neb. 527.

114. (1877.) If the cashier of a bank, on inquiry by a surety who is not an officer of the bank, states that the note upon which he is surety has been paid by the principal, the bank is estopped from denying the truth of such statement, when to do so would entail a loss on the surety. Otherwise if the surety is a director of the bank. *Merchants Bank v. Rudolf*, 5 Neb. 527.

115. (1878.) Representations of the president of a bank, made in transacting its business, are admissible in evidence against the bank; but statements made by him away from the bank, in reference to matters in which the bank has no interest, are not admissible. *Kennedy v. Otoe County Nat. Bank*, 7 Neb. 59.

116. (1879.) A bank is liable for any loss occasioned by the declaration of its cashier respecting payment of a note held

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by the bank, made to an endorser, and on which the cashier is also an endorser. *Grant v. Cropsey*, 8 Neb. 205.

117. (1896.) A person purchasing negotiable paper from the president of a bank, with a guaranty of payment executed by the president, is justified in relying on the president's representation that the paper belonged to the bank, and the bank is bound by his representation to that effect, at least where the transaction occurred in the banking house, and while the president was apparently engaged in performing his duties as such officer. *City Nat. Bank of Hastings v. Thomas*, 46 Neb. 861 (65 N. W. 895).

Confession of judgment.

118. (1901.) The president and cashier of an incorporated state bank are not authorized to confess judgment against it, under section 433 of the code, on notes executed by the cashier in the name of the bank, after it has ceased doing business. *Fogg v. Ellis*, 61 Neb. 829 (86 N. W. 494).

Liability on negotiable paper executed by officer.

119. (1886.) Where officers or clerks in banking houses receive money or securities over the bank counter, and issue therefor drafts, bills or negotiable certificates of deposit, the bank is liable thereon, although such instrument may be signed by such person without disclosing the name of the banking house. *Webster v. Wray*, 19 Neb. 558 (27 N. W. 644; 56 Am. St. Rep. 754).

119*a*. (1906.) Where a party went into a bank to make a time deposit and asked the president of the bank what interest would be paid, to which the reply stated four per cent, and instead of a certificate of deposit the president gave his personal note signed in his individual capacity, the bank is liable to such person as a depositor for money received. *Heim v. First Nat. Bank of Humboldt*, 76 Neb. 831 (107 N. W. 1019).

120. (1907.) Under code of civil procedure, section 341, if a person dealing with a president of a bank in making a loan, understood that he was making the loan to the bank, and the president had reason to suppose that he so understood, the bank is liable and cannot claim that the loan was to the president individually. *Patterson v. First Nat. Bank of Humboldt*, 78 Neb. 228 (110 N. W. 721).

Knowledge of officer as notice to bank.

121. (1876.) Notice to a bank director, not at the time officially engaged in the business of the bank, is not ordinarily binding on the bank, but notice to the president is notice to the bank. *McCann v. State*, 4 Neb. 324.

122. (1891.) The fact that officers of a bank purchasing a note, acquired knowledge, long before its organization, and in their private business, of the usurious consideration of a note, will not charge the bank with notice of such infirmity. *Koehler v. Dodge*, 31 Neb. 328 (47 N. W. 913; 28 Am. St. Rep. 518).

Estoppel to deny authority of officer.

123. (1902.) When the president and cashier of a bank, acting in his official capacity for such bank, collects money for and places it on deposit in such bank to the credit of one of its customers and pays out of such deposit notes due to the bank from the customer and checks drawn by him against such deposit, the bank cannot, for the purpose of escaping liability to its customer for the mistakes or malfeasance of its president and cashier, deny his authority to represent it in this kind of a transaction. *Citizens Bank of Humphrey v. Fromholz*, 64 Neb. 284 (89 N. W. 775).

Liability on paper misappropriated by officer.

124. (1876.) Where the president of a bank accepts a draft drawn on the United States government and payable to "William James, acting governor, or order" he has sufficient notice to put him on inquiry as to the real owner thereof, and such notice to such president is notice to the bank, and the latter is liable for full amount of such drafts where they have been wrongfully appropriated by such president. *McCann v. State*, 4 Neb. 324.

C. Deposits.

Banks as depositaries of public funds, see *Depositaries*.

Deposits as subject to garnishment, see *Garnishment*, § 20.

Presentment of check necessary to charge maker or indorser, see *Bills and Notes*, §§ 317-329.

Title to deposits and nature of relation created.

125. Where money is deposited in a bank, on an open account, subject to check

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of the depositor, and not received as a special deposit, the bank agreeing to pay interest on the money, the transaction, although called a "deposit," is in substance and legal effect a loan. (1878) *State v. Keim*, 8 Neb. 63; (1894) *State, ex rel. First Nat. Bank, v. Bartley*, 39 Neb. 353 (58 N. W. 172; 23 L. R. A. 67).

126. (1883.) When the owner of money makes a general deposit of it in a bank, it ceases to be his money, and instantly becomes the money of the bank, and he becomes the creditor of the bank to that amount. *Seward County v. Cattle*, 14 Neb. 144 (15 N. W. 337).

127. (1894.) The depositing in banks of public funds, under the provisions of the depository law, constitutes a loan and investment of the moneys so deposited. *State, ex rel. First Nat. Bank, v. Bartley*, 39 Neb. 353 (58 N. W. 172; 23 L. R. A. 67).

128. (1894.) One may involuntarily become the creditor of another, but from the very nature of things the relation of banker and depositor can be created only by consent of both parties. *State v. State Bank of Wahoo*, 42 Neb. 896 (61 N. W. 252).

129. (1896.) The law presumes that the relation existing between a bank and its customer is that of ordinary debtor and creditor. *Nichols v. State*, 46 Neb. 715 (65 N. W. 774).

130. (1896.) Whether a deposit made in a bank by its customers is a general or special one, is a question of fact to be determined from the intention of the parties; but in the absence of evidence the law presumes such a deposit a general one. *Nichols v. State*, 46 Neb. 715 (65 N. W. 774).

131. (1897.) Evidence examined and *held* to show that a bill of exchange, drawn to the order of a bank by its customer, the amount of which was placed to the customer's credit, became the property of the bank, and was not entrusted to it merely for collection. *Higgins v. Hayden*, 53 Neb. 61 (73 N. W. 280).

132. (1902.) Deposits in a bank create between it and the depositor the relation of debtor and creditor; and as long as this relation exists the bank is in duty bound to honor the checks of the depositor, and it cannot refuse to do so on the ground that the money deposited belongs to some other person, or that the title of the depositor to it is defective. *Nehawka Bank v. Ingersoll*, 2 Unof. 617 (89 N. W. 618).

——— **Trust funds.**

Mingling trust funds with personal funds of trustee, see *Trusts*, §§ 164-167; 172-175.

133. (1896.) F., a commission merchant, deposited in bank money realized from the sale of live stock consigned to him by C., his account with the bank being at the time largely overdrawn. *Held*, Regardless of the question of notice, that the bank is accountable to C., and that it cannot apply the money so deposited in satisfaction of F.'s indebtedness. *Cady v. South Omaha Nat. Bank*, 46 Neb. 756 (65 N. W. 906).

134. (1896.) Trust funds do not lose their character as such by being deposited in bank by the trustee to his own account. *Cady v. South Omaha Nat. Bank*, 49 Neb. 125 (68 N. W. 358).

135. (1897.) A school district treasurer, by a general deposit of funds held by virtue of his office, cannot create between the district and his banker the relation of debtor and creditor. *State v. Midland State Bank*, 52 Neb. 1 (71 N. W. 1011; 66 Am. St. Rep. 484).

136. (1903.) In case a person chargeable as constructive trustee, deposits the money in a bank, the bank on receiving notice of the claims of the owner, becomes a trustee also, and may be held as such. *Penny v. Bryant*, 70 Neb. 127 (96 N. W. 1033).

Application of deposits to debts due bank.

137. (1891.) A banker has no right to use the money of a depositor to discharge a note not payable at the bank where the deposit is made, without instructions from the customer to do so. *Commercial State Bank v. Rowland*, 31 Neb. 483 (48 N. W. 149).

138. (1896.) Where a customer of a bank, who has overdrawn and thus stands indebted in open account to the bank, makes a general deposit therein, the presumption of law is that such deposit was made and received toward the payment of such overdraft. *Nichols v. State*, 46 Neb. 715 (65 N. W. 774).

139. (1898.) As against the holder of a check against an account of a depositor the bank of deposit may not apply the amount of the account to the payment of the indebtedness of the depositor to the bank which is not yet due, although the depositor may be insolvent. *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803 (77 N. W. 346).

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140. (1902.) A bank that appropriates a deposit made by a customer to reduce his indebtedness due the bank, knowing the deposit, or a part thereof, to be a trust fund, is liable to the true owner for a conversion of his money, and an action at law to recover the amount can be maintained. *Globe Savings Bank v. Nat. Bank of Commerce*, 64 Neb. 413 (89 N. W. 1030).

141. (1902.) If a deposit in a bank, or any part thereof, is a trust fund, and the bank has notice thereof, it will be liable to the true owner for any conversion to liquidate a debt of the trustee. *Globe Savings Bank v. Nat. Bank of Commerce*, 64 Neb. 413 (89 N. W. 1030).

142. (1904.) Where a note due to a bank does not mature until after the death of the maker, the bank cannot set off such debt against a deposit by such maker in the bank. *Sharp v. Citizens Bank of Stanton*, 70 Neb. 758 (98 N. W. 50).

Priorities on insolvency of bank.

Rights of depositors in insolvent bank, see *post*, §§ 152-155.

143. (1894.) To make one a depositor of a bank, and in case of its insolvency to limit such person's right against the assets thereof to those of an ordinary creditor, it must appear that such person became a depositor of such bank voluntarily. *State v. State Bank of Wahoo*, 42 Neb. 896 (61 N. W. 252).

144. (1899.) The owner of a sum of money on a general deposit in a bank at the time of its failure is not entitled to a preferred claim against the assets in the hands of its receiver. *Schnelling v. State*, 57 Neb. 562 (78 N. W. 279).

145. (1906.) Where a customer enters a bank for the purpose of doing business with the bank and talks with the president of such bank and during such conversation nothing is said to indicate the transaction contemplated was intended as an individual transaction with such officer, the bank is bound by the acts of such officer. *Heim v. First Nat. Bank of Humboldt*, 76 Neb. 831 (107 N. W. 1019).

146. (1906.) Where a party went into a bank to make a time deposit and asked the president of the bank what interest would be paid, to which he replied four per cent would be paid, and instead of a certificate of deposit the president gave his personal note signed in his individual capacity, the bank is liable to such person as a depositor for money received. *Heim v. First Nat. Bank of Humboldt*, 76 Neb. 831 (107 N. W. 1019).

——— Trust funds.

147. (1894.) Where a purchaser of land gets a bank cashier to procure a loan of $2,000 on the land to complete the purchase price, and such banker holds the drafts, sent him by the person making the loan, on the pretense that the title to the land is defective, and sends the purchaser a certificate of deposit for the amount he holds, the relation as to such sum is not of creditor and debtor but of trustee and *cestui que trust*, and the purchaser may recover from the bank after its insolvency. *State v. State Bank of Wahoo*, 42 Neb. 896 (61 N. W. 252). [Overruled. 54 Neb. 725; 64 Neb. 822.]

148. (1896.) Where funds come into a bank which is nothing more than a trust to be delivered to the party entitled, the receiver of the bank is merely substituted as trustee, and its funds in his hands should be devoted to discharging such trust before distribution thereof is made to the general creditors of the bank. *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786 (69 N. W. 115; 59 Am. St. Rep. 572). [Overruled. *City of Lincoln v. Morrison*, 64 Neb. 822.]

149. (1896.) A fund which comes into the possession of a bank with respect to which the bank has but a single duty to perform, and that is to deliver it to the party thereto entitled, is a trust fund and is therefore incapable of being commingled with the general assets of such bank subsequently transferred to its receiver. *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786 (69 N. W. 115; 59 Am. St. Rep. 572). [Overruled. *City of Lincoln v. Morrison*, 64 Neb. 822.]

150. (1897.) A banker receiving on deposit from a school district treasurer, funds known to be held by the latter in his official capacity, becomes a trustee for the district, and it, upon insolvency of the banker, may recover such funds as a preferred claim against his estate. *State v. Midland State Bank*, 52 Neb. 1 (71 N. W. 1011; 66 Am. St. Rep. 484). [Overruled. 54 Neb. 725; 64 Neb. 822.]

151. (1898.) Where one in accordance with a long course of business deposits in his own name as agent moneys of his prin-

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cipal, with the latter's consent, in a bank which becomes insolvent, the moneys will not be declared a trust fund in favor of the principal and established as a preferred claim. *State v. Thomas*, 53 Neb. 464 (73 N. W. 922).

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——— Deposit made after insolvency.

152. (1892.) The fact that a bank is insolvent within the knowledge of its officers, and receives the money of a depositor under circumstances which amount to a fraud upon him, is not of itself sufficient to entitle the latter to preference from the funds of the bank in the hands of an assignee. He may follow his money while he can trace and distinguish it or the proceeds thereof, but not after it has passed into the hands of the assignee, mingled with the other funds of the bank. *Wilson v. Coburn*, 35 Neb. 530 (53 N. W. 466).

153. (1897.) Where a bank remains open and holds itself out as ready to transact business, this is an implied representation of solvency, and for its officers to then receive a deposit, knowing it to be hopelessly insolvent, is a fraud, and the depositor may rescind the contract of deposit and recover back the thing deposited, while it or its proceeds may be distinguished in specie, and before they have become commingled with the general assets of the bank. *Higgins v. Hayden*, 53 Neb. 61 (73 N. W. 280).

154. (1897.) Certain stipulations in the record *held* to justify a finding that the proceeds of the deposit in question, made at a time when the bank was insolvent, had been preserved separate, and not commingled with the general assets. *Higgins v. Hayden*, 53 Neb. 61 (73 N. W. 280).

155. (1897.) A petition seeking to charge a trust on property in the hands of the receiver of an insolvent bank may allege that the bank obtained the property as bailee, and at the same time charge that it was obtained by fraudulent concealment of insolvency, and relief may be granted on the latter ground, though the former be not proved. *Higgins v. Hayden*, 53 Neb. 61 (73 N. W. 280).

Interest on deposits.

156. (1883.) One C., a depositor, purchased sight drafts at a bank to pay for cattle that he expected to purchase in Colorado. At the same time he made a parol agreement with the bank that if he did not purchase cattle he might return the drafts to the bank and receive credit for the amount thereof with interest. *Held*, That the parol agreement was valid, and did not contradict the written agreement, as it merely showed the purpose for which the drafts were procured and delivered. *Collingwood v. Merchants Bank*, 15 Neb. 118 (17 N. W. 359).

157. (1893.) Where a certificate of deposit contained no agreement as to interest, that interest is to be computed at the rate of seven per cent from the time payment of the certificate was demanded of the defendant, and in case no such demand has been made, then from the date of the commencement of the action. *Morse v. Rice*, 36 Neb. 212 (54 N. W. 308).

Acceptance of check or agreement to accept.

158. (1891.) A verbal acceptance of a check by the drawee is valid and binding as if the acceptance was in writing. *Farmers & Merchants Bank v. Dunbier*, 32 Neb 487 (49 N. W. 376).

159. (1891.) The delivery of property for which a check was given in payment, is a sufficient consideration for acceptance of the check by the drawee. *Farmers & Merchants Bank v. Dunbier*, 32 Neb. 487 (49 N. W. 376).

160. (1891.) Evidence *held* sufficient to establish oral acceptance of check by drawee. *Farmers & Merchants Bank v. Dunbier*, 32 Neb. 487 (49 N. W. 376).

161. (1903.) It is no objection to an agreement by a bank to honor checks for a carload of horses, the drawee to be secured by a draft and bill of lading on their shipment, that the drawers were already indebted to the bank on other transactions, and hence constituted an agreement to allow an overdraft. *Falls City State Bank v. Wehrli*, 68 Neb. 75 (93 N. W. 994).

Payment of check drawn or indorsed by unauthorized person.

162. (1898.) Where a local agent presented an application to a loan company for a loan upon real estate, the proper application and abstract having been forwarded and a check sent to be delivered to the applicant, and it is shown that the applicant was a fictitious person, an indorsement of the check, if made by the agent, was a forgery; if the application and abstract were made by a third person, but not the person in whose name they were

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drawn, such indorsement was genuine. *First Nat. Bank of Hastings v. Farmers & Merchants Bank*, 56 Neb. 149 (76 N. W. 430).

163. (1898.) Where an agent of a loan company forges an application for a loan from his principal and, also, the abstracts of title to fictitious lands and a check is sent to him to be turned over to the applicant, and the agent forges the indorsement of such applicant to the check, in an action by the payee bank against a forwarding indorser bank, the evidence *held* not to sustain a finding that the indorsement was genuine. *First Nat. Bank of Hastings v. Farmers & Merchants Bank*, 56 Neb. 149 (76 N. W. 430).

164. (1901.) Where A on receipt of release, made at A's request, of all claim against an estate, and purporting to have been made by B, procures a draft to his own order, indorses it to B's order and sends it by mail to the address given him as B's, and it is there received by the person executing the release and indorsed in B's name, A has no right of action against a bank which pays the draft to the holder, supposing him to be B, though he is in fact an impostor. *Hoffman v. American Exchange Nat. Bank*, 2 Unof. 217 (96 N. W. 112).

165. (1902.) A depositor, who claims that a bank has paid out his money to a person not entitled to receive it, has an election to sue the bank or the person who received the money; but can not proceed against each, unless in case of conspiracy or joint wrong. *Jones v. First Nat. Bank of Lincoln*, 3 Unof. 73 (90 N. W. 912).

166. (1903.) In an action by a bank against a principal to recover the amount paid on a draft drawn by defendant's agent after the termination of his agency, it can recover only the amount paid before receiving notice of the agent's want of authority. That the remainder had been previously placed to the agent's credit in the bank, is not sufficient. *Baeschlin v. Chamberlain Banking House*, 67 Neb. 196 (93 N. W. 412).

167. (1903.) Where a former agent, without actual authority, and with nothing due him, has drawn on his former principal through a bank instructed by the principal to pay such drafts, it is the bank's duty, as soon as it learns of the agent's lack of authority, to retain any proceeds of the draft which have not been paid out. *Baeschlin v. Chamberlain Banking House*, 67 Neb. 196 (93 N. W. 412).

Payment of forged checks.

168. (1888.) A stranger presented to the bank of O. a check purporting to be drawn by one C. on the bank of A. for $385. The cashier of the bank of O., with which C. also had an account, compared the signature of the purported drawer with his genuine signature in a book kept by such cashier, and paid the check without requiring proof as to the identity of the person presenting the same or making inquiries in regard to him. The check was sent to a bank in Lincoln, and there credited to the bank at O., and by the Lincoln bank sent to the bank at A., on which it was drawn, and was paid by such bank. Several days afterwards it was discovered that the check was a forgery, and notice was thereupon given to the bank at Lincoln and also at O. *Held*, That the bank at O. was liable for the amount received by it on the check. *First Nat. Bank of Orleans v. State Bank of Alma*, 22 Neb. 769 (36 N. W. 289; 3 Am. St. Rep. 294).

169. (1889.) A check drawn by I. W. F., paymaster, on J. G. T., assistant treasurer B. & M. R. R. Co. in Neb., to the order of F. L. D., was presented to the Nat. Bk. of H by L. with a forged indorsement of the name of F. L. D. thereon, and the money received by L. from the bank, which having accounted to F. L. D. for the amount of the check, sued L. therefor. *Held*, That L. was liable. *Levy v. First Nat. Bank*, 27 Neb. 557 (43 N. W. 354).

Certificates of deposit.

Liability on certificate issued by officer in his own name, see *ante*, §§ 119, 120.

Limitation of action on certificate of deposit, see *post*, §§ 201, 201*a*.

170. (1893.) Where certificates of deposit in an insolvent bank are *prima facie* the obligation of the bank, the burden is on the receiver to show that they were issued without authority. *State v. Farmers & Drovers Bank*, 36 Neb. 675 (54 N. W. 974).

171. (1893.) Evidence *held* sufficient to sustain finding of referee that certificates of deposit issued to claimant by insolvent bank in exchange for notes and mortgages, were the obligation of the bank and not the personal obligation of its president. *State v. Farmers & Drovers Bank*, 36 Neb. 675 (54 N. W. 974).

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172. (1902.) When a bank, without consideration, issued certificates of deposit to its stockholders, and afterwards went into the hands of a receiver, the latter can maintain an action to recover payments payments made upon such certificates of deposit within four years of the time of commencing such action. *State v. Bank of Ogalalla*, 65 Neb. 20 (90 N. W. 961; 91 N. W. 497).

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——Transfer.

Set-off by purchaser of certificate of deposit against debt due insolvent bank, see *ante*, § 84.

173. (1892.) A certificate of deposit in the usual form issued by a bank and made payable to order or bearer, is negotiable. *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71 (51 N. W. 305; 33 Am. St. Rep. 618; 15 L. R. A. 386*n*).

174. (1892.) A *bona fide* purchaser of a negotiable certificate of deposit for value, before maturity, without notice of equities, is protected to the same extent as an innocent holder of other negotiable paper. But if such certificate is transferred when overdue, the purchaser takes it subject to all defenses which could have been made had it remained in the hands of the payee. *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71 (51 N. W. 305; 33 Am. St. Rep. 618; 15 L. R. A. 386*n*).

175. (1898.) The indorsement of a certificate of deposit by the payee before due, "without recourse," is not of itself sufficient to charge the purchaser with notice of defenses of the maker. *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71 (51 N. W. 305; 33 Am. St. Rep. 618; 15 L. R. A. 386*n*).

176. (1894.) A certificate of deposit as follows: "This certifies that A. B. has deposited in this bank $3,000, payable to order of self, in current funds, on return of this certificate properly indorsed. This deposit not subject to check. With interest at six per cent if left six months; no interest after six monts," is overdue so as to charge purchasers with notice of equities after the expiration of six months, and not until then. *Kirkwood v. First Nat. Bank of Hastings*, 40 Neb. 484 (58 N. W. 1016; 42 Am. St. Rep. 683; 24 L. R. A. 444).

177. (1894.) A certificate of deposit in the usual form, issued by a bank and made payable to order or bearer, is negotiable, and a *bona fide* purchaser thereof for value before maturity, without notice of equities, is protected to the same extent as an innocent holder of other negotiable paper. *Kirwood v. First Nat. Bank of Hastings*, 40 Neb. 484 (58 N. W. 1016; 42 Am. St. Rep. 683; 24 L. R. A. 444).

178. (1894.) The negotiability of a certificate of deposit is destroyed neither by a stipulation that it is payable on return of the certificate properly indorsed, nor by a provision that it is payable in current funds, nor by a provision that it shall bear interest if left six months, but no interest after six months. *Kirkwood v. First Nat. Bank of Hastings*, 40 Neb. 484 (58 N. W. 1016; 42 Am. St. Rep. 683; 24 L. R. A. 444).

179. (1898.) A certificate of deposit indorsed by the payee, "Pay to the order of R. C. O., Cash, for account" of the indorser, is a restrictive indorsement, vests no general property to the paper in the indorsee, but merely constitutes him an agent for the purpose of collecting; and parol evidence is not admissible to establish that the transfer of title was absolute. *United States Nat. Bank v. Geer*, 55 Neb. 462 (75 N. W. 1088; 70 Am. St. Rep. 390; 41 L. R. A. 444).

180. (1899.) A certificate of deposit against a solvent bank invests the transferee with dominion over the deposit; and the transfer is tantamount to a manual delivery. *Paxton v. State*, 59 Neb. 460 (81 N. W. 383; 80 Am. St. Rep. 689).

Effect of a check as transfer of fund.

181. (1890.) A check drawn on funds in a bank is an appropriation of the amount of the check in favor of the holder thereof, in effect an assignment of the amount of the check. *Fonner v. Smith*, 31 Neb. 107 (47 N. W. 632; 28 Am. St. Rep. 510; 11 L. R. A. 528).

182. (1890.) There is an implied promise on the part of a bank when receiving deposits to pay them out on the checks of the depositor to any person in whose favor he may draw the same, and the check-holder is thus subrogated to the rights of the depositor in so much of the deposits as the check may call for which cannot, after notice to the bank, be withdrawn by the drawer. *Fonner v. Smith*, 31 Neb. 107 (47 N. W. 632; 28 Am. St. Rep. 510; 11 L. R. A. 528).

183. (1898.) A check upon a bank by a depositor operates a transfer of the amount to the payee if on deposit at the time of

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presentation. *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803 (77 N. W. 346).

184. (1899.) A bank will not be obligated to pay a check in a sum greater than the amount to the credit of the drawer in his account with the bank; nor does the check operate a transfer *pro tanto*. *Henderson & Co. v. United States Nat. Bank*, 59 Neb. 280 (80 N. W. 898).

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185. (1900.) A check drawn upon a particular fund is an appropriation of so much of the fund as may be necessary to pay the check. *Nebraska Moline Plow Co. v. Fuehring*, 60 Neb. 316 (83 N. W. 69).

186. (1900.) A check directed against a fund to be afterwards created by depositing money in a bank, does not vest in the payee any right to, or control over, such money until it has been so deposited. *Nebraska Moline Plow Co. v. Fuehring*, 60 Neb. 316 (83 N. W. 69).

Payment of checks.

Rights and liabilities on checks as between drawer and payee, see *Bills and Notes*.

187. (1876.) The United States, being indebted to the state of Nebraska, drew two drafts upon its treasury in favor of "William H. James, acting governor, or order" and said James indorsed the drafts to McCann, the president of the Nebraska City National Bank, who indorsed the same and the bank received the proceeds therefrom. A portion of the funds was paid to an agent of James, who collected the debt from the federal government, and a large part was given to James, some to McCann and others, but none went to the state treasury, whereon, in an action against James, McCann and the bank, it was *held* that the drafts were the property of the state and could not be transferred by James except to the state treasurer and that the face of the drafts were sufficient to put a purchaser on inquiry as to their real owner. *McCann v. State*, 4 Neb. 324.

188. (1876.) Where the president of a bank accepts for deposit a draft drawn on the United States government and payable to "William H. James, acting governor, or order" he has sufficient notice to put him on inquiry as to the real owner thereof, and such notice to such president is notice to the bank, and the latter is liable for full amount of such drafts where the proceeds have been paid to and wrongfully appropriated by such governor. *McCann v. State*, 4 Neb. 324.

189. (1902.) Knowledge by the bank that a draft has been drawn on the depositor and is outstanding would not justify a refusal by the bank to pay out the money deposited when demanded by the depositor; the law would not allow the bank to set up a *jus tertii* against the demand. *Nehawka Bank v. Ingersoll*, 2 Unof. 617 (89 N. W. 618).

——— Effect of payment.

190. (1897.) Where certain officers and stockholders of a corporation borrowed money intended by them to be deposited in a bank and therein held as a trust fund for the creditors of the said corporation, but such intention as well as the insolvent condition of the corporation were unknown to the bank wherein the deposit was made, the payment in good faith of the fund upon the check of an officer of the corporation did not render the bank liable as a trustee to other creditors of the corporation, or to its receiver on their behalf, merely because the proceeds of said check, with the consent of the bank, were used to take up the note on the faith of which the loan had originally been made by the bank. *Wyman v. Nat. Bank of Commerce*, 51 Neb. 636 (71 N. W. 277).

191. (1902.) Prosecution to final judgment of a suit against the person to whom money on deposit was paid by a bank is an election to treat the payment by the bank as proper and authorized, and will bar a subsequent suit against the bank for the amount of the deposit. *Jones v. First Nat. Bank of Lincoln*, 3 Unof. 73 (90 N. W. 912).

——— Liability of bank to payee or holder.

192. (1890.) A check drawn on funds in a bank is an appropriation of the amount of the check in favor of the holder thereof —in effect an assignment of the amount of the check; and the holder, upon refusal of the bank to pay the same, where such funds have not been drawn out before its presentation, may bring an action thereon in his own name. *Fonner v. Smith*, 31 Neb. 107 (47 N. W. 632; 28 Am. St. Rep. 510; 11 L. R. A. 528).

193. (1898.) The payee or holder of a check, the drawer of which had funds on deposit with the drawer at the time of its presentation, may, on refusal of payment,

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maintain a suit on the instrument for the recovery of its stated sum. *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803 (77 N. W. 346).

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194. (1903.) The payee of a check has a right of action against the drawee if the latter has funds to meet it when it is presented. *Falls City State Bank v. Wehrli*, 68 Neb. 75 (93 N. W. 994).

195. (1905.) Where the only reason given by a bank for its refusal to pay a check, is that the maker had stopped payment thereon, it is estopped to urge in defense of a suit on such check that the maker had no funds on deposit in the bank. *First State Bank of Overton v. Stephens Bros.*, 74 Neb. 616 (105 N. W. 43).

196. (1906.) Where the holder of a bank draft neither demands payment of the bank on which it is drawn nor takes any other step to secure payment within five years from the time it came into his possession, his right of action against the bank issuing the draft because of the failure of the bank on which it was drawn to pay the same when it was presented is barred by the statute of limitations. *Wrigley v. Farmers & Merchants State Bank*, 76 Neb. 862 (108 N. W. 132)

——Liability of bank to drawer for refusal to pay.

197. (1894.) The damages recoverable for the refusal of a bank to pay a check, drawn upon it by one who has funds with the bank wherewith to make such payment, should not exceed such amount as reasonably and fairly in the natural course of things would result from such refusal. *Bank of Commerce v. Goos*, 39 Neb. 437 (58 N. W. 84; 23 L. R. A. 190).

198. (1899.) Proof by the drawer of a check that when such check was presented the drawer had with the drawee subject to check a sufficient deposit wherewith to pay such check, and that subsequently the drawer was compelled to pay the amount of the check to the holder thereof because the drawee unwarrantedly refused payment thereof, is sufficient proof to sustain a judgment for damages to the amount of the payment so made by the drawer and such other damages as are alleged and proved. *First Nat. Bank of Greenwood v. Railsback Bros. & Spelts*, 58 Neb. 248 (78 N. W. 512).

Actions to recover deposits.

Actions to establish trust in deposit made in insolvent bank, see *ante*, §§ 152-155.

——Defenses.

199. (1894.) Where a partner or officer in a banking corporation is the agent of an individual, and as such collects rents and, under an agreement with the principal, invests the proceeds at usurious rates, keeping an account in the bank in which he deposits all sums realized, the bank cannot set up usury as a defense to an action by the principal against it to recover his deposits. *Porter v. Sherman County Banking Co.*, 40 Neb. 274 (58 N. W. 721).

200. (1894.) Suit was brought by A against a bank, alleging that B, being indebted to A, had paid into the bank the amount of the indebtedness to the use of A. The bank answered, among other things, alleging that in an action by a third person against the bank, B and others, it was determined that the amount due A had been included in a mortgage from B to the bank, and that the judgment rendered in that case against B in favor of the bank did not include A's indebtedness. *Held*, That these averments stated no defense. *German Nat. Bank of Hastings v. Leonard*, 40 Neb. 676 (59 N. W. 107).

——Limitations.

201. (1899.) Where an action on certificates of deposit against a bank other than the maker, is based on allegations that since defendant had become possessed of the assets of the maker, it became liable as a matter of law, for the debts of such maker, an amended petition seeking relief on the ground of fraud in the transaction by which defendant became possessed of such assets, state a different cause of action, and hence the original petition did not stop the running of the statute of limitations as against the amended cause of action. *Buerstetta v. Tecumseh Nat. Bank*, 57 Neb. 504 (77 N. W. 1094).

201*a*. (1904.) The statute of limitations does not begin to run against a claim against a bank on a certificate of deposit payable on demand until a demand has been made. *Sharp v. Citizens Bank of Stanton*, 70 Neb. 758 (98 N. W. 50).

202. (1902.) As between a bank and one of its depositors, the statute of limitations does not begin to run in favor of the bank until a demand has been made for the money on deposit. *Citizens Bank of Humphrey v. Fromholz*, 64 Neb. 284 (89 N. W. 775).

——Pleading.

203. (1896.) In an action against a bank for money deposited by the plaintiff's agent

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to his own account, evidence of payment by the defendant on checks subsequently drawn by such agent, in good faith, relying upon his apparent title to said fund, is inadmissible under a general denial. Such fact to be available as a defense must be specially pleaded. *Cady v. South Omaha Nat. Bank*, 46 Neb. 756 (65 N. W. 906).

204. (1896.) In an action against a bank for deposits made by plaintiff's agent in his own name, evidence that the money was paid out on defendant's checks is inadmissible under a general denial. *Cady v. South Omaha Nat. Bank*, 49 Neb. 125 (68 N. W. 358).

205. (1896.) A petition in an action against a newly organized bank to recover the amount of deposits made in the old bank, that fails to show that the new corporation assumed the obligations and liabilities of the old company does not state a cause of action. *Austin v. Tecumseh Nat. Bank*, 49 Neb. 412 (68 N. W. 628; 59 Am. St. Rep. 543; 35 L. R. A. 444).

206. (1901.) In an action on a certificate of deposit, a petition which alleges that the certificate was duly issued, that plaintiff is the owner of it, that it was duly presented and payment refused, and that defendant claims to have a partial defense, cannot be successfully assailed by general demurrer. *Seven Valleys Bank v. Wise*, 61 Neb. 880 (86 N. W. 923).

207. (1902.) In an action against a bank for money deposited by a trustee to his own account, evidence of payment by the bank on checks subsequently drawn by such trustee in good faith relying on his apparent title to said fund is inadmissible under general denial. Such fact, to be available as a defense, must be specially pleaded. *Union Stock Yards Nat. Bank v. Haskell*, 2 Unof. 839 (90 N. W. 233).

——— Presumptions and burden of proof.

208. (1890.) Where there is a dispute between a bank and customer as to whether the latter had made a certain deposit, *held*, that as claim of creditor would make the deposit an unusual one, it was incumbent upon him to show from what source he had received the particular sum in dispute. *State Bank v. Smith*, 29 Neb. 434 (45 N. W. 691).

209. (1905.) Where a depositor draws a check upon a general deposit in a bank or order, the purpose being, as the depositor claims, to change a general deposit subject to check into a time deposit in the same bank, and the check is returned indorsed paid, and the bank seeks to avoid liability by a plea of payment, the burden of proof is upon the bank to show that the amount of the check was paid at the depositor's request to a third party. *Patterson v. First Nat. Bank of Humboldt*, 73 Neb. 384 (102 N. W. 765).

210. (1905.) Where a check for $450 was drawn by a depositor in a bank upon her deposit, payable to the same bank or order, its endorsement by the bank, and return to the drawer as paid, is *prima facie* evidence of the receipt by the bank of the amount evidenced by the check. It is not conclusive but is open to explanation or denial. *Patterson v. First Nat. Bank of Humboldt*, 73 Neb. 384 (102 N. W. 765).

211. (1905.) Where a depositor claims that a check for $450, payable to the "First National Bank," was given by her to the same bank for the purpose of changing her general deposit therein into a time deposit, and the only controversy is whether or not a certain "time check," signed by the president of the bank by his individual name alone, was fraudulently delivered to her in exchange for the check instead of a certificate of deposit, or whether the check was paid, the money loaned by her to the bank president individually, and the "time check" given by him as evidence of his own debt, it is error to instruct the jury that before the plaintiff can recover she must prove "not only that the $450 check was fraudulently procured from her, but that the time checks given her were fraudulent," since the plaintiff does not claim there was fraud in procuring the check. *Patterson v. First Nat. Bank of Humboldt*, 73 Neb. 384 (102 N. W. 765).

Admissibility of evidence.

212. (1902.) In a suit against a bank, book entries made by its officers or bookkeeper in the regular course of business, are competent evidence as admissions against interest. *Globe Savings Bank v. Bank of Commerce*, 64 Neb. 413 (89 N. W. 1030).

213. (1905.) In an action against a bank by a depositor on an instrument given the latter which was a note signed by the president of the bank in his individual capacity, it being claimed that the depositor thought and understood such instrument was a certificate of a time deposit, and brings the action on that theory, evidence

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that five years before another depositor was given a note similar to the one in this case and on noticing that it was not a certificate of deposit the cashier of the bank corrected it by paying the same on demand is inadmissible to show fraudulent intent as transpiring at too distant a time. *Patterson v. First Nat. Bank of Humboldt*, 73 Neb. 384 (102 N. W. 765).

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——— Weight and sufficiency of evidence.

214. (1891.) In a dispute between a depositor and a bank as to the amount plaintiff had on deposit, with defendant, the evidence *held* to sustain the verdict. *Conklin v. Graham*, 32 Neb. 546 (49 N. W. 460).

215. (1897.) In an action by the seller of cattle against a bank, the evidence *held* insufficient to show that the bank was liable as trustee for the proceeds of the sale, the funds having been deposited with the bank by the commission agents who made the sale. *Pederson v. South Omaha Nat. Bank*, 52 Neb. 95 (71 N. W. 973).

216. (1901.) In an action by an heir to recover the amount of a deposit made by the deceased in defendant bank, evidence showing the defendant received the money from the deceased sustains a verdict for plaintiff, as against a contention that the same was transferred to another bank, *Tecumseh Nat. Bank v. McGee*, 61 Neb. 709 (85 N. W. 949).

——— Judgment.

217. (1906.) Where the issue is as to whether a certificate of deposit was issued against a deposit in a bank, and the general verdict is for the plaintiff, based upon his denial that such instrument ever existed, the court need not require indemnity against such alleged outstanding instrument. *Emley v. Citizens State Bank*, 76 Neb. 794 (107 N. W. 1014).

D. Collections.

Title to papers received for collection.

218. (1897) The question whether title passes to a negotiable instrument delivered to a bank under a restrictive but ambiguous indorsement, without an express contract, but in pursuance of an established usage, is one of fact rather than law, and depends on the intent of the parties. *United States Nat. Bank v. Geer*, 53 Neb. 67 (73 N. W. 266; 41 L. R. A. 439). [Rehearing. 55 Neb. 462.]

219. (1897.) Evidence *held* to show a sale of a certificate of deposit, and not a bailment for collection. *United States Nat. Bank v. Geer*, 53 Neb. 67 (73 N. W. 266; 41 L. R. A. 439). [Rehearing. 55 Neb. 462.]

Title to funds collected.

220. (1897.) The mere crediting of the account of the remitting bank by a correspondent employed by it to make collections does not create in favor of the latter such an equity as can be interposed in defense of an action by the owner of the paper so collected for the proceeds thereof. *Branch v. United States Nat. Bank of Omaha*, 50 Neb. 470 (70 N. W. 34).

——— After insolvency of bank.

221. (1893.) Where a bank collects money for another, it holds the same as trustee of the owner, and on the making of an assignment by the bank for the benefit of its creditors the trust character still adheres to the fund in the hands of the assignee, and the owner is entitled to have his claim allowed by the county court as a preferred claim. *Anheuser-Busch Brewing As'n v. Morris*, 36 Neb. 31 (53 N. W. 1037).

222. (1893.) Where a national bank receives notes and mortgages for collection, the proceeds to be remitted when collected, it is the agent of the owner of the securities. Where the bank fails before remittance and after collection, the funds do not become the assets of the bank. *Griffin v. Chase*, 36 Neb. 328 (54 N. W. 572).

223. (1901.) Money collected by a bank for another is not a part of the assets of the bank, and on its insolvency is a preferred claim for the use of the owner. *State v. Bank of Commerce of Grand Island*, 61 Neb. 181 (85 N. W. 43; 52 L. R. A. 858).

——— Application of proceeds to debt due bank.

224. (1891.) The plaintiff in error received for collection a negotiable promissory note, unindorsed, with instructions to remit the proceeds, when collected, to the payee. Before the money was collected the bank voluntarily, and without the knowledge or consent of the payee, paid to a third party a note given by a partnership of which the payee was a member. Subsequently, but before the note was collected, the bank was notified that the note had been sold to the defendant in error. In an action against the bank to recover the money collected by it, *held*, that the bank was not entitled to set off the amount of the firm note against the money collected. *Commercial State Bank v. Rowland*, 31 Neb. 483 (48 N. W. 149).

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Receipt of depositor's check for collection.

225. (1897.) A bank receiving for collection a customer's check is required to pay the same upon the receipt thereof during business hours, or to promptly give notice of its dishonor in order to charge the drawer and indorsers thereof. *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105 (69 N. W. 765; 61 Am. St. Rep. 550).

Negligence or default in making collection.

226. (1876.) Failure of a banker to present a negotiable instrument, delivered to him for collection, for payment at maturity will render him liable for damage occasioned thereby. *Steele v. Russell*, 5 Neb. 2 ..

227. (1876.) Where a banker receives a negotiable instrument for collection, it is his duty to cause it to be presented for payment at maturity, and if refused, protested, so as to charge the indorser. *Steele v. Russell*, 5 Neb. 211.

228. (1893.) A bank receiving for collection from a correspondent checks drawn upon it by a customer with instructions to protest in case of non-payment, is required; in case payment is refused for want of funds, to give notice to the bank from which they were received not later than the next day after the dishonor. And when they are held for two days in order to enable the drawer to provide funds for payment thereof a jury will be warranted in finding that the bank intended to accept them and become liable thereon. *Wood River Bank v. First Nat. Bank of Omaha*, 36 Neb. 744 (55 N. W. 239).

229. (1893.) No custom or usage among bankers as to the manner of presenting ordinary checks for payment will relieve them from the legal duty of presenting such checks for payment within a reasonable time. *First Nat. Bank of Wymore v. Miller*, 37 Neb. 500 (55 N. W. 1064; 40 Am. St. Rep. 499).

230. (1897.) A customer's bank check is not intended for circulation as a medium of exchange and should be presented for payment with the dispatch consistent with the circumstances of the case and the transaction of other commercial business. *First Nat. Bank of Wymore v. Miller*, 37 Neb. 500 (55 N. W. 1064; 40 Am. St. Rep. 499).

231. (1897.) A bank which undertakes the collection of a customer's check is guilty of negligence in sending it for payment direct to the drawee bank, provided there is in the same town another bank in good standing. *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105 (69 N. W. 765; 61 Am. St. Rep. 550).

232. (1897.) *Held*, from an examination of the evidence, that prejudice to the defendant as drawer of the check which is the subject of controversy will be presumed from the failure to give notice of its dishonor, there being to his credit therein sufficient funds for its payment, the drawee bank having in the meantime become insolvent. *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105 (69 N. W. 765; 61 Am. St. Rep. 550).

233. (1898.) A bank to whom a draft is sent for collection is liable to the forwarding bank for negligence and want of good faith in allowing the creditor more time and afterwards taking an assignment of the creditor's property, before collecting such draft, assuming a large amount of the debts but not that for the unpaid draft. *Dern v. Kellogg*, 54 Neb. 560 (74 N. W. 844).

234. (1898.) The custom of a local bank, unknown to a forwarding bank, as to treatment of collections will not protect the former. *Dern v. Kellogg*, 54 Neb. 560 (74 N. W. 844).

235. (1898.) A bank holding paper for collection merely, and charged with no duty other than its due presentment, if it discharges that duty and is guilty of no misrepresentation or fraudulent concealment, is not forbidden to obtain a preference for a debt owing to itself from the same debtor. *United States Nat. Bank of Omaha v. Westervelt*, 55 Neb. 424 (75 N. W. 857).

236. (1900.) A bank which undertakes to collect a draft is bound to keep within the authority conferred upon it, and exercise proper diligence to obtain payment. *Omaha Nat. Bank v. Kiper*, 60 Neb. 33 (82 N. W. 102).

237. (1901.) If the payee of a check drawn upon a bank in this state indorses it to a bank in a neighboring town for collection and the latter, without the knowledge or consent of the payee, sends it for collection through a distant bank situated outside the state, thereby consuming three days for making a presentment for payment which might have been made in one day, the indorsee will be liable for the consequences of such delay and for any default or negligence of the bank chosen to make the collection. *Bedell v. Harbine Bank*, 62 Neb. 339 (86 N. W. 1060).

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——— Agent or correspondent of collecting bank.

238. (1892.) Where a bank receives for collection a note or bill payable at a distant point, with the understanding that such collection is an accommodation only, or that it shall receive no compensation therefor beyond the customary exchange, and it transmits such paper to a reputable and suitable correspondent at the place of payment, with proper instructions for the collection and remittance of the proceeds thereof, it will not be liable for the defaults of such correspondent. *First Nat. Bank v. Sprague*, 34 Neb. 318 (51 N. W. 846; 33 Am. St. Rep. 644; 15 L. R. A. 498).

239. (1892.) The exchange which is usually charged by banks for the transmission of money from one place to another, is not a sufficient consideration to support an implied undertaking to answer for the default of a correspondent, selected to make collections for customers according to the course of business of banks *First Nat. Bank v. Sprague*, 34 Neb. 318 (51 N. W. 846; 33 Am. St. Rep. 644; 15 L. R. A. 498).

240. (1893.) Where a check sent to a bank for collection remains in the bank to be protested for non-payment by the president and manager thereof, a notary public, and who, although aware of the instructions to the contrary, delays noting for protest or giving notice, in consequence of which the indorsers are discharged, such notary will be held to be the agent of the bank, and the latter will be liable for his negligence. *Wood River Bank v. First Nat. Bank of Omaha*, 36 Neb. 744 (55 N. W. 239).

241. (1893.) The general rule is that where a bank delivers a note or bill to a notary public for demand, protest, and notice, it will not be liable for the default of the latter. *Wood River Bank v. First Nat. Bank of Omaha*, 36 Neb. 744 (55 N. W. 239).

242. (1898.) A bank to which a note had been sent for collection may be held liable to the owner for the amount due thereon, where the bank forwarded the note to another bank which, pursuant to instructions, made collection and credited the proceeds to the former bank, though the collecting bank failed immediately thereafter. *First Nat. Bank of Omaha v. First Nat. Bank of Moline*, 55 Neb., 303 (75 N. W. 843).

243. (1901.) If the payee of a check drawn upon a bank in this state indorses and delivers it to a bank in a neighboring town for collection, and accompanies the act with a request that it be not immediately presented for payment and agrees that it may be sent for collection through a distant bank situate outside the state, the indorsee will not be liable for the consequences of the delay necessarily incident to the course adopted, nor for the default or negligence of the bank chosen to make presentment for payment. *Bedell v. Harbine Bank*, 62 Neb. 339 (86 N. W. 1060).

Liability on collection of void draft.

244. (1907.) A bank that, without notice or suspicion of wrongdoing, receives a draft from the drawer for collection, and demands and obtains payment of it from the drawee, and in good faith pays the proceeds over to its employer, is not liable to the payor in damages because the latter made payment without consideration, and in reliance upon a forged bill of lading which the drawer had attached to and caused to be forwarded with the draft. *Nebraska Hay & Grain Co. v. First Nat. Bank of Falls City*, 78 Neb. 334 (110 N. W. 1019).

Action or defenses for negligence or default.

——— Defenses.

245. (1897.) The mere crediting of the account of the remitting bank by a correspondent employed by it to make collections does not create in favor of the latter such an equity as can be interposed in defense of an action by the owner of the paper so collected for the proceeds thereof. *Branch v. United States Nat. Bank of Omaha*, 50 Neb. 470 (70 N. W. 34).

——— Pleading.

246. (1890.) L. & S., residents of V., in this state, on Friday, November 16, sent by mail a check on a bank at V. to M. B. & Co. at O., Neb. This was received by M. B. & Co. on the next day. The payee on the same day endorsed the check and delivered it to the Nebraska National Bank at O., which, on the same day, transmitted the same by mail to the bank at V., on which it was drawn, for payment. On Tuesday, November 20, the bank at V., in payment of the check, sent a worthless draft to the bank at O., which the latter refused to receive, and on the same day notified M. B. & Co. of that fact, and on the next day notified L. & S. The testimony showed that the bank at V. was in a failing condition when L. & S. drew and sent the check on

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it and that they stated that fact to M. B. & Co. in the letter transmitting the check. In an action against the drawers they demurred to the petition. *Held*, That if the facts stated in the petition were true, the Nebraska National Bank had shown due diligence and was entitled to recover. *Nebraska Nat. Bank v. Logan*, 29 Neb. 278 (45 N. W. 459).

247. (1890.) Action by bank which had cashed a check drawn on a bank which became insolvent against drawer of same; petition examined; *held*, that alleged negligence of bank in selecting the payee bank as agent to collect the check, did not appear therein and should have been set up by answer. *Nebraska Nat. Bank v. Logan*, 29 Neb. 278 (45 N. W. 459).

248. (1900.) Petition *held* to state cause of action against defendant bank for negligence in making collection of a draft. *Omaha Nat. Bank v. Kiper*, 60 Neb. 33 (82 N. W. 102)

249. (1903.) Petition filed in the county court in an action against a private bank for negligence in failing to collect notes left with it for that purpose, examined, and *held* to state a cause of action. *Coleman v. Spearman, Snodgrass & Co.*, 68 Neb. 28 (93 N. W. 983).

——— Evidence.

250. (1876.) Solvency of an indorser of a negotiable instrument is a material inquiry, in an action by a holder thereof, against a banker for damages for failure to present same for payment. *Steele v. Russell*, 5 Neb. 211.

251. (1876.) It is competent for a banker, who is sued for damages for failure to present a note for payment, to prove that an indorser was, and continues to be insolvent, and that no damage was occasioned by his failure to protest the note. *Steele v. Russell*, 5 Neb. 211.

252. (1876.) Embarrassed circumstances of an indorser is immaterial and constitute no defense to an action against a banker for failing to protest a note sent it for collection. *Steele v. Russell*, 5 Neb. 211.

253. (1898.) In an action by a forwarding bank against a local bank to recover for neglect in failing to promptly collect a draft suit for that purpose it was not necessary for the plaintiff to prove with certainty that but for the misconduct of the collecting agent payment would have been obtained. A *prima facie* case is established by showing that such, with reasonable probability, would have been the result. *Dern v. Kellogg*, 54 Neb. 560 (74 N. W. 844).

254. (1898.) The fact that all the time a bank held a draft the merchant against whom it was drawn continued to conduct his business and had property subject to execution to the value of many times the debt is sufficient to charge the bank *prima facie*, with the amount of the draft, for a failure and neglect to collect the same. *Dern v. Kellogg*, 54 Neb. 560 (74 N. W. 844).

——— Measure of damages.

255. (1900.) In case a debt is lost through the negligence of a collecting agent the measure of damages is the actual loss resulting from such agent's omission of duty. *Omaha Nat. Bank v. Kiper*, 60 Neb. 33 (82 N. W. 102).

E. Exchange.

Issue and payment of drafts.

256. (1892.) One who purchases a draft from a bank for $500, and receives an instrument stating the amount in figures, but containing the words, "five and no-100 dollars," by reason of which the drawee refuses to pay more than $5, is entitled to be reimbursed by the drawer, though it has since been placed in the hands of a receiver. *State v. Bank of Western*, 34 Neb. 175 (51 N. W. 749).

IV. NATIONAL BANKS.

Nature and status in general.

257. (1898.) A national bank having given a transaction the form of one with an individual for the purpose of evading the liabilities peculiar to national banks, cannot be heard to assert its true nature for the purpose of evading the liabilities attaching to individuals and of claiming the privileges of national banks. *Gadsden v. Thrush*, 56 Neb. 565 (76 N. W. 1060).

Guaranty.

258. (1894.) While a national bank may not lend its credit for the accommodation of others, still it may guarantee the payment of commercial paper as incidental to the exercise of its power to buy and sell the same. *Thomas v. City Nat. Bank of Hastings*, 40 Neb. 501 (58 N. W. 943; 24 L. R. A. 263).

259. (1894.) A, being indebted to a national bank and being the holder of certain negotiable notes, indorsed them generally

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and delivered them to the president of the bank, who negotiated them for value to C, at the same time executing in the name of the bank a written guaranty of payment. From the proceeds of the sale A's debt to the bank was canceled. *Held*, That the authority of the president to execute the guaranty would be conclusively presumed in favor of the purchaser acting without notice to the contrary; and the retention and enjoyment by the bank of the proceeds of such transaction constituted a ratification of the president's act. *Thomas v. City Nat. Bank of Hastings*, 40 Neb. 501 (58 N. W. 943; 24 L. R. A. 263).

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Transactions in real property.

260. (1876.) The limitations of the national banking acts applies to transactions in real property, independent of banking operations, and not to mortgage securities. *Richards v. Kountze*, 4 Neb. 200.

261. (1876.) In the absence of evidence showing the purpose and object of the assignment to the bank, it cannot be presumed that it was for a debt created *in presenti*, in violation of the National Banking Act. *Richards v. Kountze*, 4 Neb. 200.

262. (1876.) A note and mortgage is not extinguished by assignment to a national bank, and are valid in he hands of a subsequent assignee from such bank. *Richards v. Kountze*, 4 Neb. 200.

263. (1901.) Where security on real estate has been taken by a national bank on a contemporaneous loan, the same may be enforced, notwithstanding the provisions of the United States statutes prohibiting that character of security. *First Nat. Bank of Sutton v. Grosshans*, 61 Neb. 575 (85 N. W. 542).

264. (1901.) A party who has secured a loan from a national bank, and given real estate security therefor, cannot be heard to deny the right of the bank to enforce the provisions of the mortgage because of the section of the United States statutes prohibiting the taking of real estate security for a loan negotiated by a national bank. *First Nat. Bank of Sutton v. Grosshans*, 61 Neb. 575 (85 N. W. 542).

——— Persons entitled to question transaction.

265. (1895.) Where a bank takes a mortgage to secure a debt, a third person cannot attack the transaction or treat the mortgage as void on the ground that it is *ultra vires* of the bank to take such security. *Smith v. First Nat. Bank of Chadron*, 45 Neb. 444 (63 N. W. 796).

Liability of officers for publishing false statement.

266. (1899.) The statements and reports which are required and are made to the comptroller and published in the newspapers have among their purposes that of conveyance of information to those persons, each or all, who contemplate dealings with the bank in which its financial condition enters as a vital matter. *Stuart v. Bank of Staplehurst*, 57 Neb. 569 (78 N. W. 298).

267. (1899.) Directors of a national bank who knowingly make and publish false statements and reports of the bank's financial condition, with intent to deceive, may, in an action for deceit, be liable for damages suffered by persons who believed and acted upon such statements and reports. *Stuart v. Bank of Staplehurst*, 57 Neb. 569 (78 N. W. 298).

268. (1899.) A director of a national bank is not individually liable for the consequences of the bank's false report to the comptroller, unless such director attested the report or in some manner participated in making or publishing it. *Gerner v. Mosher*, 58 Neb. 135 (78 N. W. 384; 46 L. R. A. 244).

269. (1899.) The directors of an insolvent national bank are personally liable, at the suit of one purchasing the stock of such bank, for damages sustained by the reason of the insolvency of the corporation, when the plaintiff is induced to make such purchase by false representations of solvency, contained in reports made by the bank to the comptroller of the currency and attested by the directors and published in pursuance of law, even though the directors were unaware that such reports and representations were false or untrue and were made without intention to defraud. *Gerner v. Mosher*, 58 Neb. 135 (78 N. W. 384; 46 L. R. A. 244).

270. (1899.) Where the directors of a national bank attest the reports made of its condition by its executive officers to the comptroller of the currency under section 5211, Revised Statutes U. S., they thereby certify that the statements contained in said report are absolutely true. *Gerner v. Mosher*, 58 Neb. 135 (78 N. W. 384; 46 L. R. A. 244).

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271. (1899.) The word "attest," as used in section 5211, Revised Statutes U. S., means something more than to witness the execution of the report by the president or cashier. It means to certify its correctness. *Gerner v. Mosher*, 58 Neb. 135 (78 N. W. 384; 46 L. R. A. 244).

272. (1900.) A report of a national bank to the comptroller of the currency which complies with the law and regulations of the comptroller cannot be made the basis of an action for deceit because the item of interest on rediscounts was deducted from undivided profits instead of being made to appear specifically in such report. *Gerner v. Yates*, 61 Neb. 100 (84 N. W. 596).

273. (1905.) The officers of a national bank are personally liable for false reports made and published by them in pursuance of section 5211, Revised Statutes U. S., to the party injured thereby, and the right of the injured party to maintain the action does not rest on the federal statute but on the common law. *Yates v. Jones Nat. Bank*, 74 Neb. 734 (105 N. W. 287); *Yates v. Utica Bank*, 74 Neb. 734 (105 N. W. 287); *Yates v. Bailey*, 74 Neb. 734 (105 N. W. 287). [Reversed. 206 U. S. 158, 181.]

274. (1905.) It is no defense to an action against officers of a national bank for publishing false reports that such reports were made and published by the officers without knowledge of their falsity. *Yates v. Jones Nat. Bank*, 74 Neb. 734 (105 N. W. 287); *Yates v. Utica Bank*, 74 Neb. 734 (105 N. W. 287); *Yates v. Bailey*, 74 Neb. 734 (105 N. W. 287); *Yates v. Bank of Staplehurst*, 74 Neb. 734 (105 N. W. 287). [Reversed. 206 U. S. 158, 181.]

——— Actions to enforce liability.

275. (1899.) The liabilities which are fixed in the national banking law for violation of its provisions are not exclusive and do not preclude the action for deceit. *Stuart v. Bank of Staplehurst*, 57 Neb. 569 (78 N. W. 298).

276. (1899.) Petition against directors of a national bank for publishing a false statement as to its financial condition, *held* to state a cause of action for deceit and not for relief under the national banking law, and to present no federal question for adjudication. *Stuart v. Bank of Staplehurst*, 57 Neb. 569 (78 N. W. 298).

277. (1899.) In an action for false representations it is not necessary to aver or prove that the party making them knew they were untrue. And this rule is applicable to an action for deceit against the director of a bank for falsely stating the financial condition of the corporation. *Gerner v. Mosher*, 58 Neb. 135 (78 N. W. 384; 46 L. R. A. 244).

278. (1899.) The president and cashier of a bank, shown to have personally conducted its business, cannot be presumed ignorant of the falsity of reports of the bank's condition by them published, the books of the bank on their face disclosing the falsity. *Gerner v. Mosher*, 58 Neb. 135 (78 N. W. 384; 46 L. R. A. 244).

Usurious loans by banks.

279. (1888.) Where the usurious interest is discounted from the face of the note, the bank can recover only the face of the note less the interest deducted. If the borrower pays the usurious interest in advance he may recover double the interest so paid. *Schuyler Nat. Bank v. Bollong*, 24 Neb. 825 (40 N. W. 413).

280. (1890.) Where a national bank loans money at a usurious rate which is included in the note, in an action to enforce the contract the interest is forfeited. *Hall v. First Nat. Bank*, 30 Neb. 99 (46 N. W. 150); (1894) *McGhee v. First Nat. Bank of Tobias*, 40 Neb. 92 (58 N. W. 537).

280*a*. (1891.) The fact that officers of a bank, acquired knowledge, long before its organization, and in their private business, of the usurious consideration of a note, will not charge the bank with notice of such infirmity. *Koehler v. Dodge*, 31 Neb. 328 (47 N. W. 913; 28 Am. St. Rep. 518).

281. (1894.) Where money is loaned at a usurious interest by a partner of a private banking firm, and several renewals are made, the payments that have been made amounting to more than the original loan, a national bank that has assumed the business of the private firm and the partner making the loan is the cashier of the new bank, such bank cannot recover on the note so given in renewal of the loan. *Exeter Nat. Bank v. Orchard*, 39 Neb. 485 (58 N. W. 144).

282. (1895.) Where a national bank knowingly charges usurious interest upon a loan of money which is included in the note, in an action to enforce the contract, the entire interest is forfeited. Where ille-

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gal interest has been paid to a national bank, the borrower may recover double the amount of interest actually paid, if the action is brought within two years after such payment is made. *Norfolk Nat. Bank v. Schwenk*, 46 Neb. 381 (64 N. W. 1073).

283. (1897.) The defense of usury is available in an action by a national bank for the recovery of unpaid interest where the rate contracted for by it is in excess of that prescribed by the act of congress. *Tomblin v. Higgins*, 53 Neb. 92 (73 N. W. 461; 68 Am. St. Rep. 596). [Rehearing. 58 Neb. 336.]

284. (1898.) The inhibition contained in section 5197, Revised Statutes U. S., is general and forbids the taking of usurious interest by a national bank from an artificial as well as from a natural person. *Albion Nat. Bank v. Montgomery*, 54 Neb. 681 (74 N. W. 1102).

285. (1899.) The exemption of national banks from the penalties of usury prescribed by statute of the state owes its existence to laws enacted by congress, and such exemption should not, by implication, be extended beyond the import of the federal statute. *Gadsden v. Thrush*, 58 Neb. 340 (78 N. W. 632; 45 L. R. A. 654).

286. (1899.) In an action to foreclose a mortgage securing a note made to be used as collateral to a note owing to a national bank the mere fact that the proceeds of such collateral, when collected by the payee thereof, are to be used to discharge the said principal note to the bank does not justify the extension of the federal exemption of national banks from penalties for usury to such foreclosure proceedings. *Gadsden v. Thrush*, 58 Neb. 340 (78 N. W. 632; 45 L. R. A. 654).

286*a*. (1905.) The president and director of a bank cannot enter into a contract with the corporation in which he is such an officer to pay a usurious rate of interest on money owing by him to such corporation, and thereby escape the payment of all interest on such indebtednes under the statute denouncing usurious contracts. In such a case a court of equity will not enforce the unlawful usurious contract, but will require the debtor to do equity by paying the legal rate of interest on the principal sum for which he is indebted to the corporation. *Gund v. Ballard*, 73 Neb. 547 (103 N. W. 309).

——Set-off of usurious interest paid.

See, also, *Usury*, §§ 99-102.

287. (1894.) It seems that the remedies given by the federal statutes for usury exacted by national banks are exclusive; but that principle does not prevent a debtor, under circumstances stated, from availing himself of any defenses to which he is entitled under the state law, and which accrued before he was aware that the debt was owing to the bank. *Exeter Nat. Bank v. Orchard*, 39 Neb. 485 (58 N. W. 144).

287*a*. (1894.) In an action by a national bank to recover on renewals to it of usurious notes given to a private bank which plaintiff has succeeded, defendant is entitled to have all payments of interest applied on the principal, and he is not estopped from claiming this right by the fact that he has made such renewals to the national bank and has also sued and recovered from it the penalty provided by the federal statute. *Exeter Nat. Bank v. Orchard*, 39 Neb. 485 (58 N. W. 144).

288. (1895.) Following the decisions of the supreme court of the United States, it was held that usurious interest paid a national bank on a note cannot be applied by way of set-off or payment against the principal sum due in any suit by the bank upon such note. *Norfolk Nat. Bank v. Schwenk*, 46 Neb. 381 (64 N. W. 1073).

289. (1896.) Money paid as usurious interest to a national bank cannot be set off in a suit brought by the bank more than two years after such payment to recover the principal sum. *Lanham v. First Nat. Bank of Crete*, 46 Neb. 663 (65 N. W. 786); (1897) *Montgomery v. Albion Nat. Bank*, 50 Neb. 652 (70 N. W. 239).

Actions for penalty for usury.

290. (1892.) Defendant bank might evade the penalty by proof that it had in good faith sold and assigned the usurious note to another for whom it was merely acting as agent in making the collection, but the mere assignment of the note raises no presumption of an absolute sale. *First Nat. Bank of North Bend v. Miltonberger*, 33 Neb. 847 (51 N. W. 232).

291. (1897.) While under the state law no action can be maintained to recover back payments of usury, and all remedy is lost by payment of the debt, the national banking act provides otherwise, and an action will lie against a national bank to recover

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the penalty, notwithstanding the borrower has paid both principal and interest. *First Nat. Bank of Tobias v. Barnett*, 51 Neb. 397 (70 N. W. 937).

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292. (1898.) The right to recover double the amount of usury paid to a national banking association is, by section 5198, Revised Statutes U. S., conferred as well upon artificial as upon natural persons. *Albion Nat. Bank v. Montgomery*, 54 Neb. 681(74 N. W. 1102).

——— **Jurisdiction and venue.**

293. (1887.) Actions and proceedings against any association under the national banking act may be brought in any state, county, or municipal court, in the county or city in which such association is located, having jurisdiction in similar cases. This applies to a penalty under section 5198, Revised Statutes U. S. In such cases the state courts do not exercise a new jurisdiction conferred upon them, but their ordinary jurisdiction derived from their constitution under the state law. *First Nat. Bank v. Overman*, 22 Neb. 116 (34 N. W. 107); (1890) *Schuyler Nat. Bank v. Bollong*, 28 Neb. 684 (45 N. W. 164).

294. (1888.) The courts of record of the several states have jurisdiction in actions brought under sections 5197 and 5198, Revised Statutes U. S., to recover from national banks the penalty for knowingly taking, receiving, or charging a rate of interest greater than is allowed by law. *Schuyler Nat. Bank v. Bollong*, 24 Neb. 825 (40 N. W. 413); (1888) *Schuyler Nat. Bank v. Bollong*, 24 Neb. 821 (40 N. W. 411); (1891) *Schuyler Nat. Bank v. Bollong*, 32 Neb. 70 (48 N. W. 826); (1893) *Schuyler Nat. Bank v. Bollong*, 37 Neb. 620 (56 N. W. 209).

——— **Conditions precedent.**

295. (1890.) Where illegal interest has been charged, but not paid, an action cannot be maintained to recover it back. *Hall v. First Nat. Bank of Fairfield*, 30 Neb. 99 (46 N. W. 150).

296. (1895.) The payment of a usurious loan made by a national bank is not a condition precedent to the right of the borrower to maintain an action against such bank to recover double the amount of usurious interest paid by such borrower to such bank on such loan. *Exeter Nat. Bank v. Orchard*, 43 Neb. 579 (62 N. W. 833).

——— **Defenses.**

296*a*. (1892.) In an action against a national bank to recover double the amount of interest paid on a usurious contract, defendant contended that it had sold and assigned the usurious note to another bank and that in collecting the face of the note from the maker it was acting merely as the agent of the other bank. *Held*, First, the defendant might evade the penalty for usury by proof of a sale and assignment in good faith of the usurious note; second, the mere assignment of the note by the defendant bank in such case raises no presumption in its own favor of an absolute sale thereof. *First Nat. Bank of North Bend v. Miltonberger*, 33 Neb. 847 (51 N. W. 232).

——— **Pleading.**

297. (1888.) When an action is brought to recover a penalty under sections 5197 and 5198, Revised Statutes U. S., upon the ground of taking, receiving, reserving, or charging a rate of interest greater than is allowed by law, it is necessary to allege in the petition that the act was "knowingly done." *Schuyler Nat. Bank v. Bollong*, 24 Neb. 821 (40 N. W. 411).

298. (1890.) In a petition in an action against a national bank for taking usury, the words "so as aforesaid paid by the plaintiff to the defendant, and by the defendant knowingly contracted for and received from the plaintiff," are neither redundant, scandalous, nor irrelevant matter, within the meaning of section 125 of the code. *Schuyler Nat. Bank v. Bollong*, 28 Neb. 684 (45 N. W. 164).

299. (1895.) A petition for the recovery of double the amount of interest, in which was included usury paid to a national bank, is sufficiently definite in its statements of facts when therein is shown the dates and amounts of the several loans, the usurious rate of interest stipulated for, and the date and amount of interest actually paid upon closing up the series of transactions described. *Ord Nat. Bank v. Wells*, 43 Neb. 550 (61 N. W. 692).

——— **Limitations.**

300. (1893.) The limitation of two years within which suit may be brought against a national bank under section 5198, Revised Statutes U. S., for taking usurious interest, begins to run, as to each installment of interest, from the time when such interest is paid. *First Nat. Bank of Dorchester v.*

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Smith, 36 Neb. 199 (54 N. W. 254); (1894) *Smith v. First Nat. Bank of Crete*, 42 Neb. 687 (60 N. W. 866); (1894) *Lanham v. First Nat. Bank of Crete*, 42 Neb. 757 (60 N. W. 1041); (1895) *Norfolk Nat. Bank v. Schwenk*, 46 Neb. 381 (64 N. W. 1073).

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——— **Evidence.**

300a. (1889.) In an action against a national bank to recover the penalty provided by the United States statute for taking usurious interest, the testimony of the plaintiff, who was the principal witness relied upon to establish the usury, being vague, indefinite, and unsatisfactory, the court will not review the findings of fact of the jury. *Volker v. First Nat. Bank*, 26 Neb. 602 (42 N. W. 732).

301. (1897.) In an action against a national bank to recover the penalty for taking usury, it appeared that the transactions between plaintiff and the bank consisted of a large number of loans evidenced by notes, many of which had been from time to time renewed. *Held*, That evidence of the whole course of transactions was material, although some were not pleaded as usurious. *First Nat. Bank of Tobias v. Barnett*, 51 Neb. 397 (70 N. W. 937).

——— **Instructions.**

301a. (1897.) In an action against a national bank to recover a penalty for usury, certain instructions examined, and *held* properly refused. *First Nat. Bank of Tobias v. Barnett*, 51 Neb. 397 (70 N. W. 937).

——— **Amount of penalty recoverable.**

302. (1890.) In an action against a national banking association, for a penalty under section 5198, Revised Statutes U. S., the plaintiff may recover double the amount of *interest* actually paid, and is not confined to double the amount of *usury* paid. *Schuyler Nat. Bank v. Bollong*, 28 Neb. 684 (45 N. W. 164).

Insolvency and receivers.

303. (1898.) The commission or written appointment of a receiver of a national bank issued by the comptroller of the currency, signed by him and attested with his seal of office, is a certificate within the meaning of section 884, Revised Statutes United States. Such a certificate proves itself, and is admissible in evidence without extraneous proof of its genuineness. *Davis' Estate v. Watkins*, 56 Neb. 288 (76 N. W. 575).

304. (1900.) The United States circuit court having jurisdiction over a receiver and questions growing out of the administration of the assets of an insolvent bank, the supreme court of the state will not interfere with such jurisdiction or the carrying out of its orders and judgments. *Schaberg v. McDonald*, 60 Neb. 493 (83 N. W. 737).

305. (1901.) A bank examiner who takes charge of the assets of a national bank, under the directions of the comptroller, is not the agent for the bank in such negotiations as the bank may be permitted to enter into with a view to resumption of business. *Tecumseh Nat. Bank v. Chamberlain Banking House*, 63 Neb. 163 (88 N. W. 186; 57 L. R. A. 811).

——— **Assessment of stockholders by comptroller.**

306. (1898.) An assessment levied by the comptroller of the currency on a stockholder of a national bank draws interest from the date such assessment is made payable. *Davis' Estate v. Watkins*, 56 Neb. 288 (76 N. W. 575).

307. (1898.) In a suit against a stockholder of a national bank to recover assessments defendant cannot assail the validity of the incorporation of the bank. *Davis' Estate v. Watkins*, 56 Neb. 288 (76 N. W. 575).

308. (1898.) In a suit against a stockholder of a national bank to recover assessments levied against him by the comptroller of the currency it will be presumed that the stock certificate bearing the corporate seal of the bank was issued and signed by the officer having authority so to do. *Davis' Estate v. Watkins*, 56 Neb. 288 (76 N. W. 575).

309. (1900.) A receiver has authority to institute proceedings and collect assessments ordered by the comptroller of the currency against stockholders of an insolvent national bank on their individual liability, and satisfaction of a judgment obtained in such proceedings satisfies and obliterates the obligation, regardless of the disposition made of the proceeds of such assessment by the receiver of such national bank. *Schaberg v. McDonald*, 60 Neb. 493 (83 N. W. 737).

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Admission as attorney to practice, see *Attorney and Client*, §§ 1-7.

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Marriage of parents of illegitimates as bar to action, see *Bastards*, §§ 20-22.

Discharge in bankruptcy no bar to creditors suits, see *Creditor's Suit*, § 3.

General judgment in creditors suit as bar to special relief, see *Creditor's Suit*, § 86.

Compromise as bar to action, see *Compromise and Settlement*, §§ 17-23.

Acts barring dower, see *Dower*, §§ 15-35.

Election of remedies as bar to other remedies, see *Election of Remedies*, §§ 10-34.

Judgment as bar, see *Judgment*, XIV.

Pleas in bar, see *Pleading*, § 17.

Return of property as bar to action for conversion, see *Trover and Conversion*, § 35.

BASEBALL.

Playing on Sunday, see *Sunday*, §§ 1-3.

BASTARDS.

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Legitimation giving right to inherit.
——— In general, § 2.
——— Recognition or acknowledgment, §§ 3-6.
——— Marriage of parents, §§ 7, 8.
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——— Declarations of complainant, § 70.
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CROSS-REFERENCES.

Fornication; Parent and Child.

corpus in bastardy proceedings, *Corpus*, § 3.

llegitimate.

.) At common law, a bastard one born neither in lawful wed- ithin a competent time after its ., under circumstances which npossible that the husband of its n be its father. *Parker v. No-* Neb. 315 (93 N. W. 851; 60 L. R.

on giving right to inherit.

eneral.

.) The moral obligation of the legtimate children does not legiti- atter, except upon the conditions by section 31, chapter 23 of the Statutes. *Trayer v. Setzer*, 72 101 N. W. 989).

ognition or acknowledgment.

3.) A writing sent by one in this woman in Sweden who is ad- "dear mother" and providing for ng to Nebraska, and to send or me" and start him alone at an instrument inclosed for the e giving directions, to any one d so do, how to aid the youth, f the boy as "my dear son" and nself "his father" is not such an gment of an illigitimate child as d for by section 31, chapter 23, of Statutes, which provides that ille- children who have been acknowl- the father may inherit from him. *urke*, 56 Neb. 785 (77 N. W. 444).

2.) In the writing described in ., chapter 23, Compiled Statutes, t statement that the child is illegi- d no intention to make the child need appear. *Thomas v. Thomas*, 81 (90 N. W. 630).

5. (1902.) Section 31, chapter 23, Compiled Statutes, in making an illegitimate child an heir of the person who "shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child," only provided for the prescribed evidence of paternity. *Thomas v. Thomas*, 64 Neb. 581 (90 N. W. 630).

6. (1906.) A writing to constitute an acknowledgment of paternity within the provisions of section 31, chapter 23, Compiled Statutes, 1903, must be one in which the paternity is directly, unequivocally and unquestionably acknowledged. *Moore v. Flack*, 77 Neb. 52 (108 N. W. 143).

——— Marriage of parents.

7. (1904.) The marriage of the parents of illegitimate children does not legitimate the latter, except upon the conditions prescribed by section 31, chapter 23 of the Compiled Statutes. *Trayer v. Setzer*, 72 Neb. 845 (101 N. W. 989).

8. (1906.) Evidence examined, and *held* insufficient to show a common law marriage between plaintiff's mother and the deceased. *Moore v. Flack*, 77 Neb. 52 (108 N. W. 143).

——— Adoption into family.

9. (1901.) The expression "adopted into the family," in section 31, chapter 23, Compiled Statutes, means received into one's family and given the family name and acknowledeged as a child. *Estate of Morton v. Morton*, 62 Neb. 420 (87 N. W. 182).

10. (1901.) An illegitimate child whose parents, before his death, intermarry and have other children, and whose father has received him into his family, and acknowledged him as a child and given him the family name, shall be counted among the legitimate children of a testator and share in a devise "to my children share and share alike" equally with the legitimate children. *Estate of Morton v. Morton*, 62 Neb. 420 (87 N. W. 182).

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Statutory provisions.

11. (1888.) Statute providing for imprisonment of father, without remedy for his discharge other than security for compliance with the order of the court, is constitutional. *Ex parte Donahue*, 24 Neb. 66 (38 N. W. 28).

12. (1895.) Section 1, chapter 37, Compiled Statutes, permitting a settlement to be made in a bastardy proceeding, does not violate section 11, article III, of the constitution, providing that no bill shall contain more than one subject, and the same shall be clearly expressed in its title. *Stoppert v. Nierle*, 45 Neb. 105 (63 N. W. 382).

13. (1903.) Chapter 37, Compiled Statutes entitled "Illegitimate Children," *held* constitutional and valid. *Gatzemeyer v. Peterson*, 68 Neb. 832 (94 N. W. 974).

Nature and form of remedy.

14. The proceeding under the bastardy act is esentially a civil one. (1883) *Jones v. State*, 14 Neb. 210 (15 N. W. 901); (1884) *Altschuler v. Algaza*, 16 Neb. 631 (21 N. W. 401); (1884) *Kremling v. Lallman*, 16 Neb. 280 (20 N. W. 383); (1891) *Strickler v. Grass*, 32 Neb. 811 (49 N. W. 804).

15. (1879.) Bastary proceedings are in the nature of a civil action to enforce the performance of a civil and moral obligation —the support by a father of his child. *Cottrell v. State*, 9 Neb. 125 (1 N. W. 1008).

16. (1882.) A proceeding under the bastardy act while in the nature of a civil action is properly a police regulation requiring the putative father to furnish support for his child, and to indemnify the public against liability for its support. *Ex parte Cottrell*, 13 Neb. 193 (12 N. W. 174).

17. (1895.) An action under the provisions of our statute in relation to "Illegitimate Children" is, in its nature, a civil proceeding, and the rules governing such proceedings apply to it. *Stoppert v. Nierle*, 45 Neb. 105 (63 N. W. 382).

18. (1901.) Proceedings in bastardy are purely statutory and the issue and order must conform to the statutes. *Peters v. Killian*, 63 Neb. 57 (87 N. W. 1049).

19. (1901.) The bastardy act is an exercise of the police power of the state. the object of which is to require the putative father to furnish support for his child and indemnify the public against liability for its care and maintenance. *In re Walker*, 61 Neb. 803 (86 N. W. 510).

Bar or abatement of proceedings.

——— Intermarriage of parties.

20. (1884.) The intermarriage of the parties will always be encouraged as a means of terminating litigation and rendering some measure of justice to the innocent offspring, but it cannot be enforced nor made a condition of its support. *Kremling v. Lallman*, 16 Neb. 280 (20 N. W. 383).

21. (1902.) The word "unmarried," as used in the statute as amended in 1875, properly refers to the status of the mother at the time her child is begotten and born, and does not relate to her situation at the time of making the complaint therein referred to. *Parker v. Nothomb*, 65 Neb. 315 (93 N. W. 851; 60 L. R. A. 699).

22. (1904.) Bastardy proceedings begun against the father are not abated by his fraudulent marriage with the mother not consummated by cohabitation with but followed by immediate abandonment of her. *Trayer v. Setzer*, 72 Neb. 845 (101 N. W. 989).

——— Settlement between parents.

23. (1901.) A settlement between the parents of an illegitimate child, in order to be operative as a stay or termination of such proceedings, must be of such nature and made and attested in such manner as the act prescribes and the district court can take judicial cognizance of none other. In that proceeding the court cannot try the issue whether the father or the mother of the child is the more suitable person to be entrusted with its custody. *Peters v. Killian*, 63 Neb. 57 (87 N. W. 1049).

——— Death of child.

24. (1893.) The prosecution of the father of a bastard child, under chapter 37, Compiled Statutes, does not abate by the death of the child pending the prosecution. *Hanisky v. Kennedy*, 37 Neb. 618 (56 N. W. 208).

Who may maintain proceedings.

25. A proceeding in bastardy may be prosecuted in the name of the prosecutrix. (1879) *Cottrell v. State*, 9 Neb. 125 (1 N. W. 1008); (1883) *Jones v. State, ex rel. Gibson*, 14 Neb. 210 (14 N. W. 901); (1884) *Kremling v. Lallman*, 16 Neb. 280 (20 N. W. 301); (1884) *Altschuler v. Algaza*, 16 Neb. 631 (21 N. W. 401); (1888) *Ingram v. State, ex rel. McIntosh*, 24 Neb. 33 (37 N. W. 943).

26. (1879.) Proceedings under the bastardy act of 1875 should be conducted in the

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prosecuting witness, or, if she rosecute, in the name of the where proceedings are insti- name of the state, without ob- at ground until after judgment, a waiver of the objections, the a mere trustee for the real erest. *Cottrell v. State*, 9 Neb. 1008).

) Under the statute entitled Children," prior to its amend- 5, an action in bastardy could ed by any woman giving birth timate child, even though be- orn during the existence of the e. *Parker v. Nothomb*, 65 Neb. V. 851; 60 L. R. A. 699).

) The word "unmarried," in apter 37, Compiled Statutes of oes not properly refer to the tus at the time of making the bastardy, but only to such ch time as it will affect the the legitimacy of the child, or of the husband to support it. *othomb*, 65 Neb. 308 (91 N. W.

) In a proceeding under the the district court acquires ju- the filing of the transcript of ings before the justice, based complaint, arrest of the ac- order requiring him to appear istrict court for trial. The evi- complainant, on the preliminary reduced to writing by the ransmitted to the district court, purpose of confirming or im- testimony in the latter court; occurring in the exclusion of such examination do not affect tion. *Altschuler v. Algaza*, 16 N. W. 401).

) The county judge has juris- ear proceedings instituted under of Compiled Statutes, entitled Children." *Ingram v. State*, *osh*, 24 Neb. 33 (37 N. W. 943).

) A bastardy proceeding is es- civil action, and can only be merits in the district court, and tice of the peace has no juris- ry and determine the guilt or f a party charged with being of a bastard child. *Munro v.* Neb. 849 (60 N. W. 97).

32. (1895.) Proceedings under chapter 37, Compiled Statutes, entitled "Illegitimate Children," are within the jurisdiction of a county judge and may be instituted and hearing had before such judge. *Stoppert v. Nierle*, 45 Neb. 105 (63 N. W. 382).

33. (1895.) Error of a county judge in excluding testimony during the examination of complainant in a bastardy case will not affect the jurisdiction of the district court. *Stoppert v. Nierle*, 45 Neb. 105 (63 N. W. 382).

34. (1901.) A justice of the peace obtains jurisdiction over a defendant under the bastardy act by the filing of the statutory complaint, duly verified; the issuance of a warrant for the arrest of the defendant, and its execution, the execution of the process serving the same office as the service of a summons in an ordinary civil action. *In re Walker*, 61 Neb. 803 (86 N. W. 510).

35. (1901.) In a proceeding under the bastardy act the district court acquires jurisdiction by the filing of the transcript of the proceedings had before the justice of the peace, based on a proper complaint, arrest of the accused, and order requring him to appear before the district court for trial. *In re Walker*, 61 Neb. 803 (86 N. W. 510).

36. (1901.) The district court having acquired jurisdiction in a bastardy proceeding, by the filing of a transcript of the proceedings had before a justice of the peace, is empowered to try the case and render judgment, even though the defendant be not personally present. *In re Walker*, 61 Neb. 803 (86 N. W. 510).

Venue.

37. (1888.) Prosecution in bastardy is properly commenced in county where mother resides though child was born in another county. *Ingram v. State, ex rel. McIntosh*, 24 Neb. 33 (37 N. W. 943).

38. (1894.) Prosecution may be had in the county of complainant's residence where the child is liable to become a public charge, notwithstanding complainant may have a legal settlement elsewhere. *Clark v. Carey*, 41 Neb. 780 (60 N. W. 78).

Limitations.

39. (1888.) Where the action was not brought until after four years from birth of child and the evidence shows the party accused to be the father and claims of

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mother were made at first oportunity, etc., not barred. *Denham v. Watson*, 24 Neb. 779 (40 N. W. 308).

Examination by justice of the peace.

40. (1891.) The provisions of statute that upon a complaint of bastardy by an unmarried woman to a justice of the peace that she is pregnant, or has been delivered of a child, charging a putative father with the offense, the defendant shall be arrested, and brought to answer, and which requires the justice to examine the complainant under oath touching her complaint, which examination is to be reduced to writing, are provisions for the protection of defendants, and may be waived without prejudice to their defense. *Strickler v. Grass*, 32 Neb. 811 (49 N. W. 804).

41. (1894.) The examination by a justice of the peace of a person charged with being the father of a bastard child is in no sense a trial of the merits of the controversy; and the statute does not contemplate the taking of any testimony in such proceeding on behalf of the party accused. *Munro v. Callahan*, 41 Neb. 849 (60 N. W. 97).

42. (1903.) In a proceeding under chapter 37, Compiled Statutes, the record of the justice of the peace before whom the preliminary examination was had, showing that the examination was regularly had and completed, is conclusive upon the question. *Morgan v. Stone*, 4 Unof. 115 (93 N. W. 743).

Process.

43. (1901.) The execution of the process in a bastardy case serves the same office as the service of a summons in an ordinary civil action. *In re Walker*, 61 Neb. 803 (86 N. W. 510).

Recognizance.

44. (1899.) A recognizance in a bastardy proceeding, conditioned that accused "shall be and appear before the district court on the first day of the next term thereof, and appear thereat from day to day to abide the order of the court," is limited to the term at which it exacts the appearance. A continuance of the cause to a subsequent term of court is not within the contract of the recognizance, and, if made, a non-appearance of accused at the term to which the continuance carries the cause is not a breach of such recognizance. *State v. Murdock*, 59 Neb. 521 (81 N. W. 447).

45. (1902.) A recognizance in a bastardy proceeding, conditioned that the accused shall apear at the next term of the district court to answer such accusation, and abide the order of the court, is limited to the term at which it exacts the appearance, and where the case is continued to a subsequent term without a renewal of such recognizance, and the defendant fails to appear at such subsequent term, there is no liability on the recognizance. *Perkins v. Milton*, 64 Neb. 848 (90 N. W. 756).

Pleading.

46. (1886.) In a prosecution under chapter 37, Compiled Statutes, of 1885, entitled "Illegitimate Children," no pleadings are necessary in the district court except those specified in the act. *Hutchinson v. State*, 19 Neb. 262 (27 N. W. 113).

47. (1889.) A denial of sexual intercourse on the day named in the complaint is not a denial that such intercourse had taken place. *Planck v. Bishop*, 26 Neb. 589 (42 N. W. 723).

48. (1894.) The complaint in a bastardy proceedings, where it charges the date of the birth of the child, need not set out the time or place when or where it was begotten. *Robb v. Hewitt*, 39 Neb. 217 (58 N. W. 88).

49, 50. (1903.) In a bastardy proceeding, a complaint in which it is stated that the complainant is an unmarried woman, residing in the county where the complaint was filed, and that on a certain day immediately preceding its filing she was delivered of a bastard child, and that the accused is its father, is sufficient to sustain a verdict of guilty and a judgment thereon, when assailed for the first time in the appellate court. *Campion v. Lattimer*, 70 Neb. 245 (97 N. W. 290); (1903) *In re Application of Campion*, 5 Unof. 144 (97 N. W. 443).

Arraignment and plea.

51. (1886.) When a person charged with being the father of an illegitimate child is placed upon trial in the district court, and through inadvertence a plea to the complaint is not taken until after the jury is impaneled and a plea of not guilty is then entered, such omission to enter the plea before impaneling of the jury would be an irregularity, but without prejudice, and a new trial will not be granted for that reason. *Hutchinson v. State*, 19 Neb. 262 (27 N. W. 113).

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.) The right to have the com- to him and to be allowed to o may be waived by the de- he will be held to have waived here a trial is had as though had been entered. *McNeal v.* Neb. 579 (101 N. W. 236).

) Where, on a trial in a bas- eding, the defendant goes to he sole and only issue of his rged in the complaint, and on hat he has pleaded not guilty, e is so submitted to the jury, it no formal arraignment and is entered of record is an which at most is error without *IcNeal v. Hunter*, 72 Neb. 579 236).

? plea on retrial.

) When a plea of "not guilty" n a bastardy proceeding and a uilty is rendered, the verdict ide and a second trial had, it ry to again enter a second plea. *ishop*, 26 Neb. 589 (42 N. W.

roof.

) In a prosecution for bas- the testimony of the complaint he first act of intercourse with nt was less than 252 days be- h of the illegitimate child, the pon the complainant to estab- ponderance of the evidence that leged to have been begotten by ourse was of premature birth. *Karr*, 78 Neb. 488 (111 N. W.

missible.

neral.

.) The probable duration of f gestation is a question of fact n by proper evidence in each ase wherein that question is *avison v. Cruse*, 47 Neb. 829 23).

.) On the hearing of a bas- eding it is error for the district nit evidence of the value of the dered by the attorneys of the *Harshman v. Ingwerson*, 52 1 N. W. 980).

.) Where evidence is intro- accused for the purpose of es- n alibi, testimony which tends such evidence may be properly received in rebuttal. *Campion v. Lattimer*, 70 Neb. 245 (97 N. W. 290).

59. (1907.) In a prosecution for bastardy, where the testimony of the complainant shows that the first act of intercourse with the defendant was less than 252 days before the birth of the illegitimate child, evidence tending to show the premature birth of the child should be offered in chief, and is not admissible in rebuttal. *Souchek v. Karr*, 78 Neb. 488 (111 N. W. 150).

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——— Testimony given on preliminary proceeding.

60. (1886.) It is not error to allow counsel for defendant, in a bastardy proceeding, on cross-examination of the prosecutrix to examine her as to what she testified to on the preliminary hearing before the magistrate. *Masters v. Marsh*, 19 Neb. 458 (27 N. W. 438).

61. (1889.) Where, after the preliminary hearing before a justice of the peace, but before the trial, the plaintiff, in a bastardy proceeding, dies and the action is revived in the name of the county, the testimony of such plaintiff given before the justice is admissible on the trial. *Dodge County v. Kemnitz*, 28 Neb. 224 (44 N. W. 184).

62. (1891.) The examination provided for in section 1 of chapter 37, Compiled Statutes, is only of the complainant; and in a case where a defendant, having been arrested and brought before a justice of the peace on a charge of bastardy, was permitted to swear and examine a witness, in his defense, whose testimony was taken down in writing and afterwards offered in evidence upon the trial in the district court, *held*, that it was properly rejected. *Daly v. Melendy*, 32 Neb. 852 (49 N. W. 926).

63. (1895.) The portion of section 5, chapter 37, Compiled Statutes, entitled "Illegitimate Children," in which appears the statement, "And at the trial of such issue the examination before the justice shall be given in evidence," authorizes the offer and introduction in evidence by either party during trial in the district court of the examination of complainant in an action of bastardy, taken before a justice of the peace or county judge. *Stoppert v. Nierle*, 45 Neb. 105 (63 N. W. 382).

64. (1903.) In a proceeding under chapter 37, Compiled Statutes, the testimony given by the complaining witness at the

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preliminary examination is not original evidence, but may be introduced for the purpose of confirming or impeaching the testimony of the complaining witness at the trial; but, as the order of proof is largely within the discretion of the trial court, *held*, not prejudicial error to admit in evidence a transcript of such testimony before the direct examination of the complaining witness. *Morgan v. Stone*, 4 Unof. 115 (93 N. W. 743).

——— **Offer of compromise.**

65. (1891.) An offer of compromise made by a defendant in a bastardy proceeding, not accepted, is not admissible in evidence. The rule does not exclude the admission of particular facts tending to show guilt. *Olson v. Peterson*, 33 Neb. 358 (50 N. W. 155).

66. (1894.) An offer made by the defendant to the father of the prosecutrix to contribute money for the purpose of "sending the prosecutrix away" is not an offer to compromise, and is admissible in evidence. *Robb v. Hewitt*, 39 Neb. 217 (58 N. W. 88).

67. (1897.) In a bastardy action it is prejudicial error to admit in evidence, over proper objections, an offer of marriage by the putative father to the mother of the bastard child, made with a view to the settlement of such proceeding about to be commenced. *Lisy v. State, ex rel. Dufek*, 50 N. W. 226 (69 N. W. 768).

68. (1903.) An offer by the defendant in bastardy proceedings to take the prosecutrix away to a physician for the purpose of getting rid of the child is not an offer of compromise, and may be shown as an admission. *Gatzemeyer v. Peterson*, 68 Neb. 832 (94 N. W. 974).

——— **Marriage of prosecutrix.**

69. (1891.) Where the complainant has testified that she was unmarried at the beginning of the action, it is proper to prove, on cross-examination, any fact or circumstance tending to show that she was married when the suit was instituted. *Olson v. Peterson*, 33 Neb. 358 (50 N. W. 155).

——— **Declarations of complainant.**

70. (1895.) Evidence of declarations of the complainant in a bastardy suit, in which she claimed the defendant was the father of her child, made during ordinary conversations or out of court and not during her testimony before the justice or county judge or the district court, is incompetent and inadmissible. *Stoppert v. Nierle*, 45 Neb. 105 (63 N. W. 382).

——— **Intimacy and illicit relations of parties.**

71. (1886.) In a bastardy case it is not error to refuse a question, on the cross-examination of the prosecutrix, as to having had intercourse with defendant at a certain time and place, about nineteen months before the birth of the child. *Masters v. Marsh*, 19 Neb. 458 (27 N. W. 438).

72. (1891.) In an action of bastardy upon an answer of not guilty by the defendant, witnesses may be examined on the part of the plaintiff as to the intimate relations apparently existing between the accused at and about the time of the claimed conception. *Strickler v. Grass*, 32 Neb. 811 49 N. W. 804).

——— **Good character of defendant.**

73. (1894.) Where in a bastardy proceeding the defendant introduces evidence of good character, evidence by plaintiff on rebuttal admitted without objection, though not responsive to the question, is not reversible error. *Robb v. Hewitt*, 39 Neb. 217 (58 N. W. 88).

74. (1895.) The character and reputation of the defendant for chastity and virtue is not an issue in an action of bastardy; and notwithstanding proof of the facts of his having sexual connection with the complainant and of his being the father of her child may affect his reputation for chastity, he cannot invoke the aid of his previous reputation in that respect as tending to disprove such facts. *Stoppert v. Nierle*, 45 Neb. 105 (63 N. W. 382).

——— **Character and conduct of prosecutrix.**

75. (1884.) Where doubt is raised as to the paternity of the bastard child by reason of the complainant's connection with other men about the time it was begotten, other facts may be shown sufficient to satisfy the jury that the accused is the father. *Altschuler v. Algaza*, 16 Neb. 631 (21 N. W. 401).

76. (1886.) In a bastardy proceeding evidence that plaintiff has had intercourse with other men before the birth of the child, and clearly outside of the period of gestation, is immaterial to the issue and therefore inadmissible in evidence. Evidence of such intercourse is admissible only for the purpose of showing that another

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rson charged is the father of the
v. Beers, 20 Neb. 365 (30 N.

.) Testimony that the com-
d sexual intercourse with men
he defendant, outside the period
, is inadmissible in evidence.
terson, 33 Neb. 358 (50 N. W.

.) In a bastardy case, where
ny is conflicting as to the pater-
child, it is competent for the de-
prove that, about the time the al-
ourse was had, the complainant
was frequently visited by a
than the defendant from a half
hour and a half each time.
urt, 34 Neb 187 (51 N. W. 745).
.) In an action of bastardy the
entitled to ask the complainant
s-examination whether she had
nection with other men at or
me the child was begotten, and
h question answered; and it is
strict the range of such cross-
to a number of days less than
of gestation, especially so when,
ase at bar, the time excluded by
on is the ten days or two we ks
prior to the date when the
t has testified she had the first
ual intercourse with defendant,
vithin the period of gestation.
Nierle, 45 Neb. 105 (63 N. W.

.) Evidence of the unchastity
nant in a bastardy proceeding,
period of gestation, whether in
of proof of her improper conduct
general reputation for chastity,
nt to the issues presented for
son v. Cruse, 47 Neb. 829 (66 N.

.) Evidence of a rumor as to
nacy between complainant and a
than defendant, is not relevant
e. *Erickson v. Schmill*, 62 Neb.
W. 166).

.) In prosecutions for bastardy,
admissible to show that the
had sexual intercourse with
than the defendant about the
became pregnant. *Erickson v.*
Neb. 368 (87 N. W. 166).

of evidence.

eneral.

post, §§ 102-105.

proceeding under the bastardy act is essentially a civil one and a preponderance of evidence is sufficient. (1897) *Altschuler v. Algaza*, 16 Neb. 631 (21 N. W. 401); (1891) *Strickler v. Grass*, 32 Neb. 811 (49 N. W. 804); (1891) *Olson v. Peterson*, 33 Neb. 358 (50 N. W. 155); (1893) *Dukehart v. Coughman*, 36 Neb. 412 (54 N. W. 680); (1894) *Robb v. Hewitt*, 39 Neb. 217 (58 N. W. 88); (1896) *Davison v. Cruse*, 47 Neb. 829 (66 N. W. 823); (1906) *Stoltenberg v. State*, 75 Neb. 631 (106 N. W. 975); (1902) *Priel v. Adams*, 3 Unof. 305 (91 N. W. 536).

84. (1884.) Evidence examined, and *held* to sustain the verdict. *Altschuler v. Algaza*, 16 Neb. 631 (21 N. W. 401).

85. Evidence in bastardy proceedings *held* to sustain a finding that defendant was the putative father of a bastard child. (1888) *Denham v. Watson*, 24 Neb. 779 (40 N. W. 308); (1889) *Planck v. Bishop*, 26 Neb. 589 (42 N. W. 723)

86. (1888.) Evidence in bastardy proceeding *held* to sustain a verdict of guilty. *Ingram v. State, ex rel. McIntosh*, 24 Neb. 33 (37 N. W. 943).

87. (1891.) Evidence as to the date of the alleged conception *held* sufficient to sustain verdict against defendant. *Strickler v. Grass*, 32 Neb. 811 (49 N. W. 804).

88. (1901.) Evidence examined, and *held* sufficient to sustain a verdict of guilty on a charge of bastardy. *Guthrie v. State*, 2 Unof. 28 (96 N. W. 243).

——— **To prevent a discharge on habeas corpus.**

89. (1881.) In a prosecution for bastardy by a woman claiming to be unmarried by reason of her husband having a wife living at the time of her marriage to him, *held*, that hearsay evidence as to such prior marriage of her husband having been admitted without objection, tended to prove that she was unmarried and would be sufficient when the offense charged was clearly proved, to prevent the court from discharging the accused on a writ of *habeas corpus*. *In re Carleton*, 11 Neb. 99 (7 N. W. 755).

——— **Marriage of complainant.**

90. (1898.) To maintain a finding of guilty it is necessary to show by evidence that the mother, at the time of the birth of the alleged bastard, was an unmarried person. *Johnson v. State*, 55 Neb. 781 (76 N. W. 427).

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——— Alibi.

91. (1877.) Where, on the trial of a defendant under the bastardy act, an alibi was established by two credible witnesses in addition to that of the accused, as against the unsupported testimony of the mother of the child, the verdict should be set aside as being against the evidence. *Spurgeon v. Clemmons*, 6 Neb. 307.

——— Proof that child was alive.

92. (1893.) Where the prosecuting witness after testifying that she was the mother of the child which she held in her arms at the time, and that it was illegitimate and was begotten by defendant on a certain day, there is sufficient proof that the child was born alive and was alive at the time of the trial. *Dukehart v. Coughman*, 36 Neb. 412 (54 N. W. 680).

93. (1902.) In a prosecution for bastardy when it is proven that a child was born upon a certain day it may be inferred that it was born alive. *Priel v. Adams*, 3 Unof. 305 (91 N. W. 536).

94. (1904.) In a bastardy case the testimony of the prosecutrix that she was the mother of a bastard child; that it was born on a certain date; that it is a girl, and the accused is its father, together with the fact that she brought a child with her to the witness stand, is sufficient to warrant the inference that such child was born alive, and was living at the time of the trial. *Esch v. Graue*, 72 Neb. 719 (101 N. W. 978).

Trial.

——— Course and conduct in general.

95. (1884.) Upon the trial of a bastardy case neither party is entitled to more than three peremptory challenges. *Kremling v. Lallman*, 16 Neb. 280 (20 N. W. 383); *Stoppert v. Nierle*, 45 Neb. 105 (63 N. W. 382).

96. (1888.) In bastardy proceedings, where the prosecuting attorney instructed the prosecutrix to turn the face of the illegitimate child so that the jury could observe it, and which, upon objection being made thereto, was held by the court to be improper, no error could be assigned. *Ingram v. State, ex rel. McIntosh*, 24 Neb. 33 (37 N. W. 943).

97. (1901.) Where a defendant fails to appear in the district court, in pursuance to an order made at the preliminary inquiry had before a justice of the peace, and enteres no plea to the complaint, a trial may be had to the court without the aid of a jury provided for by section 5 to try the issue on a plea of not guilty. *In re Walker*, 61 Neb. 803 (86 N. W. 510).

——— Taking infant child to witness stand.

98. (1886.) When in a prosecution under the provisions of chapter 37, Compiled Statutes, 1885, entitled "Illegitimate Children," the prosecutrix being called as a witness takes with her to the witness stand the child, the parternity of whom is in question, said child being only about seven months old, it is not error for the trial court to refuse to order the child to be removed. *Hutchinson v. State*, 19 Neb. 262 (27 N. W. 113).

99. (1904.) It is not error for the court, on the trial of a bastardy case, to refuse to order or cause to be removed from the court room a child less than five months old, brought by the prosecutrix with her to the witness stand, where such child was not exhibited to the jury, and no comparison was made between it and the alleged father. *Esch v. Graue*, 72 Neb. 719 (101 N. W. 978).

——— Argument of counsel.

100. (1888.) In proceedings in bastardy, where the defendant, although present in court, did not take the witness stand as a witness in his own behalf and deny the charge made by the prosecutrix, it was held competent for the attorney for the prosecutrix, in arguing the case to the jury, to refer to such want of denial on the part of the accused. *Ingram v. State, ex rel. McIntosh*, 24 Neb. 33 (37 N. W. 943).

101. (1891.) Remarks of counsel derogatory to character of adverse party and his family disapproved, but *held* not sufficient ground for reversal. *Daly v. Melendy*, 32 Neb. 852 (N. W. 926).

——— Instructions.

102. (1892.) In a bastardy proceeding a failure to instruct that the jury may take into consideration any variations in the testimony of the prosecutrix before the magistrate and that before the jury, is not reversible error, where no such instruction was requested to be given. *Burris v. Court*, 34 Neb. 187 (51 N. W. 745).

103. (1891.) An instruction that it is incumbent on defendant to establish an alibi by a preponderance of the evidence, that is, by the greater weight of evidence, before he is entitled to an acquittal on this ground, and, as bearing upon this defense, "you

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should carefully consider all the evidence before you touching upon the question, and if you believe from such evidence that the defendant was at another place than that where the intercourse is alleged to have taken place at the time of such alleged intercourse, so that he could not have been guilty of the same, then you should acquit the defendant of such charge," is correct. *Daly v. Melendy*, 32 Neb. 852 (49 N. W. 926).

104. (1903.) Certain instructions examined, and *held* not improperly given. *Morgan v. Stone*, 4 Unof. 115 (93 N. W. 743).

104*a*. (1884.) In bastardy proceedings where two others than defendant swear that they had intercourse with the complainant about the time the child was begotten, it is not error to refuse to instruct that if the jury believe such witnesses they should find for defendant. *Altschuler v. Algaza*, 16 Neb. 631 (21 N. W. 401).

105. (1906.) In a bastardy proceeding in which the defendant denies his guilt, the jury, if defendant so requests, should be instructed in accordance with the provisions of section 5, chapter 37, Compiled Statutes, 1903, so far as applicable to the testimony, and it is error to refuse to so instruct. *Stoltenberg v. State*, 75 Neb. 631 (106 N. W. 975).

Cross-examination of defendant.

106. (1889.) Where in a bastardy proceeding, the defendant denies having had sexual intercourse with the complaining witness on the day named, any question relating to the situation of plaintiff and defendant while together on that day, or about that time, is proper on cross-examination. *Planck v. Bishop*, 26 Neb. 589 (42 N. W. 723).

Credibility of prosecutrix as witness.

107. (1884.) Where a complainant testifies that the defendant had sexual intercourse with her at a certain time, and is the father of her bastard child, and two witnesses swear that they had connection with her about the same time, it is not error for the court to refuse to give an instruction that if they believe the last witnesses they should find for the defendant. *Altschuler v. Algaza*, 16 Neb. 631 (21 N. W. 401).

108. (1903.) An instruction that the unsupported testimony of the prosecutrix should be received with caution and weighted carefully, on the theory that she should be regarded as an accomplice, is properly refused; her interest in the event of the case may be considered, but the instruction should go no further. *Gatzemeyer v. Peterson*, 68 Neb. 832 (94 N. W. 974).

109. (1906.) Where there is a variance between the testimony of the complaining witness given at the preliminary and her testimony at the trial in a bastardy proceeding, if the defendant requests the court to instruct the jury on this variance as affecting the credibility of the complainant, it is error to refuse such instruction. *Quinn v. Eggleston*, 76 Neb. 409 (106 N. W. 976).

Judgment.

——— Filiation.

110. (1877.) In an action for bastardy, on a verdict of guilty, it is the duty of the court to adjudge the defendant to be the reputed father of the bastard child, and a failure to do so will render the orders of the court for the support of the child erroneous. *Spurgeon v. Clemmons*, 6 Neb. 307.

——— Award of support and expenses.

111. (1888.) Where there is considerable delay in instituting the proceedings, expenses accruing prior to that time will not be allowed. *Denham v. Watson*, 24 Neb. 779 (40 N. W. 308).

112. (1891.) In a bastardy case, where the jury return a verdict of guilty against the defendant, it is ordinarily the duty of the court to charge him with such sum or sums, for the maintenance of the child, as it shall deem proper, and require him to give security to perform the order. *Dodge County v. Kemnitz*, 32 Neb. 238 (49 N. W. 226).

113. (1903.) The amount which a defendant in bastardy proceedings shall be adjudged to pay is largely in the discretion of the district court, and its award will not be disturbed unless manifestly excessive. *Gatzemeyer v. Peterson*, 68 Neb. 832 (94 N. W. 974).

114. (1894.) It is not error in a prosecution for bastardy to order the accused, on conviction, to pay to the complainant a specific amount of money for the support and education of the illegitimate child. *Clark v. Carey*, 41 Neb. 780 (60 N. W. 78).

115. (1894.) Some discretion is allowed the trial court in fixing the amount in which the accused, upon conviction for bastardy, shall stand charged, and a judgment in such case will not on appeal be held to be excessive in the absence of a manifest

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abuse of discretion. *Clark v. Carey*, 41 Neb. 780 (60 N. W. 78).

116. (1897.) The word "maintenance" as used in section 6, chapter 37, Compiled Statutes, relating to bastardy proceedings, does not include the value of services of prosecutrix' attorneys. *Harshman v. Ingwerson*, 52 Neb. 116 (71 N. W. 980).

117. (1898.) The amount which a party adjudged guilty in a prosecution for bastardy shall be ordered or adjudged to pay is to some extent within the discretion of the trial court, and its judgment in such matter will not in error proceedings be determined excessive unless there is apparent manifest abuse of discretion. *Wurdeman v. Schultz*, 54 Neb. 404 (74 N. W. 951).

——— Award when mother dead.

118. (1891.) If the mother be dead the child may be placed in the care of the putative father, in which case no order for the payment of money will be necessary. The judgment, however, continues subject to modification during the minority of the child, and if the child is ill-treated by its father or those having its care, the court upon the proper application, may make such further order as may be necessary for its maintenance and protection. *Dodge County v. Kemnitz*, 32 Neb. 238 (49 N. W. 226).

——— Bond for support.

119. (1903.) A judgment rendered in a proceeding under chapter 37, Compiled Statutes, is not void because it fails in express terms to provide for the defendant giving security for the payment of the sums adjudged against him, and thereby securing his liberty. *Morgan v. Stone*, 4 Unof. 115 (93 N. W. 743).

Bond for support.

120. (1902.) After a bastardy proceeding has been prosecuted to judgment, there is no authority for the execution and approval of a bond to save the county harmless. *State, ex rel. Peters, v. McBride*, 64 Neb. 547 (90 N. W. 209).

121. (1894.) When for the deceased mother of a bastard child the proper county has been substituted as complainant in proceedings under chapter 37, Compiled Statutes, the judgment and order of the court, upon a verdict of guilty, should require defendant to "give security to save the county harmless from any expense which may be incurred in the support of said child." *Dodge County v. Kemnitz*, 38 Neb. 554 (57 N. W. 385).

Enforcement of order of support.

122. (1882.) The sum adjudged to be paid by putative father is not a debt within the meaning of the constitution, and in case of his failure to comply with the judgment he may be imprisoned. *Ex parte Cottell*, 13 Neb. 193 (12 N. W. 174).

123. (1901.) A suit against the putative father of a bastard child, is a civil action accompanied by the extraordinary remedy of arrest and imprisonment to enforce a judgment. *In re Walker*, 61 Neb. 803 (86 N. W. 510).

Compromise of judgment.

124. (1902.) The prosecutrix has no authority to compromise or release a judgment rendered in a bastardy proceeding. *State, ex rel. Peters, v. McBride*. 64 Neb. 547 (90 N. W. 209).

Costs, apportionment of.

125. (1883.) The court may apportion the costs between the parties. *Jones v. State, ex rel. Gibson*, 14 Neb. 210 (15 N. W. 901).

Review.

126. (1888.) Proceedings under the bastardy act, where the putative father is imprisoned for non-compliance with the order of the court, will not be reviewed on application for writ of *habeas corpus*. *Ex parte Donahue*, 24 Neb. 66 (38 N. W. 28).

127. (1891.) There being no bill of exceptions, and error not appearing affirmatively, a judgment in bastardy is affirmed. *Dodge County v. Kemnitz*, 32 Neb. 238 (49 N. W. 226).

BATTERY.

See *Assault and Battery.*

BEER.

As intoxicating liquor, see *Intoxicating Liquors*, §§ 242, 243.

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BENEFICIAL ASSOCIATIONS.

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ANALYSIS.

Constitution and by-laws, § 1.
——— Waiver of provisions, § 2.
Membership.
——— Requirements and waiver thereof, §§ 3-6.
——— Suspension and reinstatement, § 7.
Change of beneficiaries, § 8.
Right to benefits, §§ 9-12.
——— Persons entitled, §§ 13-15.
Forfeiture of benefits, §§ 16-20.
Right of action against association, §§ 21-23.
Acceptance of benefits as bar of action for wrongful death, §§ 24-28.

CROSS-REFERENCES.

Fraternal and mutual benefit insurance associations, see *Insurance*.

Acceptance of relief from, as release of liability of employer, see *Master and Servant*, §§ 60-69.

Exemption of benevolent associations from taxation, see *Taxation*, §§ 144-147.

Constitution and by-laws.

1. (1899.) The rules and regulations of fraternal beneficiary societies for the creation and payment of their funds to the properly designated beneficiaries should receive such liberal construction as to carry out the benevolent purposes sought to be accomplished. *Fisher v. Donovan*, 57 Neb. 361 (77 N. W. 778; 44 L. R. A. 383).

——— Waiver of provisions.

2. (1902.) Officers of the subordinate lodges of benevolent scieties have no authority to waive any provisions of the rules of the order which form a part of the contract of membership. *Royal Highlanders v. Scovill*, 66 Neb. 213 (92 N. W. 206; 4 L. R. A. [n. s.] 421).

Membership.

——— Requirements and waiver thereof.

3. (1894.) Where the acceptance of assessments by a relief department of a railway company, from an applicant, without the required preliminaries to membership, was with the knowledge of the superintendent of the department, there was no question of the authority of subordinate employees to waive requirements, their acts being in such case the acts of the department. *Burlington Voluntary Relief Department v. White*, 41 Neb. 547 (59 N. W. 747; 43 Am. St. Rep. 701).

4. (1894.) Where a relief department, maintained by a railway company, caused to be deducted from the pay of an applicant for membership, assessments on the basis of membership, with knowledge of the fact that no formal application had been made, and no physical examination had, as required by its by-laws, it is estopped from disputing that such applicant was a member, the fact that it is a mutual insurance company not relieving it from the rules of estoppel. *Burlington Voluntary Relief Department v. White*, 41 Neb. 547 (59 N. W. 747; 43 Am. St. Rep. 701).

5. (1894.) Where a relief department maintained by a railway company, caused to be deducted from the pay of an applicant for membership, assessments on the basis of membership, with knowledge of the fact that no formal application had been made and no physical examination had, as required by its by-laws, the department was not relieved from liability because of a rule which provided that where an employee had made a proper application and passed a physical examination the department should only be liable during a delay in the approval of his application for injuries or death caused by accident. The department, under the facts stated, was estopped not only from denying that there had been an application and examination, but from denying that the application had been approved. *Burlington Voluntary Relief Department v. White*, 41 Neb. 547 (59 N. W. 747; 43 Am. St. Rep. 701).

6. (1894.) Where a relief department

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maintained by a railway company, caused to be deducted from the pay of an applicant for membership, assessments on the basis of membership, with knowledge of the fact that no formal application had been made and no physical examination had, as required by its by-laws, the tender of a return of such assessment did not release it from liability, because liabilities had already accrued against the department from which it could not discharge itself by refunding the assessment. *Burlington Voluntary Relief Department v. White*, 41 Neb. 547 (59 N. W. 747; 43 Am. St. Rep. 701).

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——— Suspension and reinstatement.

7. (1902.) Where one of the rules of a fraternal association, which forms a part of the contract of membership, is that after suspension for non-payment of dues a member could only be reinstated while in good health, the receipt of her dues for reinstatement by the subordinate lodge's secretary, while she was in a dying condition, was no waiver of such requirement of good health. *Royal Highlanders v. Scoville*, 66 Neb. 213 (92 N. W. 206; 4 L. R. A. [n. s.] 421).

Change of beneficiaries.

8. (1899.) A member holding a certificate in a fraternal beneficiary society may at his option change the beneficiary therein so long as he complies with the laws of such society and keeps within its limitations, and those of the statute under which it is organized. *Fisher v. Donovan*, 57 Neb. 361 (77 N. W. 778; 44 L. R. A. 383).

Right to benefits.

9. (1899.) A certificate in a fraternal beneficiary society is a mere expectancy, and the beneficiary has no vested right therein. *Fisher v. Donovan*, 57 Neb. 361 (77 N. W. 778; 44 L. R. A. 383).

10. (1899.) Upon the death of a member holding a certificate in a fraternal beneficiary society the money arising from such certificate vests absolutely in the beneficiary properly designated by the member. *Fisher v. Donovan*, 57 Neb. 361 (77 N. W. 778; 44 L. R. A. 383).

11. (1903.) The contract was for "payment for each day of disability by reason of accident," and the regulations provide that "the word 'disability' shall be held to mean physical inability to work." The decision of the medical examiner that plaintiff, who had suffered amputation of a leg by reason of his injury, was "able to work," will not be construed to mean that plaintiff was recovered from his disability, when it is shown by the evidence that the examiner at the same time declared plaintiff "able to do light work at present, * * * but he is still disabled." *Chicago, B. & Q. R. Co. v. Olsen*, 70 Neb. 559 (97 N. W. 831).

12. (1903.) The decision of the medical examiner that plaintiff is "not entitled to any further disability benefits" is a mere conclusion, and is not binding upon the parties. *Chicago, B. & Q. R. Co. v. Olsen*, 70 Neb. 559 (97 N. W. 831).

——— Persons entitled.

13. (1895.) No beneficiary having been designated by a member of a voluntary relief department of a railway company, the rules of the department construed and *held* to constitute his widow his beneficiary. *Burlington Voluntary Relief Department v. White*, 41 Neb. 547 (59 N. W. 747; 43 Am. St. Rep. 701).

14. (1899.) Creditors have no right to, or interest in, a certificate in a fraternal beneficiary society, either before or after the death of the member, and they cannot participate in the fund derived therefrom. *Fisher v. Donovan*, 57 Neb. 361 (77 N. W. 778; 44 L. R. A. 383).

15. (1899.) A member of a fraternal beneficiary society has no such interest or property in the proceeds of a certificate therein that he can impress such proceeds with a trust in favor of his creditors. *Fisher v. Donovan*, 57 Neb. 361 (77 N. W. 778; 44 L. R. A. 383).

Forfeiture of benefits.

16. (1900.) An employee of a railroad company who has accepted from it damages for injuries sustained cannot recover benefits for such injury from the relief department of such corporation under an agreement of membership releasing the company from liability in case of such acceptance. *Clinton v. Chicago, B. & Q. R. Co.*, 60 Neb. 692 (84 N. W. 90).

17. (1902.) Terms in a benefit certificate of the Burlington Voluntary Relief Department of the Chicago, Burlington & Quincy Railroad Company providing that where members of that department shall elect to accept the benefits provided by the certificate, they must waive all right of action against the railroad company for the injury received, examined, and *held* valid. *Oyster v. Relief Department of Chicago, B.*

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., 65 Neb. 789 (91 N. W. 699; 59
91).

2.) Where the full penalty pre-
statute has been recovered from
o, Burlington & Quincy Railroad
for the unlawful killing of one
loyees who is a member of the
Relief Department of such com-
beneficiary named in the certifi-
ch employee cannot maintain a
ction against the railroad com-
uch certificate. *Oyster v. Relief
t of Chicago, B. & Q. R. Co.*, 65
91 N. W. 699; 59 L. R. A. 291).

5.) When the certificate of
p in a railway relief department
provides that the indemnity
ovided shall be waived or for-
n action for damages against the
mpany itself, the terms of the
nd not the general rules of law
the election of remedies, will
the consequences of such an elec-
ers v. Chicago, B. & Q. R. Co.,
(104 N. W. 1066). [See *Chicago,
Co. v. Healy*, 76 Neb. 786.]

6.) The provision in a contract
rship in the relief department
ny suit at law shall be brought
d company for damages arising
owing out of" the death of the
e benefit otherwise payable shall
forfeited, is against public policy
ot be enforced. *Chicago, B. & Q.
ealy*, 76 Neb. 786 (111 N. W. 598).

ction against association.

4.) A rule of a relief depart-
railway company, that all contro-
connection with the department
submitted to the superintendent,
sion should be final, subject to
es not prevent the maintaining
n by the beneficiary of one whose
o is denied, since in disclaiming
rship before his death the super-
was not acting judicially after a
a controversy upon the subject,
cting in an administrative ca-
behalf of the department alone.
Voluntary Relief Department v.
Neb. 547 (59 N. W. 747; 43 Am.
1).

4.) A rule of a relief depart-
railway company, that all contro-
connection with the department
submitted to the superintendent,
sion should be final, subject to
appeal, does not prevent the maintaining of an action by the beneficiary of one whose membership is denied, since this was not a controversy with the department as to transactions between it and a member, but was an action by the widow after W.'s membership had ceased to enforce a liability accruing to her. *Burlington Voluntary Relief Department v. White*, 41 Neb. 547 (59 N. W. 747; 43 Am. St. Rep. 701).

23. (1895.) If parties to a contract agree that if a dispute arises between them that such dispute shall be submitted to arbitration, refusal to arbitrate or no arbitration is not a defense to an action brought on such contract by one of the parties thereto, as the effect of such agreement is to oust the courts of their jurisdiction, and is contrary to public policy and therefore void. *National Masonic Accident Ass'n v. Burr*, 44 Neb. 256 (62 N. W. 466).

Acceptance of benefits as bar of action for wrongful death.

24. (1895.) The acceptance by a railway employee of payments under a relief fund contract after an injury and the cause of action thereon has accrued operates as an estoppel to afterwards bring an action for damages for such injuries. *Chicago, B. & Q. R. Co. v. Bell*, 44 Neb. 44 (62 N. W. 314); (1900) *Clinton v. Chicago, B. & Q. R. Co.*, 60 Neb. 692 (84 N. W. 90); (1906) *Chicago, B. & Q. R. Co. v. Healy*, 76 Neb. 786 (111 N. W. 598).

25. (1895.) The agreement of an employee of a railroad company that acceptance of funds from the relief department shall release the company from liability in case of injury, is not a waiver of his right for damages when he does not accept benefits. *Chicago, B. & Q. R. Co. v. Bell*, 44 Neb. 44 (62 N. W. 314); (1894) *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb. 645 (58 N. W. 1120).

26. (1897.) The agreement of an employee of a railroad company, upon becoming a member of the relief department, that acceptance of relief fund should release the company from liability for damages in case of injury, is not against public policy or without consideration. *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442 (71 N. W. 42; 66 Am. St. Rep. 456).

27. (1897.) An agreement of an employee of a railroad company, that acceptance of a relief fund from a relief department, should relieve the railroad company

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from liability for damages in case of injury, although made with the relief department, is available to the railroad company as a defense. *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442 (71 N. W. 42; 66 Am. St. Rep. 456).

28. (1902.) The election of the widow of a member of the Voluntary Relief Department of the Chicago, Burlington & Quincy Railroad Company to accept the provisions of a relief certificate in which she is the beneficiary does not bar an action by the personal representative of the deceased against the railroad company, under the provisions of section 2, chapter 21, Compiled Statutes of Nebraska, for the benefit of the minor children of the deceased. *Oyster v. Relief Department of Chicago, B. & Q. R. Co.*, 65 Neb. 789 (91 N. W. 699; 59 L. R. A. 291).

BENEFICIARIES.

Of insurance policy, see *Insurance*.

——— of mutual societies, see *Insurance*, XIX, E.

Of trust funds, see *Trusts*, VII.

BENEFITS.

Deduction of to property from assessment for city improvements, see *Municipal Corporations*, §§ 380-388.

Special benefits from street improvement, see *Municipal Corporations*, §§ 466-482.

BENEFICIAL SOCIETIES.

See *Insurance*.

BEST AND SECONDARY EVIDENCE.

In civil cases, see *Evidence*, V.

In criminal prosecution, see *Criminal Law*, X, E.

BETTING.

See *Gaming*.

BIAS.

Disqualifying juror, see *Jury*, §§ 254-258.

Of witness as affecting credibility, see *Witnesses*, §§ 256-372.

Of judge as ground for new trial, see *Judges*, §§ 15-19.

BIBLE.

Use in public schools, see *Schools and School Districts*, §§ 273-275.

BIDS.

For state contracts, see *States*, §§ 130, 131.

On county contracts, see *Counties*, §§ 344-351.

At judicial sales, see *Judicial Sales*, §§ 316-324.

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BIGAMY.

CROSS-REFERENCES.

See, also, *Fornication; Divorce and Alimony*.

Unlawful cohabitation, see *Adultery*.

Validity of marriage, see *Marriage*.

Competency of spouse to testify against the other, see *Witnesses*, § 157.

1. (1899.) In a prosecution for bigamy it is prejudicial error to permit the state to reinforce a disputable presumption in regard to the capacity of one of the parties to contract a valid marriage, by the introduction of incompetent evidence directly bearing upon the question. *Reynolds v. State*, 58 Neb. 49 (78 N. W. 483).

2. (1899.) A married person will not be absolved from the bonds of matrimony by believing, even upon information apparently reliable, that the marriage has been dissolved by death or divorce. Public policy forbids that the performance of the marriage relation should depend upon anything so precarious as the mental state of one of the parties. *Reynolds v. State*, 58 Neb. 49 (78 N. W. 483).

3. (1899.) Whether in a prosecution for bigamy, an honest and reasonably grounded belief entertained by the defendant in the death of an absent spouse is of itself a complete defense, *quære*. *Reynolds v. State*, 58 Neb. 49 (78 N. W. 483).

4. (1901.) The mere allegation or averment of a marriage as a fact implies that the marriage was legal. *Hills v. State*, 61 Neb. 589 (85 N. W. 836; 57 L. R. A. 155).

5. (1901.) A wife is a competent witness against her husband in a prosecution for bigamy. *Hills v. State*, 61 Neb. 589 (85 N. W. 836; 57 L. R. A. 155).

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BILLIARDS.

, *Gaming.*

on of, by city, see *Municipal Cor-* §§ 592-594.

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BILL IN EQUITY.

ity.

LL OF EXCEPTIONS.

eptions, Bill of.

ILL OF EXCHANGE.

s and Notes.

BILL OF LADING.

riers, II, B.

LL OF PARTICULARS.

ading.

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e *Attachment*, §§ 66, 67.

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n of promissory note, see *Trover*
ion, §§ 6, 7.

ISITES AND VALIDITY.

d Contents of Promissory Notes.

omissory note.

) A draft, drawn by an au-
ent of a corporation, on such
or the treasurer thereof in
hird party, for a debt due such third party from the corporation, is, in effect, the promissory note of the corporation. *National Fire Ins. Co. v. Eastern Bldg. & Loan Ass'n*, 65 Neb. 483 (91 N. W. 482).

Parties.

2. (1897.) In an action by the purchaser of a note sold to him by the receiver of an insolvent bank under an order of court directing such sale, the fact that the entire capital stock of such bank was held by its cashier at the time of the making of such note, or thereafter, constitutes no defense. *Shabata v. Johnston*, 53 Neb. 12 (73 N. W. 278).

Estoppel to deny capacity of payee.

3. (1871.) The maker of a note which is in terms payable to a bank, cannot, in an action brought by it thereon, raise the question of its incorporation. He is estopped to deny it. *Platte Valley Bank v. Harding*, 1 Neb. 461.

4. (1889.) An action was brought by "The People's Bank" against the makers of a promissory note and personal service had on the same and judgment rendered by default. Afterwards the makers of the note took the case on error to the district court, where the judgment was affirmed. *Held*, That while the name of "The People's Bank" would not of itself show the legal capacity of the plaintiff, yet if the note was given to the bank by that name the makers could not deny its right to bring suit thereon. *Bair v. People's Bank*, 27 Neb. 577 (43 N. W. 347).

5. (1891.) The maker of a note, payable to a bank, cannot, in an action on the note, raise the question of the incorporation of the bank. *Exchange Nat. Bank v. Capps*, 32

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Neb. 242 (49 N. W. 223; 29 Am. St. Rep. 433).

Designation of time of payment.

6. (1893.) Where a promissory note payable in installments, the consideration of which was the procuring of a loan for the maker by the payees, contained a provision that if default should be made in the payment of any installment when due, the whole note should become due at the option of the holder in the absence of a showing of fraud, want of consideration, or illegality in the contract, a court of equity would enforce the contract as made by the parties. *Morling v. Bronson*, 37 Neb. 608 (56 N. W. 205).

Provision for confession of judgment.

7. (1878.) The following words in a promissory note to-wit: "and also authorize any attorney of record to go into court and confess judgment," was properly rejected as surplusage. *Kemp v. Klaus*, 8 Neb. 24.

Allonge.

8. (1886.) An allonge is a strip of paper pasted on a note to supply space for indorsements. *Doll v. Hollenbeck*, 19 Neb. 639 (28 N. W. 286).

9. (1886.) Where note and mortgage are not attached or fastened together; and had they been, there would remain sufficient space remaining blank on the back of the note for endorsements, the mortgage cannot be said to be an allonge of the note. *Doll v. Hollenbeck*, 19 Neb. 639 (28 N. W. 286).

Memoranda and indorsements.

10. (1898.) A condition or memorandum written in or indorsed on a promissory note by the maker prior to its delivery is a substantive part of such note. *Specht v. Beindorf*, 56 Neb. 553 (76 N. W. 1059; 42 L. R. A. 429).

B. Execution and delivery.

Authority of partner to issue negotiable instrument binding firm, see *Partnership*, §§ 98-196.

Persons liable whose names are not subscribed or inserted.

11. (1886.) Where an officer or a clerk of a bank or banking house receives money or securities over the bank counter and issues drafts, bills or negotiable certificates of deposits the bank is liable as principal, although such officer signs the instrument without disclosing the name of the bank. *Webster v. Wray*, 19 Neb. 558 (27 N. W. 644; 56 Am. Rep. 754).

12. (1886.) No party can be charged as principal upon a negotiable note or bill of exchange unless his name is thereon disclosed. *Webster v. Wray*, 19 Neb. 558 (27 N. W. 644; 56 Am. Rep. 754).

13. (1901.) With the exception of banks under certain circumstances, no party can be charged as principal upon a negotiable note or bill of exchange unless his name is thereon disclosed. *Lewis v. First Nat. Bank of Cambridge*. 1 Unof. 177 (95 N. W. 355).

Delivery.

14. (1883.) Where the payee of a note does not accept it for the purpose for which it was intended, but endorses it and delivers it to the maker to enable him to negotiate it, there is a sufficient delivery of the note to the payee. *Morris v. Morton*, 14 Neb. 358 (15 N. W. 725).

——— Conditional delivery.

15. (1891.) Where a note, executed for the use of the sheriff by a purchaser of property at foreclosure sale, is delivered to a third party to be held until a motion to set aside the sale shall be determined, and such motion is overruled and the note delivered, the payee can recover though the sale is set aside on a petition thereafter filed. *Simms v. Bank of Alma*, 32 Neb. 607 (49 N. W. 332).

16. (1904.) If the note when executed is by agreement of the parties delivered to a third person to be by him delivered to the payee upon the performance of a condition precedent, and the condition is performed after the death of the maker of the note, the delivery becomes complete by the performance of the condition. *Gandy v. Estate of Bissell*, 72 Neb. 356 (100 N. W. 803).

C. Acceptance.

Consideration for acceptance, see *post*, § 53.

Necessity.

17. (1892.) An instrument in the nature of an order for materials not accepted by the drawee does not bind the person on whom the order is drawn to furnish the materials. *Crane Bros. Mfg. Co. v. Keck*, 35 Neb. 683 (53 N. W. 606).

18. (1894.) An action cannot be maintained by the payee against the drawee of an order upon a fund payable to the drawer where the drawee has refused to accept the order. *Patrick Land Co. v. Leavenworth*, 42 Neb. 715 (60 N. W. 954).

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3.) A creditor's order on a
ay a third person a portion of
ot is inoperative unless accepted
tor. *Hopkins v. Washington*
Neb. 596 (76 N. W. 53).

) The holder of a draft may
ceive any other than a general
pay strictly accordinging to its
f he take a qualified one he is
terms and must submit to the
uences. *Green v. Raymond*, 9
N. W. 881).

) A was a subcontractor under
certain sections of railroad,
he sublet to C who filed a statu-
the railroad. D in the presence
ed for acceptance and payment
or order drawn on him by A
and payable to D in full of all
hen stated to A in the presence
would not pay it until all the
oor were settled and paid off.
an attachment against A and
. *Held*, That there was an
signment to the amount called
rder. *Code v. Carlton*, 18 Neb.
V. 353).

) The word "Excepted" writ-
the face of the draft by the
valid acceptance. *Cortelyou v.*
Neb. 697 (36 N. W. 159; 3 Am.
).

.) A verbal acceptance of a
e drawee is valid and binding
eptance was in writing. *Farm-*
ants Bank v. Dunbier, 32 Neb.
V. 376).

eated in general.

) The legal presumption aris-
e acceptance of a draft is that
has funds of the drawer in his
which to pay it at maturity.
en the acceptor and the drawer,
other holder, for whose accom-
e acceptance was given, this
may be rebutted, and the true
he parties to each other shown.
rey, 8 Neb. 238.

of conditional order.

.) Where an order read as
nn H. Erck, Esq., Omaha, Ne-
—Please pay to Geo. A. Hoag-
r, six hundred and thirty-five
of amount due me on contract
on of your store building, when
was accepted, no recovery
could be had thereon unless the acceptor was therein or thereafter indebted to Randall, he having failed to complete the building. *Hoagland v. Erck*, 11 Neb. 580 (10 N. W. 498).

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Conditional acceptance.

26. (1879.) The measure of an acceptor's liability is the acceptance itself, construed with reference to the law under which it was given. And where the holder of a draft, payable "ten days after date," took a qualified acceptance extending still further the day of payment, he is bound by the terms of such acceptance. *Green v. Raymond*, 9 Neb. 295 (2 N. W. 881).

Agreement to accept.

27. (1893.) A person who contracts in writing to accept and pay such drafts as shall be drawn by a party named, in favor of another party also named, upon compliance with certain conditions, is absolutely liable upon drafts drawn as contemplated, irrespective of the condition of the general account between the drawer and drawee at the time such drafts are made. *Palmer, Richman & Co. v. Rice*, 36 Neb. 844 (55 N. W. 256).

28. (1893.) A contract to accept drafts thereafter to be drawn upon certain conditions, can be made the basis of a recovery by the payee of such drafts, only upon showing full and exact compliance with each of said conditions. *Palmer, Richman & Co. v. Rice*, 36 Neb. 844 (55 N. W. 256).

29. (1896.) B. & F., live stock commission merchants at South Omaha, wrote to the U. Bank a letter saying: "We will pay H. & M.'s drafts until further notice for the cost or value of stock shipped to us here with or without bill of lading attached." *Held*, That B. & F. thereby obligated themselves to accept drafts made in pursuance of such letter of credit, provided they were in fact for the cost or value of stock then shipped; the bank in discounting drafts taking the risk of that fact, but the risk being transferred to B. & F. upon their acceptance of the drafts. *Burke v. Utah Nat. Bank*, 47 Neb. 247 (66 N. W. 295).

D. Consideration.

Consideration arising from gambling transaction, see *Gaming*, §§ 13, 14.

Right to urge want of consideration as defense, see *post*, §§ 424-432.

Want or failure of consideration as defense against *bona fide* purchaser, see *post*, §§ 284-291.

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Necessity.

30. (1889.) In an action upon a promissory note, where it appeared that it had been given without consideration, and transferred to parties who were not *bona fide* purchasers thereof for value before maturity, the defense of want of consideration would defeat a recovery on the note. *Fifth Nat. Bank v. Edholm*, 25 Neb. 741 (41 N. W. 776).

31. (1896.) A promissory note without consideration is invalid as between the original parties, and cannot be enforced against the maker in the hands of the payee. *Sternberg v. State, ex rel. Keller*, 48 Neb. 299 (67 N. W. 190).

32. (1898.) A non-negotiable note given to the payee thereof as a gratuity, being nothing more than a promise by the payor to make a gift in the future of the sum of money therein mentioned, is without consideration, and cannot, except under special circumstances, be enforced by action. *Ricketts v. Scothorn*, 57 Neb. 51 (77 N. W. 365; 73 Am. St. Rep. 491; 42 L. R. A. 794).

33. (1899.) Except as against a *bona fide* purchaser for value before maturity, want of consideration is a good defense to an action on a negotiable promissory note. *Fellers v. Penrod*, 57 Neb. 463 (77 N. W. 1085).

Sufficiency.

34. (1898.) Relinquishment by a married woman of dower and homestead rights in her husbands' land is a sufficient consideration for a note and mortgage executed to her. *Gruver v. Walkup*, 55 Neb. 544 (75 N. W. 1091).

35. (1898.) A promissory note given by the maker to the payee to enable the latter to cease work, but without any condition being imposed or promise exacted, is without consideration and may be repudiated, in the absence of circumstances creating an equitable estoppel. *Ricketts v. Scothorn*, 57 Neb. 51 (77 N. W. 365; 73 Am. St. Rep. 491; 42 L. R. A. 794).

36. (1898.) The note in suit was executed to the plaintiff by a relative to enable her to live without working; whereupon she abandoned the occupation in which she was engaged, and remained idle for more than a year. This action on her part was contemplated by the relative as the probable consequence of the execution of the note. *Held*, That want of consideration could not be alleged as defense. *Ricketts v. Scothorn*, 57 Neb. 51 (77 N. W. 365; 73 Am. St. Rep. 491; 42 L. R. A. 794).

37. (1898.) Where the payee of a note, given to her to enable her to cease work, has been induced to abandon a lucrative occupation in reliance on the note being paid, and has taken such action in accordance with the expectation of the maker, neither the latter nor his legal representatives will be permitted to resist payment on the ground that there was no consideration for the promise. *Ricketts v. Scothorn*, 57 Neb. 51 (77 N. W. 365; 73 Am. St. Rep. 491; 42 L. R. A. 794).

38. (1901.) A moral obligation to pay a pre-existing legal obligation is a sufficient consideration for a note given in its payment. *Fourth Nat. Bank of Cadiz v. Craig*, 1 Unof. 849 (96 N. W. 185).

——— Consideration moving to another.

39. (1894.) The contemporaneous lending of money to the husband is a sufficient consideration for the wife's signing a note evidencing such indebtedness, and a clause in such a note pledging her separate estate is binding upon her, although she personally received no consideration therefor. *Briggs v. First Nat. Bank of Beatrice*, 41 Neb. 17 (59 N. W. 351).

40. (1897.) Where, upon a sufficient consideration moving to himself, a party has given his promissory note to the cashier of a bank to take up the indebtedness of another person due to said bank, such maker will be held liable to one who subsequently purchases said note, even after due; not necessarily because of any right to protection on account of being such purchaser, but because the note could be enforced by the bank for whose benefit it was originally made. *Shabata v. Johnston*, 53 Neb. 12 (73 N. W. 278).

41. (1898.) Where one makes his own note payable at a future time in discharge of the past due note of a third person, the release of the third person and extension of time of payment form a sufficient consideration to support the new note and a mortgage made to secure it. *Morrill v. Skinner*, 57 Neb. 164 (77 N. W. 375).

42. (1898.) The promise of one to assume a debt of another in consideration of a conveyance of land by that other to the promisor will support a note and mortgage made by the promisor to the creditor in

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the promise. *Morrill v. Skin* 164 (77 N. W. 375).

) If A, as an accommodation consideration of his promise gives his note to C for a debt latter by B, the note of A does sideration. B's promise to A t consideration to support A's . *Murphey v. Illinois Trust &* , 57 Neb. 519 (77 N. W. 1102).

) Where money is advanced resentation and in the expecta- person named will sign a note r, and he afterwards does so, cient consideration as to the *r v. Union Stock Yards Nat.* o. 801 (89 N. W. 269; 93 Am. .

f interest in public lands.

) Where a person buys school the first payment, and fails interest payments, then sells in said lands, taking a note that his interest in said lands feited the same is a sufficient for the note. *Smith v. White,*

) The sale and surrender of a aim upon the public lands, to- improvements made thereon, veying no interest in the land nst the government, is a good for a promissory note; the being subjects of legitimate sale. *McWilliams v. Bridges,*

.) Improvements on public roperty, and a sufficient con- sustain a promissory note purchase of the same. *Brooks* Neb. 503 (14 N. W. 480).

) Improvements upon public statute in this state, a suffi- ration for a promissory note. *Jamison*, 14 Neb. 244 (15 N.

) The sale and relinquishment te homestead or other posses- on the public domain, together nd other improvements thereon, good and valid consideration ory note. *Paxton Cattle Co. v. nk*, 21 Neb. 621 (33 N. W. 271; ep. 852).

nce premium.

) A promissory note given in a premium of insurance is not without a real consideration by reason of a clause in both the note and policy which provides for a suspension of the policy during the time, after maturity, the note shall remain unpaid, and a recovery may be had thereon for the full amount of the note, or any unpaid balance thereof. *McEvoy v. Nebraska & Iowa Ins. Co.*, 46 Neb. 782 (65 N. W. 888).

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——— Preexisting indebtedness.

51. (1898.) A loan made, to secure which a note and mortgage is given, is sufficient consideration for the last of several renewal notes. *Saunders v. Bates*, 54 Neb. 209 (74 N. W. 578).

52. (1902.) If a note which is given in settlement of a past due indebtedness, and which extends the time of payment, contains a stipulation releasing and discharging all claims for damages arising out of the transaction in which the indebtedness was incurred, the stipulation rests upon a sufficient consideration and will be upheld. *Deering & Co. v. Walter*, 2 Unof. 361 (96 N. W. 517).

Consideration for acceptance.

53. (1891.) The delivery of property for which a check was given in payment, is a sufficient consideration for an acceptance of the check by the drawee. *Farmers & Merchants Bank v. Dunbier*, 32 Neb. 487 (49 N. W. 376).

Failure of consideration.

54. (1894.) A promissory note given for privilege of using article not shown to be patented, but apparently open to use by all, is *nudum pactum*. *Schroeder v. Neilson*, 39 Neb. 335 (57 N. W. 993).

——— Partial failure.

55. (1880.) The defense to a promissory note was, that it was given for property to which the title had failed. There was testimony tending to show that there was not an entire failure of title. *Held*, That the plaintiff was entitled to recover for such property, as the title had not failed, and a verdict for the defendant was set aside. *Brooks v. Hiatt*, 13 Neb. 503 (14 N. W. 480).

56. (1893.) In an action on negotiable instrument, as between the parties to the instrument and persons not *bona fide* purchasers for value before maturity, a partial defense is available. *Lanning, Antram & Co. v. Burns*, 36 Neb. 236 (54 N. W. 427).

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E. Validity.

Alteration of note as affecting validity thereof, see *Alteration of Instruments.*

What law governs.

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57. (1883.) Where a promissory note is made in Nebraska, but payable in New York, its validity is to be determined by the laws of Nebraska. *Joslin v. Miller*, 14 Neb. 91 (15 N. W. 214).

58. (1891.) A note made and payable in Wyoming by a corporation doing most of its business in Nebraska and secured by a mortgage on property in Nebraska, *held* to be a Wyoming contract and not usurious, though it provided for fifteen per cent. interest, a rate lawful in the latter state. *Coad v. Home Cattle Co.*, 32 Neb. 761 (49 N. W. 757; 29 Am. St. Rep. 465).

Validity of assent.

——— Fraud.

Defense as against *bona fide* purchaser, see *post*, §§ 296-301.

59. (1903.) Where the fraud in obtaining the signature of the maker is established, it is sufficient for the maker to show that he was free from fault and negligence in signing the instrument, and he is not required to show that he is not chargeable with "misplaced confidence in others." (*Dinsmore & Co. v. Stimbert*, 12 Neb. 433, modified.) *Shenandoah Nat. Bank v. Gravatte*, 4 Unof. 591 (95 N. W. 694).

60. (1903.) Where the signature of a person is obtained to a promissory note, which he is unable to read, by false and fraudulent representations, whereby he is induced to believe that he is merely signing a receipt, the note cannot be enforced, even in the hands of a *bona fide* holder, where it appears that the maker was without any fault or negligence in signing the instrument. *Shenandoah Nat. Bank v. Gravatte*, 4 Unof. 591 (95 N. W. 694).

——— Duress.

Defense as against *bona fide* purchaser, see *post*, § 302.

61. (1892.) Defendant had removed mortgaged property from the county without the consent of the mortgagee, for which he was arrested and imprisoned. The defendant and one W. thereupon signed a note with the mortgagor for the amount of the debt and costs. *Held*, That such note was not executed under duress. *Cass County Bank v. Bricker*, 34 Neb. 516 (52 N. W. 575; 33 Am. St. Rep. 649).

62. (1883.) One who obtains a note and mortgage from an irregular practitioner of medicine by means of threats to send him to the penitentiary for having made an alleged indelicate, indecent, and injurious examination of the daughter of the former while treating her for supposed suppression of the menses, obtains no lawful property in such note or mortgage, and the same will be enjoined. *Hullhorst v. Scharner*, 15 Neb. 57 (17 N. W. 259).

Legality of object or consideration.

Illegality of consideration as defense against *bona fide* purchaser, see *post*, §§ 292-295.

63. (1874.) If a note be founded upon some illegal consideration, prohibited by some positive statute, no recovery can be had, even though the indorsee may not be privy to the original transaction. *Kittle v. De Lamater*, 3 Neb. 325. [Overruled. 9 Neb. 31; 67 Neb. 69.]

64. (1876.) A promissory note given in payment of printing certain maps containing a lottery scheme is not void or illegal because such a lottery is prohibited by statute, and the maker of such a note is liable to an indorsee thereof. *Kittle v. De Lamater*, 4 Neb. 426.

65. (1879.) A note given as an inducement for securing the location of a county seat is illegal and void. *Herman v. Edson*, 9 Neb. 152 (2 N. W. 368).

66. (1887.) A promissory note given for the premium on an insurance policy issued by an insurance company which had not complied with the laws of the state is void as between the parties to the contract, and cannot be enforced. *Barbor v. Boehm*, 21 Neb. 450 (32 N. W. 221). [Overruled. *American Bldg. & Loan Ass'n v. Rainbolt*, 48 Neb. 434.]

67. (1900.) A contract whereby one agrees not to bid at a chattel mortgage sale is contrary to public policy, and a note given in pursuance of such contract is unenforceable. *McClelland v. Citizens Bank*, 60 Neb. 90 (82 N. W. 319).

68. (1904.) A promissory note given in consideration of the right to the unexpired term of a license to sell intoxicating liquors cannot be enforced. *Padget v. O'Connor*, 71 Neb. 314 (98 N. W. 870).

——— Gaming contract.

69. (1889.) A promissory note given as a marginal security for an optional pur-

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chase of grain, bought through a "bucket shop" there being no intention of the sellers to deliver the grain, or of the buyers to receive it, is not based upon a good consideration and no recovery can be had thereon. *Sprague v. Warren*, 26 Neb. 326 (41 N. W. 1113; 3 L. R. A. 679*n*).

70. (1898.) A note reading, "six months after date, if elected county commissioner, I promise to pay," etc., is a contract of wager on the result of an election, and on grounds of public policy will be declared void. *Specht v. Beindorf*, 56 Neb. 553 (76 N. W. 1059; 42 L. R. A. 429).

——— Compounding felony.

71. (1892.) The owner of property stolen or wrongfully taken may reclaim the same, or receive compensation for the injury sustained, and this compensation may be by promissory note signed by sureties; and unless there is an agreement on his part to forbear the further prosecution of the case, or to suppress some of the evidence, the defense of compounding a felony will not be available against the note. *Cass County Bank v. Bricker*, 34 Neb. 516 (15 N. W. 575; 33 Am. St. Rep. 649).

72. (1902.) If the consideration for the giving of a note is the suppression of a criminal prosecution, the transaction is illegal and void, and no recovery can be had thereon. It is not material in such a case that no criminal prosecution was actually commenced. A promise not to institute a prosecution is as illegal a consideration as the dismissal of a prosecution already instituted. *Smith Premier Typewriter Co. v. Mayhew*, 65 Neb. 65 (90 N. W. 939).

Effect of partial invalidity.

73. (1886.) When a principal writes a letter to his agent authorizing the latter to draw on him for $75, and the agent changes the letter to show the figure to be $175, one who endorses a draft for $150 on authority of the letter may recover from the principal the amount of the agent's authority, or $75. *Wilson v. Beardsley*, 20 Neb. 449 (30 N. W. 529).

74. (1904.) Where an illegal transaction constitutes a part of the consideration for a promissory note, the other portion of the consideration being lawful, the illegality of the part taints the whole consideration and the courts will not enforce the collection of such a note in the hands of the original parties. *Padget v. O'Connor*, 71 Neb. 314 (98 N. W. 870).

Right to contest validity.

75. (1903.) Where the consideration for which a note is given is unlawful, so as to render the note void, the maker cannot be estopped from urging such invalidity by reason of the fact that he knew the payee intended to indorse it as collateral security. *Corn Exchange Nat. Bank v. Jansen*, 70 Neb. 579 (97 N. W. 814).

II. CONSTRUCTION AND OPERATION.

Liabilities created by indorsement, see *post*, §§ 185-202.

In general.

76. (1898.) The drawer of a check thereby promises that there is money in the hands of the drawee to meet it, and on presentment it will be paid. *Conner v. Becker*, 56 Neb. 343 (76 N. W. 893).

77. (1901.) Bank checks are regarded as inland bills of exchange. *German Nat. Bank v. Beatrice Nat. Bank*, 63 Neb. 246 (88 N. W. 480).

Parties.

78. (1899.) A widow does not become personally liable upon the note of her deceased husband by making a voluntary partial payment thereon. *Fellers v. Penrod*, 57 Neb. 463 (77 N. W. 1085).

79. (1901.) A "pay check," given to an employee of a railroad company by the paymaster, drawn on the assistant treasurer, and made payable at different banks therein mentioned, is not a check on either of the banks as by a depositor therein. Such check is made payable at the bank specified and not by the bank, and the company, not the bank, is the drawee. *Chicago, B. & Q. R. Co. v. Burns*, 61 Neb. 793 (86 N. W. 483).

80. (1901.) An order or "pay check" drawn by a paymaster of a railroad company, on the assistant treasurer, in favor of an employee, is not drawn against a third party, but on the party from whom the debt for which the "pay check" is given, is due. *Chicago, B. & Q. R. Co. v. Burns*, 61 Neb. 793 (86 N. W. 483).

81. (1903.) A check made payable to an officer of a bank in his official capacity is to be treated as though made payable to the institution which he represents, where it appears that the maker does not intend that the payee should be a party to it, or indorse it to give it effect. *State v. Omaha Nat. Bank*, 66 Neb. 857 (93 N. W. 319).

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——— Accommodation parties.

82. (1895.) An accommodation note or bill, within the meaning of the law merchant, is one which is made or accepted not upon a consideration, but for the purpose of enabling the payee or holder to raise money on credit. *Pollard v. Huff*, 44 Neb. 892 (63 N. W. 58).

83. (1895.) An accommodation maker is one who executes commercial paper without consideration in order to enable the payee, or holder, to thereby obtain credit. *Peoria Mfg. Co. v. Huff*, 45 Neb. 7 (63 N. W. 121).

——— Representative capacity.

84. (1895.) A note signed by one who adds "trustee" to his name without disclosing the nature of the trust is the personal obligation of the signer and not that of the *cestui que* trust. *Farrell v. Reed*, 46 Neb. 258 (64 N. W. 959).

85. (1901.) A note executed to the plaintiff recited "We promise to pay," etc., and was signed, "Omaha Coffin Mfg. Co. C. A. Claflin, Pres. S. L. Andrews, Secy." *Held*, That the note was the note of the Omaha Coffin Manufacturing Co. and not the joint note of that company, Claflin and Andrews. *American Nat. Bank v. Omaha Coffin Mfg. Co.*, 1 Unof. 322 (95 N. W. 672).

86. (1903.) A note signed "Globe Loan & Trust Co., H. O. Devries, Presdt., W. B. Taylor, Secy.," on its face shows no personal liability on the part of Devries or Taylor. *English & Scottish American Mort. & Inv. Co. v. Globe Loan & Trust Co.*, 70 Neb. 435 (97 N. W. 612).

Consideration.

87. (1903.) A note in the usual form containing a stipulation on the back that it was not payable until certain land was deeded to one of the makers does not of itself show an agreement to convey the land described in the stipulation, and that such agreement was the consideration for the note. *Enlow Cattle Co. v. Ganow*, 4 Unof. 513 (94 N. W. 978).

88. (1903.) A note, in the usual form, contained a stipulation on the back thereof in these words: "This note is not payable until the south half of the southeast quarter and the south half of the southwest quarter of section twenty-six, township 28, range 38, is deeded to M. B. Ganow." *Held*, That the plaintiff, by objecting to evidence as to the consideration for the note on the ground that the note itself showed the consideration, was not committed to the theory that the consideration for the note was such agreement to convey. *Enlow Cattle Co. v. Ganow*, 4 Unof. 513 (94 N. W. 978).

Interest.

89. (1883.) The payee, or his assignee before maturity, is entitled to the rate of interest provided for in the note, not only until maturity, but until payment unless otherwise expressed, and a statute passed after maturity by the note, and before its payment, reducing the lawful rate of interest, will not affect it. *Kellogg v. Lavender*, 15 Neb. 256 (18 N. W. 38; 48 Am. Rep. 339).

90. (1889.) When at the date of the notes a contract to pay a rate not exceeding twelve per cent. interest for the loan or forbearance of money was legal, the notes sued on calling for twelve per cent. interest until paid, the decree providing for the payment of interest at that rate until paid, upheld. *Allendorph v. Ogden*, 28 Neb. 201 (44 N. W. 220).

91. (1903.) Where a note provides for ten per cent. interest after maturity, and an extension agreement is entered into between the maker and holder, extending the time of payment and providing for six per cent. interest thereon during the period of extension, after the expiration of the period of extension, the note will again draw interest at ten per cent. *Mutual Benefit Life Ins. Co. v. Daniels*, 67 Neb. 91 (93 N. W. 134).

92. (1901.) On a note bearing six per cent. interest, but providing that all should become due at option of holder on a default of interest and bear ten per cent. per annum from maturity, holder not entitled to higher rate till option declared, in this case by suit. *Klingenfeld v. Houghton*, 1 Unof. 868 (96 N. W. 76).

93. (1903.) A due bill draws interest from the day of its date in the absence of some provision therein to the contrary. *Estate of Bennett v. Taylor*, 4 Unof. 800 (96 N. W. 669).

Time of maturity.

94. (1888.) A note, "$50.00. Franklin Grove, Ill., July 1, 1878. Ten days after date I promise to pay to the order of D. B. Fisk & Co., Chicago, Ill., Fifty Dollars, at ten per cent. interest from date, Value received. M. T. Minor. No. .. Due Sept. 30, 1878," matures upon the date named

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in the body thereof, and not upon that named in the margin. *Fisk & Co. v. McNeal*, 23 Neb. 726 (37 N. W. 616; 8 Am. St. Rep. 162).

95. (1889.) An instrument bearing no date of payment, but providing that "on default of prompt payment of the interest for thirty days after it is due, then this note * * * shall be due and collectible," is a negotiable promissory note payable on demand. *Roberts v. Snow*, 27 Neb. 425 (43 N. W. 241).

96. (1893.) A provision in an installment note permitting the holder to declare the whole debt due upon default in payment of any installment is volid. After default, the holder of such a note is under no legal obligation to notify the maker that by reason thereof he has elected to declare the whole note due. *Morling v. Bronson*, 37 Neb. 608 (56 N. W. 205).

97. (1897.) When, uninfluenced by statute, a bill or note without grace falls due on Sunday or a legal holiday, it is payable on the business day next following. *Capital Nat. Bank of Lincoln v. American Exchange Nat. Bank of Chicago*, 51 Neb. 707 (71 N. W. 743).

98. (1897.) When grace on a note or bill expires on Sunday or other nonbusiness day, it becomes due, and should be presented for payment or acceptance on the latest business day within or before the period of grace. *Capital Nat. Bank of Lincoln v. American Exchange Nat. Bank of Chicago*, 51 Neb. 707 (71 N. W. 743).

99. (1899.) Where a negotiable note secured by a mortgage provides that if default should be made in the payment of an interest note which was likewise negotiable in form, and made payable on the first day of a certain month, for ten days after it became due, the principal and interest notes, at the option of the holder, should at once become due and payable without notice, the option exercised on the 13th of said month was premature. *Hartsuff v. Hall*, 58 Neb. 417 (78 N. W. 716).

Days of grace.

100. (1879.) In this state, by statute, all negotiable drafts, whether sight or time, are entitled to three days' grace in the time of payment. *Green v. Raymond*, 9 Neb. 295 (2 N. W. 881).

101. (1893.) Bank checks are due upon presentation, and not entitled to days of grace. *Wood River Bank v. First Nat. Bank of Omaha*, 36 Neb. 744 (55 N. W. 239).

102. (1899.) A debtor is entitled to days of grace on a negotiable coupon interest note. *Hartsuff v. Hall*, 58 Neb. 417 (78 N. W. 716).

Mode and form of payment.

103. (1898.) A memorandum indorsed on a promissory note, to the effect that the promise may be discharged by substitution of other obligations of the makers within a given time, is for the benefit of the makers, and if they fail to avail themselves of the privilege or option, within the prescribed period, the note becomes absolute, and a recovery may be had thereon, after maturity, according to its legal import. *Western Mfg. Co. v. Rogers*, 54 Neb. 456 (74 N. W. 849).

Construction of instruments together.

104. (1882.) A note and the mortgage securing it, executed at the same time, must be construed together as parts of one contract. *Fletcher v. Daugherty*, 13 Neb. 224 (13 N. W. 207).

105. (1902.) A note and mortgage executed and delivered together as one transaction will be construed together. Provisions in the mortgage affecting the indebtedness itself will be construed with the note. *Consterdine v. Moore*, 65 Neb. 296 (96 N. W. 1021).

106. (1904.) A note and mortgage executed at the same time and as parts of the same transaction will be construed together, and the purchaser of the note and mortgage will be charged with knowledge of the contents of the mortgage. *Allen v. Dunn*, 71 Neb. 831 (99 N. W. 680).

Memoranda and indorsements.

107. (1876.) A memorandum written under a negotiable instrument and qualifying it, is to be taken as a part of the contract. *Palmer v. Largent*, 5 Neb. 223 (25 Am. Rep. 479).

108. (1879.) A memorandum, on the back of a promissory note, stating that the note was to be paid in wheat, is a part of the note. *Polo Mfg. Co. v. Parr*, 8 Neb. 379 (30 Am. Rep. 830).

109. (1883.) A memorandum upon a note made contemporaneously with and delivered with it, and intended as a part of the contract, is a substantive part of the note, and qualifies it the same as if in-

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serted in the body of the instrument, and with it constitutes a single contract. *Grimison v. Russell*, 14 Neb. 521 (16 N. W. 819; 45 Am. Rep. 126).

110. (1902.) A note for $1,593 and a memorandum on the back thereof to the effect that when the "sureties quit paying on this note or any renewal of it, it is to be cut down to $1,050," construed to mean that the sureties were to be released when the excess of $1,050 had been paid. *Mockett v. Boston Improvement Co.*, 2 Unof. 500 (89 N. W. 283).

Effect as assignment of fund.

111. (1890.) A check drawn on funds in a bank is an appropriation of the amount of the check in favor of the holder thereof --in effect an assignment of the amount of the check. *Fonner v. Smith*, 31 Neb. 107 (47 N. W. 638); 28 Am. St. Rep. 510; 11 L. R. A. 528); (1898) *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803 (77 N. W. 346); (1900) *Nebraska Moline Plow Co. v. Fuehring*, 60 Neb. 316 (83 N. W. 69).

112. (1899.) An order drawn on a particular fund creates an equitable assignment thereof, although not accepted by the drawee. *Slobodisky v. Curtis*, 58 Neb. 211 (78 N. W. 522).

113. (1899.) A check for a sum greater than the amount the drawer has in his account with the bank does not operate as a transfer *pro tanto*. *Henderson & Co. v. United States Nat. Bank*, 59 Neb. 280 (80 N. W. 898).

114. (1900.) An order for the payment of money which is not immediately effective does not operate as an equitable assignment. *Nebraska Moline Plow Co. v. Fuehring*, 60 Neb. 316 (83 N. W. 69).

115. (1900.) A check directed against a fund to be afterwards created by depositing money in bank does not vest in the payee of the check any right to, or control over, such money until it has been so deposited. *Nebraska Moline Plow Co. v. Fuehring*, 60 Neb. 316 (83 N. W. 69).

116. (1900.) Where an order for payment of money is not immediately effective if the fund against which it is directed is seized by attachment or garnishee process, the rights of the attaching or garnisheeing creditor are superior to those of the person holding such order. *Nebraska Moline Plow Co. v. Fuehring*, 60 Neb 316 (83 N. W. 69).

III. NEGOTIABILITY AND TRANSFER.

Negotiability and transfer of bill of lading, see *Carriers*, §§ 52-54.

A. Instruments Negotiable.

Warehouse receipts as negotiable instruments, see *Warehousemen*, §§ 7-10.

In general.

117. (1880.) A promissory note is defined to be "a plain and direct enagagement in writing to pay a sum specified, at the time therein limited, to a person therein named or sufficiently indicated, or to his order, or to bearer." And an instrument possessing all of these characteristics is not rendered unnegotiable by containing a recital of fact showing particularly the consideration for which it was given, but including no promise or undertaking on the part of the payee. *Newton Wagon Co. v. Diers*, 10 Neb. 284 (4 N. W. 995).

Words of negotiability.

118. (1877.) Any words in a promissory note, from which it appears that the person making it intended it to be negotiable, will give it a transferable quality; but the words "negotiable and payable without defalcation or discount," do not of themselves make an instrument, otherwise non-negotiable, negotiable. *Hosford v. Stone*, 6 Neb. 378.

119. (1877.) A promissory note, drawn for a sum certain and made payable to any person, "or order," "or assigns," "or bearer," is negotiable; but if it is payable to a certain person without words making it payable "to order," "or assigns," "or bearer," it is not a negotiable instrument. *Hosford v. Stone*, 6 Neb. 378.

Certainty as to time of payment.

120. (1885.) A note in the following form: "October 4, 1882. On March 1, 1883, for value received, I promise to pay Anna M. Wilson or order four hundred dollars, with interest from this date. This note shall become due immediately upon Anna M. Wilson delivering possession to me of the northwest quarter of section 12, town 6, range 6 E., in Gage county, Nebraska." signed, is negotiable. *Dobbins v. Oberman*, 17 Neb. 163 (22 N. W. 356).

121. (1895.) A note held to be non-negotiable on account of the following condition: "If default be made in the payment of any interest coupon, said principal sum may, at the option of the holder of this note, become due and payable without further no-

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tice." *Stark v. Olsen*, 44 Neb. 646 (63 N. W. 37).

122. (1898.) A contract for the payment of money, to be negotiable, must, among other things, be payable at some time or other, though it may be uncertain when that time will arrive. *Specht v. Beindorf*, 56 Neb. 553 (76 N. W. 1059; 42 L. R. A. 429).

123 (1902.) The agreement in a mortgage to pay insurance premiums and taxes on the property mortgaged, will not render the note which it is given to secure non-negotiable; nor will the agreement that if the mortgagor fails to pay such insurance and taxes, the mortgagee may declare the whole debt due and payable at once, or may elect to pay the same and declare the whole debt due. *Consterdine v. Moore*, 65 Neb. 291 (91 N. W. 399; 101 Am. St. Rep. 620).

124. (1902.) A provision in a mortgage, which by the terms of the note to secure which it is given, is made a part thereof, that on failure to comply with any of the conditions of the mortgage, the whole debt shall become due and payable without notice to the mortgagor, does not affect the negotiability of the note. *Kendall v. Selby*, 66 Neb. 60 (92 N. W. 178; 103 Am. St. Rep. 697).

125. (1903.) Incorporation of a collateral agreement in a promissory note, which requires payment to be made of uncertain sums at uncertain times before maturity, and thus renders it impossible to say how much, if anything, will be due at maturity, renders the note non-negotiable. *Roblee v. Union Stock Yards Nat. Bank*, 69 Neb. 180 (95 N. W. 61).

Certainty as to amount.

126. (1902.) A provision in a note and mortgage that, in case of default in some particular, the debt shall draw a higher rate of interest than would otherwise be the case, is in the nature of a penalty, is non-enforceable, and its incorporation in the note does not affect its negotiability. *Kendall v. Selby*, 66 Neb. 60 (92 N. W. 178; 103 Am St. Rep. 697).

127. (1902.) A promissory note is not rendered non-negotiable by an agreement to pay the sum named "with exchange" on a point other than that at which it is payable. *Haslach v. Wolf*, 66 Neb. 600 (92 N. W. 574; 103 Am. St. Rep. 736; 60 L. R. A. 434).

128. (1903.) In order to be negotiable, an instrument must bear on its face entire certainty as to the amount to be paid at maturity; conditions rendering the amount then payable uncertain destroy negotiability. *Roblee v Union Stock Yards Nat. Bank*, 69 Neb. 180 (95 N. W. 61).

——— Provision for attorney's fees.

129. (1878.) A promissory note, in form otherwise negotiable, is not rendered non-negotiable by reason of containing a clause in these words, "and if suit is brought to enforce collection I will pay reasonable attorney's fees." *Heard v. Dubuque County Bank*, 8 Neb. 10 (30 Am. Rep. 811).

130. (1878.) A note in form negotiable is not rendered non-negotiable by reason of containing a stipulation providing for the payment of an attorney's fee in case of judgment thereon. *Kemp v. Klaus*, 8 Neb. 24.

131. (1895.) A note, otherwise in form negotiable, will not be held non-negotiable by reason of a provision therein for an attorney's fee in case suit is brought thereon to enforce collection. *Stark v. Olsen*, 44 Neb. 646 (63 N. W. 37).

——— Provisions for payment of taxes.

132. (1902.) The incorporating into a mortgage of provisions as to payment of taxes which would be the mortgagees' right independent of such provisions does not affect the negotiability of the instruments. *Bradbury v. Kinney*, 63 Neb. 754 (89 N. W. 257).

133. (1902.) The agreement in a mortgage to pay "all the taxes and assessments levied upon said premises and all taxes and assessments levied upon the holder of the mortgage for and on account of the same," will not render the note which it is given to secure non-negotiable. *Garnett v. Meyers*, 65 Neb. 280 (91 N. W. 400). [Overruled on rehearing. 65 Neb. 287, 94 N. W. 803].

134. (1902.) The condition in a real estate mortgage securing a note otherwise negotiable that "the said parties of the first part hereby agree to pay all the taxes and assessments levied upon said premises and all taxes and assessments levied upon the holder of the mortgage for and on account of the same" destroys the negotiability of the note. *Garnett v. Meyers*, 65 Neb. 287 (94 N. W. 803).

135. (1902.) A provision in a mortgage, which by the terms of the note to secure

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which it is given is made a part thereof, that the mortgagor shall pay taxes on the premises, and, on his failure to do so, the holder may pay the same, and the mortgage shall stand as security for such payment and interest thereon, does not affect the negotiability of the note. *Kendall v. Selby*, 66 Neb. 60 (92 N. W. 178; 103 Am. St. Rep. 697).

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136. (1904.) A mortrage securing a note containing a provision that, in case any taxes or assessments shall be levied against the legal holder of the indebtedness on account of the loan within the state in which the mortgaged property is situate, the party of the first part will pay the same, renders the note non-negotiable. *Allen v. Dunn*, 71 Neb. 831 (99 N. W. 680).

Conditions and restrictions in instrument.

137. (1878.) A promissory note otherwise negotiable is not rendered non-negotiable by reason of its containing a recital in these words. "The express condition of the sale and purchase of this Ohio reaper and mower No. — is such that the title, ownership, or possession does not pass from the said McDonald & Co. until this note and interest is paid in full. That the said McDonald & Co. have full power to declare this note due and take possession of said machine at any time they may deem themselves insecure, even before the maturity of the note." *Heard v. Dubuque County Bank*, 8 Neb. 10 (30 Am. Rep. 811).

138. (1883.) An instrument in the form on a promissory note, but which by its terms is only to be payable on the condition of another certain note therein named being not paid, is not a negotiable promissory note. *Grimison v. Russell*, 14 Neb. 521 (16 N. W. 819; 45 Am. Rep. 126).

139. (1898.) A promissory note reading, "six months after date, if elected county commissioner, I promise to pay," etc., is not a negotiable instrument. *Specht v. Beindorf*, 56 Neb. 553 (76 N. W. 1059; 42 L. R. A. 429).

Provisions in collateral instrument or agreement.

140. (1878.) Although it may appear on the face of the note that its payment is secured by collaterals in personal property or mortgage of real property, yet if otherwise in proper form it is nevertheless negotiable. *Heard v. Dubuque County Bank*, 8 Neb. 10 (30 Am. Rep. 811).

141. (1902.) A promissory note and the contemporaneous mortgage securing it, are to be construed together, and all persons charged with notice of the conditions of the mortgage are bound by its terms affecting the negotiability of the note. *Kendall v. Selby*, 66 Neb. 60 (92 N. W. 178; 103 Am. St. Rep. 697).

142. (1903.) A note otherwise negotiable is not rendered non-negotiable merely by a provision for or reference to collateral security. *Roblee v. Union Stock Yards Nat. Bank*, 69 Neb. 180 (95 N. W. 61).

143. (1903.) When executed together and as part of one transaction, a note and mortgage securing it are to be construed together and as one instrument. Hence, provisions as to the terms and manner of payment contained in the mortgage may be such as to make the note non-negotiable as to all persons chargeable with notice thereof. *Roblee v. Union Stock Yards Nat. Bank*, 69 Neb. 180 (95 N. W. 61).

144. (1903.) Where a note is negotiable in form and by its terms payable on demand, evidence of a contemporaneous oral agreement, destroying its negotiability, and making the time of payment contingent on the happening of an uncertain event, is inadmissible. *Mallory v. Estate of Fitzgerald*, 69 Neb. 312 (95 N. W. 601).

Effect of indorsement or other transfer.

145. (1902.) An indorsement upon a promissory note as follows: "For value received I hereby assign and transfer the within bond and coupons thereto annexed, together with all my interest in and rights under the mortgage securing the same, to the Coddington Savings Bank, without recourse," signed by the payee in the note, does not destroy its negotiability. *Coddington Savings Bank v. Anderson*, 64 Neb. 205 (89 N. W. 787).

146. (1902.) The indorsement upon a note as follows: "Pay to the order of —— without recourse," made and signed by the payee, does not destroy the negotiability of the note in the hands of an innocent purchaser for value, in the regular course of business. *Consterdine v. Moore*, 65 Neb. 291 (91 N. W. 399; 101 Am. St. Rep. 620).

Negotiability of particular instruments.

147. (1876.) School district orders, drawns by its officers, accepted by its treasurer, and indorsed "not paid for want of funds," are not regarded as commercial

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paper in the hands of a *bona fide* holder for value, but are subject to the same defense against an indorsee, as against the payee. *School District No. 2 v. Strough*, 4 Neb. 357.

148. (1882.) Warrants are not commercial paper, and are open to the same defense in the hands of an indorsee that they would be as against the payee. *Burlington & M. R. R. Co. v. Clay County*, 13 Neb. 367 (13 N. W. 628).

149. (1886.) Coupon notes are incidents to the main bond and dependent upon it for their validity If the bond is non-negotiable, the coupons, though payable to bearer, are also non-negotiable for the purpose of admitting equities. *Richardson v. Woodruff*, 20 Neb. 132 (29 N. W. 308).

150. (1892.) A certificate of deposit in the usual form issued by a bank and made payable to order or bearer, is negotiable. *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71 (51 N. W. 305; 33 Am. St Rep. 618; 15 L. R. A. 386*n*).

151. (1894.) A certificate of deposit in the usual form, issued by a bank and made payable to order or bearer, is negotiable, and a *bona fide* purchaser thereof for value before maturity, without notice of equities, is protected to the same extent as an innocent holder of other negotiable paper. *Kirkwood v. First Nat. Bank of Hastings*, 40 Neb. 484 (58 N. W. 1016; 42 Am. St. Rep. 683; 24 L. R. A. 444).

152. (1894.) The negotiability of a certificate of deposit is destroyed neither by a stipulation that it is payable on return of the certificate properly indorsed, nor by a provision that it is payable in current funds, nor by a provision that it shall bear interest if left six months, but no interest after six months. *Kirkwood v. First Nat. Bank of Hastings*, 40 Neb. 484 (58 N. W. 1016; 42 Am. St. Rep. 683; 24 L. R. A. 444).

153 (1895.) The warrants of a municipal corporation are not negotiable instruments. They do not constitute a new debt or evidence of a new debt, but are only the prescribed means devised by law for drawing money from the treasury. *State, ex rel. First Nat. Bank, v. Cook*, 43 Neb. 318 (61 N. W. 693).

154. (1897.) Warrants drawn by the auditor of public accounts upon the state treasury are not negotiable instruments. *Bartley v. State*, 53 Neb. 310 (73 N. W. 744).

B. Transfer by Indorsement.

Authority of attorney to indorse paper for client, see *Attorney and Client*, § 43.

Authority of agent to indorse negotiable instrument, see *Principal and Agent*, §§ 152-156.

Sufficiency of indorsement.

155. (1898.) An indorsement on a promissory note, written on the back of it: "For value received I hereby guarantee payment of the within note and waive presentation, protest, and notice," signed by the payee, operates as a transfer of the note, or as an indorsement with an enlarged liability. *Heard v. Dubuque County Bank*, 8 Neb. 10 (30 Am. Rep. 811); (1883) *State Nat. Bank v. Haylen*, 14 Neb. 480 (16 N. W. 754); (1889) *Helmer v. Commercial Bank*, 28 Neb. 474 (44 N. W. 482); (1890) *Weitz v. Wolf*, 28 Neb. 500 (44 N. W. 485).

156. (1898.) An indorsement of a negotiable promissory note in this language, "Pay to the order of—Mary W. Gaylord," is not a general indorsement, nor such an indorsement as would transfer the legal title by a mere delivery of such note. *Gaylord v. Nebraska Savings Exchange Bank*, 54 Neb. 104 (74 N. W. 415; 69 Am. St. Rep 705).

Necessity of delivery.

157. (1874.) To constitute a valid endorsement of a promissory note, there must be in addition to the mere act of writing the name on the back of the note, a delivery and acceptance of it by the indorsee. *Kittle v. De Lamater*, 3 Neb. 325.

Operation and effect as to title.

158. (1888.) Where a negotiable promissory note is transferred by indorsement after maturity, the legal title is thereby vested in the indorsee, and the amount due on the note cannot thereafter be garnished in the hands of the maker as a debt due to the original holder, whether the maker has notice of the transfer or not. *Edney v. Willis*, 23 Neb. 56 (36 N. W. 300).

159. (1898.) A payee who transferred his note cannot afterward extend the time of payment. *Zobel v. Bauersachs*, 55 Neb. 20 (75 N. W. 43).

——— Indorsement as security.

160. (1894.) One to whom a promissory note is indorsed and delivered as collateral security thereby becomes the legal owner and holder of said note and may maintain

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a suit thereon in his own name. *Kavanaugh v. Brodball*, 40 Neb. 875 (59 N. W. 517; 25 L. R. A. 774).

161. (1894.) Where a note assigned as collateral was procured by the payee by fraud, the pledgee can recover thereon only to the extent of the unpaid portion of the debt it was transferred to secure and in estimating such amount, another note pledged at the same time and afterwards surrendered in exchange for other notes secured by mortgage drawn in favor of the pledger, must be treated as having been paid in full. *Haas v. Bank of Commerce*, 41 Neb. 754 (60 N. W. 85).

161*a*. (1908.) Negotiable instruments may be pledged to secure liabilities arising in the future; but to ascertain what debts are secured resort must be had to the contract of the parties. *Brown v. James*, 80 Neb. 475 (114 N. W. 591).

——— Indorsement for collection.

162. (1878.) The single fact that a promissory note payable to bearer, was transferred to the plaintiff without consideration, or solely to enable him to bring suit upon and collect it, constitutes no defense to the action. *McWilliams v. Bridges*, 7 Neb. 419.

163. (1897.) The legal title of commercial paper indorsed "for collection" passes to the indorsee only so far as to enable him to demand and enforce payment thereof. *Branch v. United States Nat. Bank of Omaha*, 50 Neb. 470 (70 N. W. 34).

164. (1897.) The owner of commercial paper indorsed for collection may control the same until paid in full, and may intercept the proceeds thereof in the hands of an intermediate agent. *Branch v. United States Nat. Bank of Omaha*, 50 Neb. 470 (70 N. W. 34).

165. (1897.) The indorsement of a note for collection and account does not pass title to indorsee nor confer upon him authority to transfer the note so as to charge former indorsers under the law merchant. *Boyer v. Richardson*, 52 Neb. 156 (71 N. W. 981).

166. (1897.) The indorsement of a negotiable note for collection and account constitutes the indorsee the agent of the indorser for the purpose only of collecting and remitting the proceeds. *Boyer v. Richardson*, 52 Neb. 156 (71 N. W. 981).

167. (1898.) A certificate of deposit indorsed by the payee, "Pay to the order of R. C. O., Cash, for account" of the indorser, is a restrictive indorsement, vests no general property to the paper in the indorsee, but merely constitutes him an agent for the purpose of collecting; and parol evidence is not admissible to establish that the transfer of title was absolute. *United States Nat. Bank v. Geer*, 55 Neb. 462 (75 N. W. 1088; 70 Am. St. Rep. 390; 41 L. R. A. 444).

——— Unauthorized indorsement.

168. (1886.) A sales agent of a harvester machine company who takes in payment for a machine, the purchaser's note, payable to the company, has no authority to indorse such note to himself, and hence his indorsement of the company's name on such note and the transfer thereof to a third person in payment of his individual debt does not give the transferee a right to bring action on the note. *Englehart v. Peoria Plow Co.*, 21 Neb. 41 (31 N. W. 391).

——— Forged indorsement.

169. (1898.) Where a check is drawn payable to the order of a named payee, one who takes the check on the forged indorsement of the payee and himself indorses it, is liable to the bank on which the check is drawn if that bank pays it in ignorance of the forgery, in the absence of circumstances estopping the drawer from setting up the forgery. *First Nat. Bank of Hastings v. Farmers & Merchants Bank*, 56 Neb. 149 (76 N. W. 430); (1899) *First Nat. Bank of Hastings v. Omaha Nat. Bank*, 59 Neb. 192 (80 N. W. 810).

——— Transfer of collateral securities.

170. (1891.) The transfer of a promissory note by indorsement operates as an assignment or transfer of a bill of sale given to secure its payment, and the owner of the note, in a proper case, may bring replevin in his own name to recover possesion of the property covered by the bill of sale. *Gamble v. Wilson*, 33 Neb 270 (50 N. W. 3).

Enjoining negotiation of note.

171. (1889.) There being outstanding renewal notes against plaintiffs, a part of which represented usurious interest, said notes being held by a party having notice of their usurious character, and being about to mature, and there being ground to believe that they were about to be transferred to an innocent purchaser, plaintiffs may take

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the initiative and proceed in equity and by aid of injunction for relief. *Wilhelmson v. Bentley*, 25 Neb. 473 (41 N. W. 387).

172. (1895.) A court of equity has no jurisdiction to enjoin the transfer or collection of an altered note, since the maker has an adequate remedy at law. *Erickson v. First Nat. Bank of Oakland*, 44 Neb. 622 (62 N. W. 1078; 48 Am. St. Rep. 753; 28 L. R. A. 577).

173. (1895.) The fact that a party is apprehensive that his witnesses by whom he expects to establish his defense against a note may die or move away, is not alone sufficient ground to enjoin the negotiation of the instrument, since the testimony of witnesses may be perpetuated under the provisions of the code of civil procedure. *Erickson v. First Nat. Bank of Oakland*, 44 Neb. 622 (62 N. W. 1078; 48 Am. St. Rep. 753; 28 L. R. A. 577).

174. (1902.) In an action to restrain the sale of a negotiable promissory note, so as to cut off defenses thereto by way of counter-claim or recoupment, the amount of recoupment or counter-claim may, at the option of the plaintiff, be ascertained; but in such case the defendant will, if he demands it, be entitled to a trial of the issue of damages by jury. *Larabee v. Given*, 65 Neb. 701 (91 N. W. 504).

C. Transfer Without Indorsement.

Transfer by delivery.

175. (1872.) If a bill be payable to some person known at the time to exist, and present to the mind of the drawer when he made it, as the party to whose order it was to be paid, the genuine indorsement of such payee is necessary, in order to a recovery thereon by an indorsee, even though he have no interest in it, and the drawer knew that fact. Nor is the case changed by the circumstance, that the party who induced the drawer to make such bill defrauded him in so doing. *Rogers v. Ware*, 2 Neb. 29.

176. (1872.) A deposited with B, a banker, a forged draft, and had credit for its contents; and, upon his check against the same, obtained B's draft payable to the order of C, a person who was to indorse the draft. A negotiated the draft to the plaintiff for value, and *bona fide* indorsing thereon the name of C. B, discovering the forgery of the draft taken by him from A, stopped payment of the one he gave. *Held*, That C was not a fictitious payee; but his genuine indorsement must be shown to support the plaintiff's title. *Rogers v. Ware*, 2 Neb. 29.

177. (1892.) A draft payable to the order of the payee and indorsed in blank by him and delivered to a third party is thereafter like a negotiable instrument payable to bearer, and the title will pass by mere delivery. *Everett v. Tidball & Fuller*, 34 Neb. 803 (52 N. W. 816).

178. (1897.) An equitable assignment of a negotiable promissory note, secured by a mortgage, may be made by a sale and delivery thereof by the person to whose order the note is payable, without an indorsement of the note or a formal assignment in writing of the mortgage or note; and such purchaser may maintain an action in his own name to foreclose said mortgage. *Greeley State Bank v. Line*, 50 Neb. 434 (69 N. W. 966).

179. (1903.) The equitable or beneficial title to a negotiable instrument, payable to the order of the payee, may be transferred by mere delivery and without indorsement. *Cather v. Damerell*, 5 Unof. 175 (97 N. W. 623).

——— Note payable to fictitious payee.

180. (1872.) A holder of a bill must show a genuine indorsement by the payee before he can recover thereon, but, if the bill run to a fictitious payee, it is as if drawn payable to bearer; and indorsement is not necessary. And, if it be payable to some person who had no interest in it, and not intended to become a party to it, whether such person is or is not known to exist, the payee may be deemed fictitious. *Rogers v. Ware*, 2 Neb. 29.

Purchase at judicial sale.

181. (1897.) The purchaser of a negotiable promissory note at an execution or attachment sale thereof acquires thereby the interest which the execution or attachment defendant had in said note, and occupies the same relation to the maker of said note as he would had said note been indorsed to him without recourse by the payee. *Jones v. Wiesen*, 50 Neb. 243 (69 N. W. 762).

Assignment of note.

182. (1898.) A negotiable promissory note may be transferred by a separate distinct assignment thereof, but in such case the transferee will not be protected as against infirmities or defenses which might

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be shown as against the assignor. *Gaylord v. Nebraska Savings & Exchange Bank*, 54 Neb. 104 (74 N. W. 415; 69 Am. St. Rep. 705).

183. (1899.) A note payable to a party or order may be transferred by the payee, without a commercial indorsement, by either an oral or a separate, distinct, written assignment thereof, followed by delivery, which would render the transferee liable to any defenses against the original payee. *Sackett v. Montgomery*, 57 Neb. 424 (77 N. W. 1083; 73 Am. St. Rep. 522).

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——— Non-negotiable note.

184. (1899.) A non-negotiable promissory note is a mere chose in action, as such is assignable, and the assignee thereof may maintain an action thereon in his own name. *Barry v. Wachosky*, 57 Neb. 534 (77 N. W. 1080).

IV. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

Power of corporation to make accommodation indorsement, see *Corporations*, § 338.

A. Indorsement Before Delivery to or Transfer by Payee.

Nature of liability on indorsement.

185. (1880.) The intent with which an indorser of a promissory note before delivery signed his name, if not consistent with the circumstances under which he did it nor acquiesced in by the payee, is of no consequence. *Newton Wagon Co. v. Diers*, 10 Neb. 284 (4 N. W. 995).

186. (1880.) When the indorser of a promissory note has given in evidence to the jury the facts and circumstances of the indorsement, it is not competent for him to limit his liability by a resort to his private understanding of what it is. And whether his intent were to incur the liability of an indorser merely, or that of guarantor, must depend upon the agreement or circumstances under which the indorsement was made. *Newton Wagon Co. v. Diers*, 10 Neb. 284 (4 N. W. 995).

187. (1893.) A person, other than a payee, who signs his name in blank upon the back of a promissory note at the time of its execution, and before its delivery to the payee, is, as to a subsequent *bona fide* holder for value, liable thereon as a joint maker. *Salisbury v. First Nat. Bank of Cambridge*, 37 Neb. 872 (56 N. W. 727; 40 Am. St. Rep. 527).

——— As second indorser.

188. (1898.) Indorsement of a name on the back of a note preceded by the words "notice and protest waived" is notice to the original payee and subsequent owners that the liability assumed is not that of a joint maker. *Drexel v. Pusey*, 57 Neb. 30 (77 N. W. 351).

189. (1903.) A blank indorser of a promissory note payable to the order of the maker thereof, which is indorsed by such maker and afterwards delivered to a third person as payee, in absence of any special agreement to the contrary, becomes liable thereon as second indorser and will not be held to be a joint maker of the note. *Harnett v. Holdrege*, 5 Unof. 114 (97 N. W. 443).

190. (1905.) Persons who write their names in blank on the back of a promissory note payable to the order of the maker, which is indorsed by such maker and afterwards delivered to a third person, in the absence of any special agreement to the contrary, become liable thereon as indorsers and not as joint makers, and their liability cannot be varied by parol evidence. *Harnett v. Holdrege*, 73 Neb. 570 (103 N. W. 277).

——— Accommodation indorsement.

191. (1903.) A note made payable to the order of the maker thereof, and indorsed in blank, creates no obligation or liability against any one until it is put in circulation by delivery to a third person as payee, and, although the payee indorses the note first, one who writes his name in blank on the back thereof before delivery, assumes the liability of an accommodation indorser only. *Harnett v. Holdrege*, 5 Unof. 114 (97 N. W. 443).

——— As surety.

192. (1895.) One who executes a promissory note as surety for another is not an accommodation maker. *Peoria Mfg. Co. v. Huff*, 45 Neb. 7 (63 N. W. 121).

193. (1898.) In a suit by a bank upon a note a wife *held* not estopped from interposing, as a defense, her coverture and her signing as surety. *Westervelt v. Baker*, 56 Neb. 63 (76 N. W. 440).

194. (1898.) One who signs a note as surety is liable for payment thereof precisely to the same extent as his principal. *Kroncke v. Madsen*, 56 Neb. 609 (77 N. W. 202).

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——As guarantor.

195. (1895.) The agreement, "For value received we hereby guarantee payment of the within note at maturity, or any time thereafter, waiving protest and notice of non-payment," is not a mere guaranty, but an indorsement with an enlarged liability. *Pollard v. Huff*, 44 Neb. 892 (63 N. W. 58).

196. (1889.) One who, before delivery, unconditionally guarantees the payment of a promissory note, becomes absolutely liable thereon upon default of the maker. *Huff v. Slife*, 25 Neb. 448 (41 N. W. 289); (1895) *Flentham v. Steward*, 45 Neb. 640 (63 N. W. 924); (1901) *McKibbin v. Ripley*, 1 Unof. 648 (95 N. W. 1046).

197. (1903.) The liability of a guarantor is separate and distinct from that of the makers and sureties on a promissory note. *Anderson v. Hall*, 4 Unof. 494 (94 N. W. 981).

Discharge of indorser.

198. (1889.) One who before maturity unconditionally guarantees the payment of a promissory note becomes absolutely liable upon the default of the maker; and the neglect of the holder of such note to sue the maker does not discharge such guarantor, although the maker becomes insolvent during the time the holder neglects to sue. *Huff v. Slife*, 25 Neb. 448 (41 N. W. 289); (1895) *Flentham v. Steward*, 45 Neb. 640 (63 N. W. 924).

199. (1898.) The release of property of the principal debtor from the lien of a judgment rendered on a note, without the consent or knowledge of an accommodation indorser, discharges the latter *pro tanto*. *Drexel v. Pusey*, 57 Neb. 30 (77 N. W. 351).

200. (1904.) Evidence merely that the payee of notes was aware of negotiations between the signers whereby part of them were to assume the debt, and the other two to be released and that he agreed that such an arrangement would be satisfactory does not conclusively show a release of the two parties, where the payee claims, and there is evidence tending to show, that his assent was conditional upon the giving of new notes, which were never made. *Jackson v. Lalicker*, 5 Unof. 473 (99 N. W. 32).

——Alteration of note.

201. (1903.) Writing the words "For value received, we hereby guarantee the payment of the within note, and waive presentment for payment, demand and notice of protest," over an indorsement in blank on the back of a promissory note is a material alteration of the liability of the indorser, and if done without his knowledge or consent releases him from his obligation as such. *Harnett v. Holdrege*, 5 Unof. 114 (97 N. W. 443).

202. (1903.) Writing the words "This note to be exchanged for consolidated mortgage bonds of Nebraska and Northwestern Irrigation Company when issued at 90," across the face of a promissory note after it has been indorsed in blank without the knowledge or consent of the indorsers, is a material change of the note, and releases such indorsers from any liability thereon. *Harnett v. Holdrege*, 5 Unof. 114 (97 N. W. 443).

B. Indorsement for Transfer.

Release of guarantor by failure to give notice of protest, see *post*, § 354.

Nature of liability on indorsement.

203. (1895.) When the payee of a note indorses his name thereon in blank and delivers said note to a purchaser thereof, the law in effect writes over the signature of said indorser an agreement on his part that if the holder of said note shall present it to the payor thereof at its maturity for payment and it be dishonored, and that if such holder shall then give such indorser notice in a reasonable time of the dishonor of said note, that he, the indorser will pay it. *True v. Bullard*, 45 Neb. 409 (63 N. W. 824).

——As maker.

204. (1891.) A payee of a promissory note, who, on transferring it, signs his name thereon immediately to the left of the maker's signature, is liable to an innocent purchaser as maker and not simply as indorser. *Dusenbury v. Albright*, 31 Neb. 345 (47 N. W. 1047).

——As surety.

205. (1888.) Where the payee of a second renewal note signs his name as a surety on indorsement, in an action by the indorsee against the maker, surety ad the indorser, the latter and the surety of the original note sustained the relation to each other of payee and surety, and not of cosurety. *Stump v. Richardson County Bank*, 24 Neb. 522 (39 N. W. 433).

——As guarantor.

206. (1890.) Words "Demand, notice, and protest waived, and payment guaran-

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teed," written on back of note and signed by payee, constitute indorsement with enlarged liability. *Buck v. Davenport Savings Bank*, 29 Neb. 407 (45 N. W. 776; 26 Am. St. Rep. 392).

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207. (1891.) An indorser of a promissory note "without recourse," for value, contracts and engages that the signatures borne by said note as makers, or prior indorsers, are the genuine signatures of the persons thereby represented, and that such note is their valid obligation. *Palmer v. Courtney*, 32 Neb. 773 (49 N. W. 754).

208. (1898.) An indorser of a negotiable instrument guarantees the genuineness of prior indorsements. *First Nat. Bank of Hastings v. Farmers & Merchants Bank*, 56 Neb. 149 (76 N. W. 430); (1899) *First Nat. Bank of Hastings v. Omaha Nat. Bank*, 59 Neb. 192 (80 N. W. 810).

Conditional indorsement.

209. (1895.) Where a note has been indorsed with a collateral agreement that the indorser is not to be held liable for its non-payment and the indorser is afterwards sued on the note, by a subsequent transferee, he cannot recover from his indorsee for breach of such collateral agreement, in the absence of an allegation that he has paid the judgment rendered against him on the note. *True v. Bullard*, 45 Neb. 409 (63 N. W. 824).

210. (1895.) An oral agreement by an indorsee of a note that he would take it "without liability or recourse on the part of the indorsee on account of its non-payment," is not an agreement not to transfer the note, and does not render him liable to the indorser in case the person to whom he transfers it, forces the indorser to pay it. *True v. Bullard*, 45 Neb. 409 (63 N. W. 824).

Discharge of indorser.

211. (1871.) An indorser of a promissory note who waives notice of protest will be relieved from liability thereon, if the holder does not notify him within a reasonable time of its non-payment nor use due diligence to collect it of the maker. *Moffat v. Griswold*, 1 Neb. 415.

212. (1878.) An agreement by the indorsee of a promissory note for a definite extension of the time of payment, in consideration of an agreement by the maker to pay a greater rate of interest than that provided for in the note, is binding upon them, and if made without the consent of the indorser will release him from all liability thereon. *Kittle v. Wilson*, 7 Neb. 76.

213. (1878.) The defense that defendant was released as indorser, by an extension of time to the maker is a legal one, and should be made by the indorser in the action against him on the note; but if he neglects to do so and suffer judgment to go against him, he cannot afterwards make it available as a ground for enjoining the enforcement of such judgment. *Kittle v. Wilson*, 7 Neb. 76.

214. (1901.) When a payee in a note and mortgage has sold and assigned the same, accompanied by his own collateral guaranty of the prompt payment of the interest and of the collection of the principal within two years after it becomes due, and afterwards, upon the happening of a default on an installment of interest, seeks and obtains the note and mortgage from his assignee for the purpose of enforcing collection, and thereupon, without consulting the assignee with respect to the methods to be pursued, prosecutes against the debtor remedies of his own selection, he, himself, becomes responsible for any default, negligence or dilatoriness in pursuit of the principal and the same will not be imputed to his assignee. *Rice v. McCague*, 61 Neb. 861 (86 N. W. 486).

Necessity of first proceeding against indorser.

215. (1882.) The holder of a promissory note is not required to resort to his remedy against the maker before he may proceed to collect it from the indorser. And when the indorser has waived a demand, protest, and notice of non-payment, a right of recovery accrues against him as soon as the note is due. *Gibson v. Parlin*, 13 Neb. 292 (13 N. W. 405).

Estoppel to deny or limit indorsement.

216. (1879.) The plaintiff, the payee of a negotiable promissory note, having formally indorsed it to her son, who afterwards pledged it to the defendant—who had no knowledge of the purpose for which the indorsement was made—as security for a loan of money, will not be permitted to contradict, or limit the legal effect of such indorsement, by showing the real purpose for which it was made. *Cropsey v. Averil*, 8 Neb. 151.

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C. Assignment or Sale.

Representations and warranties.

217. (1884.) One B. having a note of D. in his possession, which he had paid in full out of funds of D. in his hands, afterwards sold the note to W., representing it to be a valid and subsisting obligation against D., and that D. resided near F. in this state, all of which was untrue. *Held*, that W. could recover the consideration paid to B. for the note. *Williams v. Bates*, 15 Neb. 565 (20 N. W. 31).

Liability of assignor of non-negotiable note to assignee.

218. (1899.) The payee of a non-negotiable note who writes his name across the back thereof, and sells and delivers the note, does not thereby render himself liable on such note to the holder thereof. *Barry v. Wachosky*, 57 Neb. 534 (77 N. W. 1080).

219. (1899.) The payee of a non-negotiable note may render himself liable to his assignee for its payment by writing a contract to that effect over his signature; but such a contract would be a separate and independent one, and the makers of the note would not be liable on such contract. *Barry v. Wachosky*, 57 Neb. 534 (77 N. W. 1080).

Equities and defenses against assignee.

220. (1878.) The maker may set-off any liquidated demand which he held against the payee at the time of the assignment, but claims subsequently acquired, even though they had their origin in previous transactions, are not the subject of set-off. *Davis v. Neligh*, 7 Neb. 84.

221. (1886.) The consideration of all contracts is subject to inquiry, and the assignee of a non-negotiable instrument is in no better condition than the assignor. *Richardson v. Woodruff*, 20 Neb. 132 (29 N. W. 308).

222. (1886.) Where a non-negotiable bond secured by mortgage is endorsed and transferred for value before due and without notice to the holder who brought an action of foreclosure, the holder took said bond subject to the defenses between the original parties. *Richardson v. Woodruff*, 20 Neb. 132 (29 N. W. 308).

223. (1898.) A non-negotiable chose in action is subject in the hands of an assignee thereof to all equities which were of force between the original parties thereto prior to the assignment, but not subject to equities of which he had no notice, existent between his assignor and a third person. *Williams v. Donnelly*, 54 Neb. 193 (74 N. W. 601).

D. Bona Fide Purchasers.

In general.

224. (1885.) To defeat a recovery on a note it is not sufficient to show that the holder took it under circumstances which ought to excite suspicion in the mind of a prudent man. *Dobbins v. Oberman*, 17 Neb. 163 (22 N. W. 356).

225. (1885.) A holder of negotiable paper who takes it before maturity for a valuable consideration, in the usual course of trade, without knowledge of facts which impeach its validity between antecedent parties, holds it by a good title. *Dobbins v. Oberman*, 17 Neb. 163 (22 N. W. 356).

226. (1899.) One who purchases negotiable paper before maturity in the usual course of trade and for a valuable consideration and in igronance of facts which would affect its force as between the original parties to it is an innocent purchaser. *First Nat. Bank of Cobleskill v. Pennington*, 57 Neb. 404 (77 N. W. 1084).

Statutory provisions.

227. (1876.) Where the statute of a state prescribes certain words to be inserted in the body of a negotiable note, given for a patent right, subjecting it to all the defenses as if owned by the original promisee, if the note is executed in the ordinary form—omitting the words prescribed—a *bona fide* purchaser of the same before maturiay and without notice, takes it divested of all equities between the original parties, and may enforce the payment thereof. *Moses v. Comstock*, 4 Neb. 516.

228. (1903.) In this state a statute will not be construed so as to make a negotiable instrument void in the hands of a *bona fide* purchaser, unless the act specifically so declares. *Citizens State Bank v. Nore*, 67 Neb. 69 (93 N. W. 160; 60 L. R. A. 737).

Actual notice.

229. (1874.) If an indorsee of a promissary note is implicated in the original transaction, the maker may set up any defense which would have availed against the promisee. But in order to make the latter defense available, it must clearly appear that the endorsee had notice of such circumstances as would have avoided a re-

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covery on the note in the hands of the original promisee. *Kittle v. De Lamater*, 3 Neb. 325.

230. (1890.) Where plaintiff negotiated a sale of property to defendant representing it to be his, and was in fact interested therein, and suggested that the purchase money note be made payable to a third person, who indorsed it over to plaintiff, he does not stand in the position of an innocent purchaser of the note. *Salisbury v. Iddings*, 29 Neb. 736 (46 N. W. 267).

231. (1890.) Where a purchaser of negotiable paper, before maturity, takes it with knowledge of facts which impeach its validity between antecedent parties, or with a belief based upon circumstances brought to his knowledge before the purchase that the maker had a defense to the note, such purchaser is not an innocent holder, and the paper is subject to the defenses existing between the maker and payee. *Meyers v. Bealer*, 30 Neb. 280 (46 N. W. 479).

232. (1892.) An indorsee of negotiable paper purchased before due, to be protected, must have purchased without notice of any defenses against the same and have paid the consideration before notice of such defenses. *Colby v. Parker*, 34 Neb. 510 (52 N. W. 693).

233. (1903.) Although the note does not refer to the mortgage securing it, indorsees who take with notice of its provisions are bound thereby. *Roblee v. Union Stock Yards Nat. Bank*, 69 Neb. 180 (95 N. W. 61).

——— Notice to agent of indorsee.

234. (1886.) When a note is given in payment for a piano, and conditioned on the piano giving satisfaction, and such note is transferred by the payee to his principal, the latter is not a *bona fide* purchaser, but is bound by the acts of his agent. *Coakley v. Christie*, 20 Neb. 509 (31 N. W. 73).

235. (1886.) Where a bank buys a note from a harvester company, and the president of one is an officer of the other, the bank is not a *bona fide* purchaser, and is subject to any defense that existed against the original holder. *First Nat. Bank v. Erickson*, 20 Neb. 580 (31 N. W. 387).

Constructive notice.

236. (1885.) To impeach a note in the hands of a purchaser for value before maturity it must be shown that he took it under circumstances showing bad faith or want of honesty on his part. *Dobbins v. Oberman*, 17 Neb. 163 (22 N. W. 356).

237. (1885.) Circumstances tending to show bad faith or fraud in taking a note are admissible in evidence, and the establishment of such bad faith or fraud, whether by direct or circumstantial evidence, subjects the holder of paper so taken to defenses existing between antecedent parties. *Dobbins v. Oberman*, 17 Neb. 163 (22 N. W. 356).

238. (1899.) To defeat recovery by a *bona fide* purchaser, on a note, it does not suffice to prove that the purchase was with knowledge of circumstances which should have excited suspicion in the mind of a prudent person; the proof must go to the extent that the purchase was with knowledge of such cirsumstances or facts as show want of honesty or bad faith on his part. *First Nat. Bank of Cobleskill v. Pennington*, 57 Neb. 404 (77 N. W. 1084).

239. (1902.) One who purchases a note and takes the mortgage and assignment thereof with the note is chargeable with notice of the contents of the mortgage. *Garnett v. Meyers*, 65 Neb. 287 (94 N. W. 803).

240. (1902.) When the note and mortgage and an assignment of the mortgage are sold and delivered together, the purchaser will be charged with notice of the contents of the papers. *Consterdine v. Moore*, 65 Neb. 296 (96 N. W. 1021).

241. (1906.) To defeat a recovery on a promissory note in the hands of an indorsee, who takes it before maturity for a valuable consideration, in the ordinary course of business, without notice, it is not sufficient to show that it was taken under circumstances which might excite suspicion in the mind of a prudent man, but it must be shown that the indorsee took the paper under circumstances showing bad faith or want of honesty on his part. *Norwood v. Bank of Commerce*, 77 Neb. 205 (109 N. W. 152).

——— Matters apparent from instrument.

242. (1876.) Where the United States, being indebted to the state of Nebraska, drew two drafts upon its treasury in favor of "William H. James, acting governor, or order" and said James indorsed the drafts to McCann, the president of the Nebraska City National Bank, who indorsed the same and the bank received the proceeds there-

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from; a portion of the funds was paid to an agent of James who collected the debt from the federal government, and a large part was given to James, some to McCann and others, but none went to the state treasury, whereon in an action against James, McCann and the bank it was *held* that the drafts were the property of the state and could not be transferred by James except to the state treasurer, and that the face of the drafts were sufficient to put a purchaser on inquiry as to their real owner. *McCann v. State*, 4 Neb. 324.

243. (1891.) A release of defenses, if signed and delivered with notes and mortgage, instead of working an estoppel against the maker, is sufficient to excite suspicion and put a purchaser on such an inquiry as to lead to the discovery of usury. *Richardson v. Stone*, 32 Neb. 617 (49 N. W. 763).

244. (1892.) The indorsement of a certificate of deposit by the payee before due, "without recourse," is not of itself sufficient to charge the purchaser with notice of defenses of the maker. *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71 (51 N. W. 305; 33 Am. St. Rep. 618; 15 L. R. A. 386*n*).

245. (1897.) A bank claiming rights through notes by virtue of a transfer from one to whom they had been indorsed for collection, was *held* chargeable with notice of the latter's want of ownership. *Lederer v. Union Savings Bank*, 52 Neb. 133 (71 N. W. 954).

246. (1898.) One who buys a corporation note unlawfully issued is not an innocent purchaser where it appears on the face of the note that the payee therein named and the officer by whom it was executed is the same person. *Stough v. Ponca Mill Co.*, 54 Neb. 500 (74 N. W. 868).

247. (1899.) A statement in writing which apeared on the back of a negotiable promissory note, quoted in the opinion, *held* not to be notice to purchasers of the note of infirmities of the paper, if any existent. *Knight v. Finney*, 59 Neb. 274 (80 N. W. 912).

248. (1901.) An indorsement of a draft to a bank "for collection" is notice t subsequent holders that the indorsee is agent and not owner of the draft. *First Nat. Bank of Hastings v. Farmers & Merchants Bank*, 2 Unof. 104 (95 N. W. 1062).

Taking after maturity.

——— What constitutes taking after maturity.

249. (1892.) Across the face of the certificate of deposit in the usual form, payable to the order of the payee, on the return of the certificate properly indorsed, were stamped the words, "This certificate payable three months after date, with six per cent. interest per annum for the time specified." The instrument was transferred by the payee more than three months after its date. *Held*, To be a time certificate, and dishonored when sold. *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71 (51 N. W. 305; 33 Am. St. Rep. 618; 15 L. R. A. 386*n*).

250. (1894.) A certificate of deposit as follows: "This certifies that A. B. has deposited in this bank $3,000, payable to order of self, in current funds, on return of this certificate properly indorsed. This deposit not subject to check. With interest at six per cent. if left six months; no interest after six months," is overdue so as to charge purchasers with notice of equities after the expiration of six months, and not until then. *Kirkwood v. First Nat. Bank of Hastings*, 40 Neb. 484 (58 N. W. 1016; 42 Am. St. Rep. 683; 24 L. R. A. 444).

251. (1902.) Where a negotiable promissory note has been, before maturity, duly indorsed and delivered in escrow, with the contract of its purchaser to convey in consideration of it certain land, and proceedings were necessary to enable the purchaser of the note to convey the land and carry out the contract for which the note was taken, the fact that such proceedings were not completed, and the contract not fulfilled, and the note not delivered by the depositary to the purchaser until after it matured, will not deprive the buyer of the rights of a *bona fide* purchaser before maturity, where he has completed the transaction in ignorance of any defense. *Cunningham v. Holmes*, 66 Neb. 723 (92 N. W 1023).

——— Extension of time of payment.

252. (1905.) Where, at or about the maturity of a negotiable instrument, the time of payment of the indebtedness evidenced thereby is extended by a written agreement of the parties upon a valid consideration, the agreement being independent of and collateral to the original contract, such extension does not continue the commercial

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characteristics of the note as live unmatured negotiable paper. *Swan v. Craig*, 73 Neb. 182 (102 N. W. 471).

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——— Defenses as against purchaser after maturity.

253. (1874.) An indorsee, after maturity, of a note takes it subject to all the equities which existed between the original parties. *Kittle v. De Lamater*, 3 Neb. 325; (1905) *May v. First Nat. Bank of Mendola*, 74 Neb. 251 (104 N. W. 184).

254. (1878.) When an overdue note is assigned, the assignee takes it subjent to all equities existing between the maker and the payee. In an action on the note, the maker may show that it was obtained by fraud, or without consideration, or that before he received notice of the assignment he had paid it. *Davis v. Neligh*, 7 Neb. 84; (1888) *Edney v. Willis*, 23 Neb. 56 (36 N. W. 309).

255. (1878.) T., the owner of a promissory note, had it drawn payable to K., or order. T. retained possession of the note until after it became due, and received from the maker thereof the full amount due thereon. Afterwards he delivered the note to K. It did not appear that K. paid any consideration whatever for the same. K. indorsed the note and delivered it to C. E. T., the wife of T., who assigned the same for a valuable consideration to D. In an action on the note, the note was subject to the set-off from the maker of the note to T. *Davis v. Neligh*, 7 Neb. 78.

256. (1892.) Although a *bona fide* purchaser of a negotiable certificate of deposit for value, before maturity, without notice of equities, is protected to the same extent as an innocent holder of other negotiable paper, if such certificate is transferred when overdue, the purchaser takes it subject to all defenses which could have been made had it remained in the hands of the payee. *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71 (51 N. W. 305; 33 Am. St. Rep. 618; 15 L. R. A. 386*n*).

257. (1893.) In a suit on a note by the indorsee thereof after due, against the maker, the latter may set-off a judgment owned by him against the plaintiff's assignor and others, such judgment debtors being insolvent. *Wilbur v. Jeep*, 37 Neb. 604 (56 N. W. 198).

258. (1893.) Any set-off to a promissory note which would have been good between original parties may be pleaded against an indorsee who acquires it after maturity, as he takes it subject to any set-off which the maker had against any prior holder. *Wilbur v. Jeep*, 37 Neb. 604 (56 N. W. 198).

259. (1893.) In a suit on a note by the indorsee thereof after due, against the maker, the latter may set-off a past due note owned by him, made by others, and on which the plaintiff's assignor is liable to the defendant as indorser, such makers and indorser being insolvent. *Wilbur v. Jeep*, 37 Neb. 604 (56 N. W. 198).

260. (1893.) The assignee of a promissory note and chattel mortgage, who purchased them after maturity, holds them subject to all the defenses which could have been made by the maker had they remained in the hands of the original payee or holder. *Roberson v. Reiter*, 38 Neb. 198 (56 N. W. 877).

Taking in payment of pre-existing debt.

261. (1882.) R. bought a lot of F. taking a warranty deed therefor, securing payment for the same by notes and mortgage. At the request of F. the notes and mortgage were drawn payable to V. It turned out that there was a prior mortgage on said lot, executed by F., which was foreclosed, and R. evicted. On suit brought by V. against R. on the notes, *held*, that the equitable defense by R. was not cut off by reason of V. having received said notes of F. in payment of a pre-existing indebtedness. *Vorce v. Rosenberry*, 12 Neb. 448 (11 N. W. 879).

262. (1894.) It seems that one who takes the negotiable paper of a third person in payment of a pre-existing debt is a holder for value. This is certainly true where by taking the note the creditor loses or postpones his right to proceed upon the original indebtedness. *Barker v. Lichtenberger*, 41 Neb. 751 (60 N. W. 79).

263. (1897.) Where the payee of a negotiable note indorses and delivers it to his creditor to secure the payment of a debt owing to latter, the creditor becomes an innocent holder of the note and acquires a lien thereon for the amount of his debt, provided he took it before maturity, without notice of any defenses thereto. *Jones v. Wiesen*, 50 Neb. 243 (69 N. W. 762).

264. (1902.) The indorsee of negotiable paper before due and without notice of defenses, as collateral security for an antecedent debt, is a *bona fide* holder thereof

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for value within the meaning of the law merchant. *Lashmett v. Prall*, 2 Unof. 284 (96 N. W. 152).

265. (1903.) An indorsee of a negotiable instrument, who takes it before maturity in part payment of a pre-existing debt, and credits it thereon, is a purchaser of value in the due course of business. *Smith v. Thompson*, 67 Neb. 527 (93 N. W. 678).

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Purchasers from bona fide holders.

266. (1891.) When a negotiable note is purchased after maturity from an innocent holder for value, the purchaser takes it free from all equities and defenses that existed between the original parties to the paper. *Koehler v. Dodge*, 31 Neb. 328 (47 N. W. 913; 28 Am. St. Rep. 518).

267. (1894.) When negotiable paper is purchased after maturity from an innocent holder for value before maturity, the purchaser takes it free from all equities and defenses which existed between the original parties. *Barker v. Lichtenberger*, 41 Neb. 751 (60 N. W. 79).

268. (1897.) One who purchases for value a negotiable note, either before or after its maturity, with knowledge of a defense thereto, is entitled to enforce the collection of the entire note, provided his assignor was an innocent purchaser, before due, for value, in the usual course of business. *Jones v. Wiesen*, 50 Neb. 243 (69 N. W. 762).

269. (1897.) Where a creditor of the payer of a note takes an assignment thereof before maturity to secure the debt, and thereby becomes a *bona fide* holder, if another creditor of the payee, to secure his debt, pays the claim of the indorsee and takes an assignment of the note, he will, by such transaction, acquire the same lien and title to the note which his indorser had, whether the second creditor acquired it before or after maturity, and with or without knowledge of defenses existing against the note. *Jones v. Wiesen*, 50 Neb. 243 (69 N. W. 762).

270. (1899.) One who purchases a negotiable note from an innocent holder acquires a title free from equities existing between the original parties. *Knight v. Pinney*, 59 Neb. 274 (80 N. W. 912).

——Purchase by payee.

271. (1891.) An exception to the rule that a purchaser after maturity, for value, from an innocent holder for value takes it free from equities, is where the payee becomes such purchaser. He is not within the protection of the rule applicable to innocent holders. *Koehler v. Dodge*, 31 Neb. 328 (47 N. W. 913; 28 Am. St. Rep. 518).

Taking as collateral security.

272. (1889.) Where a negotiable promissory note is transferred before due, as collateral security for a loan then made, and is received by the indorsee without notice of any defense existing against it in the hands of the indorser, he is entitled to be treated as a *bona fide* holder and protected, at least to the extent of the loan. *Helmer v. Commercial Bank*, 28 Neb. 474 (44 N. W. 482).

273. (1891.) If a negotiable note is indorsed and transferred before due, as collateral security for a loan of money then made, the pledgee, who receives the paper without notice of any defense, is a holder for value in the usual course of business. *Koehler v. Dodge*, 31 Neb. 328 (47 N. W. 913; 28 Am. St. Rep. 518).

274. (1895.) One who receives as collateral security for a loan contemporaneously made, negotiable bonds not due, without knowledge of any defense thereto, is to the extent of the loan entitled to protection as a *bona fide* purchaser. *Hayden v. Lincoln Street R. Co.*, 43 Neb. 680 (62 N. W. 73).

275. (1901.) Where a negotiable promissory note is indorsed and transferred before due, as collateral security for a loan of money then made, the pledgee without notice is a holder for value. *Connecticut Trust & Safe Deposit Co. v. Fletcher*, 61 Neb. 166 (85 N. W. 59).

276. (1902.) The indorsee of negotiable paper before due and without notice of defenses, as collateral security for an antecedent debt, is a *bona fide* holder thereof for value within the meaning of the law merchant. *Lashmett v. Prall*, 2 Unof. 284 (96 N. W. 152).

277. (1902.) Where a negotiable promissory note is indorsed and transferred, before due, as collateral security for a loan of money then made, the pledgee without notice is a holder for value. *Connecticut Trust & Safe Deposit Co. v. Trumbo*, 2 Unof. 850 (90 N. W. 216).

277*a*. (1908.) A note pledged before ma-

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turity as security for a loan made to the payee or owner is good in the hands of the transferee, who had no notice of equities between the original parties. *Brown v. James*, 80 Neb. 475 (114 N. W. 591).

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Purchase for less than face value.

278. (1881.) The mere fact that one purchases a negotiable promissory note before maturity, for about one-half the face value, there being evidence tending to show that he did not regard the note as good (collectible), and no evidence showing it to be worth more, is not sufficient to put the purchaser on inquiry as to the consideration. *Cannon v. Canfield*, 11 Neb. 506 (9 N. W. 693).

279. (1881.) Purchaser of notes for inadequate consideration is not to be *bona fide* purchaser. *Smith v. Jansen*, 12 Neb. 125 (10 N. W. 537; 42 Am. Rep. 761).

280. (1882.) Where a note is purchased before maturity for three-fifths face value, there being no testimony tending to show actual value; the purchase is *bona fide*. *Citizens Bank v. Ryman*, 12 Neb. 541 (11 N. W. 850).

281. (1889.) Where notes given for grossly usurious interest are transferred to a *bona fide* holder for one-half their face value, the purchaser claiming that the security might be inadequate, the same rule will be applied as where the original consideration was wholly fraudulent, and the purchaser may recover only the amount actually paid, with legal interest. *Cheney v. Campbell*, 28 Neb. 376 (44 N. W. 451).

282. (1891.) Where a payee of a note indorsed it in blank and delivered it to another to effect a trade, and the indorsee sells the note for his own benefit at two-thirds of its face value and there is a subsequent discharge of the note by the payee, the last purchaser can recover from the payee only to the extent of the consideration paid with interest. *Faulkner v. White*, 33 Neb. 199 (49 N. W. 1122).

Purchaser of stolen note.

283. (1879.) The *bona fide* holder can recover upon the paper, although it came to him from a person who had stolen it from the true owner, provided he took it innocently, in the course of trade, for a valuable consideration and not overdue, and under circumstances of due caution. *Wortendyke v. Meehan*, 9 Neb. 221 (2 N. W. 339).

Defenses against bona fide purchasers. ——Want or failure of consideration.

284. (1878.) I., the president of a national bank in Nebraska City, obtained from K., in the city of Omaha, his (K.'s) promissory note for the sum of $2,000 payable to I., or order and payable on demand, for the purpose of purchasing stock in the bank of which he was president. I. procured the note to be discounted by his bank, and had the proceeds thereof placed to his credit therein, and he afterwards drew the same out by checks on the bank. None of the officers of the bank, except the president, were aware of the character of the note, or that it had been given for stock. *Held*, in an action on the note, that the bank was entitled to recover. *Kennedy v. Otoe County Nat. Bank*, 7 Neb. 59.

285. (1880.) The maker of a note, given for the purchase of an organ, cannot set up, as a defense thereto, the worthless character of the organ, without first showing that the holder is not a *bona fide* purchaser. *Western Cottage Organ Co. v. Boyle*, 10 Neb. 409 (6 N. W. 473).

286. (1892.) Where the consideration for a note is a jack warranted to be a sure foal-getter and proving not to be such, that defense cannot be set up against an indorsee before maturity, knowing of the warranty but not of its failure. *Rublee v. Davis*, 33 Neb. 779 (51 N. W. 135; 29 Am. St. Rep. 509).

287. (1893.) The failure of consideration for a negotiable instrument is no defense to an action by *bona fide* purchasers without notice. *Lanning, Antram & Co. v. Burns*, 36 Neb. 236 (54 N. W. 427).

288. (1896.) A lack of consideration is no defense to negotiable paper in the hands of an innocent purchaser for value in the usual course of business before maturity. *Blue Valley Lumber Co. v. Smith*, 48 Neb. 293 (67 N. W. 159)

289. (1898.) Where one gave his note in renewal of his past due note which had been given partly in consideration of the conveyance to him of certain lots by payee, such maker cannot defeat an action on the renewal note, in the hands of an assignee thereof before due, by showing that, at the time said renewal note was executed, payee promised to cause improvements to be made which would enhance the value of the lots; the time fixed for the performance of such promise being subsequent to the date when

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the note was assigned to plaintiff. *Nebraska Nat. Bank v. Pennock*, 55 Neb. 188 (75 N. W. 554).

290. (1898.) A mortgagee who in consideration therefor agreed to pay a prior mortgage, paid the amount thereof to a person not authorized to receive payment, and who did not account to the holder. Suit was begun to foreclose the first mortgage. After such suit was begun, but before A had answered and before the record disclosed the connection between the two mortgages, B sold his note and mortgage to a stranger without notice, and before the note secured by the mortgage had matured. *Held*, That the failure of consideration for the second was not an available defense as against the innocent purchaser. *Campbell v. O'Connor*, 55 Neb. 638 (76 N. W. 167).

291. (1902.) That a promissory note was executed by way of accommodation, is a good defense as against the payee, but not as against the indorsee, from whom money was obtained by virtue thereof, even though he had notice of the relation of the parties to each other. *Baker v. Union Stock Yards Nat. Bank*, 63 Neb. 801 (89 N. W. 269; 93 Am. St. Rep. 484).

——Illegality of consideration.

292. (1879.) Illegality of consideration constitutes no defense to a promissory note in the hands of a *bona fide* holder for value before maturity. *Smith v. Columbus State Bank*, 9 Neb. 31 (1 N. W. 893).

293. (1879.) An answer, to an action on a promissory note, that the note was given in consideration that the payee desist from instituting criminal prosecution against the maker for certain felonies he was accused of having committed, constitutes no defense as against an indorsee in due course. *Smith v. Columbus State Bank*, 9 Neb. 31 (1 N. W. 893).

294. (1879.) If a note is not declared void by statute, mere illegality in its consideration will not affect the rights of a *bona fide* purchaser for value. *Wortendyke v. Meehan*, 9 Neb. 221 (2 N. W. 339).

295. (1903.) A note given for medical services by an unlicensed practioner may be recovered on by a *bona fide* purchaser, notwithstanding the provisions of chapter 55 of the Compiled Statutes, prohibiting the practice of medicine without a license. *Citizens State Bank v. Nore*, 67 Neb. 69 (93 N. W. 160; 60 L. R. A. 737).

——Fraud in procurement.

296. (1876.) If the signature of an illiterate person be obtained to a promissory note by fraudulently inducing him to believe that he is signing a different instrument, with no fault on his part, such note will be void even in the hands of a *bona fide* holder. *First Nat. Bank of Omaha v. Lierman*, 5 Neb. 247.

297. (1882.) To enable a party to resist the payment of a negotiable note in the hands of a *bona fide* purchaser before maturity, on the ground that the said note was procured through the fraud and circumvention of the payees in some way or manner unknown to him, he must show that he is not chargeable with any laches or negligence, or misplaced confidence in others. *Dinsmore v. Stimbert*, 12 Neb. 433 (11 N. W. 872).

298. (1892.) When the signature of an illiterate person is obtained to a promissory note by the payee fraudulently inducing him to believe that he is signing an instrument of an entirely different character, without any fault or negligence of the maker, the note cannot be enforced, even in the hands of a *bona fide* holder. *Willard v. Nelson*, 35 Neb. 651 (53 N. W. 572; 37 Am. St. Rep. 455).

299. (1893.) A defense that the execution of a note was fraudulently obtained, cannot be urged against a *bona fide* indorsee thereof. *Reuber v. Crawford*, 36 Neb. 334 (54 N. W. 549).

300. (1901.) Where an impostor assumes the name of another person, and thereby induces a third person to believe he is the person whose name he has assumed; and, acting on such belief, such third person indorses a draft, designating the payee by the name assumed by the impostor, and delivers it to such impostor in the belief that he is dealing with the person whose name has been assumed, and the impostor indorses the draft, using such assumed name, and transfers it to an innocent purchaser, the purchaser takes title by such indorsement. *Hoffman v. American Exchange Nat. Bank*, 2 Unof. 222 (96 N. W. 112).

301. (1903.) Fraud whereby a person is induced to sign a note in the belief that he is signing merely a receipt, may be urged as a defense even as against a *bona fide* purchaser. *Shenandoah Nat. Bank v. Gravatte*, 4 Unof. 591 (95 N. W. 694).

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——— Duress.

302. (1901.) The defense that a note was obtained by duress is not available against a good faith purchaser thereof for value before maturity. *Wilson v. Neu*, 1 Unof. 42 (95 N. W. 502).

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——— Coverture.

302*a*. (1908.) A purchaser for value, before maturity, of a promissory note, signed by a married woman, cannot invoke the rule of innocent purchaser, as against the defense of coverture at the time he purchased such note. *Northwall Co. v. Osgood*, 80 Neb. 764 (115 N. W. 308).

——— Alteration.

303. (1876.) The removal of the words "this note is given upon condition," there being nothing to show what the condition was, does not vitiate the instrument in the hands of a *bona fide* purchaser. *Palmer v. Largent*, 5 Neb. 223 (25 Am. Rep. 479).

304. (1876.) The fraudulent removal of a memorandum, written under a negotiable instrument and qualifying it, vitiates the instrument, even in the hands of a *bona fide* purchaser. *Palmer v. Largent*, 5 Neb. 223 (25 Am. Rep. 479).

305. (1879.) The alteration of a promissory note in any material part renders it invalid as such as against a party not consenting thereto, even in the hands of an innocent purchaser. *State Savings Bank v. Shaffer*, 9 Neb. 1 (1 N. W. 980; 31 Am. Rep. 394).

306. (1879.) The assignment by the payee of an altered note transfers to the assignee all the rights of the assignor to the original consideration. *State Savings Bank v. Shaffer*, 9 Neb. 1 (1 N. W. 980; 31 Am. Rep. 394).

307. (1882.) If a contract upon the same paper with a negotiable promissory note, which contract modifies and qualifies it, be detached from the note, the note will be invalid even in the hands of an innocent purchaser. *Davis v. Henry*, 13 Neb. 497 (14 N. W. 523).

308. (1904.) The alteration of a negotiable promissory note, after delivery, by filling in blanks left therein, where there is nothing on the face of the note to indicate such alteration, will not invalidate the note in the hands of a *bona fide* endorsee, for value, before maturity and without notice of such change. *Humphrey Hardware Co. v. Herrick*, 72 Neb. 878 (101 N. W. 1016).

——— Usury.

309. (1880.) S. and wife executed and delivered a negotiable note upon an usurious consideration. The payee indorsed and delivered the same to the plaintiff, before due, and without notice, for the face value thereof less ten per cent. for the immature time. *Held*, That the plaintiff was entitled to recover. *State Savings Bank v. Scott*. 10 Neb. 83 (4 N. W. 314).

310. (1883.) A negotiable promissory note secured by mortgage, transferred to a *bona fide* purchaser without notice before due, and for value, is not subject to the defense of usury. *Cheney v. Cooper*, 14 Neb. 415 (16 N. W. 471).

311. (1883.) Where a note and mortgage are indorsed and delivered to the plaintiff before maturity and received by the plaintiff for value in the ordinary course of business, without notice of any infirmity, he holds the same free from the taint of usury. *State Nat. Bank v. Haylen*, 14 Neb. 480 (16 N. W. 754).

312. (1884.) An usurious note transferred to a *bona fide* purchaser before maturity, for value, without notice, is not open to the defense of usury. *Evans v. De Roe*, 15 Neb. 630 (20 N. W. 99).

313. (1886.) Where a promissory note secured by mortgage based in part upon an usurious consideration is transferred before maturity to a *bona fide* purchaser for value, without notice, and in the usual course of business, he takes it free from the defense of usury. *Sedgwick v. Dixon*, 18 Neb. 545 (26 N. W. 247).

——— Payment.

314. (1883.) An accommodation note indorsed by the payee and delivered to one of the makers before due to be negotiated, it is not prsumed to have been paid and a person purchasing the same in good faith, may recover thereon. *Morris v. Morton*, 14 Neb. 358 (15 N. W. 725).

315. (1895.) Where a negotiable promissory note has been before maturity indorsed to a third person, the maker of the note must, in order to avail himself of the defense of payment before the indorsement, plead and prove that the plaintiff had no tice of such payment before the indorsement. *Yenney v. Central City Bank*, 44 Neb. 402 (62 N. W. 872).

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Effect of cancelation as against payee.

316. (1886.) Where an action is brought against a mortgagee to cancel certain promissory notes and a mortgage to secure the same upon real estate, and a decree is obtained against such mortgagee, a *bona fide* purchaser before maturity of such notes without notice, who was the owner of the same when the action was brought and was not made a party to the action, will not be affected by the decree. *Cheney v. Jansen*, 20 Neb. 128 (29 N. W. 289).

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V. PRESENTMENT, DEMAND, NOTICE AND PROTEST.

Presentment of negotiable instrument for payment on holiday, see *Holidays*, §§ 9, 10.

Presentment or demand of note falling due on Sunday, see *Sunday* §§ 318, 327.

Time for presentment.

317. (1883.) Where sight drafts were purchased under an agreement that if not used for a specified purpose they could be returned to the bank drawing the same and credit given, the drafts being drawn in April, the drawee being solvent until July of that year, but no presentment was made at any time, nor any offer to return the drafts to the bank until the succeeding December, *held*, that as the drafts had neither been presented nor returned to the bank in a reasonable time the holder must bear the loss. *Collingwood v. Merchants Bank*, 15 Neb. 118 (17 N. W. 359).

318. (1891.) Under the provisions of section 8, chapter 41, Compiled Statutes, legal holidays and Sundays are grouped together so far "as regards the presenting for payment or acceptance and the protesting and giving notice of the dishonor of bills of exchange, bank checks, or promissory notes," and where the third day of grace falls on Sunday, presentment or demand on the following Monday will be sufficient. *First Nat. Bank of Hastings v. McAllister*, 33 Neb. 646 (40 N. W. 1040). [Overruled. *Capital Nat. Bank v. American Exchange Nat. Bank of Chicago*, 51 Neb. 707.]

319. (1892.) Where a check is drawn on a bank and sent in a letter to a creditor who indorsed it to his banker, for its face value, and such indorsee sends it on to the drawee bank, as had been the usual custom, such drawee bank issuing a draft therefor on another bank in which it had no funds, and in the meantime the drawee bank fails, the indorser having used due diligence, the drawer is liable to the amount of the check. *Nebraska Nat. Bank of Omaha v. Logan*, 35 Neb. 182 (52 N. W. 808).

320. (1893.) No custom or usage among bankers as to the manner of presenting ordinary checks for payment will relieve them from the legal duty of presenting such checks for payment within a reasonable time. *First Nat. Bank of Wymore v. Miller*, 37 Neb. 500 (55 N. W. 1064; 40 Am. St. Rep. 499).

321. (1893.) An ordinary check is not designed for circulation, but for immediate presentment, and to charge an indorser must be presented with all due dispatch and diligence consistent with the transaction of other commercial business. *First Nat. Bank of Wymore v. Miller*, 37 Neb. 500 (55 N. W. 1064; 40 Am. St. Rep. 499); (1897) *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105 (69 N. W. 765; 61 Am. St. Rep. 550).

322. (1895.) To charge an indorser of an ordinary check it must be presented with all due dispatch and diligence consistent with the transaction of other commercial business, and whether such diligence has been used must be determined from the facts of each case. *First Nat. Bank of Wymore v. Miller*, 43 Neb. 791 (62 N. W. 195).

323. (1893.) Greater diligence is required in presenting ordinary checks for payment than in presenting bills of exchange. Whether an ordinary check has been presented for payment by the indorsee thereof in such a reasonable time as to hold the indorser must be determined from the facts and circumstances of each particular case. *First Nat. Bank of Wymore v. Miller*, 37 Neb. 500 (55 N. W. 1064; 40 Am. St. Rep. 499).

324. (1893.) Where the payee of a check drawn on a bank in Cortland deposits the same in a bank in Wymore, twenty-seven miles from Wymore, and having direct mail and telegraph connections, and the bank at Wymore sends the check to a bank at St. Joseph, Mo., which in turn sends it to Omaha, it reaching the drawer six days after the deposit was made at Wymore, when the maker has no funds in the bank, the Wymore bank not having presented the check within reasonable time, an indorser is discharged. *First Nat. Bank of Wymore*

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v. Miller, 37 Neb. 500 (55 N. W. 1064; 40 Am. St. Rep. 499).

325. (1897.) The rule of the common law respecting the presentment of instruments with grace which expire on Sunday is not abrogated by the act of 1873. (General Statutes, ch. 32, sec. 8.) *Capital Nat. Bank of Lincoln v. American Exchange Nat. Bank of Chicago*, 51 Neb. 707 (71 N. W. 743).

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326. (1902.) In the absence of special circumstances, in order to hold the drawer liable on his check, it must be presented not later than the day following its receipt, where the payee receives it in the place in which the bank on which it is drawn is located. *Edmisten v. Herpolsheimer Co.*, 66 Neb. 94 (92 N. W. 138; 59 L. R. A. 934).

327. (1902.) It is the duty of the holder of a check, if he receives it after banking hours, to present it during banking hours of the next day, if the bank is located in the same town; if not, then to forward it by mail the next day. *Edmisten v. Herpolsheimer Co.* 66 Neb. 94 (92 N. W. 138; 59 L. R. A. 934).

328. (1902.) That the check is drawn on a bank in a city where the collection of such paper is made through a clearing-house, and the check was received after banking hours, does not relieve the payee of the necessity of presenting it the following day. *Edmisten v. Herpolsheimer Co.*, 66 Neb. 94 (92 N. W. 138; 59 L. R. A. 934).

329. (1905.) Due diligence in the presentation of a check for payment does not require the holder, in the absence of special circumstances or some special custom, to present it at other than banking hours for payment. *Temple v. Carroll*, 75 Neb. 61 (105 N. W. 989).

Place of presentment.

330. (1880.) Where no particular place of payment is designated in a promissory note, the holder is bound to demand payment of the maker personally or at his residence; and the indorser contracts only to be answerable in default of the maker, after such demand has been made, and on notice to him of the default. *Townsend v. Star Wagon Co.*, 10 Neb. 615 (7 N. W. 274; 35 Am. Rep. 493).

331. (1881.) A promissory note was dated at Grand Island, Neb., made payable at ———, and had beneath the signature of the maker the words "Danncbrog, Howard Co." In an action by the indorsee against the indorser, *held*, on demurrer to the petition, that the allegations of demand at the banks at Grand Island, and that the defendant had no residence or place of business there, there being no allegations that the maker had absconded, or that inquiry had been made at Dannebrog, were insufficient to charge the indorser. *Nicholson v. Barnes*, 11 Neb. 452 (9 N. W. 652; 38 Am. Rep. 373).

332. (1881.) Although the presumption is that the maker resides at the place where a note is dated, and that he contemplated payment at that place, it is a presumption merely; and if the maker resides elsewhere within the state when the note falls due, and that place be known to the holder, demand must be made at the maker's place of residence. *Nicholson v. Barnes*, 11 Neb. 452 (9 N. W. 652; 38 Am. Rep. 373).

333. (1885.) When a bank is designated as the place at which a note is to be paid, the maker is not in default in not paying the same until the note is received at the bank. *Robinson v. Cheney*, 17 Neb. 673 (24 N. W. 378).

Effect of failure to demand payment.

334. (1876.) Where the payee of a note assigns the same to another, in payment of premises purchased, and to secure same a mortgage on the premises was given the vendor in which it was provided if the mortgagor should pay the note at maturity the mortgage should be void, a promise to pay the note is unconditional, and failure to demand payment of the makers does not release such mortgagor. *Albright v. Russell*, 5 Neb. 207.

Excuse for failure to demand payment.

335. (1905.) When the failure of a bank, holding a check as indorsee, to present it for payment is predicated on some act or omission of one of its agents having authority to make presentation, it is not excused by the fact that such agent was ignorant of the existence of the check. *Temple v. Carroll*, 75 Neb. 61 (105 N. W. 989).

Nocessity for protest.

336. (1893.) Bank checks in this country are regarded as inland bills of exchange for the purpose of presentment and demand, and notice of dishonor, and do not require a formal protest in order to charge the indorsers. *Wood River Bank v. First*

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Nat. Bank of Omaha, 36 Neb. 744 (55 N. W. 239).

337. (1901.) Bank checks do not require a formal protest to charge the indorser. A formal protest, however, is entirely proper. *German Nat. Bank of Beatrice v. Beatrice Nat. Bank*, 63 Neb. 246 (88 N. W. 480).

338. (1901.) A local bank check, which has been indorsed by the payee, may be formally protested for non-acceptance or non-payment. *German Nat. Bank of Beatrice v. Beatrice Nat. Bank*, 63 Neb. 246 (88 N. W. 480).

339. (1906.) The owner of notes secured by mortgages is not harmed nor prejudiced by the failure of one who holds the same as collateral security, to protest the non-payment of an installment. *Preston v. Morsman*, 75 Neb. 358 (106 N. W. 320).

Requisites and sufficiency of protest.

340. (1893.) The term "protest," as applied to inland bills of exchange, includes only the steps essential to charge the drawer and indorser. *Wood River Bank v. First Nat. Bank of Omaha*, 36 Neb. 744 (55 N. W. 239).

341. (1902.) Instruction sent with a note forwarded by one bank to another for the purpose of collection, "to protest," *held* to mean, and to have been understood to mean by the notary, to whose attention it was called, that the necessary steps to bind indorsers were to be taken. *Williams v. Parks*, 63 Neb. 747 (89 N. W. 395; 56 L. R. A. 759).

342. (1904.) Presentment, notice and protest of negotiable paper, in order to be effectual to bind an indorser, must be by one lawfully authorized by the holder to make them. *Hofrichter v. Enyeart*, 71 Neb. 771 (99 N. W. 658).

Notice of non-payment and protest.

——— Necessity.

343. (1897.) *Held*, From an examination of the evidence, that prejudice to the defendant as drawer of the check which is the subject of controversy will be presumed from the failure to give notice of its dishonor, there being to his credit therein sufficient funds for its payment, the drawee bank having in the meantime become insolvent. *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105 (69 N. W. 765; 61 Am. St. Rep. 550).

——— Persons who must give.

344. (1902.) While a promt return to the sender of a protest, showing no notice to an indorser, would have enabled it to serve notice in time, having entrusted that duty to a notary, it was not bound to make examination to see whether it was done. *Williams v. Parks*, 63 Neb. 747 (89 N. W. 395; 56 L. R. A. 759).

345. (1902.) The giving of notice of the dishonor of protested paper, in the absence of contrary instructions, is a notorial duty rendering the notary liable for neglect upon his bond. *Williams v. Parks*, 63 Neb. 747 89 N. W. 395; 56 L. R. A. 759).

346. (1902.) A notary should give notice of protest of paper to the holder. *Williams v. Parks*, 63 Neb. 747 (89 N. W. 395; 56 L. R. A. 759).

——— Persons to whom notice must be given.

347. (1879.) The drawer of a bank check is not released from liability thereon by reason of the failure of the holder to notify him of the non-payment of the check by the bank. *Shaffer v. Maddox*, 9 Neb. 205 (2 N. W. 464).

——— Service.

348. (1880.) If an indorser or drawer resides within the same post-office delivery, whether in or out of city limits, notice of dishonor must be served personally or left at his residence or place of business. *Forbes v. Omaha Nat. Bank*, 10 Neb. 338 (6 N. W. 393; 35 Am. Rep. 480).

349. (1902.) The notice of dishonor of a promissory note, served by the last indorser on his next prior indorser, need not be actually prepared by him, but he may adopt and utilize for that purpose a notice sent him by the protesting officer, addressed to the next prior indorser. *Oakley v. Carr*, 66 Neb. 751 (92 N. W. 1000; 103 Am. St. Rep. 739; 60 L. R. A. 440).

——— Time.

350. (1887.) Where the endorser receives his mail at the place where the note is payable, a notice of non-payment, actually received by him through the mail on the day following the last day of grace, is sufficient to charge him as endorser. *Phelps v. Stocking*, 21 Neb. 443 (32 N. W. 217); (1881) *Hendershot v. Nebraska Nat. Bank*, 25 Neb. 127 (41 N. W. 133).

351. (1887.) Where a promissory note payable at W., was duly presented to the

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makers on the last day of grace and demand of payment made, which was refused, a notice received on the following day by the endorser, who resided a few miles from W., was within a reasonable time. *Phelps v. Stocking*, 21 Neb. 443 (32 N. W. 217).

352. (1902.) Notice of dishonor of a promissory note is sufficient if sent to the last indorser by the first mail of the day following dishonor, even though such indorser is an agent for collection, merely, and he is entitled to one additional day to notify the indorser immediately preceding him. *Oakley v. Carr*, 66 Neb. 751 (92 N. W. 1000; 103 Am. St. Rep. 739; 60 L. R. A. 440).

353. (1902.) Where the last indorser of a promissory note receives the notice of dishonor on Saturday, his notice to the next prior indorser is timely if served on the following Monday. *Oakley v. Carr*, 66 Neb. 751 (92 N. W. 1000; 103 Am. St. Rep. 739; 60 L. R. A. 440).

——— Effect of failure to give.

354. (1880.) When a guarantor is not notified of the default of his principal within a reasonable time, he is released from liability to the extent that he may be damaged by the omission. And if it appear that the principal was solvent at the maturity of the obligation, but became insolvent before the demand of payment was made or notice given, except under special and peculiar circumstances, damages will be presumed. *Newton Wagon Co. v. Diers*, 10 Neb. 284 (4 N. W. 995).

Waiver of presentment.

355. (1882.) A guaranty in the following form: "For value received, we guarantee the payment of the within note, and hereby waive protest, demand, and notice of non-payment thereof," is an absolute contract upon a lawful consideration that the money expressed in the note should be paid at the maturity thereof, at all events and does not require demand on the maker or any diligence on the part of the holder. *Bloom v. Warder*, 13 Neb. 476 (14 N. W. 395).

Fees and costs of protest.

356. (1882.) It is only where a protest is necessary in order to fix an indorser's liability that he can be subjected to the costs thereof. *McKay v. Hinman*, 13 Neb. 33 (13 N. W. 15).

357. (1901.) The fees of a notary public for protesting a bank check are recoverable against the drawer and drawee. *German Nat. Bank v. Beatrice Nat. Bank*, 63 Neb. 246 (88 N. W. 480).

VI. PAYMENT AND DISCHARGE.

Receipted check as evidence of payment, see *Payment*, § 88.

Effect of note as payment of obligation for which it is given, see *Payment*, §§ 18-22.

Burden of showing authority to receive payment, see *post*, §§ 569-571.

Construction as to mode of payment, see *ante*, § 103.

Payment as defense, see *post*, §§ 441, 442.

Payment as defense against *bona fide* purchaser, see *ante*, §§ 314, 315.

Possession as evidence of payment, see *post*, §§ 697-699.

See, also, *Payment*.

Mode and sufficiency of payment.

358. (1888.) Where an agent has accepted a note held by the payee in payment of one held by the agent against him, there being no evidence of the principal's notification of such settlement a verdict for the defendant, whose defense was payment, is not sustained. *McCormick v. Peters*, 24 Neb. 70 (37 N. W. 927).

359. (1897.) The giving of credit as a deposit for the amount of a check, by the bank upon which it is drawn, is, in contemplation of law, a payment of the check in money. *Bartley v. State*, 53 Neb. 310 (73 N. W. 744).

——— Renewal note.

360. (1870.) The giving of a new note for the same debt, without an express agreement that it shall be in payment and satisfaction of the old one, has ever been considered a mere collateral security, which does not affect or alter the original liability of the parties on the old note in any respect whatever. *Young v. Hibbs*, 5 Neb. 433.

361. (1898.) Whether it is payment of a note by giving a renewal or not is to be determined from the intention of the parties as shown by the acts, facts, and circumstances accompanying and attendant upon the transaction in question. *Harvey v. First Nat. Bank of Omaha*, 56 Neb. 320 (76 N. W. 870).

Sufficiency of tender of payment.

362. (1901.) The payment of a note at its maturity at the place where the same is made payable, is a sufficient tender of

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payment to stop interest. *Chapman v. Wagner*, 1 Unof. 492 (96 N. W. 412).

Indorsement of payments.

363. (1902.) Where partial payments are made upon a promissory note even after maturity it is a proper precaution for the party making such payments to see that they are indorsed upon the instrument. But there is no absolute legal requirement that payments be so indorsed, nor does a necessary legal presumption that such indorsements were made arise from the mere fact of payment. *Storey v. Kerr*, 2 Unof. 568 (89 N. W. 601).

364. (1902.) An indorsement of a payment on a note made without the maker's knowledge or assent is not an irrevocable application of the payment to that note where the payee also holds other obligations against the payor. *Lau v. Blomberg*, 3 Unof. 124 (91 N. W. 206).

Persons to whom payment may be made.

365. (1895.) Payment of money on a note at a bank where it is made payable, when the note has not been left there and is not produced, is not a payment of the note. In such case the person receiving the money becomes the agent of the payor, not of the payee. *First Nat. Bank of Omaha v. Chilson*, 45 Neb. 257 (63 N. W. 362).

366. (1898.) The collection by a third person of installments of interest on a negotiable instrument confers no authority or apparent authority on such person to receive payment of the principal when it matures. *Campbell v. O'Connor*, 55 Neb. 638 (76 N. W. 167).

367. (1901.) A series of notes were made payable at the office of Russell & Holmes, who were private bankers. The amount due upon the notes was paid into the bank as they matured, but the bankers did not have possession of the notes; *held*, that payment to the bank did not discharge the payor in the absence of the other circumstances stated in the opinion. *Chapman v. Wagner*, 1 Unof. 492 (96 N. W. 412).

368. (1901.) A non-resident holding notes secured by a mortgage payable at a certain private banking company is guilty of such laches as to bar a recovery on such notes, where the maker pays the money to such bank, though it is not the authorized agent of payee, and the bank mails a notice to the payee that it holds the money for him and no effort is made to collect until after the running of the statute therefrom. *Chapman v. Wagner*, 1 Unof. 492 (96 N. W. 412).

369. (1902.) Where the maker pays other than the rightful owner of the note, he cannot rely on facts unknown to him, and not influencing his action, as an estoppel. *Stuart v. Stonebraker*, 63 Neb. 554 (88 N. W. 653).

370. (1902.) If the maker pay other than the rightful owner of the note, he cannot rely on facts unknown to him and not influencing his action, as an estoppel; but, if the money has reached the hands of an agent authorized to collect for the holder, such payment will be held a satisfaction of the debt. *Pochin v. Knoebel*, 63 Neb. 768 (89 N. W. 264).

371. (1902.) The maker of a note and mortgage not negotiable, who has no notice of a transfer of the papers, may satisfy the same by payment to the payee named therein. *Garnett v. Meyers*, 65 Neb. 289 (94 N. W. 803); (1902) *Consterdine v. Moore*, 65 Neb. 296 (96 N. W. 1021); (1903) *Crewison v. Oelschlegal*, 68 Neb. 573 (94 N. W. 814); (1905) *Swan v. Craig*, 73 Neb. 182 (102 N. W. 471).

372. (1905.) Where the purchaser and indorsee of a promissory note ratifies an extension of time of payment made by the original payee with the maker, and at the expiration of the extended time the maker pays the amount of the note to the original payee, having no knowledge of its indorsement, such payment is good as against the indorsee. *Swan v. Craig*, 73 Neb. 182 (102 N. W. 471).

373. (1905.) Where an indorsee of a note consents to, and ratifies, extension of the time of payment thereof made by the indorser, who was the original payee, such indorsee is estopped to recover on such note as against the maker, who has paid the indorser, not knowing the note has been transferred. *Swan v. Craig*, 73 Neb. 182 (102 N. W. 471).

374. (1907.) Where the owner of a note clothes another with the indicia of ownership and ostensible authority to contract with the maker of such note for the discharge thereof, and the maker, relying upon such ostensible ownership and authority, delivers to such person certain property, which the latter accepts in payment and discharge of the note, the owner is estopped to deny the authority of such person to act in the premises. *Home Savings Bank v. Stewart*, 78 Neb. 624 (110 N. W. 947).

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375. (1907.) The original payee of a negotiable note in possession thereof is presumed to be the owner, and has ostensible authority to accept money or property in discharge thereof, although the note bears the blank indorsement of such payee. *Home Savings Bank v. Stewart*, 78 Neb. 624 (110 N. W. 947).

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——— Agent of payee.

376. (1889.) Notes are not discharged when given in part payment for a reaper, and the amount thereof paid to agents for the sale of such machine, who had neither possession of nor authority to receive payment for the same. *Seiberling v. Demaree*, 27 Neb. 854 (44 N. W. 46).

377. (1891.) A payment made to an agent of the payer, who has possession of the note for collection discharges the obligation *pro tanto*, although the agent appropriates the money so paid and does not credit it on the note. *Durrell v. Todd*, 31 Neb. 256 (47 N. W. 862).

378. (1898.) The mere facts that a mortgagor had sent coupons, as they matured, to a certain person to whom the amounts thereby evidenced as due had been paid, and that the person so receiving such payments had delivered or even advanced the amount of such coupons to one to whom before maturity had been transferred the principal negotiable promissory note secured by mortgage, *held* not sufficient to satisfy the requirement as to a payment to such person of principal and interest made before the same became due. *Chandler v. Pyott*, 53 Neb. 786 (74 N. W. 263).

379. (1898.) Where a negotiable note, indorsed by the payee in blank, is delivered to an agent for collection, payment by the maker in good faith to the agent while the note is in his possession, after the death of the principal and without notice of his death, will discharge the debt. *Deweese v. Muff*, 57 Neb. 17 (77 N. W. 361; 73 Am. St. Rep. 488; 42 L. R. A. 789).

380. (1900.) Payment by a debtor of the principal of his note, before due, to an agent of the payee who has neither the possession of the note nor authority to collect it, is made at the risk of such debtor. *Walsh v. Peterson*, 59 Neb. 645 (81 N. W. 853).

381. (1901.) 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. *Gilbert v. Garber*, 62 Neb. 464 (87 N. W. 179).

382. (1901.) The fact that a person or company is authorized to receive the installments of interest which became due on a mortgage note or bond is not sufficient ground from which to infer that the authority also exists to collect or receive the principal sum, if the evidences of the indebtedness are not and have not been in the possession of such person or company. *Richards v. Waller*, 49 Neb. 639 (68 N. W. 1053); *Thompson v. Buehler*, 1 Unof. 590 (95 N. W. 854).

383. (1902.) A purchaser of a note who makes the assignor his agent for collection cannot, when such agent makes the collection and fails to account to his principal, repudiate the agency and stand upon the rights of a *bona fide* holder. *Stuart & Co. v. Stonebraker*, 63 Neb. 554 (88 N. W. 653).

384. (1902.) Where one purchasing a note constitutes his assignor, who is the original payee named therein, his agent for the collection of both interest and principal, and such agent, in the exercise of such authority, does collect both interest and principal, the holder cannot, after his agent's failure to account, repudiate such agency, stand upon his rights as a *bona fide* holder for value, and collect a second time from the maker, although the latter has paid the agent in the belief that he was still the holder of the note. *Pochin v. Knoebel*, 63 Neb. 768 (89 N. W. 264).

385. (1902.) Where one has placed his agent for the investment of money in notes and mortgages in such a situation that persons of ordinary prudence, acquainted with business usages, would be justified in regarding such agent as having full authority with reference to the extension, collection, etc., of such notes and mortgages, payment to such agent will be deemed payment to the principal. *Harrison Nat. Bank v. Austin*, 65 Neb. 632 (91 N. W. 540; 101 Am. St. Rep. 638; 59 L. R. A. 294).

386. (1902.) When payment is made to the agent of the holder of a negotiable promissory note and the authority of such agent to receive such payment is fully established by competent evidence, such pay-

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ment is binding on the holder of the note, although the agent did not have the note in his possession at the time of such payment. *Union Stock Yards Nat. Bank v. Haskell*, 2 Unof. 839 (90 N. W. 233).

387. (1903.) In an action on a note by the assignee thereof, certain statements of such assignee to the maker *held* insufficient to estop the former to deny that the original payee was his agent authorized to receive payment. *Ayres v. Nixon*, 5 Unof. 156 (97 N. W. 621).

——Forged indorsement.

388. (1889.) A check drawn by I. W. F., paymaster, on J. G. T., assistant treasurer B. & M. R. R. Co. in Neb., to the order of F. L. D., was presented to the National Bank of H. by L., with a forged indorsement of the name of F. L. D. thereon, and the money received by L. from the bank, which, having accounted to F. L. D. for the amount of the check, sued L. therefor. *Held*, That L. was liable. *Levy v. First Nat. Bank of Hastings*, 27 Neb. 557 (43 N. W. 354).

389. (1901.) Where the drawee of a pay check paid to one who had forged the indorsement of the payee thereto, sought to escape liability of payment to the payee on the ground of his alleged negligence, the unlawful possession of the holder of the order, and the receiving payment on the forged indorsement, being the result or fruit of a crime, the defendant could not predicate an estoppel by negligence thereon, unless it appears that the negligence is the proximate cause of the forgery being taken as genuine. *Chicago, B. & Q. R. Co. v. Burns*, 61 Neb. 793 (86 N. W. 483).

390. (1901.) Where the payee of a "pay check," drawn to him or his order, is robbed of it and his indorsement forged thereon, and payment made to an unauthorized holder, the payee may, notwithstanding such payment, recover from the drawee the amount due him, as evidenced by the order. *Chicago, B. & Q. R. Co. v. Burns*, 61 Neb. 793 (86 N. W. 483).

391. (1901.) Where A on receipt of release, made at A's request, of all claim against an estate, and purporting to have been made by B, procures a draft to his own order, indorses it to B's order and sends it by mail to the address given him as B's, and it is there received by the person executing the release and indorsed in B's name, A has no right of action against a bank which pays the draft to the holder, supposing him to be B, though he is in fact an imposter. *Hoffman v. American Exchange Nat. Bank*, 2 Unof. 217 (96 N. W. 112).

Application of payments.

392. (1875.) Partial payments made upon a debt drawing interest should be first applied in payment of the interest, and afterwards to the reduction of the principal. *Mills v. Saunders*, 4 Neb. 190.

393. (1890.) Partial payments on a note drawing more than legal interest will be applied on the principal. *Hall v. First Nat. Bank of Fairfield*, 30 Neb. 99 (46 N. W. 150).

394. (1899.) Payments on a note which include usurious interest should be credited upon the principal, whether such payment be in the form of cash or of an independent note. *Tomblin v. Higgins*, 58 Neb. 336 (78 Neb. 620).

Effect of payment as discharge.

395. (1898.) The money paid by plaintiff, an indorser of a note, to the indorsee was not paid for the benefit of the maker of the note, but to protect the plaintiff's contract of indorsement; and the effect of the payment and redelivery of the note to the plaintiff was to vest the plaintiff with the equitable title to the note. *Hartzell v. McClurg*, 54 Neb. 316 (74 N. W. 626).

396. (1899.) When the owner and holder of a past due negotiable note receives payment thereof from the maker or other person liable thereon, the obligation is extinguished, and if it be afterwards transferred to another, the transferee will acquire no better title or greater right than the transferrer possessed. *Root v. Fast*, 58 Neb. 498 (78 N. W. 939).

397. (1903.) The facts and circumstances surrounding the transfer of certain coupons by the indorsee of the bond to which they were attached, examined, and *held* to show a sale and not a payment of such coupons. *Curtiss v. McCune*, 4 Unof. 483 (94 N. W. 984).

Part payment as waiver of defenses.

398. (1902.) The maker of a coupon-note owes no duty to the payee to examine the coupons as they are returned after payment. *Foxworthy v. Colby*, 64 Neb. 216 (89 N. W. 800; 62 L. R. A. 393).

Recovery of payments.

399. (1879.) Where the payee of a draft is informed by the bank on which the same

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is drawn that the draft has been paid, and the payee drew out a portion of the money, he is liable to the bank for that amount so drawn out, when it is afterwards discovered that the draft had not been paid. *De Nayer v. State Nat. Bank*, 8 Neb. 104.

400. (1888.) If a party upon whom an order is drawn accepts the same and thereupon proceeds to pay the amount of the order to the person in whose favor it is drawn, the presumption is that the credit was given to the drawer of the order, unless the holder by some acts of his own renders himself liable, and the acceptor cannot recover from the payee. *Camp & Compton v. Sadler*, 22 Neb. 732 (36 N. W. 144).

Effect of release of joint maker.

401. (1907.) The voluntary release of one of two joint makers of a promissory note will release the other. *Banking House of A. Castetter v. Rose*, 78 Neb. 693 (111 N. W. 590).

VII. ACTIONS.

Right of action in general.

402. (1898.) The holder of a note secured by a mortgage may maintain an action at law on the note, where neither note nor mortgage contains stipulations making the mortgaged property primarily liable for the debt. *Grable v. Beatty*, 56 Neb. 642 (77 N. W. 49).

403. (1903.) The payee of a check has a right of action against the drawee if the latter has funds to meet it when it is presented. *Falls City State Bank v. Wehrli*, 68 Neb. 75 (93 N. W. 994).

Accrual of right of action.

404. (1886.) Where an instrument in the form of a promissory note is only to be payable upon condition that another certain promissory note therein named is paid by one of the parties named, the person so named, upon payment of such promissory note, may bring an action to recover the sum due against the persons signing such instrument. *Grimison v. Russell*, 20 Neb. 337 (30 N. W. 249).

Joinder with action to foreclose.

404*a*. (1908.) An action to foreclose a mortgage cannot, against objections made by the defendant, be joined with an action to obtain a money judgment upon a note not secured by the mortgage. *McCague Savings Bank v. Croft*, 80 Neb. 702 (115 N. W. 315).

Persons who may maintain action.

405. (1875.) The right to sue upon a note executed exclusively for the benefit of a banking corporation, vests in the bank, and the indorsement of its cashier, to whom as cashier, such note is made payable, is not necessary. *Lacey v. Central Nat. Bank of Omaha*, 4 Neb. 179.

406. (1882.) Where 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. *Stoll v. Sheldon*, 13 Neb. 207 (13 N. W. 201).

407. (1889.) The pledgee of a note, although he takes it subject to equities, may nevertheless bring an action on it as the real party in interest. *Herron v. Cole Bros.*, 25 Neb. 692 (41 N. W. 765).

408. (1889.) An indorsee of a promissory note, where the indorsement was not made for value, nor in the due course of trade, but for the purpose of collection, can maintain an action in his own name for the collection of the note, but in such case the suit would be subject to any defenses the maker may have had as against the indorser of the plaintiff, such defenses not having been cut off by the indorsement. *Roberts v. Snow*, 27 Neb. 425 (43 N. W. 241).

409. (1890.) An action cannot be brought on a note by the payee, where he has indorsed it as collateral security to a third person who still holds it. *Johnson v. Chilson*, 29 Neb. 301 (45 N. W. 462).

410. (1894.) One to whom a note is indorsed and delivered as collateral security, may maintain a suit thereon in his own name. *Kavanaugh v. Brodball*, 40 Neb. 875 (59 N. W. 517; 25 L. R. A. 774).

411. (1898.) The equitable owner of a negotiable promissory note in his possession may maintain an action thereon in his own name. *Hartzell v. McClurg*, 54 Neb. 316 (74 N. W. 626).

412. (1902.) The indorsee of a check is possessed of the legal title thereto, and is the proper party plaintiff in an action for its collection. *Commercial State Bank of Genoa v. Rowley*, 2 Unof. 645 (89 N. W. 765).

Conditions precedent.

Possession of collateral security as defense, see *post*, § 440.

413. (1877.) When the original debt is sued on, the plaintiff must produce the new

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note on the trial, or satisfactorily show that it is lost or destroyed. *Young v. Hibbs*, 5 Neb. 433.

414. (1883.) The holder of a collateral security for the payment of a promissory note, without special contract to that effect, need not convert and apply the said collateral before bringing suit on the note. *Lormer v. Bain*, 14 Neb. 178 (15 N. W. 323); (1898) *Carson's Executors v. Buckstaff*, 57 Neb. 262 (77 N. W. 670).

415. (1892.) Where a negotiable note is lost before it becomes due the court will require the plaintiff to give an indemnifying bond to the maker as a condition of recovering judgment, but where the instrument is lost after it becomes due no bond ordinarily will be required. *Means v. Kendall*, 35 Neb. 693 (53 N. W. 598, 610).

416. (1894.) Where an instrument negotiable by delivery is lost before maturity, a bond of indemnity should be required as a condition for recovery thereon; but where it is clearly shown that the instrument was payable to order and not indorsed, or that it was lost after maturity, no indemnity should generally be required. *Kirkwood v. First Nat. Bank of Hastings*, 40 Neb. 484 (58 N. W. 1016; 42 Am. St. Rep. 683; 24 L. R. A. 444).

417. (1894.) The maker of notes which were procured by fraud of the payee, in an action against the former by one who holds the notes as collateral security, cannot require plaintiff to first exhaust other collateral. *Haas v. Bank of Commerce*, 41 Neb. 754 (60 N. W. 85).

418. (1897.) Where a note payable to order, but neither indorsed nor transferred, is lost before maturity, the execution of an indemnity bond is not essential to plaintiff's recovery in a suit on the note. *Palmer v. Carpenter*, 53 Neb. 394 (73 N. W. 690).

419. (1898.) In the absence of an agreement by a mortgagee to look primarily to his security for satisfaction of the debt, a foreclosure of the mortgage is not a condition precedent to an action at law on the secured claim. *Grable v. Beatty*, 56 Neb. 642 (77 N. W. 49).

Defenses.

420. (1895.) In an action on a promissory note by an alleged indorsee thereof, a denial of the indorsement and plaintiff's ownership is a good defense. *Central City Bank v. Rice*, 44 Neb. 594 (63 N. W. 60).

421. (1898.) In a suit on a note transferred by indorsement to plaintiffs, it was *held* that defendant was not estopped to deny that plaintiffs were partners. *Hoyt v. Kountze*, 54 Neb. 368 (74 N. W. 585).

422. (1898.) Where one executes a promissory note and transfers to the payee as collateral security thereto a note then held against a third person secured by a real estate mortgage, a decree foreclosing such mortgage will not bar an action at law on the first note, since it did not evidence the debt the mortgage was previously given to secure. *Maxwell v. Home Fire Ins. Co.*, 57 Neb. 207 (77 N. W. 681).

423. (1901.) In an action on a note, where a defense set up that defendant had executed a deed to plaintiff, in trust, that if the note was paid the property was to be reconveyed, an instruction directing a verdict for plaintiff was proper. *Fahay v. State Bank of O'Neill*, 1 Unof. 89 (95 N. W. 505).

——— Want or failure of consideration.

424. (1880.) Want of consideration for an indorsement is a good defense to an action by the payee of a promissory note against an indorser before delivery. *Newton Wagon Co. v. Diers*, 10 Neb. 284 (4 N. W. 995).

425. (1883.) The consideration of negotiable promissory notes may be inquired into in an action on the notes by the promisee against the maker. *Kennedy v. Goodman*, 14 Neb. 585 (16 N. W. 834).

426. (1883.) The formal making and delivery of an instrument for the payment or security for the payment of money will not preclude the maker, when sued by the promisee, from pleading and proving that no consideration was given. *Kennedy v. Goodman*, 14 Neb. 585 (16 N. W. 834).

427. (1884.) In an action between the payee and drawer of a bank check, payment of which has been refused by the bank, where the drawer sets up as a defense the want of consideration for the drawing and delivery of such check, it is no answer to such defense that the plaintiff received the same without notice, etc. *Camp v. Sturdevant*, 16 Neb. 693 (21 N. W. 449).

428. (1884.) The possession by A. H. of a bank check payable to the order of P. D. S. was no evidence to P. D. S. that said check had been drawn by the drawer

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and delivered to said A. H. to enable him, A. H., to obtain money or credit thereon, nor is such possession evidence to go to the jury of such fact, and hence the maker can urge want of consideration as a defense. *Camp v. Sturdevant*, 16 Neb. 693 (21 N. W. 449).

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429. (1890.) An answer in an action on a note, alleging that it was given for a right to sell a patented article, that the payee represented himself to be the agent of the manufacturer and agreed to send a sample to the defendant to be used in making such articles, and that such article was patented, all of which representations were false, set up a good defense. *Haggland v. Stuart*, 29 Neb. 69 (45 N. W. 263).

430. (1890.) In an action on a note, brought by the payee, an answer alleging that the note was given in payment for a horse sold by plaintiff to defendant, which at the time was affected with glanders, an infectious and contagious disease, as plaintiff well knew and defendants did not know, sets up a good defense. *Johnson v. Chilson*, 29 Neb. 301 (45 N. W. 462).

431. (1891.) Where the payee of a note indorses it as collateral to secure a note with a mortgage given by himself, and the maker of the original note purchases both notes and mortgage, he may, in an action against the payee to foreclose, show that such original note was without consideration. *Smith v. Kinney*, 32 Neb. 162 (47 N. W. 341).

432. (1903.) Where the payee of a purchase money note agreed to repair the machine, which was then defective, and put it in good working order, or else surrender the note, notice to the payee that the repairs have not been effective, is not necessary before it can be urged as a defense to the note. *Warder, Bushnell & Glessner Co. v. Myers*, 70 Neb. 15 (96 N. W. 992).

——— Usury.

433. (1883.) Where a note and mortgage were given for the sum of $445.15, and only $380 received by the mortgagor, usury is established. *Cattle v. Haddox*, 14 Neb. 527 (16 N. W. 841).

434. (1844.) A promissory note given for already accrued interest, in part usurious, was without consideration, and suspension of the right of collection between its date and maturity in no way operated to supply this essential element otherwise lacking. *McGhee v. First Nat. Bank of Tobias*, 40 Neb. 92 (58 N. W. 537).

435. (1894.) Every renewal of a note given for a usurious loan of money is subject to the defense of usury between the original parties and purchasers with notice. *McDonald v. Aufdengarten*, 41 Neb. 40 (59 N. W. 762).

436. (1897.) Where one executes his negotiable note payable to the order of a debtor and delivers it to him as an accommodation, and the debtor indorses and delivers the note to his creditor in payment of a usurious note due the creditor from the debtor, such accommodation note is not a renewal of the usurious note; and, in a suit on the accommodation note against the maker, he cannot interpose, as a defense thereto, the usurious contract existing between the creditor and debtor. *Palmer v. Carpenter*, 53 Neb. 394 (73 N. W. 690).

437. (1898.) Where a usurious loan has been repeatedly renewed, and the notes evidencing the indebtedness have been taken in the name of a bank, or of its cashier, indifferently, and each transfer has been after due, the holder of the final note, who prosecutes the action, does so subject to any defense of usury which might have been set up against said note or any of its antecedents. *Farmers Bank of Kearney v. Oliver*, 55 Neb. 774 (76 N. W. 449).

438. (1898.) Notes made and payable to another state and stipulating for a higher rate of interest than is lawful in Nebraska will be enforced according to their terms, in the absence of a plea of usury. *McCready v. Phillips*, 56 Neb. 446 (76 N. W. 885).

439. (1904.) Where one secures a loan and receives six hundred dollars and executes a note and mortgage to secure the same for six hundred and ninety dollars with interest at seven per cent. per annum and at the end of five years, counting the ninety dollars, more than ten per cent. of the amount received has been paid in interest, the transaction is usurious. *Allen v. Dunn*, 71 Neb. 831 (99 N. W. 680).

——— Possession of collateral security.

440. (1898.) The maker of a note cannot defend an action thereon on the ground that plaintiff held a third person's collectible note as collateral security, and that the note pledged was for a greater amount than the note sued on. *Carson's Executors v. Buckstaff*, 57 Neb. 262 (77 N. W. 670).

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——Payment.

441. (1882.) That a promissory note was payable in wheat and that the wheat had been delivered in pursuance of the contract is a good defense to an action on such a note, and under proof the jury should be instructed for defendant. *Smith v. Hobleman*, 12 Neb. 502 (11 N. W. 753).

442. (1896.) Under a letter of credit, "We will pay H. & M.'s drafts until further notice for the cost or value of stock shipped to us here with or without bill of lading attached," a draft was drawn October 23 and accepted October 29. On October 29 a large shipment of stock was made. November 8 another draft was drawn not covered by stock shipped, unless the shipment of October 29 should be applied thereto. There was no evidence that the discounting bank in receiving the last draft relied on the acceptance of the former as not including the shipment of October 29. *Held*, That under the circumstances B. & F., in defense of an action based on their refusal to accept the last draft, were not estopped from showing that the earlier draft had been covered in part by the shipment of October 29, the day of its acceptance. *Burke v. Utah Nat. Bank*, 47 Neb. 247 (66 N. W. 295).

——Counter-claim or set-off.

443. (1890.) In an action upon a note given for a twine-binder machine, accompanied by warranty, alleged damages to crops growing out of a failure of warranty are not ground for counter-claim. *Clark v. Deering*, 29 Neb. 293 (45 N. W. 456).

444. (1892.) In an action on a negotiable certificate of deposit, transferred after due, the maker may set off any cross-demand which existed in his favor against the original payee at the time of the transfer. *First Nat. Bank of Rapid City v. Security Nat. Bank*, 34 Neb. 71 (51 N. W. 305; 33 Am. St. Rep. 618; 15 L. R. A. 386).

445. (1898.) A debtor, when sued on a note by his creditor, may plead as a counter-claim or set-off the value of any collateral security converted by plaintiff to his own use, released, dissipated, or diverted from the purpose for which it was pledged. *Carson's Executors v. Buckstaff*, 57 Neb. 262 (77 N. W. 670).

Venue.

446. (1883.) An action against the maker and several indorsers of a promissory note may be brought in any county where any one of the parties defendant resides, or may be summoned. *Pearson v. Kansas Mfg. Co.*, 14 Neb. 211 (15 N. W. 346).

Parties.

447. (1885.) New parties to an action by way of intervention are permitted only when the intervenor claims some interest in the subject of the action; the owner of the title to real estate cannot intervene in an action on a note, in which an attachment has issued. *Kimbro v. Clark*, 17 Neb. 403 (22 N. W. 788).

448. (1887.) Where a promissory note payable to order is endorsed by the payee and transferred to two persons, who bring an action thereon as "H. & A. F. Randolph, partners, etc.," *held*, that H. & A. F. Randolph, being the lawful holders of the note, if not partners, could in their individual names maintain an action thereon as "H. & A. F. Randolph." *Walgamood v. Randolph*, 22 Neb. 493 (35 N. W. 217).

449. (1892.) In an action upon a note signed by three persons all should be joined as defendants, although, if service cannot be had upon all, the action may proceed against those served. A failure to join all is ground of demurrer for defect of parties defendant, and the defect must be insisted upon or it will be waived. *Beeler v. First Nat. Bank of Larned*, 34 Neb. 348 (51 N. W. 857).

450. (1899.) In an action by the assignee of a non-negotiable note, on which the payee has made himself liable by a special contract of indorsement, the original payee is not a proper party. To a suit by such assignee on the payee's contract to be liable for the payment of the note the makers thereof are not proper parties. *Barry v. Wachosky*, 57 Neb. 534 (77 N. W. 1080).

451. (1899.) In an action on a non-negotiable note, by the assignee thereof, the assignor is not a necessary party. *Barry v. Wachosky*, 57 Neb. 534 (77 N. W. 1080).

452. (1905.) Persons severally liable upon the same promissory note may all or any of them be included in the same action, at the option of the plaintiff. (Code, sec. 44.) *Palmer v. McFarlane*, 73 Neb. 178 (102 N. W. 256).

453. (1907.) The voluntary release of one of two joint makers of a promissory note will release the other. But when an action has been brought against both jointly, and a successful defense has been made by

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one defendant supported by the evidence of both, and judgment has been entered against the other defendant, upon appeal by such defendant to the district court the action may proceed against him alone, and the petition which alleges all the facts above stated is not subject to demurrer for non-joinder of defendants. *Banking House of A. Castetter v. Rose*, 78 Neb. 693 (111 N. W. 590).

Limitations.

Part payment as bar to running of statute of limitation, see *Limitation of Actions*, §§ 139, 140.

454. (1888.) A note, "$50.00. Franklin Grove, Ill., July 1, 1878. Ten days after date I promise to pay to the order of D. B. Fisk & Co., Chicago, Ill., Fifty Dollars, at ten per cent interest from date. Value received. M. T. Minor. No. .. Due Sept. 30, 1878," matures upon the date named in the body thereof, and not upon that named in the margin. *Fisk & Co. v. McNeal*, 23 Neb. 726 (37 N. W. 616; 8 Am. St. Rep. 162).

455. (1889.) Where a real estate mortgage secures five notes, each dated February 29, 1876, payable in one, two, three, four, and five years, and the summons in an action to foreclose the mortgage is dated February 9, 1888, only one of the notes is barred, as they continue to be evidence of the debt for ten years after maturity. *Cheney v. Campbell*, 28 Neb. 376 (44 N. W. 451).

456. (1893.) In December, 1881, the defendant, a resident of the state of Iowa, gave the plaintiff his promissory note due January 1, 1884, and payable in that state. He removed to Nebraska in 1888, and suit was commenced on the note in this state on July 13, 1891. *Held*, The action was not barred. *Minneapolis Harvester Works v. Smith*, 36 Neb. 616 (54 N. W. 973).

457. (1893.) The statute of limitations begins to run in favor of the drawer of a check at the latest after the lapse of a reasonable time for the presentment of the check. *Scroggins v. McClelland*, 37 Neb. 644 (56 N. W. 208; 40 Am. St. Rep. 520; 22 L. R. A. 110).

458. (1898.) An action on a check by the holder against the maker after demand of the drawee and non-payment is a suit on a written instrument, within the meaning of section 10 of the code, and the limitation is five years. *Connor v. Becker*, 56 Neb. 343 (76 N. W. 893).

459. (1901.) A promissory note is barred after five years from its maturity, though the same is secured by a real estate mortgage, and the statute of limitations is a complete defense to the recovery of a personal judgment upon the note against a maker, other than the mortgagor. *Omaha Savings Bank v. Simeral*, 61 Neb. 741 (86 N. W. 470).

460. (1901.) A letter from the maker of a note to the payee that the former is trying to collect a debt due him that the note in issue could be paid, is not such an acknowledgment of the liability as will avoid the statute of limitations. *Cook v. Farley*, 1 Unof. 540 (95 N. W. 683).

461. (1902.) The institution of a suit of foreclosure on a mortgage before the note evidencing the indebtedness is barred by the statute, tolls the statute on the note from the time of the commencement of the foreclosure action. *Harris v. Nye & Schneider Co.*, 3 Unof. 169 (91 N W. 250).

462. (1903.) Prior to the act of 1897, the institution of a suit to foreclose a mortgage and for personal judgment against the makers of the notes secured by the mortgage, tolls the statute of limitation on the liability of the makers on the notes. *Carstens v. Eller*, 5 Unof. 149 (97 N. W. 631).

463 (1906.) Where the holder of a bank draft neither demands payment of the bank on which it is drawn nor takes any other step to secure payment within five years from the time it came into his possession, his right of action against the bank issuing the draft because of the failure of the bank on which it was drawn to pay the same when it was presented is barred by the statute of limitations. *Wrigley v. Farmers & Merchants State Bank*, 76 Neb. 862 (108 N. W. 132).

464. (1907.) The payment of dividends upon the stock of a corporation assigned to the payee by the maker of a note as collateral security, and the application thereof as payments upon the note, will stay the running of the statute of limitations. *Bosler v. McShane*, 78 Neb. 86 (110 N. W. 726); (1907) *Bosler v. McShane*, 78 Neb 91 (113 N. W. 998).

Petition.

465. (1876.) A petition in an action upon a promissory note reciting the consideration of the note, and disposition of property for which it was given, but not alleging that there was a "wrongful con-

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version" of the property, is not subject to objection by demurrer, on the ground that "an action on a promissory note and an action of trover are improperly joined." *Lash v. Christie*, 4 Neb. 262.

466. (1881.) In an action upon a negotiable instrument the petition must show the nature of the liability of the indorser, and this would require, where possible, that a copy of the indorsement should be set out in the petition, showing the character of the indorsement. *Nicholson v. Barnes*, 11 Neb. 452 (9 N. W. 652; 38 Am. St. Rep. 373).

467. (1886.) Where a plaintiff claims to have become the owner and holder of commercial paper before maturity and in good faith, he should, in his petition, state not only that he purchased the note before maturity, but that it was indorsed to him. *Britton v. Berry*, 20 Neb. 325 (30 N. W. 254).

468. (1888.) Petition *held* to state a cause of action against the maker and indorser of a promissory note. *Hendershot v. Nebraska Nat. Bank*, 25 Neb. 127 (41 N. W. 133).

469. (1889.) A petition that alleges the defendants were indebted to plaintiff upon a promissory note, which was attached to the petition, that there was due plaintiff $66, with interest, while informal, is sufficient after judgment. *Downing v. Glenn*, 26 Neb. 323 (41 N. W. 1119).

470. (1891.) Where a copy of the note sued on is set out in the petition, a further copy need not be attached. *Barnes v. Van Keuren & Floyd*, 31 Neb. 165 (47 N. W. 848).

471. (1892.) Petition and exhibit set out in opinion *held* sufficient after judgment to sustain it, as the defendant who could avail himself of the defense does not object. *Belcher v. Palmer*, 35 Neb. 449 (53 N. W. 380).

472. (1898.) A petition on a promissory note alleged that the owner and holder of the note indorsed and delivered it to the plaintiff. *Held*, Equivalent to an express averment that the owner thereby transferred the title to the indorsee. *Myers v. Farmers State Bank*, 53 Neb. 824 (74 N. W. 252).

473. (1898.) In an action on a dishonored check, pleading as a second cause of action thereon, the common counts not approved. *Penn Mutual Life Ins. Co. v. Conoughy*, 54 Neb. 123 (74 N. W. 422).

474. (1898.) A petition in a suit upon a promissory note, made a part of the petition, which alleges that the defendant executed and delivered the note to the plaintiff, that such note is wholly due and payable, and that the defendant wholly neglects to pay the same, or any part thereof, states a cause of action. It is not essential to such a petition that it negative the payment of the note by a stranger thereto. *Hartzell v. McClurg*, 54 Neb. 313 (74 N. W. 625).

475. (1898.) In a suit upon a promissory note the petition, after alleging the execution and delivery of the note by the defendant to the plaintiff, averred: "That afterwards the plaintiff sold and discounted said note, and that the holder thereof, at its maturity, presented it for payment and it was dishonored; that by reason of the neglect and refusal of the said defendant to pay said note the plaintiff was compelled to 'take up' said note." *Held*, That this averment was the ordinary and concise language of business men, and, when liberally construed in accordance with section 121 of the code of civil procedure, means that the plaintiff, upon the dishonor of the note, paid the amount due thereon to its holder, and he thereupon surrendered the note to plaintiff. *Hartzell v. McClurg*, 54 Neb. 316 (74 N. W. 626).

476. (1901.) A petition in an action on a note and mortgage, against the purchaser of the mortgaged premises, setting out the execution of the note and mortgage, and the conveyance of the land to defendant subject to the mortgage is good as against a demurrer. *Lincoln University v. Polk*, 1 Unof. 403 (95 N. W. 611).

477. (1901.) A petition that alleges that the payment of the note sued on was guaranteed by defendants at the time of the delivery of the note states a cause of action against defendant. *McKibbin v. Ripley*, 1 Unof. 648 (95 N. W. 1046).

478. (1902.) In an action on a promissory note, an averment by the holder that he caused due notice of dishonor to be served on the last indorser but one, is sufficient, in the absence of a motion to make more specific, to admit evidence that the notice was given to the last indorser and by him transmitted to the one next prior. *Oakley v. Carr*, 66 Neb. 751 (92 N. W. 1000; 103 Am. St. Rep. 739; 60 L. R. A. 440).

479. (1903.) In an action on a demand note, the failure to allege a demand before

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suit brought, will not be held fatal after judgment. *Grant v. Commercial Nat. Bank*, 67 Neb. 219 (93 N. W. 185).

480. (1905.) A petition in an action on a note setting out the note and alleging its indorsement to plaintiff states a cause of action thereon. *Palmer v. McFarlane*, 73 Neb. 178 (102 N. W. 256).

481. (1905.) A petition setting out a copy of a note, and indorsements thereon, and alleging a purchase by plaintiff from an indorsee before maturity and for value, sufficiently alleges a *bona fide* purchase of such note. *Haslach v. Wolf*, 73 Neb. 658 (103 N. W. 317).

——— Designation of parties.

482. (1897.) In an action on a draft accepted by C. E. Eiseley a petition against Charles F. Eiseley as defendant and alleging that defendant accepted the draft is sufficient for all purposes to describe the defendant, and to identify him as the party who accepted the draft. *Eiseley v. Taggart*, 52 Neb. 658 (72 N. W. 1039).

483. (1900.) In actions upon promissory notes or other written instruments, whenever any of the parties thereto are designated by initials or some contraction of the Christian name, it is sufficient to so designate such parties, instead of stating the Christian name in full. (Code, sec. 23.) *Richardson v. Opelt*, 60 Neb. 180 (82 N. W. 377).

——— Allegation as to amount due.

484. (1882.) Under section 129 of the code, where a copy of the instrument sued upon is set out as a part of the petition, it must be alleged that there is due thereon from the adverse party to the plaintiff a specific sum. *Gage v. Roberts*, 12 Neb. 276 (11 N. W. 306).

485. (1882.) In an action upon a promissory note it is sufficient to allege the making and delivering of the note, set out a copy of the same, and allege that there is due thereon from the maker to the plaintiff a specified sum. *Gage v. Roberts*, 12 Neb. 276 (11 N. W. 306).

486. (1885.) A petition which contains no allegation that defendants executed the note copied therein, nor that there is due from them the sum demanded, is not sufficient. *Spellman v. Frank*, 18 Neb. 110 (24 N. W. 442).

487. (1885.) In an action upon a promissory note when a copy of the note sued upon is set out as a part of the petition, it must be alleged that there is due thereon from the adverse party to the plaintiff a specific sum, unless these facts may be inferred from others pleaded. *Spellman v. Frank*, 18 Neb. 110 (24 N. W. 442).

488. (1901.) 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. *Dodds v. McCormick Harvesting Machine Co.*, 62 Neb. 759 (87 N. W. 911).

——— Bill of particulars.

489. (1884.) A bill of particulars in a justice's court which sets out a copy of the notes sued on, and alleges that there is due thereon from the defendant to the plaintiff a specified sum, is sufficient. *Freeman v. Burks*, 16 Neb. 328 (20 N. W. 207).

490. (1885.) Where an action is brought on a promissory note before a justice of the peace, and the note is copied by him into his docket and a summons issued thereon, it is a sufficient bill of particulars. *Phœnix Ins. Co. v. Lemke*, 18 Neb. 184 (34 N. W. 727).

Answer.

491. (1877.) An answer, in an action on a note, setting up a former suit by another person and a recovery therein, but containing no allegation that the payee disposed of his interest in the note to the plaintiff in such suit, does not constitute a defense to the present action. *Brandt v. Abers*, 6 Neb. 504.

492. (1880.) A general averment in an answer to a petition on a promissory note, that the defendant "received no consideration" therefor, is controlled and completely nullified by a statement of facts and circumstances in the same answer showing that it is untrue, and that there was in fact a good and sufficient consideration. *McCormick v. Barry*, 10 Neb. 207 (4 N. W. 1014).

493. (1880.) An averment in an answer that the note was given for a certain kind of "reaper and mower combined," but that the one received was in some respects different; and that the defendant, a year afterwards, "notified" the seller "concerning said machine," but omitting to state of what

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such notification consisted, is immaterial, and constitutes no defense. *McCormick v. Barry*, 10 Neb. 207 (4 N. W. 1014).

494. (1884.) An allegation in answer that only a specified sum is due on the note in suit is a mere conclusion, and does not of itself constitute a defense to the action. *Hager v. Blake*, 16 Neb. 12 (19 N. W. 780).

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495. (1884.) An answer alleging that the note was given for a patented article and the patent right thereto, and that the patent was void for want of novelty, but which fails to allege that the patented article was without value, does not state a defense. *Wilch v. Phelps*, 16 Neb. 515 (20 N. W. 840).

496. (1887.) In an action on a note, an answer alleging that the payees at the time the note was given, agreed with defendant that, if he would give the note for the amount expressed upon its face, they would forward him goods to the amount of $3,000, to make good certain overcharges and off-sets claimed by him, growing out of previous transactions in the purchase of merchandise of them by him, but that they had failed so to do, to his damage, etc.; that plaintiff took the note without consideration, after maturity, and with full knowledge of all the facts connected with its execution and of his rights as against it, *held* to state a defense. *Haggerty v. Walker*, 21 Neb. 596 (33 N. W. 244).

497. (1888.) A party charging fraud and misrepresentation must plead the facts, and a mere allegation of fraud or misrepresentation is not sufficient. *Tepoel v. Saunders County Nat. Bank*, 24 Neb. 815 (40 N. W. 415).

498. (1889.) In an action by the assignee against the assignor of a note against which the defense of usury had been successfully urged, to recover the amount paid therefor, where the answer alleged that defendant had informed plaintiff of each and every defect in said note and defense to which it was subject, a motion, to require such answer to be made more specific by stating the manner in which plaintiff gave such information, is properly overruled. *McDuffie v. Bentley*, 27 Neb. 380 (43 N. W. 123).

499. (1890.) In an action on a note by an assignee thereof, where defendant answers, alleging fraud in its inception, and plaintiff without demurring, replies and goes to trial, the court should not direct a verdict for plaintiff on the ground that the answer states no defense. *Haggland v. Stuart*, 29 Neb. 69 (45 N. W. 263).

500. (1890.) An answer alleging that the note sued on has been indorsed by plaintiff to a third party as collateral security and that it still remained in the hands of such indorsee, sets up a good defense and is not demurrable. *Johnson v. Chilson*, 29 Neb. 301 (45 N. W. 462).

501. (1893.) An allegation in an answer, "And the defendants as a separate defense say that the note declared upon has been fully satisfied and delivered to the defendants for cancellation," is a sufficient allegation of payment. *Smith v. Gardner*, 36 Neb. 741 (55 N. W. 245).

502. (1894.) Plea of usury must state facts showing when, where, at what rate, and with whom alleged usurious agreement was made; otherwise no evidence should be admitted in support of it. *Rainbolt v. Strang*, 39 Neb. 339 (58 N. W. 96).

503. (1894.) An answer to an action on a note by an indorsee, the defense being usury, wherein it is alleged there was an agreement to loan defendant money without stating how much, does not state a good defense as there is no appearance of usury from such pleading. *Rainbolt v. Strang*, 39 Neb. 339 (58 N. W. 96).

504. (1895.) In an action on a note by the payee against two makers, one answered alleging that he was surety thereon for the other, that he was induced to sign said note by means of the representations of the plaintiff to the effect that he had been requested by the principal to become surety for him, the principal, but that such statement was wholly false, and made for the purpose of fraudulently inducing him to become a party to said note. *Held*, To state a defense. *Gist v. Feitz*, 43 Neb. 238 (61 N. W. 621).

505. (1896.) Answer examined, and *held* to charge a failure of consideration only and not fraud in the inception of the notes sued upon. *Crosby v. Ritchey*, 47 Neb. 924 (66 N. W. 1005).

506. (1897.) In a suit by an indorsee of a note against the maker, *held* that the answer fails to state a defense. *First Nat. Bank of Dubuque v. McKibben*, 50 Neb. 513 (70 N. W. 38).

507. (1898.) An answer in an action on a note, given by a surety alone as a

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renewal note, alleging an agreement that the plaintiff would hold the note until other signers could be found when it would be returned to defendant does not state a defense. *State Bank of Ceresco v. Belk*, 56 Neb. 710 (77 N. W. 58).

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508. (1898.) In a suit on a note secured by collateral, an answer which simply avers that the creditor still has possession of the collateral security pledged to him, but does not allege that the debt sued for has been paid, is not a good plea of conversion. *Carson's Executors v. Buckstaff*, 57 Neb. 262 (77 N. W. 670).

509. (1899.) An allegation in the answer, that the note sued on is not owned by plaintiff but is the property of another certain person, alleges a good defense and is not demurrable. *Van Housen v. Broehl*, 59 Neb. 48 (80 N. W. 260).

510. (1903.) The plea of duress as a defense to an action upon a contract is sufficient if it shows that, by reason of threats or other unlawful means, the defendant was deprived of his free will and understanding, and that the contract sued upon was not his free and voluntary act. *Nebraska Mutual Bond Ass'n v. Klee*, 70 Neb. 383 (97 N. W. 476).

Demurrer.

511. (1876.) Alleged defects in a petition that "a copy of the note sued on is not attached to or filed with" it, and that "the names of parties are not properly entitled," can only be reached by motion. They are not grounds for demurrer. *Lash v. Christie*, 4 Neb. 262.

Reply.

512. (1877.) When an answer contains an allegation that one of several defendants, joint makers of a promissory note, was in reality only a surety thereon, to which allegation there was no reply, it will be taken as true. *Dillon v. Russell & Holmes*, 5 Neb. 484.

Issues and proof.

513. (1880.) In an action on a promissory note, circular letters signed by the payee of the note, and sent to the maker after maturity, urging payment, is not admissible under a defense of want of consideration. *Knowlton v. Parsons*, 10 Neb. 502 (6 N. W. 605).

514. (1883.) Where in an action on a note it appeared that the note for fifteen hundred dollars was obtained by fraud, in that the maker, an old, infirm and nearly blind man, supposed he was signing a note for thirty dollars, and judgment is rendered for defendant, the plaintiff cannot assign for error that he was entitled to a judgment for the thirty dollars, where he did not offer to amend his petition. *Griffith v. Short*, 14 Neb. 259 (15 N. W. 335).

515. (1895.) Where suit is brought upon a note by the pledgee thereof, evidence that plaintiff took other security and agreed to release the note is inadmissible under an answer that the debt for which the note was pledged had been paid. *First Nat. Bank of Omaha v. Chilson*, 45 Neb. 257 (63 N. W. 362).

516. (1896.) Evidence contradictory of the terms of a promissory note cannot furnish a defense to such note when it is admitted by defendants that such note was duly executed by them. *Miller v. Gunderson*, 48 Neb. 715 (67 N. W. 769).

517. (1899.) That for a promissory note in suit by an indorsee there was a lack or want of consideration, the consideration has failed, or that it has been paid prior to its transfer, of any or all of which the indorsee had notice at or prior to the acquirement of title to the paper, or for any other legal reason they exist as equities against the debt of the note in his hands, are defenses, and to be pleaded in the answer for the party defendant. *Knight v. Finney*, 59 Neb. 274 (80 N. W. 912).

518. (1901.) Although plaintiff fails to plead that he took the note sued on without notice of defense, still if defendant in his answer denies that plaintiff took the note without notice, and evidence is taken upon that question at the trial without objection, it is not error to submit it to the jury. *Western Mattress Co. v. Potter*, 1 Unof. 627 (95 N. W. 841).

519. (1903.) Under an answer denying the genuineness of the note sued on, testimony of a settlement of the accounts between the maker and payee thereof, at a date subsequent to the alleged making of the note, is admissible as tending to prove the non-existence of the note on that date. *Gandy v. Estate of Bissell*, 5 Unof. 184 (97 N. W. 632).

520. (1905.) Where a suit is brought on a note and the defense is set up that the note is void as being a part of a contract of the lease of Indian lands, in conflict with a federal statute regulating such

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leases, plaintiff should plead the exceptions to such statutes if he desires to avail himself of exceptions contained in a subsequent statute. *Lutz v. Pender Nat. Bank*, 73 Neb. 314 (102 N. W. 673).

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521. (1907.) The transferee of a negotiable promissory note who has purchased the same in the usual course of trade for value may maintain an action at law against the maker without proof of indorsement. *First Nat. Bank of Madison v. Sprout*, 78 Neb. 187 (110 N. W. 713).

——Matters admissible under general denial.

522. (1892.) Evidence that a note has been materially altered after execution is admissible on foreclosure of mortgage securing it under a general denial. *Walton Plow Co. v. Campbell*, 35 Neb. 173 (52 N. W. 883; 16 L. R. A. 468*n*).

523. (1896.) Want of consideration in an action on a promissory note is new matter which must be specially pleaded, and is not available as a defense under a general denial. *Sharpless v. Giffen*, 47 Neb. 146 (66 N. W. 285).

524. (1896.) The defense that the consideration for the note was an illegal sale of intoxicating liquors made by the payee to the maker was an affirmative defense, and could not be proved under a general denial. *Dillon v. Darst*, 48 Neb. 803 (67 N. W. 783).

525. (1899.) In an action by an indorsee of a note, where defendant pleads want, or failure of consideration, or payment, and notice of these facts by the plaintiff before transfer; a general denial in the reply will join the issues *Knight v. Finney*, 59 Neb. 274 (80 N. W. 912).

526. (1901.) In an action upon a promissory note, or other contract for the unconditional payment of money, a general denial, being regarded as the code equivalent of the common-law plea of non-assumpsit, does not put the allegation of non-payment in issue. *Barker v. Wheeler*, 62 Neb. 150 (87 N. W. 20).

527. (1902.) An allegation in the petition that the note sued on bears date in Oklahoma, and that twelve per cent. per annum is a lawful rate of interest by statutes of Oklahoma, is sufficient, on a general denial, to admit evidence of the Oklahoma statute. *Hewit v. Bank of Indian Territory*, 64 Neb. 468 (90 N. W. 250).

528. (1904.) A fraudulent alteration of the note sued upon may be shown under the general issue, and, when the whole evidence fairly raises the question, testimony tending to show that no such indebtedness as the one sued upon ever existed is competent upon the issue of alteration. *Gandy v. Estate of Bissell*, 72 Neb. 356 (100 N. W. 803).

——Variance.

529. (1902.) Where it is alleged in the petition that the plaintiff is the owner and holder of the notes sued on, and it develops in the testimony that the notes were indorsed and delivered to the plaintiff as collateral security for an indebtedness, such allegation and proof do not constitute a variance. *Holway v. American Exchange Nat. Bank*, 64 Neb. 67 (89 N. W. 382).

530. (1903.) One cannot recover as for money loaned, on a petition which charges the defendants with no other liability than that of indorsers of a promissory note. *Harnett v. Holdrege*, 5 Unof. 114 (97 N. W. 443).

Process.

531. (1882.) In a joint action against the maker and indorser upon a promissory note, the claim in the summons "for $75, with ten per cent. interest from February 19, 1880, and ten per cent. of amount as attorney fee upon a certain promissory note," is sufficient to apprise the indorser "of the nature of the claim against him." *McKay v. Hinman*, 13 Neb. 33 (13 N. W. 15).

532. (1883.) Where, in an action against the maker and several indorsers of a note, jurisdiction is acquired over one of the defendants, the court may issue its summons to any other county in this state, for service upon any of the parties found there, and acquire jurisdiction over him. *Pearson v. Kansas Mfg. Co.*, 14 Neb. 211 (15 N. W. 346). [Overruled. 57 Neb. 534; 72 Neb. 152.]

533. (1885.) Where a surety on a promissory note has been discharged from liability by the creditor extending the time of payment to the principal, he is a defendant having such a substantial interest in the action as will permit a service and jurisdiction on a defendant residing in another county, by service on such surety. *Dunn v. Haines*, 17 Neb. 560 (23 N. W. 501).

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Presumptions.

534. (1876.) In the absence of evidence showing the purpose and object of the assignment to the bank, it cannot be presumed that it was for a debt created *in presenti*, in violation of the National Banking Act. *Richards v. Kountze*, 4 Neb. 200.

535. (1894.) Where two makers of a promissory note are shown to be sureties for a third party, they will be presumed to be co-sureties until the contrary is shown. *Eisley v. Horr*, 42 Neb. 3 (60 N. W. 365).

536. (1895.) Where a mortgage of land in Nebraska is there executed and delivered to secure a note appearing from its face to have been twelve days previously executed in Iowa to a loan broker of that state, the presumption is, in the absence of explanatory evidence, that payment of the proceeds of the loan and delivery of the note and mortgage were contemporaneous acts, and that the note is not an Iowa contract. *Stark v. Olsen*, 44 Neb. 646 (63 N. W. 37).

537. (1898.) When one not a payee signs his name in blank upon the back of a promissory note before the delivery thereof, the law presumes he signs as maker. *Drexel v. Pusey*, 57 Neb. 30 (77 N. W. 351).

538. (1903.) A promissory note in the hands of the payee is, even after maturity, evidence of the existence of a debt. *Goff v. Byers Bros. & Co.*, 70 Neb. 1 (96 N. W. 1037).

539. (1905.) Where there is no evidence as to the date of an indorsement on a negotiable promissory note of the name of the payee or an indorsee, the presumption of law is that it was made before maturity and that the holder thereof is a *bona fide* holder for value. *Haslach v. Wolf*, 73 Neb. 658 (103 N. W. 317).

Burden of proof.

540. (1888.) In an action on a note executed and delivered to plaintiff by its corporate name, it is unnecessary to prove plaintiff's corporate existence. *Holland v. Commercial Bank*, 22 Neb. 571 (36 N. W. 113).

541. (1892.) In an action by a payee against the acceptor of a conditional order for the payment of money, the plaintiff must aver and prove that the conditions stipulated in the order have been fulfilled in order to entitle him to recover. *Stabler v. Gund*, 35 Neb. 648 (53 N. W. 570).

542. (1903.) The burden of proof is upon the holder of a promissory note signed by a married woman to show that she intended to bind her separate estate for the satisfaction of the obligation. *Farmers Bank v. Boyd*, 67 Neb. 497 (93 N. W. 676).

——— **Execution and delivery of note.**

543. (1885.) In an action upon a promissory note, an answer consisting of a general denial is a denial of the execution of the note, and the burden of proof is upon the plaintiff to establish its execution and delivery before it is admissible in evidence. *Donovan v. Fowler*, 17 Neb. 247 (22 N. W. 424).

544. (1890.) In an action on a promissory note, where the answer is a general denial, the burden of proof is upon the plaintiff to show that the defendant executed the note. This burden does not shift to the defendant after the note is introduced in evidence, but remains with the plaintiff through the entire trial. *First Nat. Bank of Madison v. Carson*, 30 Neb. 104 (46 N. W. 276).

545. (1892.) In an action upon a promissory note, where the answer is a general denial, the burden of proof is upon the plaintiff to establish the genuineness of the instrument, and this burden remains with him throughout the case. *Monitor Plow Works v. Born*, 33 Neb. 747 (51 N. W. 129).

——— **Ownership of note.**

546. (1892.) Where the plaintiff claims as an indorsee of a negotiable promissory note, and the indorsement is denied in the answer, he must prove the words or form of the indorsement. It is for the court to determine its legal effect. *Colby v. Parker*, 34 Neb. 510 (52 N. W. 693).

547. (1894.) In a suit against the maker of a promissory note by an alleged indorsee thereof, as such, the defendant's answer denied plaintiff's ownership. *Held*, To entitle plaintiff to recover, he must establish, by competent evidence, that the indorsement on the note was that of the payee. *Schroeder v. Nielson*, 39 Neb. 335 (57 N. W. 993).

548. (1894.) Where maker of a note, in action by indorsee, denies latter's ownership, indorsee must prove that note was indorsed by payee. *Rainbolt v. Strang*, 39 Neb. 339 (58 N. W. 96).

549. (1901.) Where, in an answer, execution and delivery of a note and mortgage pleaded in the petition are admitted.

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the burden is on the defendant to prove some fact showing want of ownership. *Bank of Stockham v. Alter*, 61 Neb. 359 (85 N. W. 300).

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550. (1902.) Where, in an action by the alleged indorsee of a promissory note, the defendant denies the plaintiff's ownership, the burden of proof is upon plaintiff to show by competent evidence that the indorsement on the note is that of the payee. *Payne v. Liebee*, 3 Unof. 448 (91 N. W. 581).

——Want or failure of consideration.

551. (1879.) A negotiable promissory note is *prima facie* evidence of a sufficient consideration, but when between the parties to the instrument evidence is introduced to rebut this presumption, the plaintiff must satisfy the jury by a preponderance of evidence that there was a consideration. *Search v. Miller*, 9 Neb. 26 (1 N. W. 975).

552. (1899.) In an action on a note, by an endorsee the burden of proving want of failure of consideration, or payment, and notice of such facts by the indorsee, is on defendant. *Knight v. Finney*, 59 Neb. 274 (80 N. W. 912).

——Validity of consideration.

553. (1889.) Where doubt is cast upon the validity of the contract by the testimony, it is the duty of the party claiming any rights under it to make it satisfactorily and affirmatively appear that the contract was made with the intention to deliver the grain. *Sprague v. Warren*, 26 Neb. 326 (41 N. W. 1113; 3 L. R. A. 679*n*.

——Good faith of purchase.

554. (1885.) Where usury in the original transaction for which negotiable promissory notes were given is proved, a party who claims to have purchased the notes before maturity must assume the burden of proof to show that he is a *bona fide* purchaser for value before maturity and without notice. *Darst v. Backus*, 18 Neb. 231 (24 N. W. 681; (1888) *Knox v. Williams*, 24 Neb. 630 (39 N. W. 786; 8 Am. St. Rep. 220); (1892) *Colby v. Parker*, 34 Neb. 510 (52 N. W. 693); (1892) *Suiter v. Park Nat. Bank of Chicago*, 35 Neb. 372 (53 N. W. 205); (1894) *McDonald v. Aufdengarten*, 41 Neb. 40 (59 N. W. 762); (1903) *Bovier v. McCarthy*, 4 Unof. 490 (94 N. W. 965).

555. (1889.) Where usury in the original transaction is shown, and where the note has been renewed a number of times, and usurious interest added to each renewal, and the note then transferred to one who claims to be a *bona fide* purchaser without notice, the burden of proof is on such party to show that he is such purchaser. *Lincoln Nat. Bank v. Davis*, 25 Neb. 376 (41 N. W. 281).

556. (1889.) When a note has been the subject of litigation in a previous suit at law, and shows it has been trimmed and torn in such a way as to excite suspicion that something has been torn off, the burden is on the holder to show that he is a *bona fide* purchaser for value, or submit to equitable defenses. *Richardson v. Stone*, 28 Neb. 137 (44 N. W. 105).

557. (1890.) Where a note is shown to have originated in fraud, a presumption arises that a subsequent holder gave no value for it; and such presumption will prevail in an action by such holder against the maker unless rebutted by evidence of value and good faith in the transfer. *Haggland v. Stuart*, 29 Neb. 69 (45 N. W. 263).

558. (1890.) In an action to recover on a promissory note by an indorsee, it being shown in evidence that the note was given to the payee in consideration of his taking the maker into partnership as an attorney at law and real estate broker, the note and mortgage to be held until the proceeds of the business paid for it, the indorsee must prove that he bought and paid for the note before he received notice of the defenses under such agreement. *Norman v. Waite*, 30 Neb. 302 (46 N. W. 639).

559. (1891.) In an action by the assignee of a note, where the defense is usury, and a stipulation introduced that a certain person if present would so testify, and that such statement might be used in evidence, if no contradictory evidence is offered, the burden is upon plaintiff to prove the *bona fides* of his purchase. *Richardson v. Stone*, 32 Neb. 617 (49 N. W. 763).

560. (1893.) Where undisputed proof showed a want of consideration for a promissory note, and the proof failed to clearly establish the fact that the plaintiff was a *bona fide* purchaser for value before maturity, a verdict and judgment in favor of the defendant will not be set aside. *Hooper v. Grewell*, 36 Neb. 595 (54 N. W. 967).

561. (1894.) Where, to an action upon a promissory note by an indorsee thereof, the defense interposed is fraud or illegality

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in the inception of the contract, the burden is upon the plaintiff to prove that he is a *bona fide* holder for value, but where the only defense is the failure of consideration, or the like, the burden is upon the defendant to overcome the presumption that the note was transferred before due for value in the usual course of business. *Violet v. Rose*, 39 Neb. 660 (58 N. W. 216); (1897) *Nat. Bank of Battle Creek v. Miller*, 51 Neb. 156 (70 N. W. 933); (1901) *Chapman v. Snyder*, 1 Unof. 230 (95 N. W. 346).

562. (1895.) Where the only defense to an action by an indorsee is failure of consideration, the burden is on defendant to overcome the presumption that the note was transferred for value before maturity. *Kelman v. Calhoun*, 43 Neb. 157 (61 N. W. 615); (1896) *Crosby v. Ritchey*, 47 Neb. 924 (66 N. W. 1005); (1898) *Crosby v. Ritchey*, 56 Neb. 336 (76 N. W. 895); (1901) *Chapman v. Snyder*, 1 Unof. 230 (95 N. W. 346).

563. (1895.) Where, in an action on a promissory note by an indorsee thereof, the defense interposed is fraud in the inception of the note, the burden is upon the plaintiff to prove that he is a *bona fide* holder for value. *Kelman v. Calhoun*, 43 Neb. 157 (61 N. W. 615); (1895) *Fawcett v. Powell*, 43 Neb. 437 (61 N. W. 586); (1897) *Nat. Bank of Battle Creek v. Miller*, 51 Neb. 156 (70 N. W. 933); (1900) *Thompson v. West*, 59 Neb. 677 (82 N. W. 13; 49 L. R. A. 337); (1901) *Chapman v. Snyder*, 1 Unof. 230 (95 N. W. 346); (1906) *Lahrman v. Bauman*, 76 Neb. 846 (107 N. W. 1008).

564. (1897.) In an action by an indorsee of a negotiable promissory note against the maker, its mere production by the plaintiff, duly indorsed, raises a presumption of law that it was transferred before maturity and for value, and the burden is on the defendant to show that plaintiff is not an innocent holder. *First Nat. Bank of Dubuque v. McKibben*, 50 Neb 513 (70 N. W. 38).

——— Payment.

565. (1880.) Where an answer to an action on a note sets up that the same was to be set off against the purchase price of a certain land bought from the maker, and the reply admits such purchase but pleads payment, the burden of proving such payment is on the plaintiff. *Kelsey v. McLaughlin*, 10 Neb. 6 (4 N. W. 361).

566. (1887.) Where an action was brought upon a promissory note for the sum of $250, and it appeared that originally the loan had been made for $500, that a number of renewals had been had, and it was claimed by the payee that the note sued on was for the balance of the original loan; a letter written by the payee to the maker, as follows: "Your letter received, and we credit $300 on note," imposed on the payee the burden of showing that the note referred to in such letter was not that held by the payee against the defendant. *Butts v. Capital Nat. Bank*, 21 Neb. 586 (33 N. W. 250).

567. (1897.) Where a note was made for the amount of an unpaid subscription to the captial stock of a corporation, the payment of such note, to be available, must be pleaded and proved by the party relying on such payment, as a discharge of his liability, and a finding of the trial court adverse to such alleged discharge will not be disturbed on appeal when all the evidence on that issue is not preserved by bill of exceptions. *Wyman v. Williams*, 52 Neb. 833 (73 N. W. 285).

568. (1901.) A defendant setting up payment of a note sued on is encumbered with the burden of proving the same. *Mains v. Mains*, 1 Unof. 679 (95 N. W. 776).

——— Authority to receive payment.

569. (1891.) Where the maker of a note pays the amount thereof to one not in possession of it the burden is upon him to show authority of such party to receive payment. *South Branch Lumber Co. v. Littlejohn*, 31 Neb. 606 (48 N. W. 476); (1896) *Richards v. Waller*, 49 Neb. 639 (68 N. W. 1053); (1898) *Chandler v. Pyott*, 53 Neb. 786 (74 N. W. 263); (1898) *Campbell v. O'Connor*, 55 Neb. 638 (76 N. W. 167); (1901) *Gilbert v. Garber*, 62 Neb. 464 (87 N. W. 179); (1901) *Thompson v. Buehler*, 1 Unof. 590 (95 N. W. 854).

570. (1902.) If the maker elects to pay a negotiable promissory note to one who cannot and does not produce the note, by so doing he assumes the burden of showing that the party to whom he paid it was the owner of the note, or was authorized by the owner to receive the money for him. *Coddington Savings Bank v. Anderson*, 64 Neb. 205 (89 N. W. 787); (1902) *Garnett v. Meyers*, 65 Neb. 280 (91 N. W. 400), [see *Garnett v. Meyers*, 65 Neb. 287]; (1902) *Consterdine v. Moore*, 65 Neb. 291 (91 N. W. 399; 101 Am. St. Rep. 620), [see *Consterdine v. Moore*, 63 Neb. 296].

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571. (1902.) One who makes payment of a promissory note to a person, not the owner of the note, and not in possession of it, at a place other than the place of payment designated therein, assumes the burden of proving that the party to whom payment was made was empowered to collect the money. *Lay v. Honey*, 2 Unof. 749 (89 N. W. 998).

Admissibility of evidence.

572. (1874.) Where the maker of a negotiable promissory note is sued by an endorsee, and pleads that the note was given upon an illegal contract prohibited by statute, and also pleads that the note was not transferred to the endorsee before it became due, all the evidence in respect to the contract between the original parties, and the endorsement and delivery of the note to the endorsee, should be submitted to the jury for their determination. *Kittle v. De Lamater*, 3 Neb. 325.

573. (1875.) Where the defense to an action on a promissory note was that the note had been given to cover an overdraft by a depositor in a bank, testimony of one of the makers, as to his understanding of the purpose and object of giving the note, is inadmissible. *Lacey v. Central Nat. Bank*, 4 Neb. 179.

574. (1875.) Demand for security for an overdraft by a depositor in a bank, made long after a note had been given and where there was an overdraft still due, does not constitute a part of the *res gestæ*. *Lacey v. Central Nat. Bank*, 4 Neb. 179.

575. (1876.) In determining whether the signature to a note was obtained by fraud it is proper for the jury to take into consideration all the facts and circumstances attending the transaction, in which the signature was obtained. *First Nat. Bank of Omaha v. Lierman*, 5 Neb. 247.

576. (1883.) There being evidence that a note sued on was transferred after maturity, evidence of payment is admissible, as against the transferee. *Lamb v. Hotchkiss*, 14 Neb. 102 (15 N. W. 324).

577. (1886.) Whether or not an indorsement on a note was made recently, is not a subject for expert testimony and depositions of such not admissible. *Cheney v. Dunlap*, 20 Neb. 265 (29 N. W. 925; 57 Am. Rep. 828).

578. (1887.) When a note sued on is claimed to have been procured by the fraud and connivance of plaintiff and one defendant, evidence that after the case was dismissed for failure of plaintiff to furnish security for costs, such defendant aided him in procuring such security, is admissible. *Brown v. Herr*, 21 Neb. 113 (31 N. W. 246).

579. (1889.) In an action on a note claimed to have been given without consideration and transferred to one who was not a *bona fide* purchaser for value before maturity, cross examination of witness, set out in opinion, *held*, proper, as tending to show true nature of transaction by which plaintiff acquired title to note sued on. *Fifth Nat. Bank v. Edholm*, 25 Neb. 741 (41 N. W. 776).

580. (1889.) Where a member of the firm, suing on a usurious note as a *bona fide* purchaser, was called as a witness by defendant, and it was shown by him that to his knowledge usurious interest was generally charged by the payee's bank (a member of the firm controlling which was a brother of witness) such testimony, though not conclusive against plaintiffs, is competent as a circumstance to be considered with other facts tending to establish notice of defense. *Blackwell v. Wright*, 27 Neb. 269 (43 N. W. 116; 20 Am. St. Rep. 662).

581. (1889.) In an action on a usurious note by one claiming to be a *bona fide* purchaser thereof, evidence that immediately after the alleged purchase, and before he had had an opportunity to see defendant plaintiff offered the note at a heavy discount, is admissible as a circumstance tending to show knowledge of the existing defense. *Blackwell v. Wright*, 27 Neb. 269 (43 N. W. 116; 20 Am. St. Rep. 662).

582. (1890.) In an action on a note given as the purchase price of a hotel, the defense being fraudulent representations as to the value of the hotel business, a monthly statement of receipts and disbursements, of the business, furnished by plaintiff to defendant during the negotiations, is admissible. *Salisbury v. Iddings*. 29 Neb. 736 (46 N. W. 276).

583. (1890.) In an action on a note given as the purchase price of a hotel and fixtures defended on the ground of fraudulent representations as to value, the answer alleging that defendant relied on the inventory furnished by plaintiff, testimony of defendant as to the particulars in which the inventory was false, is admissible.

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Salisbury v. Iddings, 29 Neb. 736 (46 N. W. 267).

584. (1892.) In an action upon a note claimed by the defendant to be forged, it is not competent for him to introduce evidence tending to prove that the payee had, at other times and unconnected with the note in suit, negotiated paper alleged to be forged. *Monitor Plow Works v. Born*, 33 Neb. 747 (51 N. W. 129).

585. (1892.) A stranger took the drafts with alleged forged acceptance, and indorsed the same and delivered them in the night season to one Wheeler, and thereupon left the county. Wheeler soon after, 9 A. M. next morning, took the drafts to a bank and had them discounted for four-fifths of their face value. The alleged acceptor lived less than three miles from the bank and apparently was solvent, yet no inquiry was made of him, nor any one having knowledge of the matter in regard to the drafts. *Held*, That these facts were proper to be submitted to the jury in determining the question of good faith of the purchaser. *State Bank of Wilcox v. Wilkie*, 35 Neb. 579 (53 N. W. 603).

586. (1893.) In a suit by an indorsee against the indorser of an ordinary check, where the defense is that the check was not presented for payment within a reasonable time, inquiry as to whether the indorser was damaged by reason of the failure to present the check for payment is immaterial. *First Nat. Bank of Wymore v. Miller*, 37 Neb. 500 (55 N. W. 1064; 40 Am. St. Rep. 499).

587. (1894.) Where, in an action on a note, a defendant pleads both fraud and failure of consideration, it is not error for the trial court to permit the introduction of evidence as to the transactions between the original parties before the defendant has by evidence attacked plaintiff's *bona fides*, especially in view of the rule that the order in which proof shall be introduced rests within the discretion of the trial court. *Violet v. Rose*, 39 Neb. 660 (58 N. W. 216).

588. (1894.) In an action by the indorsee of a note, where the defendant pleads fraud and failure of consideration, it is not error to permit defendant to testify as to transactions between the original parties, before showing that plaintiff was not a *bona fide* purchaser. *Violet v. Rose*, 39 Neb. 660 (58 N. W. 216).

589. (1894.) When the defense to a note is usury, evidence that the indorsee knew at the time of the purchase that the payee usually loaned money at an usurious rate of interest, while insufficient of itself to charge the purchaser with notice of the defense, is competent to go to the jury as a circumstance to be considered, in connection with other proven or admitted facts, as tending to establish that plaintiff took the paper with notice of its infirmities. *McDonald v. Aufdengarten*, 41 Neb. 40 (59 N. W. 762).

590. (1894.) In an action on a note by an endorsee, alleged by the maker to have been given for certain corporation stock falsely represented by the payee, the maker not alleging in her answer an agreement that the note was not to be delivered until the dividends of the stock should yield a certain return, evidence that such note was not intended to be delivered until such conditions were fulfilled is irrelevant and properly excluded. *Stedman v. Rochester Loan & Bank Co.*, 42 Neb. 641 (60 N. W. 890).

591. (1896.) Where a note executed by a devisor was canceled after his death and a new one given by the devisees, a will showing that the devise was subject to the payment of debts and that the property was bequeathed to them, may, in an action on the note, be admitted in evidence under an issue as to consideration. *McCormal v. Redden*, 46 Neb. 776 (65 N. W. 881).

592. (1896.) In a suit upon a promissory note given as part payment for corporation stock, the defense being that the defendants were induced to make such purchase by certain false representations of the plaintiff, testimony showing that prior to such sale he made to other persons similar misstatements in the sale to them of a portion of the same series of stock is irrelevant and immaterial. *Johnson v. Gulick*, 46 Neb. 817 (65 N. W. 883; 50 Am. St. Rep. 629).

593. (1896.) Where, in an action on a bill or note, the defendant is examined with respect to the genuineness of the signature alone, he should not, on cross-examination, be required to state his opinion touching collateral or incidental matters based upon a comparison of the disputed signature with others. *Norfolk Nat. Bank v. Job*, 48 Neb. 774 (67 N. W. 781).

594. (1897.) In an action on a promissory note, or other written agreement, a contemporaneous contract in writing, con-

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nected therewith by direct reference or by necessary implication, is admissible as part of the transactions involved. *Seieroe v. First Nat. Bank of Kearney*, 50 Neb. 612 (70 N. W. 220).

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595. (1897.) In a suit by an indorsee of a note, admission in evidence, over plaintiff's objection, of a published reward for payee's arrest is prejudicial error. *Sanford v. Craig*, 52 Neb. 483 (72 N. W. 864).

596. (1899.) In a suit by the purchaser of a note from the first indorsee, such indorsee may testify upon rebuttal as to the *bona fides* of the purchase and ownership of the paper. *Knight v. Finney*, 59 Neb. 274 (80 N. W. 912).

597. (1899.) In the trial of an action on a promissory note, the execution of which is denied, evidence of facts and circumstances surrounding the parties and attending the giving of the note is relevant. *German-American Bank of Milwaukee v. Stickle*, 59 Neb. 321 (80 N. W. 910).

598. (1901.) In a suit upon a promissory note, the plaintiff claiming to be an innocent purchaser thereof, the fact that the payee's name appears on the back of the note will not render the note and indorsement competent evidence without proof that it is the signature of the payee. *Western Mattress Co. v. Potter*, 1 Unof. 627 (95 N. W. 841).

599. (1902.) Proof that the note in question was given for a pre-existing debt contracted and due in Oklahoma, is relevant as tending to establish an Oklahoma contract. *Hewitt v. Bank of Indian Territory*, 64 Neb. 468 (90 N. W. 250).

600. (1902.) When the usual rate of discount is shown at the place where a note is purchased, as bearing upon the question of good faith in such purchase, it is proper to exclude evidence offered as to rates of discount in other places, although in the same county. *Canon v. Farmers Bank of Cook*, 3 Unof. 348 (91 N. W. 585).

601. (1902.) An offer to prove that defendant's cashier, when he purchased the note in suit, knew of other alleged fraudulent transactions of the kind in question generally, in Lincoln in the years of 1895 and 1896, and that Woods Bros., of said place, had tried to hire him as a capper, without offering to in any manner connect such proof with the transaction in question, was properly excluded as too remote to be of any assistance to the jury. *Canon v. Farmers Bank of Cook*, 3 Unof. 348 (91 N. W. 585).

602. (1903.) Where plaintiff alleges an absolute agreement to pay drafts of an agent if cashed by plaintiff, and defendants set up a conditional agreement, and the evidence is conflicting, defendants should be allowed to prove facts showing that under the agreement, as claimed by them, there was nothing due the drawer and no authority to make the draft. *Baeschlin v. Chamberlain Banking House*, 67 Neb. 196 (93 N. W. 412).

603. (1903.) In case of a draft made through a bank by an agent on a plea by the drawee of bad faith upon the bank's part, and when there is evidence showing knowledge by it of the relations of the drawer and drawee, evidence tending to show a misappropriation of the proceeds of the draft by the agent for the bank's benefit, and with its knowledge, should be admitted. *Baeschlin v. Chamberlain Banking House*, 67 Neb. 196 (93 N. W. 412).

604. (1904.) When, in an action upon a promissory note, there is evidence tending to show that the note sued upon is not the genuine note of the defendant, it is competent to show the circumstances surrounding the parties at the time of the alleged execution of the note. *Gandy v. Estate of Bissell*, 72 Neb. 356 (100 N. W. 803).

605. (1905.) In an action by a *bona fide* purchaser of a negotiable instrument for value before maturity, without notice, where the defense is fraud in the procurement of the paper, evidence of similar frauds committed by the agent of the payee about the same time is inadmissible. *Hunt v. Van Burg*, 75 Neb. 304 (106 N. W. 329).

——— Altered note.

606. (1890.) Where the defense to an action on a promissory note was that it was indorsed after maturity and that there was no consideration therefor, the note, showing on its face an alteration of dates, is not admissible in evidence without an explanation of such alteration. *Johnson v. First Nat. Bank*, 28 Neb. 792 (45 N. W. 161.) [Overruled. *Dorsey v. Conrad*, 49 Neb. 443.]

607. (1894.) A note showing on its face alteration in rate of interest should not be received in evidence until such alteration is explained. *Courcamp v. Weber*, 39 Neb. 533 (58 N. W. 187). [Overruled. *Dorsey v. Conrad*, 49 Neb. 443.]

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608. (1896.) Where a promissory note is offered in evidence, and it is apparent from an inspection that there had been a material alteration thereof it may generally be received. Whether so altered prior or subsequent to its execution and delivery, is a question, finally, for the determination of the trial court or the jury, as is any controverted fact in the case, from a consideration of all the competent evidence adduced by the parties explanatory or tending to settle the disputed point. *Goodin v. Plugge*, 47 Neb. 284 (66 N. W. 407).

609. (1896.) A note which shows on its face a material alteration may go in evidence in the first instance, leaving the parties to such explanation of the alteration as they may choose to offer. *Dorsey v. Conrad*, 49 Neb. 443 (68 N. W. 645).

——— **Declarations and admissions.**

610. (1875.) In an action upon a promissory note, where the defense was that the note had been given in part payment of real estate, upon which an incumbrance existed, proof that one of the payees had said that "if the defendant would pay off the incumbrance plaintiffs would owe the defendant $5,000," *held* inadmissible. *Mills v. Saunders*, 4 Neb. 190.

611. (1889.) In an action by a married woman, on a promissory note the defense to which was that it was given to her husband, whose initials were the same as hers, and that the note was non-negotiable, the reply being a general denial, a question put the husband on cross-examination asking if he had not, at a certain time and place, had the note in his possession, and offered to trade it to a certain person, saying that it belonged to him, is admissible, as inconsistent with his examination in chief. *Galloway v. Hicks*, 26 Neb. 531 (42 N. W. 709).

612. (1890.) In an action on a note by an indorsee, statements by his agent who presented it to the maker for collection, as to who owned the note, are admissible, on behalf of the maker. *Salisbury v. Iddings*, 29 Neb. 736 (46 N. W. 267).

613. (1893.) In a case where a bank sues the makers of a note indorsed to it by the secretary of the payee, a corporation, the declarations of officers of such corporation, made after the transfer to the bank, are inadmissible, for the purpose of showing want of authority in the secretary to make the transfer. *Commercial Nat. Bank of St. Paul v. Brill*, 37 Neb. 626 (56 N. W. 382).

614. (1895.) In an action against joint makers of a note, one of whom claims his signature was forged by the other, declarations of the latter that he could imitate the signature of any person, are not admissible. *Stratton v. Nye*, 45 Neb. 619 (63 N. W. 928).

615. (1899.) In an action between an indorsee of a promissory note and the maker, the admissions or statements of the indorser made subsequent to the indorsement may not be received in evidence to impeach the validity or weaken the force of the indorsement or the transfer of title evidenced by it. *Zimmerman v. Kearney County Bank*, 57 Neb. 800 (78 N. W. 366).

616. (1899.) Each party testified of one, and only one, conversation in regard to the matter at issue,—the execution of a promissory note. They differed as to the time and place of the conversation. The one gave testimony of admissions made by the other; the latter offered to show what he said at the time and place when and where he claimed to have talked with the former of and concerning the issuable matter. This was excluded. *Held*, Error. *Johnson v. Opfer*, 58 Neb. 631 (79 N. W. 547).

617. (1901.) In an action upon an alleged promissory note, purporting to have been executed by the agent of the maker, in which action one of the matters in dispute is the authority of the agent in the premises, a letter apparently written by the maker and recognizing the existence and validity of the note, but which is not signed otherwise than by the impression thereon of the maker's name by means of a rubber stamp, without evidence as respects by whom or by what authority the stamp was affixed, is inadmissible. *Reynolds v. Phillips*, 1 Unof. 114 (95 N. W. 491).

618. (1903.) Where the genuineness of the note sued on is denied, evidence that several years prior to its alleged execution, the maker had stated that he was in straitened circumstances, and needed to borrow money, is not admissible. *Gandy v. Estate of Bissell*, 5 Unof. 184 (97 N. W. 632).

——— **Parol evidence.**

619. (1888.) Parol evidence is admissible to explain that the word "excepted"

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written on a draft was intended as an acceptance. *Cortelyou v. Maben*, 22 Neb. 697 (36 N. W. 159; 3 Am. St. Rep. 284).

620. (1889.) Where a note has no date of payment, the legal intendment that it is payable upon demand, cannot be changed by parol proof any more than could the express terms of a written instrument be changed. *Roberts v. Snow*, 27 Neb. 425 (43 N. W. 241).

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621. (1890.) While parol testimony may not be received to contradict or vary the terms of a promissory note, yet the consideration for which it was given may be established by parol testimony. *Walker v. Haggerty*, 30 Neb. 120 (46 N. W. 221); (1901) *Gifford v. Fox*, 2 Unof. 30 (95 N. W. 1066).

622. (1892.) In an action on a promissory note parol evidence is admissible that the amount of the note is part of a debt assumed by the holder as part consideration for the sale of a farm to him by the makers. *Fall v. Glover*, 34 Neb. 522 (52 N. W. 168).

623. (1893.) Where persons other than the payee had signed their names on the back of a promissory note at time of its execution, and were, after its maturity, sued by a *bona fide* purchaser of the note as joint makers, it was *held* that parol evidence could not be admitted to limit the character of their liability or show it to be different from what the law presumed it to be. *Salisbury v. First Nat. Bank of Cambridge City*, 37 Neb. 872 (56 N. W. 727; 40 Am. St. Rep. 527).

624. (1893.) A blank indorsement of a negotiable instrument before due, where the transfer is to a *bona fide* holder in the due course of business, establishes a liability which cannot be varied by parol evidence. But between the original parties a blank indorsement may be modified by parol. The entire transaction may be shown by reason of which the indorsement was made, and parol evidence is admissible for the purpose of proving the same. *Holmes v. First Nat. Bank of Lincoln*, 38 Neb. 326 (56 N. W. 1011; 41 Am. St. Rep. 733).

625. (1894.) Evidence of a parol agreement entered into by the makers and payee of a promissory note contemporaneously with or previous to its execution, whereby it was attempted to be shown that such note was not to become due according to its plain terms, but that its collectibility depended upon the happening of an event in the future, was incompetent, and the jury was properly instructed to give it no consideration. *Van Etten v. Howell*, 40 Neb. 850 (59 N. W. 389).

626. (1895.) Parol evidence is not admissible to establish a contemporaneous oral agreement not to negotiate a negotiable instrument. *Waddle v. Owen*, 43 Neb. 489 (61 N. W. 731).

627. (1895.) Between the original parties a blank indorsement may be modified by parol, the entire transaction may be shown by reason of which the indorsement was made, and parol evidence is admissible for the purpose of proving the actual contract made between the indorser and the indorsee at the time of the blank indorsement. *True v. Bullard*, 45 Neb. 409 (63 N. W. 824).

628. (1896.) As against a subsequent *bona fide* holder, the liability created by the indorsement in blank of a bill or note cannot be varied by parol evidence; but, as between the original parties to such an indorsement, the terms of the contract is a proper subject of inquiry, and may be established by parol evidence. *Corbett v. Fetzer*, 47 Neb. 269 (66 N. W. 417).

629. (1896.) As between the original parties to the indorsement, the words "without recourse," following the name of the first, and preceding the name of the second indorser of a bill or note, may be shown by parol evidence to apply to the former instead of the latter. *Corbett v. Fetzer*, 47 Neb. 269 (66 N. W. 417).

630. (1897.) A general indorsement of commercial paper may, except as against a *bona fide* holder, be explained and the precise terms of the agreement shown by parol evidence. *Whitney v. Spearman*, 50 Neb. 617 (70 N. W. 240).

631. (1897.) As between the immediate parties the form of an indorsement is not conclusive, but the nature of the contract may be proved by parol evidence. *United States Nat. Bank v. Geer*, 53 Neb. 67 (73 N. W. 266; 41 L. R. A. 439). [Rehearing, 55 Neb. 462.]

632. (1898.) Where commercial paper is indorsed in blank, the terms of the contract may be shown by parol evidence to be different from those which the law implies in such cases. *United States Nat. Bank v. Geer*, 55 Neb 462 (75 N. W 1088; 70 Am. St. Rep. 390; 41 L. R. A. 444).

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633. (1898.) A restrictive indorsement in unambiguous language cannot be contradicted or explained by evidence resting in parol. *United States Nat. Bank v. Geer*, 55 Neb. 462 (75 N. W. 1088; 70 Am. St. Rep. 390; 41 L. R. A. 444).

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634. (1898.) As between original parties to a note and those not innocent purchasers it may be shown by parol that one signing his name in blank on the back of the note was an accommodation indorser. *Drexel v. Pusey*, 57 Neb. 30 (77 N. W. 351).

635. (1901.) Parol testimony is admissible in an action upon a promissory note to show that it was given to secure the performance of an agreement whereby the payee conveyed to the maker certain lands in consideration that the maker should support the payee during his lifetime, and that the maker had performed the conditions of the agreement. *Gifford v. Fox*, 2 Unof. 30 (95 N. W. 1066).

636. (1902.) Where a promissory note in the usual form calls for the payment of money, evidence that it was to be paid in work and labor cannot be received against the objection of the holder. *Vradenburg v. Johnson*, 3 Unof. 326 (91 N. W. 496).

637. (1903.) Where the rights of innocent third parties are not involved, it is permissible to show by parol evidence that the contract between the indorser and indorsee of a promissory note was different from that which results by legal implication from a blank indorsement. *Jaster v. Currie*, 69 Neb. 4 (94 N. W. 995).

638. (1903.) The terms of a promissory note cannot be contradicted, altered or varied by evidence of a prior or contemporaneous parol agreement between the payor and the payee. *Aultman, Miller & Co. v. Hawk*, 4 Unof. 582 (95 N. W. 695).

639. (1904.) Though the language of a note executed by directors of a corporation imports a personal obligation, it may be shown by parol evidence, on an issue of reformation that the intention of both the makers and the payee was to execute an instrument binding the corporation only, and that, though the language was that which they intended, it did not express their true purpose. *Western Wheeled Scraper Co. v. McMillen*, 71 Neb. 686 (99 N. W. 512).

640. (1905.) Parol evidence of a custom or course of dealing previously pursued by the maker with regard to other notes of a like character is not admissible for the purpose of showing, inferentially, that the indorsers were joint makers, and thus change and enlarge their liability. *Harnett v. Holdrege*, 73 Neb. 570 (103 N. W. 277).

Weight and sufficiency of evidence.

641. (1886.) Defense that, at the time of execution of a note and mortgage sued on, a certain contemporaneous agreement in writing was made by the parties whereby it was intended to change the terms of the note by prescribing the methods of payment is not established by the evidence. *Marshall v. Roe*, 20 Neb. 307 (30 N. W. 59).

642. (1886.) Evidence of transfer after maturity, that the maker was insane, and the note sued on was without consideration; and of two set-offs which, in amount, would overbalance the note, is sufficient to sustain a verdict for the defendant in an action on a promissory note. *Britton v. Berry*, 20 Neb. 325 (30 N. W. 254).

643. (1887.) Where, in an action on a promissory note and account, the answer of the defendant was a plea of payment and overpayment, and there is a failure of proof to show payment of the account, a verdict for the defendant therein cannot be sustained. *Tootle v. Maben*, 21 Neb. 617 (33 N. W. 264).

644. (1887.) Evidence examined, and *held*, not to sustain finding of district court that note in suit was executed. *Nebraska Land & Cattle Co. v. Bowie*, 21 Neb. 667 (33 N. W. 246).

645. (1889.) In an action on several promissory notes in which a set-off is pleaded by defendant the evidence showing the verdict to be excessive, in default of a remittitur the judgment will be reversed. *Everson v. Graves*, 26 Neb. 262 (41 N. W. 994).

646. (1891.) Evidence *held* sufficient to establish oral acceptance of check by drawee. *Farmers & Merchants Bank v. Dunbier*, 32 Neb. 487 (49 N. W. 376).

647. (1892.) An action was brought upon two drafts which it was claimed one W. had accepted. This he denied. The proof tended to show that the alleged acceptance had been obtained, if at all, January 14, 1890, about 7 p. m., by one H., a stranger; that W. had then signed a property statement for an alleged hydro-carbon burner, which H. professed to be about to furnish to him. W. also signed two con-

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tracts. He denied that the signatures to the acceptance were his, and the jury having found that he did not sign the same, *held*, that the verdict conformed to the proof. *State Bank of Wilcox v. Wilkie*, 35 Neb. 579 (53 N. W. 603).

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648. (1892.) In an action on a note, the dispute being as to the word "protest waived," preponderance of the evidence being that the defendant placed the words thereon to satisfy an indorsee, a judgment for the latter is sustained. *Mehagan v. McManus*, 35 Neb. 633 (53 N. W. 574).

649. (1893.) Where a bank has an arrangement with a corporation whereby the bank agrees to discount notes held by the corporation, and in pursuance of such agreement such notes have customarily been brought to the bank and been negotiated by the secretary of the corporation, such facts are sufficient evidence of the authority of the secretary to transfer a particular note and of the genuineness of the indorsement upon such note, the proceeds of the note having been placed by the bank to the corporation's credit and paid out on the corporation's checks. *Commercial Nat. Bank of St. Paul v. Brill*, 37 Neb. 626 (56 N. W. 382).

650. (1895.) The evidence in this case examined, and *held* to show such delay in presentment for payment, as discharged defendant in error from liability to the plaintiff in error as indorser of ordinary checks. *First Nat. Bank of Wymore v. Miller*, 43 Neb. 791 (62 N. W. 195).

651. (1895.) Evidence that notes deposited as collateral security for the payment of other notes were from time to time renewed, interest collected thereon in advance, and the time of payment extended will not of itself support a finding that the holder of such original notes thereby extended their time of payment. *Benton v. German-American Nat. Bank*, 45 Neb. 850 (64 N. W. 227).

652. (1895.) Verdict for plaintiff *held* to be sustained by the evidence in a suit on a note, where the sureties alleged that the principal delivered it without complying with an agreement to procure the signature of another surety. *Brumback v. German Nat. Bank of Beatrice*, 46 Neb. 540 (65 N. W. 198).

653. (1896.) In an action against a husband and wife on a promissory note, the evidence being conflicting and unsatisfactory as to a defense that the wife signed as surety, the case was properly sent to the jury. *McKinney v. Hopwood*, 46 Neb. 871 (65 N. W. 1055).

654. (1896.) Plaintiffs in error, on the evidence in the record, *held* not liable as indorsers. *Corbett v. Fetzer*, 47 Neb. 269 (66 N. W. 417).

655. (1896.) In an action on a note, where the genuineness of the signature was denied, the evidence examined, and *held* sufficient to sustain a verdict for defendant. *Norfolk Nat. Bank v. Job*, 48 Neb. 774 (67 N. W. 781).

656. (1896.) Evidence in an action against the indorsers of a note *held* to show the note to have been made by a partner after the dissolution of the firm and without authority to bind the defendant. *Graves v. Norfolk Nat. Bank*, 49 Neb. 437 (68 N. W. 612).

657. (1897.) In a suit on a note admitted in evidence upon uncontradicted testimony of a qualified witness who gave it as his opinion, on the only issue, that the signatures were genuine, the action of the court in directing a verdict for plaintiff was *held* proper. *Mosher v. Farmers & Merchants Nat. Bank*, 51 Neb. 55 (70 N. W. 540).

658. (1897.) When there is no other disputed question the signatures of defendants are sufficiently proved to allow of the receipt in evidence of a note alleged to have been signed by them when a witness, duly qualified to testify on that question, gives it as his opinion that the alleged signatures are genuine. *Mosher v. Farmers & Merchants Nat. Bank*, 51 Neb. 55 (70 N. W. 540).

659. (1899.) Evidence *held* to sustain a finding that a note had been paid before an alleged assignment of the note had been made. *Root v. Fast*, 58 Neb. 498 (78 N. W. 939).

660. (1901.) Evidence in an action on notes *held* not to support a judgment for defendant. *Lewis v. North*, 62 Neb. 552 (87 N. W. 312).

661. (1901.) Evidence in an action on accepted draft examined, and *held* to support the verdict and judgment. *Clarkson Saw Mill Co. v. Patrick*, 2 Unof. 191 (96 N. W. 211).

662. (1902.) Evidence examined, and *held* not to support the claim that time of payment of notes had been extended so as

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to release a surety thereon. *Parker v. Taylor*, 3 Unof. 318 (91 N. W. 537).

——— Want or failure of consideration.

663. (1882.) In an action upon a promissory note given for fruit trees the defense was a failure of consideration and breach of warranty, but there was no testimony tending to show the loss of trees or a breach of warranty. *Held*, A failure to prove the defense. *Citizens Bank v. Ryman*, 12 Neb. 541 (11 N. W. 850).

664. (1889.) Evidence as to consideration for note sued on *held* sufficient to sustain verdict for plaintiff. *Herron v. Cole Bros.*, 25 Neb. 692 (91 N. W. 765).

665. (1895.) Evidence examined, and *held* not to prove a failure of consideration or to overcome the presumption that the plaintiff is a *bona fide* holder of the note sued on. *Kelman v. Calhoun*, 43 Neb. 157 (61 N. W. 615).

666. (1901.) Evidence examined, and found not to support the defense of want of consideration for, or fraud in procuring, the note and mortgage in suit. *Fourth Nat. Bank of Cadiz v. Craig*, 1 Unof. 849 (96 N. W. 185).

——— Validity of consideration.

667. (1880.) In an action on a promissory note the defendants answered that it was given for the balance due on an optional contract in grain in Chicago. *Held*, That the testimony failed to establish the defense. *Pieronnet v. Lull*, 10 Neb. 457 (6 N. W. 759).

668. (1887.) Evidence *held* to sustain finding that note sued on was obtained by the fraud and connivance of the payee and one of the makers. *Brown v. Herr*, 21 Neb. 113 (31 N. W. 246).

669. (1896.) Suit on a promissory note. Defense: Consideration for the note, a loan of money made by appellee to appellants at a usurious rate of interest, and that the contract was made in the state of New York and void under the laws thereof. Evidence set out at length in the opinion and *held* to sustain the finding of the district court that the contract between the parties was made in, and governed by the laws of, the state of Nebraska. *Bascom v. Zediker*, 48 Neb. 380 (67 N. W. 148).

670. (1902.) Evidence examined, and held sufficient to sustain finding that the note in suit was given in consideration of plaintiff's promise not to prosecute one of the defendants for embezzlement. *Smith Premier Typewriter Co. v. Mayhew*, 65 Neb. 65 (90 N. W. 939).

——— Duress.

671. (1903.) Evidence examined, and *held* to sustain finding that the note in suit was procured by duress, consisting of threats to prosecute the maker's son-in-law. *Nebraska Mutual Bond Ass'n v. Klee*, 70 Neb. 383 (97 N. W. 476).

——— Good faith of purchase.

672. (1889.) A transaction by which a grossly usurious note was transferred to a third party as alleged, before due and for a valuable consideration, but in which neither the seller nor buyer can state what had been paid or the manner of paying the same, fails to establish a *bona fide* purchase. *Lincoln Nat. Bank v. Davis*, 25 Neb. 376 (41 N. W. 281).

673. (1892.) A promissory note was given to an agent for a windmill. The agent indorsed the note and transferred it to the windmill company to be applied on his general account. The company afterwards transferred it to its general agent, who took it in satisfaction of a debt, paying the full value thereof. The windmill proved defective. *Held*, That the testimony tended to show that the plaintiff was a *bona fide* purchaser of the note for value before maturity and without notice, and that the most that could be said of the proof impugning his right was that it raised a suspicion of bad faith, but was wholly insufficient to found a verdict for the defendant upon. *Martin v. Johnston*, 34 Neb. 797 (52 N. W. 819).

674. (1894.) The evidence considered and *held* sufficient to sustain the plea of usury, and that plaintiff was not an innocent purchaser without notice. *McDonald v. Aufdengarten*, 41 Neb. 40 (59 N. W. 762).

675. (1899.) Evidence *held* to sustain a finding that plaintiff and his assignor purchased the note in suit after maturity, and that nothing was due on the note when the action was brought. *Davis v. Culver*, 58 Neb. 265 (78 N. W. 504).

676. (1901.) Where the defense of usury is established, the mere introduction of a promissory note duly indorsed is insufficient to prove that the plaintiff is an innocent holder for value before maturity. *Male v. Wink*, 61 Neb. 748 (86 N. W. 472).

677. (1906.) Evidence examined, and

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held not sufficient to show bad faith or want of honesty in the purchase of the note in controversy. *Norwood v. Bank of Commerce*, 77 Neb. 205 (109 N. W. 152).

678. (1907.) Evidence *held* sufficient to sustain finding that plaintiff was not a *bona fide* purchaser of a note given in payment for a stolen horse. *Palmer v. McFarlane*, 78 Neb. 788 (111 N. W. 794).

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——— Authority to receive payment.

679. (1891.) One L., having dealings with the Stewart-Chute Lumber Co. at Adams, Nebraska, in 1887, gave his note thereto for $269.80. This note soon afterwards was transferred to the South Branch Lumber Co., which brought an action on the note. L. pleaded payment, and in support thereof introduced a receipt, "Received from D. Littlejohn $100 on account, $100. Signed, S. C. L. Co." The party giving this receipt did not have the note in his possession, and the proof failed to show that he was authorized to receive the money. *Held*, A failure of proof on a material point. *South Branch Lumber Co. v. Littlejohn*, 31 Neb. 606 (48 N. W. 476).

680. (1901.) Evidence examined, and *held* not to show agency for the collection of a negotiable note. *Gilbert v. Garber*, 62 Neb. 464 (87 N. W. 179).

631. (1901.) Evidence examined, and *held* not sufficient to show that the person to whom the mortgage debt was paid was the agent of the owner and holder and authorized to receive the same. *Thompson v. Buehler*, 1 Unof. 590 (95 N. W. 854).

682. (1902.) Evidence in an action on a note and mortgage by a purchaser from the original payee *held* sufficient to sustain a finding that the original payee was impliedly authorized to collect the same and payment to him was payment to the holder. *Pochin v. Knoebel*, 63 Neb. 768 (89 N. W. 264).

683. (1902.) Evidence examined, and *held* not sufficient to show that F. was the agent of the pledgee of the note to collect the principal of the debt. *Connecticut Trust & Safe Deposit Co. v. Trumbo*, 2 Unof. 850 (90 N. W. 216).

684. (1906.) In an action on a note, evidence held insufficient to sustain a finding of payment to a third person as agent for the payee, there being no express authority of such alleged agent. *Parker v. Leech*, 76 Neb. 135 (107 N. W. 217).

——— Possession as evidence of ownership.

685. (1879.) Negotiable paper before maturity is intended, to some extent at least, to represent money. Possession is *prima facie* evidence of ownership where it is payable to bearer, or indorsed in blank. *Wortendyke v. Meehan*, 9 Neb. 221 (2 N. W. 339); (1898) *New England Loan & Trust Co. v. Robinson*, 56 Neb. 50 (76 N. W. 415; 71 Am. St. Rep. 657).

686. (1880.) A note itself is *prima facie* evidence of indorsement and delivery before maturity, and its possession is *prima facie* evidence of ownership. *Knowlton v. Parsons*, 10 Neb. 502 (6 N. W. 605).

687. (1883.) The possession by the plaintiff of a negotiable promissory note maturing January 1, 1881, executed by the defendants, payable to the order of T. K. P. with the following words written on the back, "collection guaranteed and notice of protest waived this 26th of April, 1880. T. K. P.," is evidence of title to such note in the plaintiff, and of its receipt of the same before maturity, for value, in the due course of business and without notice of infirmity. *State Nat. Bank v. Haylem*, 14 Neb. 480 (16 N. W. 754).

688. (1894.) In an action by the transferee of a negotiable note properly indorsed before maturity, the production of the note shows *prima facie* that he is a *bona fide* holder. *McDonald v Aufdengarten*, 41 Neb. 40 (59 N. W. 762).

689. (1895.) Possession of instruments which pass by delivery alone is *prima facie* evidence of ownership and therefore is *prima facie* proof in support of a claim of any lesser interest. *Sharmer v. McIntosh*, 43 Neb. 509 (61 N. W. 727); (1896) *City Nat. Bank of Hastings v. Thomas*, 46 Neb. 861 (65 N. W. 895).

690. (1898.) Possession of a negotiable note, duly indorsed by the payee, creates a presumption of title thereto in the holder. *Saunders v. Bates*, 54 Neb. 209 (74 N. W. 578).

691. (1899.) Where plaintiff's averment of ownership by indorsement is denied in a suit on a note, introduction of the note in evidence, without referring to the indorsement, does not establish plaintiff's right to recover. *Grant v. Clarke*, 58 Neb. 72 (78 N. W. 364).

692. (1901.) The possession of a negotiable promissory note is *prima facie* evi-

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dence of ownership. *Sanford v. Litchenberger*, 62 Neb. 501 (87 N. W. 305). (1902) *Michigan Mutual Life Ins. Co. v. Klatt*, 2 Unof. 872 (92 N. W. 325); (1904) *Gandy v. Estate of Bissell*, 72 Neb. 356 (100 N. W. 803).

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693. (1902.) If a payee of a note makes an indorsement thereon to G., but delivers it to M., and M. brings action thereon, his possession of the note, with proof that he paid the payee therefor, will raise a presumption that the note was never delivered to G., and is sufficient *prima facie* evidence of M.'s ownership of the note. *Menzie v. Smith*, 63 Neb. 666 (88 N. W. 855).

694. (1902.) In a suit upon a negotiable promissory note, the possession of the note is *prima facie* evidence of ownership, which will not be overcome by a finding in a former action, before the note was due, that it was the property of a stranger to the pending suit. *Ryan v. West*, 63 Neb. 894 (89 N. W. 416).

695. (1903.) The fact that a promissory note was found in the possession of the payee at the time of his death, is evidence that he had not made a present of it to the maker. *Oelke v. Theis*, 70 Neb. 465 (97 N. W. 588).

——— Payment.

696. (1884.) The possession of a canceled bank check by the drawer, who testifies that on the day of its date he made and delivered it to the drawee in payment of a debt, is sufficient proof *prima facie* of the payment of the amount named in the check. *Peavy v. Hovey*, 16 Neb. 416 (20 N. W. 272).

——— Possession as evidence of payment.

697. (1893.) The possession of a promissory note by the maker after maturity thereof is *prima facie* evidence of payment. *Smith v. Gardner*, 36 Neb. 741 (55 N. W. 245).

698. (1893.) The force of the presumption of payment from the possession of a note by the maker depends upon the circumstances of the particular case. It is error, therefore, to instruct the jury that possession of a note raises a strong presumption of payment or is a strong circumstance to prove payment. *Smith v. Gardner*, 36 Neb. 741 (55 N. W. 245).

699. (1903.) In an action in replevin by a mortgagee, the production at the trial, from the possession of the plaintiff, of the notes evidencing the debt and payable to him, is *prima facie* evidence that they have not been paid. *Heagney v. Case Threshing Machine Co.*, 4 Unof. 753 (99 N. W. 260).

Questions of law and fact.

700. (1876.) Where the defense, in an action upon a promissory note is based upon an alleged alteration of the instrument, it is the duty of the court to determine whether such alteration is material. *Palmer v. Largent*, 5 Neb. 223 (25 Am. Rep. 479).

701. (1897.) Where the terms of a note in suit are not disputed, the court may instruct the jury whether or not the note is negotiable. *Corry v. Klump*, 52 Neb. 592 (72 N. W. 857).

702. (1897.) The question whether title passes to a negotiable instrument delivered to a bank under a restrictive but ambiguous indorsement, without an express contract, but in pursuance of an established usage, is one of fact rather than law, and depends on the intent of the parties. *United States Nat. Bank v. Geer*, 53 Neb. 67 (73 N. W. 266; 41 L. R. A. 439). [Rehearing, 55 Neb. 462.]

703. (1904.) Where there is conflicting evidence with regard to whether or not the holder of a negotiable promissory note is an innocent purchaser, for value, before maturity, the question is a question of fact for the jury, and it is error for the court to direct a verdict for the plaintiff. *Padget v. O'Connor*, 71 Neb. 314 (98 N. W. 870).

Direction of verdict.

704. (1889.) Where a note is given to a selling agent in payment of a threshing machine, and such note is forwarded to their principal, and at maturity the maker sends the amount to such agents, who reply that they do not have the note but will send and get it, there is no evidence of authority of such agents, and a verdict for plaintiff, in an action on such note, should be directed. *Sieberling v. Demarec*, 27 Neb. 854 (44 N. W. 46).

Instructions.

705. (1877.) It is error to refuse to give instructions that where the answer alleges that one of several joint makers of a note was in fact a surety, it will be taken as true, where no reply was made. *Dillon v. Russell & Holmes*, 5 Neb. 484.

706. (1882.) An instruction which, substantially, told the jury to find for the de-

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fendant, if they should find from the evidence "that the defendant before signing said note used the diligence and care that a man of ordinary care and prudence would have used under similar circumstances, to ascertain its contents," is erroneous. *Dinsmore v. Stimbert*, 12 Neb. 433 (11 N. W. 872).

707. (1884.) In an action on a note given for money placed in defendant's hands to be used for a certain purpose, where there was evidence that, on the failure of such use, the payee directed it to be used for another purpose, which was done, an instruction that unless there was a final settlement and a balance struck between the parties, "then there was no accord and satisfaction and the plaintiff must recover," is properly refused. *Hitchcock v. Hassler*, 16 Neb. 467 (20 N. W. 396).

708. (1887.) In an action on a note where the defense was that such note was obtained by the fraud and connivance of plaintiff and one of the defendants, the instructions given set out and *held* to be proper. *Brown v. Herr*, 21 Neb. 113 (31 N. W. 246).

709. (1889.) Where in an action on a note the jury were instructed that if they found that the defendant had not proved the failure of consideration as alleged in his answer, they should find for the plaintiff, held, error, as substantially withdrawing from the jury the other issues involved in the case. *Galloway v. Hicks*, 26 Neb. 531 (42 N. W. 709).

710. (1889.) An instruction that the defendant by his answer alleged that the note upon which the action was brought was executed and delivered "to the plaintiff" to procure credit, etc., was erroneous as a misstatement of the issues in the case, the allegation of the answer being that the note was made to the husband of the plaintiff and not to her, her ownership and title being denied. *Galloway v. Hicks*, 26 Neb. 531 (42 N. W. 709).

711. (1889.) Where it appears that the makers of notes are jointly liable and entitled to any set-off which might be proved, it is not error to instruct the jury that they may find the whole of the set-off, prorate the same, and deduct from the notes the proper amount so found. *Davis v. Sloman*, 27 Neb. 877 (44 N. W. 41).

712. (1890.) In action on note given as purchase price of hotel and fixtures, defended on ground of fraudulent representations as to value, instructions examined and *held* proper. *Salisbury v. Iddings*, 29 Neb. 736 (46 N. W. 267).

713. (1890.) In an action on a promissory note, the defense being forgery, an instruction that if the jury find for defendant on the question of forgery he is not liable on the note even though it has passed into the hands of a *bona fide* purchaser before maturity, was properly given. *First Nat. Bank v. Carson*, 30 Neb. 104 (46 N. W. 276).

714. (1891.) In an action to recover upon a note which the plaintiff claimed had been canceled by mistake without being paid, and delivered to the defendant, and the defendant claimed that he had paid the same, two of the instructions given were inconsistent with each other as to the burden of proof, and therefore erroneous. *Farmers Bank v. Harshman*, 33 Neb. 445 (50 N. W. 328).

715. (1893.) In an action on a promissory note, the defense to which was failure of consideration, in that there was a breach of warranty in the sale of certain sheep, instructions making fraud a valid defense to the action, no fraud being in issue, is erroneous. *Farmers & Merchants Bank v. Upham*, 37 Neb. 417 (55 N. W. 1044).

716. (1894.) In an action by an indorsee of a note where the maker alleges, as a defense, that the rate was given for certain stock of a milling corporation falsely represented to be solvent and paying large dividends, and the evidence shows the indorser was a *bona fide* purchaser before maturity, an instruction for the plaintiff was proper. *Stedman v. Rochester Loan & Bank Co.*, 42 Neb. 641 (60 N. W. 890).

717. (1896.) Instructions *held* not prejudicial to payee in an action on a note where the genuineness of the signature was in issue. *Norfolk Nat. Bank v. Job*, 48 Neb. 774 (67 N. W. 781).

718. (1898.) In an action against the sureties on a note it is error to instruct the jury that they are not liable thereon to the same extent as the principal, and that the contract of the sureties is to pay only when the liability of the principal is fixed and ascertained by a judgment at law against him, and execution issued thereon and his property exhausted. *Kroncke v. Madsen*, 56 Neb. 609 (77 N. W. 202).

719. (1900.) In an action to recover on a lost note, instructions in regard to the

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burden of proving the loss are not prejudicially erroneous, where it appears conclusively that the note was non-negotiable and had been delivered to the defendant. *Walsh v. Peterson*, 59 Neb. 645 (81 N. W. 853).

720. (1901.) In an action on a note of which plaintiff claims to be a holder without notice and the payee's name appears on the back of the note, if the allegation that the note was indorsed to the plaintiff is denied and the evidence upon that point is conflicting, it is error to refuse to instruct the jury that they cannot find that the plaintiff is an innocent purchaser unless the note bears the genuine or authorized indorsement of the payee. *Western Mattress Co. v. Potter*, 1 Unof. 627 (95 N. W. 841).

721. (1902.) An instruction that a defendant who had admitted execution of the note sued on had the burden of proving "the material allegations" of the answer in which he set up an affirmative defense, without stating the issues raised upon such answer, *held* without prejudice where the allegations therein were few in number, plain, and simply expressed, and all material, and another instruction, stating the rules of law applicable to the defendant's case, set forth what he must establish substantially to the same effect as the facts pleaded. *Murray v. Burd*, 65 Neb. 427 (91 N. W. 278).

722. (1903.) Where no issue as to the *bona fides* of the transfer and want of notice on the part of the indorsee is raised by the pleadings, error in instructing the jury that a promissory note, containing an agreement to pay exchange on the principal sum, is non-negotiable, is without prejudice. *Bovier v. McCarthy*, 4 Unof. 490 (94 N. W. 965).

723. (1903.) Where a suit on a note is defended on the ground either that the note was forged, or that the amount thereof had been raised, an instruction to find for plaintiff "if you believe that the signature is genuine," is erroneous. *Gandy v. Estate of Bissell*, 5 Unof. 184 (97 N. W. 632).

724. (1904.) Instructions submitting to the jury a question whether an assumption of the entire notes in controversy by two of the makers thus releasing the other two, was or was not induced by fraud, found vague if not contradictory. *Jackson v. Lalicker*, 5 Unof. 473 (99 N. W. 32).

725. (1905.) Where a bank receives a check on another bank after banking hours and the drawee bank fails before opening hours the next day an instruction that if the payee had reason to believe the drawee bank was in failing circumstances, it was its duty to present the check for payment forthwith, is erroneous. *Temple v. Carroll*, 75 Neb. 61 (105 N. W. 989).

Right to open and close.

726. (1902.) Where petition, in vague terms and by reference to note, alleges that twelve per cent. per annum is a lawful rate of interest by statutes of Oklahoma, and note sued on bears date in Oklahoma and interest at twelve per cent per annum, and such allegation is denied, *held* not error to refuse opening and closing to defendants, who plead usury, but admit execution and delivery of note. *Hewit v. Bank of Indian Territory*, 64 Neb. 463 (90 N. W. 250).

Amount of recovery.

727. (1888.) In an action on a purchase money note the consideration may be inquired into and plaintiff's recovery limited to the actual amount due. *Wilson v. Ellsworth*, 25 Neb. 246 (41 N. W. 177).

728. (1893.) Where, in an action on a negotiable check, payment of which had been stopped by the drawer, the answer admitted a portion of the indebtedness, and alleged a partial failure of consideration, the plaintiff should recover the amount admitted to be due, and judgment in favor of defendant could not be sustained. *Lanning, Antram & Co. v. Burns*, 36 Neb. 236 (54 N. W. 427).

Stipulation for judgment.

729. (1879.) Where one member of a partnership draws a sixty days' sight draft of the firm of T. & S. and indorsed it in the name of the firm, and the drawer's partner denies any liability thereon, but at the trial stipulated for judgment against himself as a mere accommodation indorser, such stipulation is virtually an admission of the validity of the endorsement, and of his liability thereon. *Trego v. Lowrey*, 8 Neb. 238.

Judgment.

730. (1881.) Upon an action on promissory note and to enforce vendors lien where the answer admitted execution of the note but denied existence of lien, and the lien was found not to exist, the plaintiff is entitled to judgment for amount of the note. *Rhea v. Reynolds*, 12 Neb. 128 (10 N. W. 549).

731. (1885.) Where the justice has in

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his possession the instrument on which the action is brought, and there is no affidavit of the defendant made and filed with him denying its execution, nor any defense made to the action, the justice may render judgment on such instrument, although the plaintiff fail to appear. *Phœnix Ins. Co. v. Lemke*, 18 Neb. 184 (24 N. W. 727).

732. (1898.) Section 511 of the code of civil procedure cannot be invoked in determining the liability of a surety to his obligee or payee, but merely requires that a judgment against a principal and surety shall state which is the principal debtor and which the surety, and provides, as between them, the mode of enforcing the same. *Kroncke v. Madsen*, 56 Neb. 609 (77 N. W. 202).

733. (1898.) The rendition of a judgment against principal and surety on a note, without having judicially determined on the record which defendant was the principal debtor and which the surety, in accordance with section 511 of the code of civil procedure, does not extinguish the relation of suretyship between the parties, and the duties of the creditor with reference thereto. *Drexel v. Pusey*, 57 Neb. 30 (77 N. W. 351).

734. (1898.) Where it is disclosed in an action on a note that one maker is principal and the other surety, a judgment for plaintiff should, under section 511 of the code, state which defendant is the principal debtor and which is surety. *Maxwell v. Home Fire Ins. Co.*, 57 Neb. 207 (77 N. W. 681).

——— Reformation of instrument.

735. (1877.) In an action between the original parties to a promissory note, the district court has ample power to correct mistakes and enforce the original contract. *Brown v. Straw*, 6 Neb. 536 (29 Am. Rep. 369).

——— Merger and bar.

736. (1899.) A former judgment on a note is not a defense to a subsequent action on the same note, where the judgment was void for want of jurisdiction over the person of the defendant. *Sackett v. Montgomery*, 57 Neb. 424 (77 N. W. 1083; 73 Am. St. Rep. 522).

——— Payment and satisfaction.

737. (1889.) In an action against the makers and indorser of a promissory note judgment was rendered against all of the defendants jointly, no defense of suretyship having been made by the indorser. An execution was issued on the judgment and placed in the hands of the sheriff for collection and which was paid by the defendant, who was the indorser of the note upon which the judgment was founded, the money being returned by the sheriff with the execution to the clerk of the district court, who paid it to the judgment plaintiff. After the receipt of the money the plaintiff in the action assigned the judgment to the defendant, by whom it was paid, and who in the name of the plaintiff caused an execution to issue which was levied upon the land of his co-defendant, and under which the sheriff sold the said land. *Held*, That said sale should be set aside upon the ground that the payment of the judgment satisfied and canceled it, and that the relation of principal and surety did not exist as between the judgment defendants. *Potvin v. Meyers*, 27 Neb. 749 (44 N. W. 25).

——— Opening or vacating.

738. (1879.) One who signs a note as surety supposing an action against the principal to be on the genuine note, when in fact it was on a forged instrument, may secure relief in equity against a judgment recovered therein, when he makes no defense under the mistake. *Young v. Morgan*, 9 Neb. 169 (2 N. W. 237).

Attorney's fees.

739. (1881.) Attorney's fees in notes not recoverable since June 1, 1879. *Dow v. Updike*, 11 Neb. 95 (7 N. W. 857).

740 (1881.) There is no authority to allow attorney fees in actions founded on instruments executed since June 1, 1879. *Hardy v. Miller*, 11 Neb. 395 (9 N. W. 475).

741. (1881.) The repeal of the act allowing attorney's fees on foreclosure did not affect a contract entered into while the act was in force. *White v. Rourke*, 11 Neb. 519 (9 N. W. 689).

742. (1884.) If an allowance of attorney's fees is made, the record should show the fact, and it should be kept entirely distinct from the judgment proper. It is considered in the nature of costs and should be treated as such. *Aultman & Co. v. Stout*, 15 Neb. 586 (19 N. W. 464).

743. (1893.) A provision in a note executed since June 1, 1879, for the payment of attorney's fees for collection is invalid. *Security Company of Hartford v. Eyer*, 36

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Neb. 507 (54 N. W. 838; 38 Am. St. Rep. 735).

Appeal and error.

744. (1896.) In an action on certain promissory notes a finding of payment upon conflicting evidence will not be disturbed. *McCormick Harvesting Machine Co. v. Seeman*, 49 Neb. 312 (68 N. W. 482).

BLACKLIST.

As libel, see *Libel and Slander*, § 20.

BLACKMAIL.

Charging one to be blackmailer libelous, see *Libel and Slander*, § 10.

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BOARDING-HOUSES.

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For general city taxes, see *Municipal Corporations*, §§ 1014-1028.

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BOARD OF SUPERVISORS.

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County bonds, see *Counties*, §§ 398-409; 460-543.

Estoppel to deny validity of county bonds, see *Counties*, §§ 534-537.

Indemnity bonds in general, see *Indemnity*.

Limitation of action on indemnity bond, see *Indemnity*, § 28.

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Compelling registration of public bonds, see *Mandamus*, §§ 156-158.

Of builders' contracts, see *Mechanics' Liens*, VIII.

Contractor's bond to city, see *Municipal Corporations*, §§ 289-293.

Of cities, see *Municipal Corporations*, §§ 921-968.

Validity of bond issued by city, see *Municipal Corporations*, §§ 961-964.

Right of taxpayer to object to issue by city, see *Municipal Corporations*, §§ 961-964.

Liability of surety in general, see *Principal and Surety*, II.

Discharge of surety in general, see *Principal and Surety*, III.

In aid of railroads, see *Railroads*, II.

State bonds, see *States*, § 211.

School district bonds, see *Schools and School Districts*, §§ 174-197.

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Irrigation bonds, see *Water and Watercourses*, §§ 251-253.

For performance of duties of trust or office.

Of particular public officers, see, also, specific topics.

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Liability on clerk's bond, see *Clerk of Courts*, §§ 20-30.

Additional bond of clerk of district court, see *Clerk of Courts*, §§ 5, 6.

Action on coroner's bond, see *Coroners*, § 4.

Of county officers, see *Counties*, §§ 135-141.

Of administrators, see *Executors and Administrators*, §§ 356-368.

Of administrator for sale of real estate, see *Executors and Administrators*, §§ 222-224.

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Liability of road overseer on bond, see *Highways*, § 150.

Liability of judge on bond, see *Judges*, §§ 30-34.

Of justice of peace, see *Justices of the Peace*, § 6.

Liability of justice of peace on bond, see *Justices of the Peace*, §§ 32-34.

Compelling approval of official bonds, see *Mandamus*, §§ 148-151.

Of public officers, see *Officers*, §§ 23-41.

Alteration of bond of public officers, see *Officers*, §§ 169-171.

Liability on sheriff's bond, see *Sheriffs and Constables*, §§ 121-145.

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Liability on trustee's bond, see *Trusts*, §§ 217-220.

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Appeal bonds, see *Appeal and Error*, VI, C.

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Liability on supersedeas bond on appeal from foreclosure, see *Mortgages*, §§ 932-939.

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Admissibility in evidence, see *Evidence*, §§ 312-318.

BOOKS OF SCIENCE.

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BOUNDARIES.

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Boundaries of cities, see *Municipal Corporations*, §§ 61-64.

Effect of change of stream, see *Water and Watercourses*, §§ 61-74.

Changing boundary of township, see *Towns*, § 11.

I. DESCRIPTION.

Location of lines.

1. (1875.) In identifying a block of lots depended upon the correct location of another block, some distance away, a corner of which has been taken as an initial point in making the survey; and the surveyor testified that in 1857 a fence was erected around the block, but was destroyed in 1862, and in making survey in question, he found west line and southwest corner by remains of the fence, instructions were properly given to the jury that in determining whether the fence had been built upon the true line, they may take into account the time when it was built, the fact that it was about the time of the survey. *Horbach v. Miller*, 4 Neb. 31.

Townsite lines.

2. (1884.) The intention of the proprietor of a town site as to the streets and lots therein is indicated by the monuments which he has caused to be placed at the corners of the lots, and by his conveyance of the streets to the public, and in case of variance between the plat and survey the lines actually run and marked on the ground will control. *Holst v. Streitz*, 16 Neb. 249 (20 N. W. 307).

Courses and distances.

3. (1880.) Mounds thrown up by the government surveyors as corners, and quarter section corners, of sections, control course and distance. *Johnson v. Preston*, 9 Neb. 474 (4 N. W. 83); (1894) *Thompson v. Harris*, 40 Neb. 230 (58 N. W. 712).

4. (1895.) Where the original mounds or monuments established during a government survey can be identified, they will control courses and distances. *Peterson v. Skjelver*, 43 Neb. 663 (62 N. W. 43).

4a. (1908.) Fixed monuments and boundaries actually marked upon the ground by the government surveyors, when established, control the distances stated in the notes of such survey. *Bock v. Porterfield*, 80 Neb. 523 (114 N. W 597).

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5. (1907.) Fixed monuments and known corners govern both courses and distances. *Bridenbaugh v. Bryant*, 79 Neb. 329 (112 N. W. 571).

5a. (1907.) In determining the boundaries of land, fixed monuments and known corners govern both courses and distances; and, where the existence of the original government corner is established at a certain point by sufficient evidence, its authenticity cannot be overcome by showing that the location is not at the distance from other monuments indicated by the field notes of the original survey. *Hurn v. Alter*, 80 Neb. 183 (113 N. W. 986).

Watercourses as boundaries.

6. (1888.) Where the main-land and an island have been separately surveyed, and purchased by different parties as distinct tracts, the grantees of the main-land cannot claim the island as included in their grant. *Wiggenhorn v. Kountz*, 23 Neb. 690 (37 N. W. 603; 8 Am. St. Rep. 150).

7. (1902.) Grants of land bounded upon a river not navigable carry with them the exclusive right and title of the grantee to the centre of the stream, unless the terms of the grant clearly denote the intention to stop at the bank or margin of the river; the rule of the common law being that proprietors of land adjoining public rivers not affected by the flow of the tide own the soil *ad filum aquæ*. *McBride v. Whitaker*, 65 Neb. 137 (90 N. W. 966).

——Meandered lines.

8. (1876.) Although, as to public lands of the United States, a meandered line is generally considered as following the windings of a stream, yet the question whether it does so or not may be determined by evidence *aliunde*. The mere fact that it is run and designated upon the plats as a meandered line is not conclusive against the government. *Lammers v. Nissen*, 4 Neb. 245; (1886) *Bissel v. Fletcher*, 19 Neb. 725 (28 N. W. 303); (1892) *Harrison v. Stipes*, 34 Neb. 431 (51 N. W. 976).

9. (1902.) A grant of land bounded upon a non-navigable river, made by the general government with reference to the plat of the survey, which shows a meandered line along the river bank, conveys to the grantee title to such unsurveyed islands or parts of islands as lie within that limit. *McBride v. Whitaker*, 65 Neb. 137 (90 N. W. 966).

10. (1902.) An instruction that the jury were to decide from the evidence whether or not certain meandering lines, located by the government surveyor, could be identified where such lines indicated the margin of a certain channel, does not substitute such meandered lines for the center of the channel as a boundary, where the jury are expressly told that, if they can locate such channel, its center is to serve as the boundary between the parties in the action. *Shrake v. Laflin*, 3 Unof. 489 (92 N. W. 184).

Location of corners.

11. (1880.) In an action to recover certain tracts of lands, and to establish the corners thereof, where the jury find that such corner was established by the government surveyors, its location cannot be changed by testimony showing that it is not equidistant between the southwest and southeast corners of the section. *Johnson v. Preston*, 9 Neb. 474 (4 N. W. 83).

12. (1902.) If the location of section and quarter section corners by the original government survey can be ascertained, they are not to be moved, but will control all other surveys; but when the marks of the government survey have been obliterated, and the location of the corners by that survey cannot be established by witnesses who know where they were located, resort must be had to other evidence, and in the absence of any other proof, the measurements indicated by the field notes of the government survey must control. *Clark v. Thornburg*, 66 Neb. 717 (92 N. W. 1056).

13. (1902.) Government corners fixed by a United States surveyor at the time of the original survey will control the field notes of the survey taken at the time the corner was erected and will control the field notes or courses and distances of any subsequent survey. Such corner, if identified by the proofs, is the best evidence of where the line should be. But in the absence of such corner, or of satisfactory proof of its location, the field notes of the survey will govern and determine the true line, and such field notes and government plats in such case are *prima facie* evidence of its true location, and the burden is then shifted to the party who wishes to establish the corner at a place different from that called for by the field notes and government plat of the original survey. *Knoll v. Randolph*, 3 Unof. 599 (92 N. W. 195).

14. (1906.) In an action to establish a controverted section line, where the trial is conducted by both parties on the theory

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that the corner established by the government surveyors was not a lost corner, it is not error to charge the jury that they are to determine the location of the original boundary line, even though evidence was admitted that a corner had been established by the county surveyor who proceeded on the theory that the original corner was lost. *Stryker v. Meagher*, 76 Neb. 616 (107 N. W. 792).

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Establishment by adjoining owners.

15. (1882.) Where the owners of a fractional half section of land, agreed upon an equal division of the tract and established a line upon which a hedge was set out, and fence erected, and both parties cultivated up to and made improvements upon their respective tracts with reference to this line, and sold and conveyed their respective interests in the land, the grantees having knowledge of the agreement, the line thus established will be sustained, particularly in view of the fact that there was testimony tending to show that the action was barred. *Trussel v. Lewis*, 13 Neb. 415 (14 N. W. 155; 42 Am. Rep. 767).

16. (1882.) Where the true line can be ascertained, and parties by mistake agree upon an erroneous line as their boundary, believing it to be the true line, they will not be concluded by such agreement from claiming to the true line when discovered, unless the statute of limitations has run, or equitable reasons exist for establishing the erroneous line. But if the true line cannot be ascertained with certainty, then an agreement establishing a line of division will be sustained. *Trussel v. Lewis*, 13 Neb. 415 (14 N. W. 155; 42 Am. Rep. 767).

17. (1893.) Where there is a dispute as to the exact boundary between the owners of adjoining lands, and a county surveyor establishes a line upon an actual survey of the lands, and both claimants participated in making and paying the expenses of the survey, which survey was acquiesced in for a considerable time afterwards, it will not be disturbed because a new survey, made some years afterwards, tends to show a mistake in the establishment of such line. *Benson v. Daly*, 38 Neb. 155 (56 N. W. 788).

18. (1902.) Where a division line, supposed to be the true line established by the government survey, has been acquiesced in by the parties interested for more than ten years, it is conclusive of the location of the boundary line; but whether such line was agreed upon, or has been acquiesced in as the true division line, is a question of fact to be submitted to the jury in a proper case. *Clark v. Thornburg*, 66 Neb. 717 (92 N. W. 1056).

19. (1903.) Where the true boundary line between adjoining owners is uncertain and unknown to them and may be ascertained only at more or less trouble and expense, an executed agreement to accept and abide by a certain line as such boundary, is binding upon the parties and subsequent purchasers having notice thereof, although the boundary agreed upon may not be the true line. *Egan v. Light*, 4 Unof. 127 (93 N. W. 859).

20. (1903.) A road was ordered by the authorities of Nance county along a "half section line." In a contest over the location of such line between owners of premises on opposite sides thereof, in which contest the county is not interested, *held* that the line of a division fence jointly built between the holdings of the contending parties, to which each party had occupied, and maintained possession for more than ten years, was rightly adopted by the trial court as the "half section line" within the meaning of the proceedings locating such road. *County of Nance v. Russell*, 5 Unof. 97 (97 N. W. 320).

21. (1903.) Where the true boundary line between adjoining owners is uncertain and unknown to them and may be ascertained only at more or less trouble and expense, an executed agreement and abide by a certain line as such boundary, is binding upon the parties and subsequent purchasers having notice thereof, although the boundary agreed upon may not be the true line. *Lynch v. Egan*, 67 Neb. 541 (93 N. W. 775).

22. (1903.) Evidence showing that both plaintiff and defendant are grantees of parties who had fixed the boundary line between their premises by agreement, and that the grantees had notice of such agreement, sustains a decree enjoining defendant from tearing down the agreed boundary fence. *Lynch v. Egan*, 67 Neb. 541 (93 N. W. 775).

23. (1907.) A boundary line agreed upon by adjoining land owners as the result of a survey and acquiesced in by them for more than ten years, is conclusive, although such survey afterwards proves to be inaccurate. *Smith v. Nelson*, 78 Neb. 745 (111 N. W. 779).

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II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

Judicial notice of correctness of surveys.

24. (1883.) Judicial notice will not be taken of the incorrectness of the government surveys of an Indian reservation, although the court, as individuals may believe it incorrect. *Minkler v. State, ex rel. Smithers*, 14 Neb 181 (15 N. W. 330).

Presumption and burden of proof.

25. (1891.) Where a corner supposed to have been established by the government in the surveys of public lands has been acquiesced in by adjoining owners of such lands for nearly ten years, and improvements made and the land broken up to the line thus established, there is a presumption in favor of such corner being the true one, which can only be overcome by clear proof that it was not established by the government. *Coy v. Miller*, 31 Neb. 348 (47 N. W. 1046).

26. (1902.) Where, on a line of the same survey and between remote corners, the whole length of which is found to be variant from the length called for, it is not to be presumed that the variance was caused from a defective survey of any part, but it must be presumed, in the absence of circumstances showing the contrary, that it arose from imperfect measurement of the whole line, and such variance must be distributed between the several subdivsions of the line in proportion to their respective lengths. *Brooks v. Stanley*, 66 Neb. 826 (92 N. W. 1013).

Evidence admissible.

——In general.

27. (1893.) Where a government corner between two adjoining landowners has been obliterated, the exact location of the corner may be determined by the jury from the evidence in an action of ejectment, and it is unnecessary first to establish the corner by an action in equity. *Kittell v. Jenssen*, 37 Neb. 685 (56 N. W. 487).

28. (1902.) The identification of a section corner as a starting point, made by the county surveyor upon examination of the ground and upon sworn evidence, will not be rejected in the absence of any showing of mistake or error. *Shrake v. Laflin*, 3 Unof. 489 (92 N. W. 184).

29. (1902.) A survey will not be rejected merely because the county surveyor commenced the measurement of a line at its northern extremity, where that extremity is well ascertained, instead of going over it from the south as was done in the original survey. *Shrake v. Laflin*, 3 Unof. 489 (92 N. W. 184).

30. (1907.) The fact that the boundary lines of fields and highways, as established by the early settlers, are in harmony with disputed monuments is relevant as tending to show that such monuments are true corners. *Bridenbaugh v. Bryant*, 79 Neb. 329 (112 N. W. 571).

——Maps and surveyor's notes.

31. Field notes and plats of the original government survey are competent evidence in ascertaining where monuments are located, in case a government corner is destroyed, or the point where it was originally placed cannot be found, or the location of the original corner is in dispute; but when it is shown by uncontradicted evidence that a section corner was located by the government surveyors at a certain point, such location must control, even though it is at a place different from that given in the field notes and plat. (1894) *Woods v. West*, 40 Neb. 307 (58 N. W. 938); (1895) *Peterson v. Skjelver*, 43 Neb. 663 (62 N. W. 43).

32. (1885.) Where a stone purporting to be the northeast corner of a section was fifty-two rods east of the true section line, as shown by the surveys both north and south of it, and there was no evidence tending to show that it had been placed there by the government surveyors, nor had it been seen until about forty years after the original surveys, *held*, that the quantity of land contained in the subdivisions of the section in question, and the one east of it, and the field notes and plates of the original survey were properly received in evidence for the purpose of determining the original location of the section corner. *Morrison v. Neff*, 18 Neb 133 (24 N. W. 555).

33. (1894.) Where the description in a deed contains a call to and along a line, the true location of which is uncertain, maps proved to be in common and accepted use in the community at the time of the conveyance are admissible to show that a particular line was in the community generally recognized by the name used in the deed. *Hanlon v. Union P. R. Co.*, 40 Neb. 52 (58 N. W. 590).

——Parol evidence in general.

34. (1884.) Where there is a call in a deed, which was in fact not intended by the

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parties, and is unambiguous, the intention of the parties cannot be made to take the place of the call, neither is parol proof competent to locate the land. *Gillespie v. Sawyer*, 15 Neb. 536 (19 N. W. 449).

35. (1894.) A written lease described the demised land as "four acres out of lot four," in a certain governmental subdivision "lying north of the railroad track." *Held*, That in an action between the lessor and lessee's assignee parol evidence was admissible to show that the lessor and lessee, about the time the lease was made, had gone upon the land and agreed upon certain lines and monuments as defining its boundaries. *Schneider v. Patterson, Murphy & Co.*, 38 Neb. 680 (57 N. W. 398).

36. (1894.) Where the description in a deed contains a call to and along a line, the true location of which is uncertain, parol evidence is admissible to show that at the time of the conveyance a particular line was in the community generally recognized by the name used in the deed. *Hanlon v. Union P. R. Co.*, 40 Neb. 52 (58 N. W. 590).

Competency of non-experts to testify.

37. (1889.) Not improper for witnesses, even if not surveyors, to testify as to lines, corner-stones, and other boundaries, the description of the disputed boundary not requiring professional skill or mathematical knowledge. *Obernalte v. Edgar*, 28 Neb. 70 (44 N. W. 82).

38. (1902.) In determining boundary lines between lands, the testimony of a non-expert, who claims to have located the line from government monuments then in existence, may be accepted by the jury in preference to that of surveyors who have subsequently located a different line independently of such monuments. *Baty v. Elrod*, 66 Neb. 735 (92 N. W. 1032).

39. (1906.) When a government monument, being the corner between two adjoining landowners, has been obliterated, its location may be proved by testimony of witnesses acquainted therewith. *Reed v. Burrell*, 77 Neb. 76 (108 N. W. 155).

Weight and sufficiency.

40. (1891.) Evidence as to alleged location of corner established by government, examined, and *held* insufficient to overcome effect of acquiescence by parties in different location. *Coy v. Miller*, 31 Neb. 348 (47 N. W. 1046).

41. (1893.) In an action of ejectment, the question involved being the location of a corner as located by the government survey, surveys from known government corners both north and south and east and west of the corner in disppute, by which it was located on a line with other corners on both of said lines, and each landowner would thereby be given the full amount of land called for by his patent, would be preferred to a survey which was not begun at a known government corner and lacked many of the elements of certainty, and which gave one of the landowners much more than he was entitled to under his patent, and the other less. *Woods v. West*, 37 Neb. 400 (56 N. W. 30).

42. (1894.) Evidence *held* sufficient to sustain finding of jury that a government corner was located at a certain point different from one shown in field notes and plat. *Woods v. West*, 40 Neb. 307 (58 N. W. 938).

43. (1896.) In an action of ejectment the evidence as to the boundary line, though conflicting, will sustain a judgment for defendant. *Blomgren v. Holmquest*, 49 Neb. 49 (68 N. W. 382).

44. (1902.) Evidence examined, and *held* to warrant a finding that a channel indicated by the field notes of an original survey as constituting the boundary line between parties could no longer be located by either natural or artificial landmarks. *Shrake v. Laflin*, 3 Unof. 489 (92 N. W. 184).

45. (1902.) Plaintiff's showing the United States survey field notes, when applied to the land in dispute by a competent surveyor, supported his contention as to the boundary line in dispute, *held* sufficient where the monuments of the government survey are no longer recognizable, to take that question to the jury, notwithstanding a former owner swore to the other location of the line as having been originally made from the government quarter-corner mounds. *Baty v. Elrod*, 66 Neb. 744 (97 N. W. 343).

46. (1905.) Evidence *held* sufficient to sustain decree in dispute over boundary line between two quarter sections of land. *Coppom v. Forman*, 74 Neb. 275 (104 N. W. 167).

47. (1905.) Evidence *held* sufficient to sustain decree in dispute over boundary line between two quarter sections of land. *Coppom v. Forman*, 74 Neb. 275 (104 N. W. 167).

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48. (1907.) In an action to recover possession of a triangular shaped tract between the parties' land, which under one survey belonged to defendant, and under another belonged to plaintiff, evidence showing the first surveyor ignored certain government corners supports a finding for plaintiff. *Bridenbaugh v. Bryant*, 79 Neb. 329 (112 N. W. 571).

49. (1908.) It is a general rule that only a preponderance of evidence is required to establish an issue in civil actions; and boundary disputes furnish no exception to this rule. *Bock v. Porterfield*, 80 Neb. 523 (114 N. W. 597).

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BOUNTIES.

1. (1896.) Chapter 1, Session Laws, 1895, providing for sugar bounties, carries no appropriation for payment thereof, and there being no appropriation for that purpose elsewhere, the auditor has no authority to issue warrants in payment of such bounties. *State, ex rel. Norfolk Beet Sugar Co., v. Moore*, 50 Neb. 88 (69 N. W. 373; 61 Am. St. Rep. 538).

2. (1905.) The statute offering a bounty for the manufacture of sugar and chicory being unconstitutional because of lack of power on the part of the legislature to appropriate money for such purpose, the fact that the manufacturers paid larger prices for their products to the producers of beets from which to manufacture these articles, relying upon this statute for remuneration, will not create in favor of such manufacturers any obligation against the state. *Oxnard Beet Sugar Co. v. State*, 73 Neb. 66 (105 N. W. 716).

3. (1905.) Chapter 1 of the laws of 1895, entitled "An act to provide for the encouragement of the manufacture of sugar and chicory and to provide a compensation therefor," is unconstitutional and void. *Oxnard Beet Sugar Co. v. State*, 73 Neb 66 (105 N. W. 716).

BOWLING ALLEYS.

Operation in saloon.

1. (1903.) The running of a bowling alley in connection with a saloon or hotel, is in this state a criminal offense. *Koepke v. State*, 68 Neb. 152 (93 N. W. 1129).

BREACH OF MARRIAGE PROMISE.

ANALYSIS.

Construction of contract, § 1.
Rescission of contract, § 2.
Damages, §§ 3, 4.
Pleading, § 5.
Evidence.
——— Admissibility, 6-12.
——— Weight and sufficiency, §§ 13-15.

CROSS-REFERENCES.

See, also, *Marriage; Seduction.*

Pleading contract as within statute of frauds, see *Frauds, Statute of*, § 2.

Construction of contract.

1. (1903.) Where upon an agreement of marriage the parties expressly agree that the ceremony shall be celebrated in accordance with the rules and customs of a particular religion and church, such rules and customs become a part of the contract and binding upon the parties. *Wanecek v. Kratky*, 69 Neb. 770 (96 N. W. 651; 66 L. R. A. 798*n*).

Rescission of contract.

2. (1903.) Where one of the parties to a marriage contract fails to perform his agreement at the time fixed for the ceremony, no reasonable excuse existing for such failure, the other party may rescind the contract and maintain an action for damages. *Wanecek v. Kratky*, 69 Neb. 770 (96 N. W. 651; 66 L. R. A. 798*n*).

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Damages.

3. (1884.) An action for breach of promise, though in form *ex contractu*, yet it being impossible to fix a rule or measure of damages, the jury must determine the same from all the circumstances of each case. *Schreckengast v. Ealy*, 16 Neb. 510 (20 N. W. 853).

4. (1889.) In an action for damages for a breach of promise of marriage, where there was sufficient evidence to justify the jury in finding that the promise was made, and that the defendant had seduced the plaintiff through and by reason of her reliance upon his promise, it was *held* that a verdict in favor of the plaintiff for $7,000 damages was not excessive. *Musselman v. Barker*, 26 Neb. 737 (42 N. W. 759).

Pleading.

5. (1884.) Where in an action for breach of promise of marriage the promise is alleged to have been made at a certain date, to which the defendant pleaded infancy, it is not error for the court to permit an amended petition to be filed stating other promises and a ratification of the first after the defendant came of age. *Schreckengast v. Ealy*, 16 Neb. 510 (20 N. W. 853).

Evidence.

——— Admissibility.

6. (1884.) A question whether plaintiff had been waited on by another suitor, asked of her on cross-examination, should be confined to the time her engagement to defendant was in existence. *Schreckengast v. Ealy*, 16 Neb. 510 (20 N. W. 853).

7. (1889.) The loss of social standing in the community in which a plaintiff in an action for damages for breach of promise of marriage resides, caused by the seduction of the plaintiff, is an element of damages to be considered in such action, and a ruling of the trial court permitting the plaintiff to state in her evidence that since, she had been "sneered at" upon the streets in the city in which she resided, would not be error requiring the reversal of a judgment rendered upon a verdict in the plaintiff's favor. *Musselman v. Barker*, 26 Neb. 737 (42 N. W. 759).

8. (1889.) In an action for breach of promise it was not error for the court to permit the plaintiff to testify that the defendant was the father of an illegitimate child, begotten by him while the agreement for marriage existed, and on faith thereof on the part of the plaintiff in the action. *Musselman v. Barker*, 26 Neb. 737 (42 N. W. 759).

9. (1895.) Evidence of defendant's reputation for wealth is admissible to show the condition in life the plaintiff would have secured by a consummation of the contract. *Stratton v. Dole*, 45 Neb. 472 (63 N. W. 875).

10. (1895.) Where defendant's mother, at his request, procured the plaintiff to receive him as a suitor, and was otherwise actively engaged in promoting the marriage agreement, communications by the former to the plaintiff, while thus engaged, touching the defendant's property, made as an inducement to the marriage contract, are admissible in evidence in an action against the latter for the breach thereof. *Stratton v. Dole*, 45 Neb. 472 (63 N. W. 875).

11. (1895.) It is permissible for the defendant to prove specific acts of incontinence on the part of the plaintiff. If guilty of fornication, that fact would be a defense to her action, since personal purity is one of the implied conditions of her agreement. If her actions have been wantonly indelicate and inconsistent with the conduct of a pure-minded woman, that fact is admissible at least in mitigation of damage. *Stratton v. Dole*, 45 Neb. 472 (63 N. W. 875).

12. (1903.) In an action for breach of promise of marriage the general reputation of the defendant for wealth, as distinguished from his actual circumstances, is not a proper matter to be taken into account in estimating the amount of damages. *Johansen v. Modahl*, 4 Unof. 411 (94 N. W. 532).

——— Weight and sufficiency.

13. (1889.) Testimony of a plaintiff, in a breach of promise suit, that defendant had often promised to marry her, when corroborated by two other witnesses is sufficient to sustain a verdict for the plaintiff. *Musselman v. Barker*, 26 Neb. 737 (42 N. W. 759).

14. (1895.) Evidence *held* sufficient to sustain a judgment for plaintiff in an action by her to recover from defendant damages for breach of a contract to marry. *Stratton v. Dole*, 45 Neb. 472 (63 N. W. 875).

15. (1903.) Evidence examined, and *held* not to establish a written contract of marriage. *Haslam v. Barge*, 69 Neb. 644 (96 N. W. 245).

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BREACH OF THE PEACE.

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CROSS-REFERENCE.

Information for disturbing religious society, see *Disturbance of Public Assemblage.*

1. (1902.) The defendant in a proceeding for the prevention of crime may be taxed with costs only (1) where he is held to bail by the district court; and (2) where, for want of bail, he is sent to prison. *Speer v. State*, 64 Neb. 77 (89 N. W. 624).

2. (1902.) Sections 500 and 501 of the criminal code, authorize the taxation of costs only in cases where a crime has been charged and there has been a conviction in accordance with established procedure and have no application to proceedings under chapter 26. *Speer v. State*, 64 Neb. 77 (89 N. W. 624).

BREAKING.

As element of burglary, see *Burglary*, §§ 1-3.

Sufficiency of proof in burglary, see *Burglary*, §§ 40-42.

BRIBERY.

CROSS REFERENCES.

Votes procured by bribery, see *Elections*, § 100.

Attempt to bribe as affecting credibility of witness, see *Witnesses*, § 355.

Statutory provisions.

1. (1884.) Section 105 of the act for incorporation of cities of the first class (Compiled Statutes, 102) does not repeal criminal code, p. 175, making the receiving of a bribe by a city officer a crime. *Guthrie v. State*, 16 Neb. 667 (21 N. W. 455).

Witness who may be bribed.

2. (1906.) One who has not been summoned or recognized as a witness in a pending suit, and who is not acquainted with either of the parties thereto, and has no knowledge of any fact either direct or collateral which may be the subject of inquiry therein, is not a witness within the meaning of section 164 of the criminal code. *Gandy v. State*, 77 Neb. 782 (110 N. W. 862).

Evidence.

3. (1884.) Under the allegations of the indictment and the circumstances of the case as shown by the testimony, it was *held* competent for the state to prove other acts of bribery than those alleged in the indictment for the purpose of corroborating the principal witness upon material facts involved in the original contract of bribery, and also for the purpose of showing the system, plan, and design of the parties involved in the transaction alleged in the indictment. *Guthrie v. State*, 16 Neb. 667 (21 N. W. 455).

4. (1906.) On the trial of one charged with the crime of attempting to corrupt a witness, it is reversible error to allow the state to introduce evidence tending to show that the defendant offered a person the sum of $500 to steal a written instrument called a certain power of attorney, where the information contains no charge of that kind or nature. *Gandy v. State*, 77 Neb. 782 (110 N. W. 862).

Information.

5. (1884.) The indictment in this case alleged that the sum of $300 was paid to plaintiff in error as a bribe by one C. B., "and others whose names are to the grand jurors unknown." The proof showed that the money was paid by C. B. for the purpose alleged in the indictment. *Held*, That the variance was not fatal and that the district court was justified, under the provisions of section 413 of the criminal code, in disregarding it. *Guthrie v. State*, 16 Neb. 667 (21 N. W. 455).

6. (1906.) An information for the crime of attempting to corrupt a witness must allege that the person sought to be corrupted was a witness; that the defendant knew such person to be a witness, or must state such facts constituting the offense as show conclusively that the defendant had such knowledge. *Gandy v. State*, 77 Neb. 782 (110 N. W. 862).

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BRIDGES.

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ANALYSIS.

Character of bridges as highway, § 1.
Acquisition by public, §§ 2, 3.
Bonds in aid of construction, §§ 4-11.
Liability on subscription to private bridge, § 12.
Duty of mill owner to construct, § 13.
Establishment by public authority, §§ 14-18.
——— Mandamus to compel construction, § 19.
——— Selection of design and material, § 20.
——— Contribution of expenses, §§ 21-30.
Taxes and assessments, § 31.
Maintenance and repair.
——— Duty to repair, §§ 32-37.
——— Mandamus to compel repair, § 38.
——— Contribution and liability of adjoining county, §§ 39-58.
Liability of adjoining county for constructing ice breaker, § 59.
Injuries to bridges, § 60.
Liability for injuries by reason of defective bridges.
——— In general, §§ 61-63.
——— Care required of public, §§ 64, 65.
——— Right to assume bridge is safe, § 66.
——— Notice of defects, §§ 67, 68.
——— Notice of claim for injuries, §§ 69, 70.
——— Pleading, §§ 71, 72.
——— Evidence, 73, 74.
——— Questions for jury, § 75.

CROSS-REFERENCES.

Contracts for construction of county bridges, see *Counties*, §§ 326-368.

Liability of bridge to execution, see *Execution*, § 26.

Contract for purchase, see *Highways*, §§ 155-157.

Bonds in aid of, by cities, see *Municipal Corporations*, §§ 947, 948.

Duty to build across canal or water way crossing public road, see *Water and Watercourses*, §§ 57, 58.

Character of bridges as highway.

1. (1875.) Public bridges are part of public roads, and the provisions of section 16, chapter 67, General Statutes, requiring contracts for the construction of roads to be let to the lowest competent bidder, apply to the letting of contracts for the erection of bridges; and it is the duty of county commissioners to adopt plans and specifications, in advance of the letting, as a basis on which bids may be received. *State, ex rel. Putnam, v. Buffalo County Comm'rs*, 4 Neb. 150; *McConnell v. Dewey*, 5 Neb. 385; *Follmer v. Nuckolls County*, 6 Neb. 204.

Acquisition by public.

2. (1879.) County commissioners have no power to purchase a private bridge over a stream within the county; and an award made under such a contract is a nullity. *McCann v. Otoe County*, 9 Neb. 324 (2 N. W. 707).

3. (1891.) Where the county board appropriates a private bridge and locates a road over it upon petition duly signed, the county is liable to the owner for compensation. *Blaine County v. Brewster*, 32 Neb. 264 (49 N. W. 183).

Bonds in aid of construction.

4. (1876.) County bonds issued for the purpose of erecting a public bridge over the Platte river, conformable in all respects to the laws of this state, authorizing the issuance of bonds in aid of works of internal improvement, are valid. *Union P. R. Co. v. Colfax County*, 4 Neb. 450.

5. (1876.) A bridge over the Platte

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river is a work of internal improvement, and from the course of legislation, in this state, it is clear that aid may be granted in its erection by the issuance of county bonds, by grant from the state, donations, or by two counties bordering on the river uniting in the enterprise. *Union P. R. Co. v. Colfax County*, 4 Neb. 450.

6. (1877.) Precinct bonds may be issued to aid in building a public wagon bridge across the Platte river, that being a work of internal improvement. *Fremont Building Ass'n v. Sherwin*, 6 Neb. 48.

7. (1877.) Where the vote is regular in all other respects, it is not a valid objection to the bonds issued in pursuance thereof that the proposition contained a provision for collecting tolls from persons crossing the bridge—especially after the bonds have passed into the hands of innocent purchasers. *Fremont Building Ass'n v. Sherwin*, 6 Neb. 48.

8. (1878.) Under the act of February 15, 1869, enabling counties, cities and precincts to issue bonds in aid of internal improvements, precincts may issue such bonds to aid in the construction of bridges for public use, and when such bonds are issued in conformity with the provisions of the law, they are valid, and the collection of taxes, levied on the property of the precinct to pay the interest thereon, may be legally enforced. *South Platte Land Co. v. Buffalo County*, 7 Neb. 253. [Changed by statute. 19 Neb. 159; 26 Neb. 705.]

9. (1884.) A bridge across the Platte river is a work of internal improvement, and county bonds voted to erect the same are valid. Nor does the fact that the entire bridge is within the limits of the county voting the bonds, change its character or affect the validity of the bonds. *State, ex rel. Peterson, v. Keith County*, 16 Neb. 508 (20 N. W. 856).

10. (1888.) Bonds may be issued by a city to aid in the construction of a public bridge on a public thoroughfare leading into such city, although the bridge is outside of the corporate limits. *State, ex rel. City of Columbus, v. Babcock*, 23 Neb. 179 (36 N. W. 474).

11. (1888.) The provisions of section 77, chapter 14 of the Compiled Statutes, authorizing a city in certain cases to appropriate the sum of five dollars per lineal foot to aid in the construction of a county bridge, do not prevent a city situated on a stream like the Loup river, from issuing bonds to aid in the construction of a public bridge across such river. *State, ex rel. City of Columbus, v. Babock*, 23 Neb. 179 (36 N. W. 474).

Liability on subscription to private bridge.

12. (1879.) One who subscribes a sum of money to a bridge company, in aid of rebuilding a toll bridge, is not liable thereon where the location of the bridge is changed without such subscriber's consent. *Fremont Ferry Co. v. Fuhrman*, 8 Neb. 99.

Duty of mill owner to construct.

13. (1906.) Where water is diverted from its natural channel by means of a canal constructed and operated to supply power for a mill, it is the duty of the mill owner to erect and maintain suitable bridges for the convenience of the public at any point where the canal crosses a public road. *Nuckolls County v. Guthrie & Co.*, 76 Neb. 464 (107 N. W. 779).

Establishment by public authority.

14. (1877.) The building of county bridges being entirely within the control of county commissioners, and they having accepted the bridge from the plaintiff, and allowed his claim therefor, the remedy for any person feeling himself aggrieved was by appeal to the district court. Having neglected this remedy the plaintiff cannot resort to equity for relief by an original suit. *Clark v. Dayton*, 6 Neb. 192.

15. (1879.) It is discretionary with the county board what bridges shall be erected. The courts will not interfere unless there is an abuse of such discretion. *Brown v. Merrick County*, 18 Neb. 355 (25 N. W. 356).

16. (1895.) By the enactment of chapter 72, Session Laws 1887, it was not intended to make counties under township organization liable for the payment of bridges already constructed. *Tullock v. Webster County*, 46 Neb. 211 (64 N. W. 705).

17. (1895.) Prior to the enactment of chapter 72, Session Laws, 1887, a county under township organization was not invested with power of building bridges in the county. *Tullock v. Webster County*, 46 Neb. 211 (64 N. W. 705).

18. (1905.) Sections 102*a* and 102*b*, chapter 78, Compiled Statutes 1903, being chapter 72, laws 1887, do not operate as a repeal of that portion of section 77, article 1, chapter 14, Compiled Statutes 1903, per-

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taining to the liability of counties, cities and villages for the construction and repair of bridges. *City of Central City v. Marquis*, 75 Neb. 233 (106 N. W. 221).

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——— **Mandamus to compel construction.**

19. (1906.) Mandamus will lie to compel the construction of a bridge on a highway across a stream. *Nuckolls County v. Guthrie & Co.*, 76 Neb. 464 (107 N. W. 779).

——— **Selection of design and material.**

20. (1907.) When they build or repair a bridge, the commissioners must necessarily decide upon the material to be used and the character and design of the structure. *State, ex rel. Ellis, v. Switzer*, 79 Neb. 78 (112 N. W. 297).

——— **Contribution of expenses.**

21. (1885.) Where the middle of a stream is the dividing line between two counties, and a bridge is erected across said stream by the county board of one of such counties, without the co-operation of the county board of the other, the county erecting the bridge may use precinct bonds, voted for that purpose to complete the bridge in the county not co-operating in the erection of the bridge. *Brown v. Merrick County*, 18 Neb. 355 (25 N. W. 356).

22. (1885.) Sections 87 and 88 of the road law merely authorize the county boards of counties separated by a stream to meet and confer together in regard to the erection, jointly, of a bridge across such stream, and to enter into a joint contract for that purpose, but in the absence of a contract there is no power in one board to erect or repair a bridge across such stream, and compel the other board to pay part of the cost. *Brown v. Merrick County*, 18 Neb. 355 (25 N. W. 356).

23. (1902.) That a county board allowed the claim of an adjoining county for one-half the cost of a bridge erected on the county line, is not available as an estoppel on an appeal from the order allowing such claim. *Saline County v. Gage County*, 66 Neb. 839 (92 N. W. 1050). [Reversed on rehearing. 66 Neb. 844.]

24. (1902.) The liability of a county to contribute for the cost of the construction or repair of a bridge on a highway along the line between that and an adjoining county is purely statutory, and is based on sections 87, 88 and 89, chapter 78, Compiled Statutes. *Saline County v. Gage County*, 66 Neb. 839 (92 N. W. 1050). [Reversed on rehearing. 66 Neb. 844.]

25. (1902.) When a bridge is constructed on a county line and the entire cost thereof paid by one county, no cause of action arises against the adjoining county for contribution, in the absence of a contract in that behalf to which the latter county is a party. *Saline County v. Gage County*, 66 Neb. 839 (92 N. W. 1050). [Reversed on rehearing. 66 Neb. 844.]

26. (1902.) That a county allowed the work of contruction of a bridge on the line between it and an adjoining county to proceed without objection, and, when completed, graded the approaches to the bridge, and that its inhabitants used the bridge, would not estop such county nor its taxpayers from denying the validity of a claim presented by the adjoining county to the latter county for half the cost of such bridge. *Saline County v. Gage County*, 66 Neb. 839 (92 N. W. 1050). [Reversed on rehearing. 66 Neb. 844.]

27. (1902.) When the county boards of adjoining counties have attempted to enter into a joint contract for the building of a bridge over boundary streams, but, by reason of the neglect of requisite formalities, one of such counties fails of becoming obligated thereby, and the other, in good faith, and pursuant to the contract, builds and pays for the bridge, the former may ratify and confirm the contract by the allowance in behalf of the latter of a claim for one-half the contract price of the structure, and a taxpayer can not defeat or annul such ratification by appealing from the order of allowance. *Saline County v. Gage County*, 66 Neb. 844 (97 N. W. 583).

28. (1902.) A county can become obligated to contribute towards the expenses of building a bridge over a stream upon a boundary line between itself and another county, either by entering in the first instance into a joint contract for the construction of such bridge in the manner prescribed by statute, or by subsequently ratifying a contract for that purpose. *Saline County v. Gage County*, 66 Neb. 844 (97 N. W. 583).

29. (1903.) The purpose of Compiled Statutes, chapter 78, section 87, and the ones immediately following, is to provide for bridges which are rendered necessary in order to travel from one county into an adjacent one, and to divide the cost between

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the two, and the statute should be construed if possible, so as to give effect to the apparent intent of the legislature. *Dodge County v. Saunders County*, 70 Neb. 442 (97 N. W. 617).

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30. (1903.) When the legislature speaks of "streams which divide counties," in section 87, chapter 78, Compiled Statutes, it must be taken as referring, not to the entire stream but to some part of or line therein. *Dodge County v. Saunders County*, 70 Neb. 442 (97 N. W. 617).

Taxes and assessments.

31. (1884.) The board of county commissioners had no authority in the year 1879 to levy a bridge tax, there being no law in force at that time authorizing such a tax. *Burlington & M. R. R. Co. v. Cass County*, 16 Neb. 136 (19 N. W. 700).

Maintenance and repair.

——— Duty to repair.

32. (1881.) Where there are not sufficient funds in the county treasury to repair all the bridges in a county, the court will not control the discretion of county commissioners as to what bridges they shall repair, unless there is a clear abuse of the trust. *State, ex rel. Roe, v Kearney County*, 12 Neb. 6 (10 N. W. 413); (1885) *Brown v. Merrick County*, 18 Neb. 355 (25 N. W. 356); (1907) *State, ex rel. Ellis, v. Switzer*, 79 Neb. 78 (112 N. W. 297).

33. (1888.) Prior to the act of 1887, in a county under the township system of government, the respective towns, and not the county board of supervisors, were vested with the power and charged with the duty of building and repairing the bridges in such towns, and the letting of contracts therefore. *Whitcomb v. Reed*, 24 Neb. 50 (37 N. W. 684).

34. (1894.) Where a county builds a bridge with money realized from precinct bonds, the precinct is not the owner of the bridge in such a sense as to relieve the county from a liability to keep it in repair. *Dutton v. State, ex rel. Pankonin*, 42 Neb. 804 (60 N. W. 1042).

35. (1895.) By the enactment of chapter 72, Session Laws, 1887, it was not intended to make counties under township organization liable for repairs made to bridges prior to the taking effect of said act. *Tullock v. Webster County*, 46 Neb. 211 (64 N. W. 705).

36. (1895.) Prior to the enactment of chapter 72, Session Laws, 1887, a county under township organization was not charged with the duty of repairing bridges. *Tullock v. Webster County*, 46 Neb. 211 (64 N. W. 705).

37. (1906.) Repairs of county bridges contemplated by sections 114 and 115, chapter 78, Compiled Statutes, providing for repairs are such as may be made at once, and without considerable cost. *State, ex rel. Sumpton, v. Smith*, 77 Neb. 1 (108 N. W. 173).

——— Mandamus to compel repair.

38. (1894.) A county may be compelled by mandamus to repair a bridge. *Dutton v. State, ex rel. Pankonin*, 42 Neb. 804 (60 N. W. 1042).

——— Contribution and liability of adjoining county.

39. (1881.) Where a bridge across the Platte river was constructed by one county an adjoining county cannot be compelled to aid in keeping it in repair. *State, ex rel. Roe, v. Kearney County*, 12 Neb. 6 (10 N. W. 413).

40. (1894.) A bridge across the Platte river between two counties, the county boundary extending to the channel of the river, it is the duty of each county to keep the respective parts of the bridge in repair, and may be compelled to so do by mandamus instituted in the name of citizens and taxpayers. *Dutton v. State, ex rel. Pankonin*, 42 Neb. 804 (60 N. W. 1042).

41. (1899.) Ordinarily, where a stream of water constitutes the boundary line between two political subdivisions, each subdivision holds to the middle of the stream and accordingly is liable for bridge repairs, as laid down in *Dutton v. State*, 42 Neb. 804, irrespective of the volume of flowage being nearer one bank than the other. *State, ex rel. Pankonin, v. County Comm'rs of Cass County*, 58 Neb. 244 (78 N. W. 494).

42. (1902.) The liability of a county to contribute to the repair of bridges along the county line, is purely statutory. *Saline County v. Gage County*, 66 Neb. 839 (92 N. W. 1050). [Reversed on rehearing. 66 Neb. 844.]

43. (1902.) Chapter 78, Compiled Statutes, entitled "Roads," in so far as it relates to the building of bridges over streams dividing counties, is not in violation of the constitution. *Cass County v. Sarpy County*, 66 Neb. 473 (92 N. W 635).

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44. (1902.) A petition in an action by one county for contribution from another for repairs to a bridge over a stream separating the two counties, is not defective for failure to allege that the contract was let to the lowest bidder. *Cass County v. Sarpy County*, 63 Neb. 813 (89 N. W. 219).

45. (1902.) When a public bridge has been constructed across a stream dividing two counties, each county may be compelled, at the suit of the other, to contribute toward the expense of necessary repairs upon the same, although there may be no contract between the counties for the building or repair of the structure. *Cass County v. Sarpy County*, 63 Neb. 813 (89 N. W. 291). [Overruled on rehearing. 66 Neb. 473.]

46. (1902.) Where repairs on a bridge on a county line are paid for wholly by one county, in the absence of a contract in that behalf, to which the other county is a party, no cause of action arises against the latter unless it has refused to enter into a contract therefor. *Saline County v. Gage County*, 66 Neb. 839 (92 N. W. 1050). [Reversed on rehearing. 66 Neb. 844.]

47. (1902.) A county is excused from contributing toward the expense of repairing a bridge over a stream dividing it from an adjoining county by the fact that the county making the repairs did so in violation of the law regulating the manner of making such repairs on bridges for the maintenance of which it is solely responsible. *Cass County v. Sarpy County*, 66 Neb. 473 (92 N. W. 635).

48. (1903.) The fact that a resolution, passed by the board of one county calling upon the other, on the opposite side of a stream, to join in making bridge repairs, designates two bridges, while, after the latter's refusal, a contract is let and recovery sought as to the one only, is not fatal. *Dodge County v. Saunders County*, 70 Neb. 442 (97 N. W. 617).

49. (1903.) Under the provisions of section 87, chapter 78, Compiled Statutes, 1901, a county may be required to contribute toward the repair of a bridge abutting in such county although it is located mainly within the territorial jurisdiction of an adjoining county. *Dodge County v. Saunders County*, 70 Neb. 451 (100 N. W. 934).

50. (1903.) The word "stream" as used in Compiled Statutes, chapter 78, section 87, is used in a general sense, and includes rivers, and smaller courses of running water. *Dodge County v. Saunders County*, 70 Neb. 451 (100 N. W. 934).

51. (1904.) When a county has refused, upon request, to participate with an adjoining county in repairing a bridge over a stream forming part of the boundary line between them, and the latter county has performed the work at its separate expense, it is not a defense to an action for contribution under the statute, that the plaintiff county, in procuring the repairs to be made, proceeded in an irregular or illegal manner with respect to obligating itself to pay for them, provided it did in fact become so obligated. *Cass County v. Sarpy County*, 72 Neb. 93 (100 N. W. 197).

52. (1904.) Where there is a bridge over a stream which divides two counties and is a charge upon each, it is the duty of the county board of either county, when notified in writing by the other to join in a contract for the repairs of the bridge, to either to comply with the notice by joining in the contract or unequivocally refuse to do so. *Iske v. State, ex rel. Pankonin*, 72 Neb. 278 (100 N. W. 315).

53. (1904.) The duty of one county when notified, to join with another county in a contract for repairs of a bridge over a boundary stream, or else to unequivocally refuse to do so, may be enforced by mandamus. *Iske v. State, ex rel. Pankonin*, 72 Neb. 278 (100 N. W. 315).

54. (1905.) The term "bridges," in section 77, article 1, chapter 14, Compiled Statutes, 1903, making it the duty of cities to repair bridges, does not include the approaches thereto. *City of Central City v. Marquis*, 75 Neb. 233 (106 N. W. 221).

55. (1906.) A county which refuses to enter into a contract with an adjoining county to repair a bridge across a stream dividing the counties is liable to the county making the repairs under contract for "such proportion of the cost of making said repairs as it ought to pay, not exceeding one-half of the full amount so expended," when the county making the repairs has followed the procedure pointed out by the statute as to notice, etc. *Dodge County v. Saunders County*, 77 Neb. 787 (110 N. W. 756).

56. (1906.) Where the proper steps have been taken to render an adjoining county liable for the repair of a bridge, and where an issue is raised as to the necessity of

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the repairs or as to the amount paid being more than the actual and reasonable cost thereof, then the amount that the defaulting county ought to pay is a question for the jury, but, if no such issue is tendered, the county in default is liable for one-half of the cost of repairs. *Dodge County v. Saunders County*, 77 Neb. 787 (110 N. W. 756).

57. (1906.) The fact that a bridge across the Platte river where it divides the counties of Dodge and Saunders is not one continuous structure but consists of two separate portions separated by an island, one of which portions is entirely within Dodge county, does not, under the circumstances, relieve Saunders county from the burden of contributing to the repair of the entire structure. *Dodge County v. Saunders County*, 77 Neb. 787 (110 N. W. 756).

58. (1906.) Though the whole of the Platte river, flowing between Colfax and Butler counties is in Colfax county, mandamus to compel Colfax county to repair a bridge that has been taken out by an ice-gorge, cannot be maintained without notice to both counties, under section 116, chapter 78, Compiled Statutes, and the counties must be joined. *State, ex rel. Sumpton, v. Smith*, 77 Neb. 1 (108 N. W. 173).

Liability of adjoining county for constructing ice breaks.

59. (1906.) A county is not liable for contribution to the cost of ice breaks erected by an adjoining county at a bridge across a stream dividing the counties, when the notice to repair made no mention of the necessity for such ice breaks. *Dodge County v. Saunders County*, 77 Neb. 787 (110 N. W. 756).

Injuries to bridges.

60. (1884.) On trial under an indictment for maliciously cutting down and destroying a public bridge on a public highway, it is competent for the state to prove, by the records of the county commissioners' court, the establishment of the highway on which the bridge was constructed, and also by such records and the records of the district court, that the accused presented and prosecuted his claim for damages resulting from such location, and that he received and accepted the damages awarded him by the trial jury in the district court. *O'Dea v. State*, 16 Neb. 241 (20 N. W. 299).

Liability for injuries by reason of defective bridges.

——In general.

61. (1880.) At common law a county is not liable for the failure of the commissioners to keep a bridge in repair. *Woods v. Colfax County*, 10 Neb. 552 (7 N. W. 269).

62. (1893.) Where a county board negligently fails to keep a public bridge in suitable repair so as to be in a safe condition for travel, and damages have been occasioned by reason thereof, under the act of the legislature of 1889, the county is liable therefor to the person sustaining the damages, unless he has been guilty of contributory negligence. *Hollingsworth v. Saunders County*, 36 Neb. 141 (54 N. W. 79).

63. (1906.) One who is injured by reason of a defective bridge while riding in a private vehicle may recover from a county otherwise liable, notwithstanding the negligence of the driver, which may have contributed to produce the injury, the injured party being free from negligence and having no authority or control over the driver. *Loso v. Lancaster County*, 77 Neb. 466 (109 N. W. 752).

——Care required of public.

64. (1902.) In constructing and maintaining a bridge for public use, a municipality is not limited in its duty by the ordinary business use of the structure, but is required to provide for what may be fairly anticipated for the proper accommodation of the public in the various occupations which may be pursued in the locality. *Seyfer v. Otoe County*, 66 Neb. 566 (92 N. W. 756).

65. (1905.) In an action for injuries caused by a defect in a bridge at a point near one side, an instruction that it is not necessary that defendant keep the entire width of its highways and bridges in good condition for travel, while stating a correct proposition of law, *held* erroneous under the circumstances of this case. *Clingan v. Dixon County*, 74 Neb. 807 (105 N. W. 710).

——Right to assume bridge is safe.

66. (1905.) A party attempting to cross a bridge which is a part of a highway in the absence of notice to the contrary, or facts sufficient to put him on inquiry, has a right to assume that it is reasonably safe for the accommodation of the public at large in the various occupations pursued in the locality where the bridge is situated. *City of Central City v. Marquis*, 75 Neb. 233 (106 N. W. 221).

——Notice of defects.

67. (1904.) The county cannot be held as an insurer of those who have occasion

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to use a county bridge. If the defect in a bridge, from which injury and damages occur to the person using it, as a latent defect, not discernable from the ordinary tests and examinations usually made to ascertain its condition, and if those charged with such examination have not been negligent in their duty in that regard, the county cannot be held liable for damages caused by such latent and undiscovered defects. *Johnson County v. Carmen*, 71 Neb. 682 (99 N. W. 502).

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68. (1905.) In an action to recover for personal injuries resulting from the defective condition of a bridge, it is not error to instruct the jury that actual notice to the municipality is not necessary, where "the defects are of such a nature or have existed for such a length of time that they might by the exercise of ordinary diligence have been discovered and repaired." *City of Central City v. Marquis*, 75 Neb. 233 (106 N. W. 221).

——— **Notice of claim for injuries.**

69. (1893.) The person sustaining damages by the failure of a county board to keep a public bridge in repair, may maintain an original action against the county whose duty it was to keep the bridge in repair. He is not required to present his claim to the county board for allowance or rejection, since the provisions of section 37, chapter 18, Compiled Statutes, do not apply to demands arising upon torts. *Hollingsworth v. Saunders County*, 36 Neb. 141 (54 N. W. 79).

70. (1895.) A county is liable in damages for injuries resulting from an unsafe county bridge, though no notice of the defects had been given to any officer of the county. *Raasch v. Dodge County*, 43 Neb. 508 (61 N. W. 725).

——— **Pleading.**

71. 1893.) The pettition to recover damages from a county for injuries resulting from a failure of the county board to keep a public bridge in repair, set out in the opinion, *held* to state a cause of action. *Hollingsworth v. Saunders County*, 36 Neb. 141 (54 N. W. 79).

72. (1904.) In a suit against a county for damages on account of the death of a party caused by the giving way of a county bridge, the petition contained a general statement that the bridge was "out of repair and unsafe," a motion for a more specific statement should be sustained. *Johnson County v. Carmen*, 71 Neb. 682 (99 N. W. 502).

——— **Evidence.**

73. (1902.) The declaration of a deceased person made to a third party, as to his knowledge of the condition of a bridge, which gave way while he was attempting to cross it and caused his death, before the accident occurred, may be properly received in evidence as tending to establish contributory negligence. *Seyfer v. Otoe County*, 66 Neb. 566 (92 N. W. 756).

74. (1905.) Evidence in an action for injuries sustained by plaintiff by reason of the fall of a bridge while crossing over the same with a traction engine *held* to sustain a finding of constructive notice of the defective condition of the bridge. *City of Central City v. Marquis*, 75 Neb. 233 (106 N. W. 221).

——— **Questions for jury.**

75. (1902.) In an action against a county by the administrator of the estate of a deceased person to recover damages alleged to have been caused by the breaking down of a bridge while the deceased was attempting to cross it with a steam traction engine and separator, it is for the jury to determine whether the bridge was properly constructed and maintained, and whether the use the deceased was making of it was unusual and extraordinary, and such as the county was not bound to anticipate. *Seyfer v. Otoe County*, 66 Neb. 566 (92 N. W. 756).

BRIEFS.

In appeal in criminal cases, see *Criminal Law*, § 1055.

In appeal in civil cases, see *Appeal and Error*, XI.

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BROKERS.

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Rights of purchaser from agent against principal, see *Vendor and Purchaser*, § 12.

I. EMPLOYMENT, AUTHORITY, AND DUTIES OF BROKER.

Contract of employment.

1. (1896.) A conveyance of chattels at a certain price, with a provision that the buyer may, upon failure to resell, return them, is a contract of sale with an option

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to recind, and not a contract of brokerage. *Houck v. Linn*, 48 Neb. 227 (66 N. W. 1103).

2. (1904.) Where the owner by letter authorized an agent to make a sale of a certain tract of land and offered a specified commission for doing so, and the agent by letter notified the owner that he was attempting to make the sale in the manner suggested by the owner and named a prospective purchaser to whom the land was finally sold in the manner agreed upon between the owner and agent, such a contract in writing as is required by section 74 of chapter 73, Compiled Statutes, is created. *Bradley & Co. v. Bower*, 5 Unof. 542 (99 N. W. 490).

3. (1904.) Under the provisions of section 74, chapter 73, Compiled Statutes, 1901, a contract for the sale of land between the owner thereof and an agent or broker must be signed by the owner and broker, must contain a description of the land, and set forth the amount of compensation the agent is to receive for negotiating a sale, or it will be void and furnish no basis for recovery. *Danielson v. Goebel*, 71 Neb. 300 (98 N. W. 819).

4. (1905.) A letter written to one who has solicited the agency for the sale of certain real estate, in which the owner states, in substance, "I still have the northwest quarter of section 20, township 22-5, and would sell for $3,000 cash net to me, or $3,200 on time, one-third down and the back payments secured by first mortgage. The man that sells it will have to get his commission out of the man that buys"—is sufficient to authorize such person to sell the land according to the terms therein stated. *Weaver v. Snively*, 73 Neb. 35 (102 N. W. 77).

Necessity of contract in writing.

5. (1890.) Where a landowner employs an agent to procure a purchaser for his real estate upon certain terms and conditions, the contract of employment need not be in writing. *Griffith v. Woolworth*, 28 Neb. 715 (44 N. W. 1137).

6. (1902.) A verbal contract with an agent or broker to sell land for the owner thereof, is void under the statute of frauds, and it requires the voluntary act of both parties thereto to execute it so as to completely take it out of the operation of the statute. *Allen v. Hall*, 64 Neb. 256 (89 N. W. 803).

7. (1903.) The act of 1897 (Session Laws, 1897, ch. 57), entitled "An act to provide for the making of contracts in writing between owners of land and brokers or agents employed to sell lands," is not repugnant to the constitutional inhibition against special legislation; and every provision of said act is clearly expressed in its title. *Baker v. Gillan*, 68 Neb. 368 (94 N. W. 615).

8. (1904.) A verbal contract with an agent or broker to sell land for the owner or to obtain a purchaser therefor is void. *Covey v. Henry*, 71 Neb. 118 (98 N. W. 434); *Frahn v. Metcalf*, 75 Neb. 241 (106 N. W. 227).

9. (1906.) A contract whereby a real estate agent agrees to secure for purchase by defendant a tract of land, and a check for his commission is given in advance, to be valid when the land is secured, is not within the statute of frauds and not void as not being in writing. *Mellor v. McConnell*, 75 Neb. 776 (106 N. W. 1012).

10. (1905.) A contract whereby one person employs an agent to negotiate for the purchase of real estate is not a contract for the creation of an estate or interest in land, or trust or power over or concerning lands, etc., within the meaning of the statute of frauds. *Johnson v. Hayward*, 74 Neb. 157 (103 N. W. 1058).

——— Sufficiency of signature.

11. (1907.) The word "subscribed" as used in section 74, chapter 73, Compiled Statutes, 1905, relating to contracts between real estate brokers and landowners, is synonymous with the word "signed." *Myers v. Moore*, 78 Neb. 448 (110 N. W. 989).

12. (1907.) The requirement of section 74, chapter 73, Compiled Statutes, 1905, that the contract be "subscribed" by both parties is met where the signatures of the parties are placed thereon, for the purpose of authenticating and giving force and effect to the contract, whether they be placed at the bottom, the top, or in the body of the instrument. *Myers v. Moore*, 78 Neb. 448 (110 N. W. 989).

Exclusive authority.

13. (1897.) A stipulation giving the agent exclusive authority to sell the premises for an indefinite time is not void as against public policy. *Woods v. Hart*, 50 Neb. 497 (70 N. W. 53).

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Revocation of authority.

14. (1897.) The principal may, at any time before sale, revoke the agent's authority, even though the instrument expressly stipulated the agent's power to sell should be exclusive. *Woods v. Hart*, 50 Neb. 497 (70 N. W. 53).

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Authority conferred.

14*a*. (1882.) Where an agent with only special and limited authority to sell a tract of land for a fixed price in case he could sell it "immediately," answered by letter that he could not sell it for that price, and requested permission to sell for considerably less, or if that were not given to "let the matter drop," he has no authority to sell the land at the price first offered, without a renewal of his agency. *Matthews v. Sowle*, 12 Neb. 398 (11 N. W. 857).

15. (1905.) A written contract between the owner of real estate and a real estate broker for the "sale" of property does not contemplate an exchange thereof for other property. *Lucas v. County Recorder of Cass County*, 75 Neb. 351 (106 N. W. 217).)

Rights of purchaser under sale repudiated by principal.

15*a*. (1898.) Where a real estate agent gave a memorandum of sale subject to approval of his principal, and the evidence showed the latter's prompt disapproval, direction of a verdict against one claiming the realty under the memorandum was *held* proper. *Powell v. Binney*, 54 Neb. 690 (74 N. W 1073).

Authority to act for buyer.

See, also, *post*, §§ 30-33.

16. (1902.) When a party acts as agent for both the seller and the buyer, and that is known to them, the law exacts the most perfect good faith, honesty and fairness on his part, and will not adjudge the specific performance of a contract thus made unless it has been entered into with perfect fairness and without misapprehension or misrepresentation. *Andrew v. Whitwer*, 3 Unof. 55 (90 N. W. 924).

17. (1905.) The mere listing of property with a broker for sale does not necessarily constitute the broker the owner's agent to make the sale so as to prevent him from becoming agent for a person desiring to purchase the property. *Johnson v. Hayward*, 74 Neb. 157 (103 N. W. 1058).

18. (1905.) A broker whose undertaking is merely to find a purchaser at a price fixed by the seller, or at a price which shall be satisfactory to the seller when he and the purchaser meet, is in reality only a middleman, whose duty is performed when the buyer and seller are brought together, and hence may act as agent for one desiring to purchase the property. *Johnson v. Hayward*, 74 Neb. 166.

Purchase of property by broker.

19. (1888.) Where an agent for the sale of real estate conceals from his principal material facts relative to the value of the property to be sold, and by a subterfuge fraudulently purchases the property from his principal in the name of another, for less than its value, the principal may, by proper proceedings in equity, rescind the sale and require a conveyance of the property from the agent. *Bookwalter v. Lansing*, 23 Neb. 291 (36 N. W. 594).

20. (1888.) If the broker, in good faith and without any desibn to obtain the property for himself, sold it to a purchaser, reported the sale to his principal, giving the terms and conditions thereof, and after the ratification of the sale by the principal, purchased the land from the party to whom it had been sold and received a conveyance from him, no fraud having been perpetrated against his principal, the principal cannot rescind the sale and require a reconveyance from the broker. *Bookwalter v. Lansing*, 23 Neb. 291 (36 N. W. 594).

21. (1893.) An agent is required to disclose to his principal all the information he has touching the subject-matter of the agency; and his relation to his principal forbids his becoming a purchaser thereof for his own benefit in any way without the full knowledge by the principal of this fact, and the principal's acquiescence therein with such knowledge. The burden of proving such knowledge and acquiescence is upon the agent. *Jansen v. Williams*, 36 Neb. 869 (55 N. W. 279; 20 L. R. A. 207).

22. (1905.) An agent for the purchase of property who purchases in his own name will be compelled to convey to his principal at the price paid by him. *Morrison v. Hunter*, 74 Neb. 559 (105 N. W. 88).

22*a*. (1907.) An agent having authority to sell both real and personal property for a certain sum, cannot, without the consent of his principal, take over to himself the personal property upon receiving the

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authorized sum for the real estate. *Northup v. Bathrick*, 80 Neb. 36 (113 N. W. 808).

23. (1905.) Where one employed to act as the agent for another in the purchase of real estate becomes the purchaser himself, he will be considered in equity as holding the property in trust for his principal, although he purchased with his own money, subject to reimbursement for his proper expenditures in that behalf. *Johnson v. Hayward*, 74 Neb. 157 (103 N. W. 1058).

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Priority of claims of purchasers.

24. (1905.) Where the equity of a person to have land purchased by his agent in his own name, charged with the trust, and that of a subsequent purchaser from the agent are equal, the former being prior in time, will prevail. *Johnson v. Hayward*, 74 Neb. 157 (103 N. W. 1058).

Denial of relation by broker.

24*a*. (1907.) By correspondence, plaintiffs, who are real estate brokers, arranged with a landowner for a sale of his land to a stranger, and during the negotiation demanded a certain sum as their commission, which, upon consummation of the sale, was paid to them. *Held*, That the plaintiffs will not be heard to say that they were not the agents of the vendor. *Northup v. Bathrick*, 80 Neb. 36 (113 N. W. 808).

II. COMPENSATION AND LIENS.

Right to compensation.

25. (1892.) A real estate broker who is employed to sell or dispose of the property of his principal is entitled to recover his commission whenever he has procured a customer who is willing and able to purchase the property at the price and upon the terms named by his principal. *Siemssen v. Homan*, 35 Neb. 892 (53 N. W. 1012).

26. (1897.) A real estate broker employed to make a sale has no claim for commissions until he furnishes a purchaser willing and able to buy the property upon the terms fixed by his principal. *Stewart v. Smith*, 50 Neb. 631 (70 N. W. 235).

27. (1893.) A commission cannot be collected by an agent for his services as such if he has wilfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency. *Jansen v. Williams*, 36 Neb. 869 (55 N. W. 279; 20 L. R. A. 207).

28. (1898.) Where a firm of real estate brokers undertook to find purchasers of land for one who held title thereto merely for convenience of transfer for the benefit of associates interested therein, such firm is not, in equity, entitled to decree subjecting unsold portions of such land, or such associates personally, to liability for the payment of commissions on the theory that the services of the firm in finding purchasers as undertaken were rendered in the execution of a technical trust. *Marshall v. Goble*, 56 Neb. 274 (76 N. W. 573).

29. (1894.) A real estate broker is ordinarily entitled to his commission when he has produced a purchaser willing and able to purchase on the terms proposed by the principal, but the broker and principal may agree on different terms, and if they do so, the broker is only entitled to commission when he has complied with the terms of the special contract. *Barber v. Hildebrand*, 42 Neb. 400 (60 N. W. 594).

Acting for both parties.

See, also, *ante*, §§ 16-18.

30. (1894.) A real estate agent acting for both parties in effecting an exchange of their property can recover compensation from neither unless such agent's double employment was known and assented to by both said contracting parties. *Campbell v. Baxter*, 41 Neb. 729 (60 N. W. 90).

31. (1894.) Money paid by a principal to his agent for the latter's services in effecting a sale or exchange of the principal's property may be recovered back, in an action at law, when it appears that such agent had or was to receive a commission or compensation from the other party to the trade or exchange for his services in bringing it about, if it also appear that at the time such principal made such payment he was ignorant of the fact that his agent was acting for both parties to such trade or exchange. *Campbell v. Baxter*, 41 Neb. 729 (60 N. W. 90).

32. (1895.) A real estate agent who has acted for both parties to an exchange of property can recover compensation only when his services have been limited to bringing together such parties as, without his interference, have agreed upon an exchange of the property with reference to which such agent procured them to meet; and even this limited right to compensation does not exist as against a party who

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in advance did not know of and assent to the agent's dual employment. *Strawbridge v. Swan*, 43 Neb. 781 (62 N. W. 199).

33. (1891.) One C. was employed by Y. to sell certain city property, and effected an exchange of real estate with one P. After the transaction was complete, P. paid C. $100 for his services, although he testified that he had previously not employed him. *Held*, There being no charge of bad faith, that if Y. had employed C to sell his property and he had procured a sale and exchange of the same upon terms satisfactory to Y., he was entitled to a fair compensation for his services. *Campbell v. Yager*, 32 Neb. 266 (49 N. W. 181).

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Sufficiency of services.

——In general.

34. (1889.) An owner of land authorized a broker to sell it for $150 per acre, "or if you have a proposition, you submit it, and I will consider it." The broker telegraphed to him that he thought he could sell at the price, with part of the payments deferred, and asked, "Shall I try?" The owner answered, "Will reply by letter," and in the letter declined to sell. *Held*, That there had been no sale according to the owner's terms (which must be construed to have been cash) and hence no commission was earned. *Morrill v. Davis*, 27 Neb. 775 (43 N. W. 1146).

35. (1894.) Where real estate is listed with an agent or broker for sale, the agreement being that it is to be sold for $4,800 net to the owner of the land, the broker to have and receive as compensation for making the sale any sum in excess of the $4,800 for which he can effect a sale, and he meets a party who desires to purchase the land, and informs him that it can be purchased for $4,800, and then introduces him to the owner, who completes the sale at the price above named, in an action by the broker to recover a reasonable commission, *held*, that he is not entitled to recover. *Beatty v. Russell*, 41 Neb. 321 (59 N. W. 919).

36. (1894.) Where a party, owner of 260 shares of bank stock, each share being of the value of $100, desired to sell the stock and agreed with a firm in the business of selling real estate and other property that if the firm would find him a purchaser for the stock said firm should receive, as compensation for such services, all of the consideration received for the sale of such stock in excess of the face or par valuation thereof, and the consideration for the sale of the stock was $26,000, the face value, and the seller to retain a dividend then earned of $780, *held*, that this was a sale of the stock for the sum of $780 in excess of the face or par value, and on proof of performance of the services contracted for, the plaintiffs were entitled to recover the above amount. *Blakeslee v. Ervin*, 40 Neb. 130 (58 N. W. 850).

37. (1898.) Ordinarily a real estate broker, who for a commission undertakes to sell land on certain terms and within a specified period, is not entitled to compensation for his services unless he produce to the owner a purchaser within the time limited who is able and willing to buy upon the terms prescribed in the contract of employment. *Langhorst v. Coon*, 53 Neb. 765 (74 N. W. 257).

——Bringing parties together.

38. (1882.) Where a real estate broker produces a purchaser willing to take the property, with whom the seller himself negotiates, the broker is entitled to his commission, although the seller sees fit to let the contract rest in parol, whereby he may be unable to enforce it. *Potvin v. Curran*, 13 Neb. 302 (14 N. W. 400).

39. (1882.) Where the price of property and the terms of payment are fixed by the seller, and the broker engages to procure a purchaser at that price and upon those terms, if, upon the procurement of the broker, a purchaser is produced, with whom the seller himself negotiates and effects a sale, although the terms may be changed, and even the sale itself finally abandoned, he is entitled to his commission. *Potvin v. Curran*, 13 Neb. 302 (14 N. W. 400).

40. (1884.) A landowner employed an agent to sell his real estate upon commission. The agent advertised the land at his own expense, and a neighbor seeing the advertisement directed a buyer to the farm, and thereby a sale of the land was effected. There being a dispute as to the contract between the landowner and agent, *held*, that the sale being effected through the agent's advertisement constituted a strong equity in his favor. *Anderson v. Cox*, 16 Neb. 10 (20 N. W. 10).

41. (1887.) Where an action was brought to recover commissions for effecting the sale of real estate, and the testimony shows

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that the broker merely procured a purchaser who purchased the premises from the owner, *held*, that, in the absence of objections, a judgment awarding the broker a less sum than the commission upon a completed sale will not be set aside. *Gregg v. Loomis*, 22 Neb. 174 (34 N. W. 355).

42. (1888.) Where the price of property and terms of payment are fixed by the seller, and a broker engages to procure a purchaser at this price and upon these terms, if, upon the procurement of the broker, a purchaser is produced with whom the seller himself negotiates and effects a sale, the broker is entitled to his commission. *Butler v. Kennard*, 23 Neb. 357 (36 N. W. 579).

43. (1888.) Where the price of property and the terms of payment are fixed by the seller, and the agent engages to procure a purchaser at that price and upon those terms, if, upon the procurement of the agent, a purchaser is produced, to whom a sale is made, even though the contract of sale may be made by the seller, the agent is entitled to his commission. *Nicholas v. Jones*, 23 Neb. 813 (37 N. W. 679).

44. (1892.) An instruction, "If you find from the evidence that the defendant employed the plaintiff to sell the farm and procure a purchaser therefor, and if you further believe that the purchaser, Levi Cox, received the information which led to the purchase of said farm from other parties than the plaintiff, and that plaintiff did not sell said farm or obtain or procure a purchaser for the same, then the plaintiff cannot recover, and you will find for the defendant," correctly states the law. *Burkholder v. Fonner*, 34 Neb. 1 (51 N. W. 293).

45. (1895.) In an action to recover commission the instruction that a man had the right to sell or trade his own property, and that if defendant acted for himself in the matter and did not employ plaintiff as his agent to procure him a customer, plaintiff could not recover for the alleged services, *held*, correctly to state the law, in view of the issues and of the proofs thereunder. *Strawbridge v. Swan*, 43 Neb. 781 (62 N. W. 199).

46. (1899.) A real estate agent who has been instrumental in producing a purchaser for land listed with him for sale is entitled to his contract commission though the owner of the property consummate the sale in ignorance of the services rendered by the agent. *Craig v. Wead*, 58 Neb. 782 (79 N. W. 718).

47. (1899.) Under a real estate broker's contract to find a purchaser it is not essential to his earning commissions that he literally bring the vendor and vendee together, or that he even inform the vendor of the identity of the proposed purchaser. It is sufficient if by his influence on the mind of the vendee he be the efficient cause of the two assuming the relations of vendor and vendee. *Hambleton v. Fort*, 58 Neb. 282 (78 N. W. 498).

48. (1902.) Where it appears that a piece of property has been listed with a real estate broker as a whole, and his sole authority is to negotiate a sale as a whole, and his negotiations to so sell it to a particular customer have been broken off, a subsequent sale some months later of a portion, only, of the property by the owner to the purchaser with whom the broker's negotiations were had, but independently, will not entitle the broker to a commission. *Frenzer v. Lee*, 3 Unof. 69 (90 N. W. 914).

Failure to complete transaction.

——In general.

49. (1897.) In an action for the recovery of an agreed compensation to be paid on the making of a sale or disposition of property, a broker is not entitled to recover for merely finding a purchaser, where the sale failed of consummation. *Dorrington v. Powell*, 52 Neb. 440 (72 N. W. 587).

——Default of principal or seller.

50. (1889.) Where real estate agents procure buyers for a tract of land listed with them for sale, and such buyer makes a part payment, such brokers are entitled to their compensation, even though the vendor refuse to complete the transaction. *Gibbons v. Sherwin*, 28 Neb. 146 (44 N. W. 99).

51. (1889.) A real estate agent was employed by one B to effect any exchange of certain real estate with one C. He succeeded in making a contract between the parties for the exchange of said parcels of land, and C complied with the contract on his part, but B, apparently without just cause, refused to comply. *Held*, That the agent was entitled to his commission. *Greenwood v. Burton*, 27 Neb. 808 (44 N. W. 28).

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52. (1890.) Where the owner of land employs a real estate agent to find a buyer for his land, which such agent does, and the owner accepts a better offer, he is liable to the agent for his commission. *Griffith v. Woolworth*, 28 Neb. 715 (44 N. W. 1137).

53. (1893.) Where a real estate broker is employed to procure a purchaser of real property, he is entitled to compensation when he has secured a proposed purchaser ready, able, and willing to buy the property on the terms and conditions upon which the said broker is authorized to procure such purchaser. This right to compensation will not be impaired by the subsequent inability or unwillingness of the owner to consummate such sale on the terms prescribed. *Jones v. Stevens*, 36 Neb. 849 (55 N. W. 251).

54. (1896.) A broker does not earn his commission by producing one able to purchase only by a resort to an unlawful device, though a contract of sale is entered into which the principal refuses to consummate because it involves a fraud upon a third person. *Zittle v. Schlesinger*, 46 Neb. 844 (65 N. W. 892).

——— Default of purchaser.

55. (1892.) Where a real estate broker secures a purchaser for land, on an agreement to exchange other property subject to a mortgage of twenty-five hundred dollars, but in fact the incumbrances is in excess of that amount and the purchaser is unable to consummate the transaction according to his agreement, the broker is not entitled to his commission. *Siemssen v. Homan*, 35 Neb. 892 (53 N. W. 1012).

55a. (1888.) Where a real estate agent is given authority to sell city property and finds a buyer who agrees to take the same after several inspections of the premises, but, when the parties meet to execute the deed, discovers the lot is some short in width and refuses to purchase, the agent cannot recover his commission from defendant. *Sloman v. Badwell*, 24 Neb. 790 (40 N. W. 321).

56. (1894.) Where the contract between the principal and the broker was that no commission should be paid unless an exchange of land were actually consummated, and a contract of exchange was entered into whereby the exchange was made conditional upon the purchaser's furnishing an abstract showing perfect title to the land to be given by him in exchange, and the purchaser furnished an abstract which did not show good title in him, and the exchange was not effected, *held*, that the broker was not entitled to his commission. *Barber v. Hildebrand*, 42 Neb. 400 (60 N. W. 594).

57. (1898.) Where a real estate broker contracts to produce a purchaser who shall actually buy, he has performed his contract by the production of one, financially able, with whom the owner actually makes an enforceable contract of sale, and failure to carry out that contract, even if the default be that of the purchaser, does not deprive the broker of his right to commission. *Lunney v. Healey*, 56 Neb. 313 (76 N. W. 558; 44 L. R. A. 593).

Fraud and bad faith of broker.

58. (1896.) While a real estate broker is usually entitled to his commission when he has produced one ready, willing, and able to purchase on the terms proposed by the principal, or when he has produced one with whom a contract of sale is actually made, still, if the person produced is able to purchase only by resort to an unlawful device, the broker has not earned his commission. *Zittle v. Schlesinger*, 46 Neb. 844 (65 N. W. 892).

59. (1902.) Where evidence tended to show an interest in the contract of purchase on the part of real estate broker, instruction that he must, to entitle him to commissions, act in good faith and in the interest of his employer, *held* not erroneous. *Buck v. Hogeboom*, 2 Unof. 853 (90 N. W. 635).

60. (1902.) An agent authorized by contract to sell real estate to any purchaser thereafter to be secured is not guilty of fraud for failing to disclose the identity of a prospective purchaser, where it appears that the vendors neither asked nor made any attempt to ascertain who such purchaser was. *Rank v. Garvey*, 66 Neb. 767 (92 N. W. 1025).

Quantum meruit, recovery on.

61. (1885.) In an action to recover for the value of services as agent in selling real estate, and there is testimony tending to show that the plaintiff rendered some service, but did not effect a sale, an instruction that if the jury believe that he rendered some service he is entitled to recover on a *quantum meruit* is not improper. *Mc-*

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Murtry v. Madison, 18 Neb. 291 (25 N. W. 85).

62. (1895.) On a petition alleging merely a special contract and performance by the plaintiff, the plaintiff cannot recover on a *quantum meruit* for part performance. *Mayer v. Ver Bryck*, 46 Neb. 221 (64 N. W. 691).

63. (1897.) A real estate broker suing and relying solely upon a special contract cannot recover on a *quantum meruit*. *Dorrington v. Powell*, 52 Neb. 440 (72 N. W. 587).

64, 65. (1904.) Services as a real estate broker rendered for the owner of the land, without a written contract, cannot be recovered for, as such, upon a *quantum meruit*. *Blair v. Austin*, 71 Neb. 401 (98 N. W. 1040) [see *Barney v. Lasbury*, 76 Neb. 701]; (1905) *Rodenbrock v. Gress*, 74 Neb. 409 (104 N. W. 758).

66. (1906.) A broker cannot recover on a *quantum meruit* on a contract void because not in writing, nor for the value of time expended in that behalf. *Barney v. Lasbury*, 76 Neb. 701 (107 N. W. 989).

Failure of notice to reach seller.

67. (1889.) Miscarriage of a notice of sale of lands, required by the vendor as a condition in the contract with the agent who sold the property, does not deprive the latter of his right to recover for services performed. *Gibbons v. Sherwin*, 28 Neb. 146 (44 N. W. 99).

III. ACTIONS FOR COMPENSATION.

Pleading.

Additional allegation in petition in district court on appeal, see *Justice of the Peace*, § 533.

68. (1891.) In an action by one who had been appointed sole agent to sell defendant's lands, for commissions on sales made by defendant, the defendant obtained leave to amend his answer by alleging "that after making the sales named he (plaintiff) complained that the prices were too high as named by defendant and made no effort to sell the same, but neglected the same, to the defendant's damage and injury." *Held*, That the matter involved in the amendment, not being pertinent to the case, was calculated to raise a false issue and distract the attention of the jury from the real questions for their determination. *Marshall v. Goble*, 32 Neb. 9 (48 N. W. 898).

69. (1904.) A petition, in an action by a real estate agent for commission earned under a contract to sell defendants realty, setting out a parol contract with defendant to find a buyer for his land does not state a cause of action. *Covey v. Henry*, 71 Neb. 118 (98 N. W. 434).

70. (1904.) Petition examined, and *held* sufficient to withstand a demurrer except for the fact that the letters alleged to constitute the contract are not shown or alleged to have been signed. *Bradley & Co. v. Bower*, 5 Unof. 542 (99 N. W. 490).

71. (1907.) In an action to recover compensation for services rendered as a real estate broker, a petition which discloses on its face that the contract of agency was not in writing is open to attack by demurrer. *Smith v. Aultz*, 78 Neb. 453 (110 N. W. 1015).

Issues and proof.

72. (1891.) In an action by a broker for commissions, a defense that plaintiff was to take his pay in land, is not available under a general denial. *Bishop v. Stevens*, 31 Neb. 786 (48 N. W. 827).

73. (1892.) In an action for commissions, testimony that a third person effected the sale is not admissible under a general denial. *St. Felix v. Green*, 34 Neb. 800 (52 N. W. 821).

74. (1897.) Where the claim of an agent for compensation was for finding a purchaser for the land of the defendant ready and willing to purchase, and, without objection, proof was made of the ability to purchase, as well as of the alleged readiness and willingness, the variance cannot be urged as error for the first time in the supreme court. *Hoefer v. Langhorst*, 53 Neb. 364 (73 N. W. 692).

75. (1907.) In an action by a principal against a broker to recover money received by the latter in payment for the land, and which he claims as his commission, the plaintiff, by alleging a contract of employment with defendant, is not thereby estopped to deny the particular contract for compensation which defendant pleaded in his answer. *Wells v. Cochran*, 78 Neb. 612 (111 N. W. 381).

Defenses.

76. (1894.) A broker is not a guarantor of the vendor's title and a defect in such title cannot defeat an action for his commission. *Barber v. Hildebrand*, 42 Neb. 400 (60 N. W. 594).

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77. (1895.) Where a broker undertakes to sell real estate in consideration of a suit of clothes to be worth fifty dollars, and there is a tender of a suit of clothes at the time, which tender is kept good, the plaintiff cannot recover. *Mayer v. Ver Bryck*, 46 Neb. 221 (64 N. W. 691).

78. (1896.) In an action to recover a brokers commission under a contract to exchange landd, a defect in the title to the land offered in exchange is as good a defense as would be proof that the purchaser produced had no means of buying. *Zittle v. Schlesinger*, 46 Neb. 844 (65 N. W. 892).

Evidence.

——Burden of proof.

79. (1895.) Plaintiff in an action to recover for services in effecting an exchange of defendant's property must show by a preponderance of the evidence that he was employed by defendant. *Strawbridge v. Swan*, 43 Neb. 781 (62 N. W. 199).

80. (1907.) To entitle a recovery on a contract of brokerage for the purchase of real estate, it is essential that the broker establish that he procured a valid conveyance of the real estate, or an enforceable contract of sale of the same, before he is entitled to the commission stipulated in his contract with the purchaser. *Bolton v. Coburn*, 78 Neb. 731 (111 N. W. 780).

81. (1906.) To entitle a real estate broker to recover a commission for the sale of real estate he must prove a sale of the land on such terms as would entitle him to a commission under the provisions of a written contract between himself and the owner. *Tracy v. Dean*, 77 Neb. 382 (109 N. W. 505).

——Admissibility.

82. (1892.) In an action to recover commissions for selling real estate, the defendant denied plaintiff's employment, or that he was instrumental in making the sale, and averred that it was negotiated by persons other than the plaintiff. It is incompetent to ask the buyer of the property, from whom he purchased and upon whose representations he relied in doing so. *Burkholder v. Fonner*, 34 Neb. 1 (51 N. W. 293).

83. (1894.) In an action to recover a commission for procuring a purchaser to certain realty, the action being upon a *quantum meruit*, and plaintiff testified that his services were worth a certain sum, it is not error to admit, without objection testimony as to the customary compensation to such brokers. *Shields v. Gamble*, 42 Neb. 850 (61 N. W. 101).

84. (1894.) In establishing the contract between the broker and his principal the parties are not bound by the terms of the written contract between the principal and purchaser, although it may evidence a portion of the broker's contract. In such a case parol evidence may be introduced, even if it operate to contradict or vary the terms of the written contract between the principals. *Barber v. Hildebrand*, 42 Neb. 400 (60 N. W. 594).

——Weight and sufficiency.

85. (1887.) Where a real estate broker brought an action to recover commissions for a completed sale of real estate, and the testimony showed that he had merely procured a purchaser, who afterwards purchased such real estate from the owner. *Held*, That the action was one to recover upon a *quantum meruit*—the value of the services rendered, but as no objection had been made to the testimony, the judgment will be sustained. *Gregg v. Loomis*, 22 Neb. 174 (34 N. W. 355).

86. (1890.) In action by broker for commission evidence examined and *held* to sustain judgment for plaintiff. *Seeley v. Smith*, 29 Neb. 545 (45 N. W. 922).

87. (1891.) In an action by a real estate agent to recover commissions for the sale of a house and lot belonging to the defendant there is but little conflict in the testimony, and a clear preponderance thereof sustains the plaintiff's claim for a commission. *Held*, That the judgment was right and is affirmed. *Tubbs v. Mackintosh*, 31 Neb. 238 (47 N. W. 854).

88. (1891.) Action for commission; verdict for $112.50, as commission on sale for $3,500, found to be sustained by the evidence. *Wasmer v. Lean*, 32 Neb. 519 (49 N. W. 463).

89. (1892.) Evidence *held* to sustain finding that plaintiff had been a moving cause in effecting the sale of the property in question, and hence was entitled to a commission therefor. *St. Felix v. Green*, 34 Neb. 800 (52 N. W. 821).

90. (1893.) One S., being the owner of certain real estate, executed a power of attorney to one H., authorizing him to sell the land, for either cash or partly on credit, for not less than $20 per acre. H. being

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unable to sell at $20 per acre, afterwards sold the land, subject to the approval of his principal, for $2,000 cash. *Held*, That the weight of the testimony sustained the finding and judgment of the court that the principal had ratified and confirmed the sale. *Prine v. Syverson*, 37 Neb. 860 (56 N. W. 714).

91. (1894.) Evidence *held* sufficient to prove a contract hiring plaintiff as broker to sell certain bank stock, and that plaintiff had made a sale thereof. *Blakeslee v. Ervin*, 40 Neb. 130 (58 N. W. 850).

92. (1894.) In an action for a broker's commission for the sale of real estate, which agency was denied, evidence showing that the defendant asked plaintiff, a real estate broker, what he had for sale, plaintiff suggested certain lands and wrote to the owner and another agent, *held* to sustain a verdict for plaintiff. *Shields v. Gamble*, 42 Neb. 850 (61 N. W. 101).

93. (1898.) Evidence in an action by a real estate broker to recover his commission from the owner of real land who has refused to convey to a purchaser sustains a finding for plaintiff. *Lunney v. Healy*, 56 Neb. 313 (76 N. W. 558; 44 L. R. A. 593).

94. (1905.) Under the evidence, *held*, that a real estate broker has no just cause for complaint of an allowance to him of $300 as commission for services in the exchange of properties. *Lucas v. County Recorder of Cass County*, 75 Neb. 351 (106 N. W. 217).

95. (1907.) Evidence examined, and *held* insufficient to show a right of plaintiff to recover commissions as broker for the sale of real estate. *Bolton v. Coburn*, 78 Neb. 731 (111 N. W. 780).

96. (1906.) Correspondence set out in the opinion *held* insufficient to entitle the plaintiff to recover a commission. *Tracy v. Dean*, 77 Neb. 382 (109 N. W. 505).

Instructions.

97. (1885.) Where there was evidence tending to show that the plaintiff rendered no services whatever in effecting a sale of real estate, an instruction to the effect that if the jury should so find the plaintiff would not be entitled to recover is based upon evidence in the case, and is not inconsistent with the instruction that if he did render some service, he is entitled to recover on a *quantum meruit*. *McMurtry v. Madison*, 18 Neb. 291 (25 N. W. 85).

98. (1885.) In an action for compensation an instruction that plaintiff is entitled to recover, if at all, "such sum as you believe from the evidence his services were reasonably worth according to the usual and customary mode of charging for such services among real estate agents at the time and place such services were rendered," *held* proper. *Lansing v. Johnson*, 18 Neb. 174 (24 N. W. 726).

99. (1891.) Instructions in action by broker for commissions, *held* erroneous. *Marshall v. Goble*, 32 Neb. 9 (48 N. W. 898).

100. (1892.) Instructions to find for plaintiff in case the jury found he consummated a sale of realty *held* applicable to the evidence. *St. Felix v. Green*, 34 Neb. 800 (52 N. W. 821).

101. (1895.) In an action by a real estate broker to recover on a special contract for procuring a purchaser, the contract having been made by one alleged to be the agent of the owner and the authority of the agent being one of the issues, the court properly refused an instruction stating that the plaintiff was entitled to recover if he was employed by the owner or some one acting for her without stating that such person must be authorized to so act. *Funk v. Latta*, 43 Neb. 739 (62 N. W. 65).

102. (1897.) Instructions in an action for a broker's commission *held* not erroneous. *Stewart v. Smith*, 50 Neb. 631 (70 N. W. 235).

103. (1898.) Instructions *held* correct in an action by real estate agents for commission for making a sale. *Traynor v. Morse*, 55 Neb. 595 (75 N. W. 1103).

104. (1902.) In an action by a broker, for commissions alleged to be due for procuring a purchaser of real estate, the instructions examined, and *held* properly given. *Huffman v. Ellis*, 64 Neb. 623 (90 N. W. 552).

105. (1902.) Where party claims compensation as real estate broker for procuring a purchaser of lands and no exclusive right of sale was claimed, an instruction to the effect that the seller had a right to trade his own property, and that if the broker was not instrumental in bringing about the making of a contract, he could recover no commission on it, *held* proper. *Buck v. Hogeboom*, 2 Unof. 853 (90 N. W. 635).

BUCKET SHOPS.

Recovery of money lost in, see *Gaming*, §§ 25-29.

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BUILDING AND LOAN ASSOCIATIONS.

ANALYSIS.

Status of association, § 1.
Statutory provisions, §§ 2-7.
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Subscription to stock, §§ 10, 11.
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——— What law governs, §§ 20-22.
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Interest and usury.
——— Rate of interest chargeable, §§ 24-27.
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——— Allowance in general, §§ 38-47.
——— Allowance for premiums and dividends, §§ 48-53.
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CROSS-REFERENCES.

See, also, *Corporations*.

Assessment of property for taxation, see *Taxation*, § 294.

Listing shares for taxation, see *Taxation*, §§ 221, 222.

Status of association.

1. (1894.) A corporation which has for its object the purchase of land and the construction of houses thereon (the funds being realized from the capital stock paid in by subscribers in installments), and finally the allotment of the lots and houses among stockholders in satisfaction of their stock, is one organized for the purpose of carrying on a lawful business and authorized by the general incorporation laws. *York Park Building Ass'n v. Barnes*, 39 Neb. 834 (58 N. W. 440).

Statutory provisions.

2. (1878.) In the act of February 18, 1873, entitled "An act to enable associations of persons for raising funds to be loaned among their members for building homesteads to become bodies corporate," the words "and other purposes" are null and void. *Lincoln Building & Savings Ass'n v. Graham*, 7 Neb. 173.

3. (1896.) The act of 1873 (Gen. Stats., p. 207), providing for the incorporation of building and loan associations, does not conflict with section 15, article III of the constitution, prohibiting special legislation. *Livingston Loan & Building Ass'n v. Drummond*, 49 Neb. 200 (68 N. W. 375).

4. (1896.) Assuming that the purpose of the act of 1891, relating to foreign building and loan associations (Comp. Stats., secs. 148*a*-148*r*, ch. 16), was to invalidate contracts of non-complying corporations, the act, as to agreements existing at the time of its enactment, is unconstitutional. *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434 (67 N. W. 493).

5. (1896.) The primary object of the act of 1891, relating to building and loan associations (Comp. Stats., secs. 148*a*-148*r*, ch. 16), is to bring a designated class of foreign corporations within the jurisdiction of the state courts in order to protect persons dealing with them from fraud and imposition. *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434 (67 N. W. 493).

6. (1901.) The title to an act of the legislature of 1873, entitled "An act to enable associations of persons for raising funds to be loaned among their members for building them homesteads and other purposes, to become bodies corporate," with

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sufficient clearness indicates the subject of legislation. *Nebraska Loan & Building Ass'n v. Perkins*, 61 Neb. 254 (85 N. W. 67).

7. (1901.) Chapter 11, General Statutes of 1873, entitled "An act to enable associations of persons for raising funds to be loaned among their members for building them homesteads and other purposes, to become bodies corporate," is not unconstitutional. *Chadron Loan & Building Ass'n v. O'Linn*, 1 Unof. 1 (95 N. W. 368).

By-bidding by officers.

8. (1902.) Loans by the association must be open to competitive bidding, and by-bidding by the officers or agents of the association for the purpose of increasing the premium to be paid for loans, will not be tolerated. *South Omaha Loan & Building Ass'n v. Wirrick*, 63 Neb. 598 (88 N. W. 694).

Deducting premium from loan.

9. (1902.) A building and loan association may deduct from a loan made to one of its members the premium bid for the right of precedence in taking such loan. *South Omaha Loan & Building Ass'n v. Wirrick*, 63 Neb. 598 (88 N. W. 694).

Subscription to stock.

10. (1894.) One to whom stock is issued, who pays assessments thereon, acts as an officer and takes part in management of corporation, is estopped to deny his subscription. *York Park Building Ass'n v. Barnes*, 39 Neb. 834 (58 N. W. 440).

11. (1896.) In a suit for money paid for stock, and to cancel the subscription contract on account of false and fraudulent representations of defendant's agent, the surrender of the stock is a condition precedent to the right to rescind, in absence of evidence that the stock is worthless. *Building & Loan Ass'n of Dakota v. Cameron*, 48 Neb. 124 (66 N. W. 1109).

Validity of contract in general.

12. (1902.) Contracts in which a corporation, in consideration of stated payments made to it, makes promises, which are the main inducement to such contracts, and are impossible to perform, are unlawful, being against public policy. *State, ex rel. Prout, v. Nebraska Home Co.*, 66 Neb. 349 (92 N. W. 763; 103 Am. St. Rep. 706; 60 L. R. A. 448).

13. (1902.) Contracts of a corporation, in consideration of stated payments to it, by which it professes to assist the holders of its contracts in the purchase of homes and in payment of the same, where under its scheme some of the contributors can obtain no assistance for more than seventy years, are unlawful, as against public policy. *State, ex rel. Prout, v. Nebraska Home Co.*, 66 Neb. 349 (92 N. W. 763; 103 Am. St. Rep. 706; 60 L. R. A. 448).

Contracts with foreign association.

14. (1901.) A contract made in this state, with a resident thereof, by a foreign building and loan association, which has failed to first procure a certificate or approval and authorization from the proper officers for transacting business in this state, is void and unenforceable, though the parties to such contract may have stipulated therein that it should be governed by the laws of the state where the offending association is resident. *Henni v. Fidelity Building & Loan Ass'n*, 61 Neb. 744 (86 N. W. 475; 87 Am. St. Rep. 519).

15. (1901.) 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. *Pioneer Savings & Loan Co. v. Eyer*, 62 Neb. 810 (87 N. W. 1058).

16. (1901.) The policy of this state, as announced by the legislature, is to prohibit the transaction of business by foreign building and loan associations, unless duly authorized by the proper authorities. *Henni v. Fidelity Building & Loan Ass'n*, 61 Neb. 744 (86 N. W. 475; 87 Am. St. Rep. 519).

17. (1901.) In the absence of usury, fraud, or other illegality, a contract with a foreign building and loan association will be enforced according to an equitable interpretation of its terms. *People's Building, Loan & Savings Ass'n v. Gilmore*, 1 Unof. 181 (90 N. W. 108).

18. (1902.) When a member of a so-called mutual loan association, not incorporated under the laws of this state, borrows money of the society at an agreed rate of interest and surrenders to the society his shares of stock therein, and stipulates to continue the payment of monthly dues upon such shares, such stipualtion is without consideration and is void, and the borrower's obligations to the association are discharged by the repayment of the loan with interest at the agreed rate. *Kear*

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v. Eastern Building & Loan Ass'n, 2 Unof. 895 (90 N. W. 643).

19. (1906.) A contract with a foreign building and loan association authorized to transact business in this state at the time the contract is made does not become unenforceable by reason of the failure of the association to renew its authority to transact business in the state. *Eastern Building & Loan Ass'n v. Tonkinson*, 76 Neb. 470 (107 N. W. 762).

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——What law governs.

20. (1903.) Contracts made in this state, by residents of this state, with foreign building and loan associations, such contracts being made through agents of such associations located in this state, are Nebraska contracts, and their construction, validity and enforcement are governed by the laws of this state. *National Mutual Building & Loan Ass'n v. Retzman*, 69 Neb. 667 (96 N. W. 204).

21. (1901.) A contract executed in this state by a New York building and loan association, on property in this state, is a Nebraska contract, and the construction and validity is to be governed by laws of this state. *People's Building, Loan & Savings Ass'n v. Parish*, 1 Unof. 505 (96 N. W. 243)

22. (1902.) Contracts made in Nebraska, with residents of this state, by a foreign building and loan association, if made by agents of such associations within this state, are Nebraska contracts; and by their construction, validity and enforcement are governed by the laws of this state. *People's Building, Loan & Savings Ass'n v. Shaffer*, 63 Neb. 573 (88 N. W. 669).

Recovery of premiums.

23. (1894.) Action by stockholder to recover back payments on his shares, on ground that company refused to make a promised loan; judgment for plaintiff affirmed, and order requiring plaintiff to file certificate of stock with clerk for cancelation and delivery to defendant approved. *American Building & Loan Ass'n v. Mordock*, 39 Neb. 413 (58 N. W. 107).

Interest and usury.

——Rate of interest chargeable.

24. (1878.) Persons associated and incorporated under section 123 and subsequent sections of chapter XXV of the Revised Statutes of 1866, for the transaction of lawful business, have no authority as a corporation to charge and receive interest on loans made by them, to exceed the maximum rate allowed by law; and all loan contracts made by such corporation for interest in excess of the rate fixed by law, are affected with the vice of usury. *Lincoln Loan & Savings Ass'n v. Graham*, 7 Neb. 173.

25. (1896.) The act of 1873 authorized associations created thereunder to collect money by stated dues, fines, interest, and by premiums bid by members for the right of precedence in taking loans. It also provided that the dues, fines, and premiums, although in excess of legal interest, shall not be construed to make the loan usurious. *Held*, That interest might be reserved at the highest rate permitted by law on the face of the loan, although the premium was deducted from that amount and the difference only paid the borrower. *Livingston Loan & Building Ass'n v. Drummond*, 49 Neb. 200 (68 N. W. 375).

26. (1902.) A contract which provides for the payment of 6 per cent. interest, payable monthly, on a loan of $1,500, and also provides for a "premium" of $1,500, to be paid by the borrower by taking stock in that amount in a foreign corporation which has not complied with our statute regulating building and loan associations, and making monthly payments on said stock of $9 each until the same is matured, is usurious. *Anselme v. American Savings & Loan Ass'n*, 66 Neb. 520 (92 N. W. 745).

27. (1904.) The loan made to the appellee in this case held to be tainted with usury. *Clarke v. Woodruff*, 72 Neb. 286 (100 N. W. 314).

——Determining usurious contract.

28. (1906.) In determining whether a contract with a foreign building and loan association is usurious, it is proper to consider only such payments contracted for as are in the nature of interest and premiums on the loan. *Eastern Building & Loan Ass'n v. Tonkinson*, 76 Neb. 470 (107 N. W. 762).

——Foreign association.

29. (1898.) In foreclosure by a foreign building and loan association the rate of interest is not regulated by chapter 14, Session Laws of 1891, which relates solely to domestic associations. *National Mutual Building & Loan Ass'n v. Keeney*, 57 Neb. 94 (77 N. W. 442).

30. (1899.) A foreign building and loan association is subject to the penalties of the statute against usury. *Building & Loan Ass'n of Dakota v. Bilan*, 59 Neb. 458 (81 N. W. 308).

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——— Penalties.

31. (1898.) In an action of foreclosure brought by a building and loan association incorporated under the laws of a state other than Nebraska, the rights of plaintiffs with respect to interest are governed by chapter 44, Compiled Statutes; and if, for the use of the money sought to be collected, the proofs, upon proper issues, show that more than ten per cent. interest per annum has been contracted for or received under any pretense whatever, the penalties prescribed by said chapter 44 for contracting for or receiving usury should be enforced. *National Mutual Building & Loan Ass'n v. Keeney*, 57 Neb. 94 (77 N. W. 442).

32. (1899.) The contracts of foreign building and loan associations made in this state are not exempt from the penalties denounced against usurious transactions by our statutes. *Interstate Savings & Loan Ass'n v. Strine*, 58 Neb. 133 (78 N. W. 377).

33. A foreign building and loan association doing business in this state, is subject to the penalties of the statute against usury. (1899) *Interstate Savings & Loan Ass'n v. Strine*, 59 Neb. 27 (80 N. W. 45); (1899) *Building & Loan Ass'n of Dakota v. Bilan*, 59 Neb. 458 (81 N. W. 308); (1899) *People's Building & Loan Ass'n v. Parish*, 1 Unof. 505 (96 N. W. 243); (1902) *People's Building & Loan Savings Ass'n v. Palmer*, 2 Unof. 460 (89 N. W. 316); (1902) *People's Building & Loan Savings Ass'n v. Welton*, 2 Unof. 462 (89 N. W. 317); (1902) *People's Building, Loan & Savings Ass'n v. Carricker*, 2 Unof. 465 (89 N. W. 316).

34. (1902.) A foreign building and loan association, which reserves a greater rate of interest than $10 per year on the hundred in a contract for the loan of money in this state, is not exempt from the penalties of the usury laws. *Anselme v. American Savings & Loan Ass'n*, 66 Neb. 520 (92 N. W. 745).

35. (1902.) The provisions of the homestead association act of 1873, did not exempt foreign building and loan associations from the penalties of usury. *People's Building, Loan & Savings Ass'n v. Shaffer*, 63 Neb. 573 (88 N. W. 669).

Recovery of loan on insolvency.

36. (1902.) Where a building and loan association is insolvent and unable to perform its contracts with its members, and a receiver is appointed to wind up its affairs, it is entitled to recover from a borrowing member the amount of money actually loaned, with interest thereon from date at the legal rate, less the amount paid by the member as interest and premium, with interest from the date of the several payments. Such borrower is not entitled to credit upon his loan for money paid into the association as dues upon the stock. *Anselme v. American Savings & Loan Ass'n*, 63 Neb. 525 (88 N. W. 665).

Change of business method as defense to foreclosure.

37. (1902.) In an action to foreclose a mortgage given to a building and loan association organized under the laws of this state, the fact that the association changed its method of making loans and conducting its business after the making of the mortgage is no defense to the action, especially in the absence of a showing that the mortgagor objected thereto. *South Omaha Loan & Bldg. Ass'n v. Wirrick*, 63 Neb. 598 (88 N. W. 694).

Application of payments on forfeiture or foreclosure.

——— Allowance in general.

38. (1894.) In an action to foreclose a mortgage given to secure a loan from a building and loan association, to a member, equity will relieve against a forfeiture of payments for delinquency in the interest to the extent of treating payments upon the stock as payments upon the loan. *Randall v. Nat. Building, Loan & Protective Union*, 42 Neb. 809 (60 N. W. 1019; 29 L. R. A. 133).

39. (1894.) Payments by a member of a building and loan association upon stock should, in an accounting of the amount due on a mortgage against him, be treated as payments on the loan. The fact that the company declared the stock forfeited according to the terms of the contract does not change the rule. *Randall v. Nat. Building, Loan & Protective Union*, 42 Neb. 809 (60 N. W. 1019; 29 L. R. A. 133).

40. (1894.) A member of a building and loan association, who was also a borrower, brought an action, before the maturity of the stock or loan, to redeem from the mortgage given to secure the loan on the ground of fraud in procuring it. She prayed that the mortgage be canceled on her payment of the amount found by the court to be due. The association brought its action to foreclose the mortgage because of delinquency

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in interest. The note provided that any such delinquency rendered the whole debt due. The court consolidated the two cases and made a general finding for the plaintiff in the first suit, but ascertained the amount due on the mortgage and decreed a foreclosure and sale. The association appealed. *Held*, That inasmuch as both parties sought the same relief and the appellant obtained all the relief it sought except as to the amount found due, the other issues were immaterial to the appeal. *Randall v. Nat. Building, Loan & Protective Union*, 42 Neb. 809 (60 N. W. 101[a]; 29 L. R. A. 133).

41. (1895.) An agreement whereby the stock of a borrowing member of a building and loan association, pledged as collateral security for his loan, is to be forfeited upon default of interest, without allowing credit on account of payments previously made on such stock, is unconscionable, and will not be enforced by the courts of this state, although recognized as valid in the association's own state. *Randall v. Nat. Building, Loan & Protective Union*, 43 Neb. 876 (62 N. W. 252).

42. (1895.) Although stock payments by a borrowing member of a building and loan association are not *ipso facto* credits upon his indebtedness so as to reduce *pro tanto* the amount due on his mortgage, a borrower may elect to have payments on account of stock applied upon his indebtedness to the association. *Randall v. Nat. Building, Loan & Protective Union*, 43 Neb. 876 (62 N. W. 252).

43. (1900.) A borrower from a building and loan association, whose mortgage stipulates that in case of foreclosure he shall receive credit for the withdrawal value of his shares of stock on a basis fixed by the by-laws, is entitled on foreclosure to have the withdrawal value of his stock fixed and credited according to his contract. *Equitable Building & Loan Ass'n v. Bidwell*, 60 Neb. 169 (82 N. W. 384).

44. (1901.) In an accounting between a foreign building and loan association and one of its members, when there exists a stock purchase and a loan, the transaction is to be treated as a loan and the borrower has the right to have the value of his stock applied to reduce the indebtedness of the mortgage, if he so chooses. *McDowell v. Pioneer Savings & Loan Co.*, 2 Unof. 24 (90 N. W. 111).

45. (1901.) It is the right of a defaulting borrower from a building and loan association who so elects to have a credit of the present value of his stock applied to the reduction of his mortgage indebtedness. *People's Building, Loan & Savings Ass'n v. Gilmore*, 1 Unof. 181 (90 N. W. 108).

46. (1901.) The stock is to be taken as worth the amount that has been paid on it, in absence of evidence as to its actual value. *McDowell v. Pioneer Savings & Loan Co.*, 2 Unof. 24 (90 N. W. 111).

47. (1902.) In an accounting between a foreign building and loan association and a member to whom a loan has been made, if credit is given the member for the amount paid upon the stock, it must be on the theory that such amount represents the value thereof, he having elected to apply it on the debt. Hence, where such sum is credited to the borrower, no further deduction should be made for value of the stock. *Mercantile Co-operative Bank v. Shaaf*, 2 Unof. 703 (89 N. W. 990).

——— Allowance for premiums and dividends.

48. (1896.) In ascertaining the amount due on a loan, from a building and loan association, the borrower is entitled to a credit of the present value of the stock at the time of foreclosure as well as to a fair and reasonable credit on account of unearned premium, and by-laws fixing the terms of ascertaining such credit will be enforced where not unconscionable. *Livingston Loan & Building Ass'n v. Drummond*, 49 Neb. 200 (68 N. W. 375); (1901) *Chadron Loan & Bldg. Ass'n v. Simmons*, 1 Unof. 718 (95 N. W. 868).

49. (1901.) Payments made on the stock are not to be applied as payments on the loan until the borrower has elected to have them so applied, and credit for the value of the stock should be given at the time of such election, and not as of the date when the payments were made. *McDowell v. Pioneer Savings & Loan Co.*, 2 Unof. 24 (90 N. W. 111).

50. (1901.) Payments made on account of operating expenses and fines paid belong to the company and should not be credited on the mortgage. *McDowell v. Pioneer Savings & Loan Co.*, 2 Unof. 24 (90 N. W. 111).

51. (1901.) Payments made for premium and interest, if not usurious, are not to be credited on the principal of the mortgage debt. *McDowell v. Pioneer Savings & Loan Co.*, 2 Unof. 24 (90 N. W. 111).

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52. (1901.) Any dividends declared or earned on the stock will inure to the borrower's credit, and this may be credited on the mortgage. *McDowell v. Pioneer Savings & Loan Co.*, 2 Unof. 24 (90 N. W. 111).

53. (1901.) Value of stock will be taken to at least equal sum of stock payments and declared dividends in the absence of competent proof of losses. *People's Building, Loan & Savings Ass'n v. Gilmore*, 1 Unof. 181 (90 N. W. 108).

Evidence.

54. (1894.) In an action against a building and loan association to recover payments on shares of stock parol evidence of the contents of the by-laws of the association is not admissible. *American Building & Loan Ass'n v. Mordock*, 39 Neb. 413 (58 N. W. 107).

55. (1894.) In an action by a stockholder of a building and loan association to recover back payments made on his shares of stock objection to a deposition, in regard to the usage and custom of the company in transacting business was by the direct contract between them and the rules and by-laws of the association, properly sustained. *American Building & Loan Ass'n v. Mordock*, 39 Neb. 413 (39 N. W. 107).

56. (1896.) Evidence examined, and *held* not to prove the breach by the defendant, a foreign building and loan association, of an alleged agreement to maintain at the plaintiff's home a local board of directors. *American Building & Loan Ass'n v. Rainbolt*, 48 Neb 434 (67 N. W. 493).

BUILDING REGULATIONS.

By cities, see *Municipal Corporations*, §§ 581-584.

BUILDINGS.

Removal of, by city authorities, see *Municipal Corporations*, § 585.

Effect of mechanic's lien, see *Mechanics' Liens*.

School buildings, see *Schools and School Districts*, §§ 118-138.

BURDEN OF PROOF.

In particular actions or proceedings, see specific topics.

On dissolution of attachment, see *Attachment*, § 313.

Of get of child in bastardy, see *Bastardy*, § 55.

In action on negotiable instrument in general, see *Bills and Notes*, §§ 540-571.

Good faith of purchaser of negotiable instrument, see *Bills and Notes*, §§ 554-564.

In action against common carrier, see *Carriers*, §§ 162-164; 270-290; 330-332.

Contracts, action on, see *Contracts*, §§ 434-440.

Of compromise of claim, see *Compromise and Settlement*, §§ 48, 49.

In criminal prosecutions, see *Criminal Law*, §§ 218-227.

In divorce, see *Divorce*, §§ 71, 72.

In civil actions in general, see *Evidence*, III.

For spread of fire from railroad, see *Railroads*, § 391-397.

Undue influence in wills, see *Wills*, §§ 60-64.

BURGLARY.

ANALYSIS.

I. OFFENSES AND RESPONSIBILITY.
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——— Breaking and entering, §§ 1-3.
——— Time of breaking, §§ 4-7.
——— Character of building, §§ 8, 9.
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II. PROSECUTION AND PUNISHMENT.
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——— Time of commission of offense, §§ 36-39.
——— Breaking and entering, §§ 40-42.
——— Violence, § 43.
Question for jury, § 44.
Effect of mistrial on subsequent prosecution for larceny, § 45.
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Sentence, § 53.

CROSS-REFERENCES.

See, also, *Criminal Law; Larceny.*

Entering without intent to commit crime, see *Forcible Entry and Detainer; Trespass.*

I. OFFENSES AND RESPONSIBILITY.

Nature and elements of offense.

——— Breaking and entering.

Evidence of breaking, see *post*, §§ 40-42.

1. (1895.) A breaking necessary to constitute the crime of burglary may be by any act of physical force, however slight, by which the obstruction to entering is forcibly removed. *Metz v. State*, 46 Neb. 547 (65 N. W. 190).

2. (1897.) The lifting of a hook with which a door is fastened, or the opening of a closed door in order to enter a building, is a "breaking" within the accepted definition of burglary, although the entry might have been effected through a door already open. *Ferguson v. State*, 52 Neb. 432 (72 N. W. 590; 66 Am. St. Rep. 512).

3. (1897.) It is a familiar principle that a breaking necessary to constitute the crime of burglary may be by any act of physical force, however slight, by which the obstruction to the entering is removed. *Ferguson v. State*, 52 Neb. 432 (72 N. W. 590; 66 Am. St. Rep. 512).

——— Time of breaking.

Evidence of time of offense, see *post*, §§ 36-39.

4. (1893) Under section 48, criminal code, the breaking and entering in the night season is an essential element of the crime. *Ashford v. State*, 36 Neb. 38 (53 N. W. 1036).

5. (1897.) That the act be committed in the night-time is an essential element of the crime of burglary. *In re McVey*, 50 Neb. 481 (70 N. W. 51).

6. (1897.) Under an information against a person for the crime of burglary, he cannot be convicted of the statutory offense of breaking and entering buildings in the daytime described in section 53 of the criminal code. *In re McVey*, 50 Neb. 481 (70 N. W. 51).

7. (1898.) By section 48 of the criminal code, breaking and entering in the night-season are essential elements of the crime of burglary. *Bergeron v. State*, 53 Neb. 752 (74 N. W. 253).

——— Character of building.

8. (1895.) A building, erected upon a farm, designed and used for the purpose of storing corn after it is husked, is a storehouse and warehouse within the meaning of section 48 of the criminal code defining burglary. *Metz v. State*, 46 Neb. 547 (65 N. W. 190).

8*a*. (1907.) A vat six or eight feet deep and six feet in diameter, constructed of heavy oak timbers, which is partly sunk in the ground, having a hinged cover secured in place by a lock, and which is used for storing hides, awaiting sale, is a "storehouse," within the meaning of that word, as used in section 48 of the criminal code. *Steele v. State*, 80 Neb. 9 (113 N. W. 798).

9. (1900.) Breaking into a basement hallway, *held* to be a burglary of the dwelling-house of the person residing in the building, and having the general charge and control thereof, although such basement is not connected internally with other portions of the building *Hahn v. State*, 60 Neb. 487 (83 N. W. 674).

——— Value of property.

10. (1898.) Where an information for burglary charges that the breaking and entering were effected with the intent to steal, it is necessary to prove that the property possessed some value and was within

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the building. *Bergeron v. State*, 53 Neb. 752 (74 N. W. 253).

Consent of owner as defense.

11. (1887.) Where the proprietor of a building hears of an intended burglary to be committed by breaking into such building, and does not prevent it, but puts a force in the building to capture the burglar, and does effect his capture, this does not affect the guilt of the burglar. *State v. Sneff*, 22 Neb. 481 (35 N. W. 219).

II. PROSECUTION AND PUNISHMENT.

Indictment and information.

Indictments in general, see *Indictment and Information.*

——— In general.

12. (1888.) Where a preliminary examination was held upon a complaint charging the crime of burglary with the intent to steal, and the information filed by the county attorney in the district court charges the same offense, but with the intent to commit a rape, it was held that the same crime, to-wit, burglary, was described, both in the complaint and in the information. *Alderman v. State*, 24 Neb. 97 (38 N. W. 36).

13. (1903.) An allegation of an unlawful entering of a building with intent to commit one of the crimes enumerated in section 49 of the criminal code, is not sufficient to charge a crime as therein defined. *Smith v. State*, 68 Neb. 204 (94 N. W. 106).

14. (1907.) A preliminary examination on a complaint charging breaking into a storeroom with intent to steal goods will sustain a prosecution on an information charging the same facts, together with the value of the property actually stolen. *Wheeler v. State*, 79 Neb. 491 (113 N. W. 253).

——— Time of offense.

Time as element of offense, see *ante*, §§ 4-7.

15. (1900.) It is not essential, in an information or indictment charging burglary, to state the particular hour of the night at which the crime was committed. *Leisenberg v. State*, 60 Neb. 628 (84 N. W. 6).

——— Intent.

16. (1889.) In an indictment for burglary it is necessary that the indictment contain an averment that the breaking was with intent to steal property within the building. *Winslow v. State*, 26 Neb. 308 (41 N. W. 1116).

17. (1907.) A complaint which charges the defendant with burglariously breaking and entering a storeroom with intent to steal the goods and property of the owner need not allege the value of the property stolen or intended to be stolen. *Wheeler v. State*, 79 Neb. 491 (113 N. W. 253).

——— Ownership of premises.

18. (1889.) In an indictment for burglary, it is necessary that the name of the owner of the building broken into should be given, and for this purpose the person in the visible occupancy and control of the premises, at the time of the burglary, may be set out as the owner, whether he be the owner of the title or a tenant. *Winslow v.* State, 26 Neb. 308 (41 N. W. 1116). [Overruled in part. *Leisenberg v. State*, 60 Neb. 628.]

19. (1900.) In an information for burglary, it is proper to allege ownership in the person having the visible occupancy and control of the premises burglarized. *Hahn v. State*, 60 Neb. 487 (83 N. W. 674).

20. (1900.) Where a building is occupied by a person having general charge thereof the ownership should be alleged in him in an information for burglary, though some of the rooms are let to lodgers. *Hahn v. State*, 60 Neb. 487 (83 N. W. 674).

21. (1900.) Where a building occupied by a person having general charge thereof has a basement, some of the rooms of which are let to lodgers, and for other purposes, and a hallway leading to the different rooms is in possession of and used by the person in charge of the building, in common with those occupying the rented rooms in such basement, and a burglary is committed by breaking in at the door of such hallway, ownership was properly charged as being in the person in possession, and having charge and control of the premises. *Hahn v. State*, 60 Neb. 487 (83 N. W. 674).

——— Description of building.

Character of property as element of offense, see *ante*, §§ 8, 9.

22. (1903.) In an information for burglary, a drug store is properly described as "a storehouse, commonly called a drug store." *McNutt v. State*, 68 Neb. 207 (94 N. W. 143).

Presumption from possession of property.

23. (1894.) An instruction which, in effect, left it to the jury to determine what weight and effect should be given the cir-

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cumstance that the accused, soon after the burglary charged was in possession of goods which had been taken from the store where the burglary had been committed, proper. *Whitman v. State*, 42 Neb. 841 (60 N. W. 1025). [Overruled. *Metz v. State*, 46 Neb. 547.]

24. (1895.) That a building was burglariously entered, and property stolen therefrom was, soon thereafter, found in the exclusive possession of the accused, do not, alone, raise a presumption of law that he is guilty of the burglary. The inference to be drawn from such facts is for the jury alone to determine, when considered in connection with all the other facts proven. *Metz v. State*, 46 Neb. 547 (65 N. W. 190).

25. (1900.) No presumption of guilt arises from the mere possession of stolen property. *Williams v. State*, 60 Neb. 526 (83 N. W. 681).

Admissibility of evidence.

26. (1898.) Circumstantial evidence is competent in a prosecution for burglary. *Cunningham v. State*, 56 Neb. 691 (77 N. W. 60).

27. (1904.) Where one is arrested for the crime of burglary, evidence of what was found in his room at the time of his arrest, together with his conduct and statements on that occasion, is proper and competent as tending to show his consciousness of innocence or guilt, as the case may be. *Kennedy v. State*, 71 Neb. 765 (99 N. W. 645).

28. (1904.) The attempts of the accused to escape, while confined in jail awaiting his trial, may be shown as an inculpatory circumstance properly to be considered by a jury, and to be given such weight as it seems fairly entitled to, with the other evidence introduced at the trial, in determining the question of his guilt or innocence. *Kennedy v. State*, 71 Neb. 765 (99 N. W. 645).

Weight and sufficiency of evidence.

——In general.

29. (1887.) The evidence examined and held not sufficient to support a verdict of guilty of the crime of burglary. *Wright v. State*, 21 Neb. 496 (32 N. W. 576).

30. (1903.) Evidence found sufficient to support the allegation of the ownership of the building burglarized and property stolen. *McNutt v. State*, 68 Neb. 207 (94 N. W. 143).

31. (1903.) In a prosecution for burglary and larceny, the proof must agree with the allegations of the information in the description of the property, but when the property stolen is described in the information as "one Elgin gold watch" and "thirty-two gold watch chains," the verdict will not be set aside as unsupported by the evidence because no witness testified that the articles were gold, if the articles are produced and offered in evidence at the trial, and there is nothing in the record to show that the jury could not determine the truth of the allegation from an inspection of the articles. *McNutt v. State*, 68 Neb. 207 (94 N. W. 143).

32. (1904.) Evidence showing that one accused of burglarizing a bank and securing over two thousand dollars, had, for some time before the burglary, been loafing about the town, looking into the bank windows; that he had no occupation; that before the crime charged he had no money, but immediately after he had plenty; that soon after the burglary he and his wife sold their household goods for a sum greatly under its real value and left the state returning again when he was arrested; and when arrested tried to escape; and that several revolvers were found on his person at the time, sustains a verdict of guilty. *Kennedy v. State*, 71 Neb. 765 (99 N. W. 645).

33. (1905.) Evidence that defendant was seen looking "Indian fashion" into a bank window the day before the robbery thereof; that early the next morning a team of horses and buggy were stolen in the town and were seen being rapidly driven toward another town; that the buggy was found in a corn-field and the horses running loose and defendant was seen walking toward a town from the vicinity where the buggy was found; and that defendant, after the robbery, was known to have a quantity of gold coins, and no evidence to explain defendant's presence in the town at about the time of the robbery, sustains a conviction for burglary. *Keeler v. State*, 73 Neb. 441 (103 N. W. 64).

——Circumstantial evidence.

34. (1898.) Circumstantial evidence is legal and competent in criminal cases, and if it is of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty, it is sufficient to authorize a conviction for burglary. *Cunningham v. State*, 56 Neb. 691 (77 N. W. 60).

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——— Intent.

35. (1893.) The intent with which the breaking and entering were done must be proved as laid in the information. *Ashford v. State*, 36 Neb. 38 (53 N. W. 1036).

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——— Time of commission of offense.

Time as element of offense, see *ante*, §§ 4-7.

36. (1895.) Evidence showing that during a certain night a board was removed from a corn crib belonging to the prosecuting witness, and without his consent, and a quantity of corn taken therefrom and the wagon tracks leading from the crib led to defendant's house where the corn was found, and the team identified as defendant's is sufficient to sustain a conviction of burglary. *Metz v. State*, 46 Neb. 547 (65 N. W. 190).

37. (1897.) Proof that the burglary was committed on the precise day laid in the information is not essential to a conviction. It is sufficient if it be proved that the crime was committed within the period limited by statute for the prosecution of the offense. *Ferguson v. State*, 52 Neb. 432 (72 N. W. 590; 66 Am. St. Rep. 512).

38. (1900.) The fact that a building was feloniously broken and entered between the hours of 6:30 P. M. and 9 P. M. on March 29 does not show with the requisite degree of moral certainty, that the crime charged was committed in the night season. *Leisenberg v. State*, 60 Neb. 628 (84 N. W. 6).

39. (1905.) In a prosecution for burglary, the charge that it was committed in the night season is to be proved like any other fact. If the whole evidence shows that fact beyond a reasonable doubt it is sufficient. *Keeler v. State*, 73 Neb. 441 (103 N. W. 64).

——— Breaking and entering.

Breaking and entering as element of crime, see *ante*, §§ 1-3.

40. (1886.) In a prosecution for a violation of section fifty-one of the criminal code, where it is shown that the accused went to the house of another in the nighttime and called to the persons within, who were asleep, to open the door, falsely stating that he was the sheriff of the county and desired to serve a subpœna; but when the door was opened he ordered the inmates to throw up their hands, but before he could enter the house the door was closed, and through which he shot twice, and then forced the door open and entered the house, this was *held* to be sufficient proof of a breaking and entering. *Seling v. State*, 18 Neb. 548 (26 N. W. 254).

41. (1895.) Evidence showing the accused broke into a building, while intoxicated, for the purpose of stealing liquor, sustains a verdict of guilty to the charge of burglary. *McMahon v. State*, 46 Neb. 166 (64 N. W. 694).

42. (1889.) Where, in a prosecution for burglary by breaking and entering a dwelling-house, with intent to steal, it was shown that the entry was through an open transom, and it did not appear that there was any breaking, either actual or constructive, the conviction was not sustained by sufficient evidence. *McGrath v. State*, 25 Neb. 780 (41 N. W. 780).

——— Violence.

43. (1886.) The fact that a person after breaking and entering a house approached the head of the family in his bed, fired off his pistol, and presented the muzzle thereof to him and ordered him in a threatening manner to hold up his hands, is sufficient proof of personal violence to meet the requirements of section 51 of the criminal code. *Seling v. State*, 18 Neb. 548 (26 N. W. 254).

Question for jury.

44. (1887.) In a prosecution for burglary of a railroad station, it appearing that the agent had information of the contemplated burglary, whether or not the company, by its agent, consented to the act by reason of such agent requesting his informant to aid and watch defendant, is for the jury. *State v. Sneff*, 22 Neb. 481 (35 N. W. 219).

Effect of mistrial on subsequent prosecution for larceny.

45. (1901.) The fact that the accused was prosecuted for burglary, resulting in a mistrial, is not a bar to a prosecution for larceny resulting from burglary. *Sharp v. State*, 61 Neb. 187 (85 N. W. 38).

Instructions.

46. (1897.) In a prosecution for burglary it is not error to instruct the jury that it is sufficient to find that the crime was committed "on or about" the date charged in the information, or at any date within the statute of limitations. *Ferguson v.*

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State, 52 Neb. 432 (72 N. W. 590; 66 Am. St. Rep. 512).

47. (1897.) An instruction that if the jury does not believe beyond a reasonable doubt that a burglary has been committed yet are convinced that the defendant did steal the goods described in the information, is not objectionable as assuming that a burglary had been committed. *Ferguson v. State*, 52 Neb. 432 (72 N. W. 590; 66 Am. St. Rep. 512).

48. (1897.) An instruction which defined a reasonable doubt as being an actual, substantial doubt of guilt arising from the evidence or want of evidence in the case, upheld. *Ferguson v. State*, 52 Neb. 432 (72 N. W. 590; 66 Am. St. Rep. 512).

49. (1898.) An instruction in a prosecution for burglary where the evidence was circumstantial, "What is meant by circumstantial evidence, in criminal cases, is the proof of such facts or circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged; and if these facts and circumstances are sufficient to satisfy the jury of the guilt of the defendant beyond a reasonable doubt, then such evidence is sufficient to authorize the jury in finding a verdict of guilty," approved. *Cunningham v. State*, 56 Neb. 691 (77 N. W. 60).

50. (1898.) The statute defining burglary states, among other things, "if any person shall * * * wilfully, maliciously and forcibly break and enter," etc. If in an instruction, in which it is purposed to embody a statement of the elements which constitute the crime and necessary to be proved, the word "maliciously" in reference to the breaking and entering is omitted, it is sufficient if other words, or another word, identical in meaning or expressing the same meaning be used. *Carrall v. State*, 53 Neb. 431 (73 N. W. 939).

51. (1901.) Where in a prosecution against a defendant charged as principal in the crime of burglary, the jury are instructed that the defendant may be found guilty if he advised and counseled the commission of the crime, such instruction is erroneous, as authorizing a conviction as an accessory on an information charging him as principal in the alleged burglary. *Sandage v. State*, 61 Neb. 240 (85 N. W. 35; 87 Am. St. Rep. 457).

52. (1900.) Where, in an action against a person for burglary with intent to steal and also the larceny of goods, the court, in instructing the jury, in defining what constitutes the offense of burglary, omits an essential element, and the jury return a verdict of not guilty as to the charge of burglary, *held* that such omission is error without prejudice. *Williams v. State*, 60 Neb. 526 (83 N. W. 681).

Sentence.

53. (1889.) A sentence of ten years, on a plea of guilty by a young man, less than twenty-one years of age, who had fallen in with strangers and became intoxicated and persuaded to burglariously enter a dwelling with them, *held* to be excessive under the circumstances. *Charles v. State*, 27 Neb. 881 (44 N. W. 39).

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Computation of time, see *Time*, §§ 7-12.

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CANCELATION OF INSTRUMENTS.

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Cancelation of deed not an eviction under a warranty, see *Covenants*, § 30.

Setting aside invalid deeds, see *Deeds*, §§ 117-133.

Cancelation of insurance policy, see *Insurance*, §§ 143-159.

Grounds for cancelation.

——— In general.

1. (1895.) To set aside a contract for duress it must be shown first that the will of one of the parties was overcome, and that he was thus subjected to the power of another, and that the means used to induce him to act were of such a kind as would overcome the mind and will of an ordinary person. *Hargreaves v. Korcek*, 44 Neb. 660 (62 N. W. 1086).

2. (1905.) Where a joint tenant gains complete title to the land by a quitclaim deed of his co-tenant, and is adjudged a trustee for such co-tenant, on the refusal of the grantee to reconvey according to the agreement of the parties, the court will set aside the quitclaim deed and restore the grantor to his rights in the property. *Koefoed v. Thompson*, 73 Neb. 128 (102 N. W. 268).

——— Incapacity to execute.

What constitutes mental capacity to execute instrument, see *Insane Persons*, §§ 21-25.

3. (1877.) A court of equity will relieve a party against contracts made by him while temporarily insane from the use of intoxicating liquor, where such contracts have been procured by the fraud or imposition of the other party. *Johnson v. Phifer*, 6 Neb. 401.

4. (1882.) A deed executed by one while he is *non compos mentis*, for no consideration, is invalid and may be canceled. *Fisher v. Fisher*, 12 Neb. 416 (11 N. W. 864).

——— Failure of consideration.

5. (1905.) Where an old woman, dependent upon a soldier's pension for support, conveyed her house and lot to her son, in consideration of a promise to support her, the cancelation of such conveyance is affirmed, where, a year later, she is ejected from the place. *McIntyre v. McIntyre*, 75 Neb. 397 (106 N. W. 29).

——— Coercion or fraud.

6. (1886.) Where an old woman has been induced through coercion, though not amounting to fraud, to deed her property to her son who agreed to care for her and husband, but, after securing the deed mistreats her and the father and does not properly provide for them, the deed will be set aside. *Munson v. Carter*, 19 Neb. 293 (27 N. W. 208).

7. (1894.) Where coersion is not sufficient to amount to duress, but a social or domestic force is exerted on a party which controls the free action of the will, and prevents voluntary action in the making of a contract or execution of a deed for real estate, equity may relieve against the same on the ground of undue influence. *Hartnett v. Hartnett*, 42 Neb. 23 (60 N. W. 362).

——— Misrepresentation.

8. (1885.) Where a mother, by reason of false representation made by her daughter, is induced to execute a deed conveying a farm to the daughter, who represented that by reason of litigation between a son and his wife the mother would lose the place unless she disposed of the legal title, when in fact there was no such danger, the transfer will be set aside at a suit by the mother. *Kleeman v. Peltzer*, 17 Neb. 381 (22 N. W. 793).

9. (1888.) Where a person desiring to

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purchase real estate knows its value, and when asked by the vendor, a resident of another state, and who has no knowledge of such value, as to the worth of such property, designates a sum greatly beneath its worth, as he well knows, and such statement is relied upon by the vendor and a sale effected, it may be sufficient to authorize a cancelation of the deed at the suit of the vendor. *Morgan v. Dinges*, 23 Neb. 271 (36 N. W. 544; 8 Am. St. Rep. 121).

10. (1890.) Misrepresentations before sale, as to value of certain land, by vendee, who was not ignorant of its value, to vendor in a distant state who had never seen it, *held*, sufficient ground for cancelation of the deed. *Delorac v. Conna*, 29 Neb. 791 (46 N. W. 255).

——— Claim for penalty for failure to release chattel mortgage.

11. (1902.) A claim for penalty for failure to release a chattel mortgage, not reduced to judgment, cannot be made the basis of an equitable action to cancel another mortgage between the same parties. *Meredith v. Lyon & Healey*, 3 Unof. 485 (92 N. W. 122).

Persons entitled.

12. (1896.) A mortgage will not be canceled upon the application of the mortgagor, no creditor being interested, without a tender or requirement that the mortgagee be reimbursed for such expenditures as he has made, and indemnified as to such liabilities as in good faith he has incurred, on the faith of such mortgage. *Miller v. Gunderson*, 48 Neb. 715 (67 N. W. 769).

Consideration for cancelation.

13. (1895.) The mutual waiver of the rights of the parties to a contract of sale of personal property is sufficient consideration for a cancelation of the contract, to release the parties from their obligations thereunder. *Bryant v. Thesing*, 46 Neb. 244 (64 N. W. 967).

Negligence of plaintiff.

14. (1901.) One who seeks relief on the ground of mistake of fact must show that he was free from negligence. *Farrell v. Bouck*, 61 Neb. 874 (86 N. W. 907).

Condition precedent.

15. (1883.) Where a party has executed a mortgage of real property to secure the repayment to the county of the amount of certain coupon bonds, voted by the electors of the county, and issued by the county commissioners, and delivered to such person to aid him in building a water grist mill, an action will not lie in equity to remove said mortgage, as a cloud on the title of the plaintiff, to such real property, without first paying off such mortgage, according to the terms thereof, on returning to said county the value of such coupon bonds. *Brewer v. Merrick County*, 15 Neb. 180 (18 N. W. 43).

16. (1887.) Where heirs come into a court of equity to claim an interest in lands, which has not been conveyed, but which lands have been held adversely by other parties for a long period, they must do equity by paying a just proportion of the taxes and the interest due thereon. *Snowden v. Tyler*, 21 Neb. 199 (31 N. W. 661).

17. (1888.) Where a sale was had under a void foreclosure of a mortgage of real estate, and a sheriff's deed executed, *held*, that the mortgagor in an action to cancel the deed as a cloud upon his title must offer to do equity by paying what is equitably due under the decree, with interest and taxes. *Loney v. Courtnay*, 24 Neb. 580 (39 N. W. 616).

17*a*. (1903.) By an agreement made between an administratrix and those claiming under a contract of decedent for the sale of land, it was attempted to change said contract so that the east instead of the north twenty acres of the forty-acre tract was to be conveyed by the estate, the west ten acres of the north twenty being retained by the estate and sold for its benefit. A sum of money exceeding $350, paid by the administratrix on a contract made by the decedent in his lifetime, was returned to her by those claiming the benefit of the decedent's contract to convey in consideration of her agreement to convey the east twenty acres. An heir not made a party to the petition of the administratrix for leave to convey, had the benefit of the money and the land retained and hence should not be given the ten acres wrongfully conveyed, until he offers to do equity. *Holmes v. Columbia Nat. Bank*, 4 Unof. 893 (97 N. W. 26).

Jurisdiction.

18. (1889.) The district, not county, court has jurisdiction to set aside a deed obtained by false representations. *Barker v. Barker*, 27 Neb. 135 (42 N. W. 889).

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Limitations and laches.

19. (1902.) The statute of limitations does not begin to run against an action to cancel a deed, constituting a cloud on the title to real estate, until some right or title is asserted under such deed, and such fact is brought to the knowledge of the holder of the title. *Palmer v. Mizner*, 2 Unof. 899 (90 N. W. 637).

20. (1902.) Laches will not be imputed to one from a mere failure to watch the records to guard against the recording of a forged or undelivered deed purporting to be a conveyance of his real estate. *Palmer v. Mizner*, 2 Unof. 899 (90 N. W. 637).

21. (1906.) An action to set aside a deed twenty-eight years after the conveyance, on the ground of insanity of the grantor, is on its face barred by the statutes. *Hawley v. Van Lanken*, 75 Neb. 597 (106 N. W. 456).

Parties.

22. (1887.) Heirs at law of a deceased grantor may prosecute in their own names, a suit to set aside the conveyance on the ground of incompetency. *Cole v. Cole*, 21 Neb. 84 (31 N. W. 892).

23. (1891.) In an action to set aside a deed, alleged to have been fraudulently obtained, the immediate grantee, who has conveyed away the entire interest, is not a necessary party. *Dailey v. Kinsler*, 31 Neb. 340 (47 N. W. 1045).

Pleading.

24. (1902.) In view of the other allegations as to the nature and circumstances of the conveyance, showing fraud and undue influence, the allegation that it "was without consideration" sufficiently states a fact, and is not open to objection. *Bennett v. Bennett*, 65 Neb. 432 (91 N. W. 409).

25. (1902.) In a suit to cancel a conveyance by an old man alleged to have been of weak mind, allegations that the defendant represented that the grantor's son and son-in-law were conspiring to defraud him of his land; that they were intending to bring an action against him and would be able to procure a judgment by false evidence, and cause the land to be sold to satisfy it unless conveyed to the defendant; that the defendant promised to hold the land in trust and reconvey it; that such representations were false; that the conveyance was without consideration; and that it was procured by said false representations in consequence of the extreme old age, mental weakness and childishness of the grantor, state a cause of action. *Bennett v. Bennett*, 65 Neb. 432 (91 N. W. 409).

26. (1907.) In a petition to cancel a conveyance of real property alleged to have been obtained by false and fraudulent representations, an allegation that the plaintiff, in reliance upon such representations, parted with the title to the land is a sufficient plea that he was damaged by the fraud. *Rihner v. Jacobs*, 79 Neb. 742 (113 N. W. 220).

Burden of proof.

27. (1902.) The circumstances under which a conveyance was made, the condition of the grantor at the time, and the injustice to him and his heirs if it is upheld, may be such as to cast upon the grantee the burden of showing that it is untainted with undue influence, imposition, or fraud, but is the intelligent and deliberate act of the grantor. *Bennett v. Bennett*, 65 Neb. 432 (91 N. W. 409).

Admissibility of evidence.

28. (1906.) The fact that the attending physician prescribed certain drugs for a patient which are used in the treatment of mental disorders is not competent evidence tending to establish the insanity of the patient. *Ames v. Ames*, 75 Neb. 473 (106 N. W. 584).

29. (1906.) In a suit by one of the representatives of a deceased person to set aside a conveyance made by the deceased on the ground that he was mentally incompetent to execute such conveyance, an answer filed by the deceased in a suit pending in his lifetime, in which he averred that at the time of executing the contract then in suit he was suffering from mental and physical prostration, and *non compos mentis*, is inadmissible in evidence on the question of the mental capacity of the grantor. *Ames v. Ames*, 75 Neb. 473 (106 N. W. 584).

Weight and sufficiency of evidence.

30. (1887.) The evidence examined, and *held* to sustain the finding and decree of the district court, and not to present a case of fraud or undue influence. *Holmes v. Hill*, 22 Neb. 425 (35 N. W. 206).

31. (1892.) In an action to cancel deed and quiet title in grantor, evidence examined, and *held* to sustain finding that the conveyance by plaintiff was without consideration, and that defendant was not

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a *bona fide* purchaser from the grantee. *Rakes v. Brown*, 34 Neb. 304 (51 N. W. 848).

32. (1892.) In an action to set aside a deed made by a father in his dotage to his youngest son, *held*, that the testimony tended to show undue influence on the part of the son, and that the father was not in a mental condition to transact important business. *Loder v. Loder*, 34 Neb. 824 (52 N. W. 814).

33. (1894.) Evidence, in an action to cancel certain notes alleged to have been obtained by fraud, showing that the notes were given in the belief that they were to cover part of the interest on a loan secured by the defendant for plaintiff, from a third party, but in fact were made to defendant and kept by him, is sufficient to sustain a decree of cancelation. *Galloway v. Merchants Bank of Neligh*, 42 Neb. 259 (60 N. W. 569).

34. (1895.) Evidence in an action to set aside a deed on the ground of fraud and duress *held* to sustain a decree for defendant. *Firestein v. Horwich*, 43 Neb. 453 (61 N. W. 592).

35. (1895.) Evidence discussed *held* insufficient to show plaintiff's right to have a conveyance executed by her canceled on account of fraud, duress, and undue influence. *Firestein v. Horwich*, 43 Neb. 453 (61 N. W. 592).

36. (1896.) Evidence in an action to cancel a deed from a mother to a son *held* to sustain a decree for defendant. *Issitt v. Dewey*, 47 Neb. 196 (66 N. W. 288).

37. (1896.) Evidence in an action to rescind a contract of conveyance and cancel a deed on the ground of fraud *held* to sustain a decree for defendant. *Stochl v. Caley*, 48 Neb. 786 (67 N. W. 783).

38. (1899.) In an action to cancel and set aside a deed on the ground of fraud and duress, evidence *held* to sustain a finding of no existing oral contract with plaintiff whereby the father was to convey the premises to him at his death, and decree for defendant sustained. *Moore v. Moore*, 58 Neb. 268 (78 N. W. 495).

39. (1899.) Evidence examined, and *held* to sustain a finding that a deed was forged. *Lindsay v. Palmer*, 58 Neb. 168 (78 N. W. 371).

40. (1905.) Evidence in an action for the cancelation of a deed in blank, delivered to a real estate broker, who was to obtain the signature of the plaintiff's wife thereto, *held* to sustain a decree for plaintiff. *Lucas v. County Recorder of Cass County*, 75 Neb. 351 (106 N. W. 217).

40*a*. (1908.) In an action to set aside a conveyance on the ground that the deed had not been delivered, the evidence *held* sufficient to sustain a judgment for plaintiff. *Wetherell v. Adams*, 80 Neb. 584 (114 N. W. 778).

41. (1907.) Evidence in an action to cancel a deed to land sold by plaintiff, for which certain trust company stock was given to secure the mortgage back, which stock was shown to be of little value, and was given to pay for the land, which in effect, was in turn given to pay for the stock, sustains a decree for plaintiff. *Rihner v. Jacobs*, 79 Neb. 742 (113 N. W. 220).

Adjudicating right of possession.

42. (1907.) In an equitable action to set aside a deed, where the right of possession is in issue and depends upon principles of equity that must necessarily be determined by the court, it is the duty of the court to determine the right of possession, if all parties in interest are before the court, and put the parties entitled thereto into possession. *Hobson v. Huxtable*, 79 Neb. 340 (116 N. W. 278).

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Of election returns, see *Elections*, §§ 118-141.

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CARLISLE TABLES.

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Admissibility in evidence in general, see *Damages*, §§ 135-138*a*; *Death*, §§ 38-41.

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CARRIERS.

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ANALYSIS.

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I. CONTROL AND REGULATION.

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Telegraph and telephone companies as common carriers, see *Telegraphs and Telephones*, §§ 1-5.

1. (1893.) Street railway companies are common carriers of passengers, and are liable as other common carriers upon common law principles. *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890 (55 N. W. 270; 38 Am. St. Rep. 753; 20 L. R. A. 316).

1*a*. (1885.) Telephone companies are common carriers of news and intelligence. *State, ex. rel. Webster, v. Nebraska Telephone Co.*, 17 Neb. 126 (22 N. W. 237; 52 Am. Rep. 404); *Nebraska Telephone Co. v. State. ex rel. Yeiser*, 55 Neb. 627 (76 N. W. 171; 45 L. R. A. 113).

2. A telegraph company is a public carrier of intelligence with rights and duties analogous to those of a public carrier of goods or passengers. (1893) *Pacific Telegraph Co. v. Underwood*, 37 Neb. 315 (55 N. W. 1057; 40 Am. St. Rep. 490); (1895) *Western Union Telegraph Co. v. Call Publishing Co.*, 44 Neb. 326 (62 N. W. 506; 48 Am. St. Rep. 729; 27 L. R. A. 622); (1897) *Perry v. German-American Bank*, 53 Neb. 89 (73 N. W. 538; 68 Am. St. Rep. 593).

Statutory provisions.

3. (1887.) The word "locality," mentioned in act of March 31, 1887, means the territory unjustly discriminated against, and may be a village, city, county, or portion of the state. *State, ex rel. Board of Transportation, v. Fremont, E. & M. V. R. Co.*, 22 Neb. 313 (35 N. W. 118).

4. (1887.) Act of March 31, 1887, prohibits any preference or advantage to any particular person, company, corporation, or locality on any particular description of traffic in any respect, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any prejudice or disadvantage in any respect, and places the general supervision of all railroads within the state in the board of transportation, and requires it carefully to investigate any complaints made in writing, and under oath, concerning any unjust discrimination against any person, firm, corporation or locality; either in rates or facilities furnished, in order to prevent unjust discriminations against either persons or places. *State, ex. rel. Board of Transportation, v. Fremont, E. & M. V. R. Co.*, 23 Neb. 313 (35 N. W. 118).

5. (1887.) The act to regulate railroads and prevent unjust discrimination, approved March 31, 1887, being remedial, is to receive a liberal construction. *State, ex rel. Board of Transportation, v. Fremont E. & M. V. R. Co.*, 22 Neb. 313 (35 N. W. 118).

6. (1889.) The act of 1897 (Session Laws, p. 303, ch. 56) placed certain companies or persons, owners or in control of telegraph, telephone or express line or lines, under the control of the board of transportation, and for the jurisdiction and powers of the board adopted such as were conferred by a prior act. It was not amendatory of the act of 1887, by which there was created the board of transportation. *Pacific Express Co. v. Cornell*, 59 Neb. 364 (81 N. W. 377).

7. (1900.) The act of 1897 (Session Laws, ch. 56), empowering the board of transportation to regulate the charges of express, telephone and telegraph companies, is an original and independent statute and

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is not violative of section 11, article III of the constitution, respecting amendatory legislation. *Nebraska Telephone Co. v. Cornell*, 59 Neb. 737 (82 N. W. 1).

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7a. (1900.) Chapter 60, Session Laws, 1887, regulating railroads, providing for a board of transportation, etc., is void, as the act as enrolled was not passed by the legislature in the mode prescribed by section 11, article III of the constitution. *State v. Burlington & M. R. R. Co.*, 60 Neb. 741 (84 N. W. 254).

8. (1904.) A statute forbidding railroad companies to charge for transportation for any specific distance a greater sum than they charge for carriage over a greater distance is within legislative discretion and is valid. *Chicago, B. & Q. R. Co. v. Anderson*, 72 Neb. 856 (101 N. W. 1019).

9. (1899.) The law creating the board of transportation, by which certain designated state officers of the executive department are charged with prescribed duties in regard to railroads, does not cast such duties upon the individuals, as distinguished from the offices or officers, but it is the latter upon whom is put the burden of further acts executive in their nature. *Pacific Express Co. v. Cornell*, 59 Neb. 364 (81 N. W. 377.)

Legislative authority to create railroad commissioners.

9a. (1884.) The legislature have no power under the constitution to create railroad commissioners. The supervision of railroads by a commission would be proper, but the power must be conferred on executive offices already existing. *In re Railroad Commissioners*, 15 Neb. 679 (50 N. W. 276).

Power of courts to regulate.

10. (1896.) It is not within the power of a court to make such an arrangement for the business intercourse of common carriers as, in the opinion of such court, they ought to make for themselves. *State, ex rel. Board of Transportation, v. Sioux City, O. N. & W. R. Co.*, 46 Neb. 682 (65 N. W. 766; 31 L. R. A. 47).

11. (1898.) The power—the jurisdiction—to determine what compensation a public service corporation may exact for services to be rendered by it is a legislative and not a judicial function. *Nebraska Telephone Co. v. State, ex rel. Yeiser*, 55 Neb. 627 (76 N. W. 171; 45 L. R. A. 113).

Regulation of rates or fares.

12. (1893.) The street railway of the city of Lincoln is so far under the control of the municipality that the latter may fix the rates of fare for passage over said railway, and may require tickets six for twenty-five cents to be kept for sale by each conductor of a street car. *Sternberg v. State*, 36 Neb. 307 (54 N. W. 553; 19 L. R. A. 570).

Discrimination.

See, also, *post*, §§ 118-125.

12a. (1885.) The right to build and operate a railroad and to charge and take tolls and fares, is a prerogative granted by the state. Public utility is the consideration for such grant. Although in the hands of a private corporation it is still a sovereign franchise, and must be used and treated as such, it must be held in trust for the general good. In the use of such franchise all citizens have an equal interest and equal rights, and all must, under the same circumstances, be treated alike, without unjust discrimination against any. *State, ex rel. Mattoon, v. Republican V. R. Co.*, 17 Neb. 647 (24 N. W. 329; 52 Am. Rep. 424).

Who are members of state board of transportation.

13. (1899.) The secretaries, including the secretary of the board of transportation, whose appointment is provided for by the law, are not executive state officers. They are, in the nature of mere deputies, to act for their principals in matters which precede and lead to a final order or decision, which must be by the principals. *Pacific Express Co. v. Cornell*, 59 Neb. 364 (81 N. W. 377).

Power of board of transportation in general.

14. (1900.) The act of 1893, known as the "Maximum Rate Law" (Session Laws, ch. 24), does not materially modify the provisions of the law enacted in 1887 (Session Laws, ch. 60), defining the duties and powers of the state board of transportation. *Nebraska Telephone Co. v. Cornell*, 59 Neb. 737 (82 N. W. 1).

15. (1900.) The act of 1887 (Laws 1887, ch. 60) creating the board of transportation and defining its powers, is not in conflict with constitution, art. V, p. 26, which forbids the legislature to create any executive state office, nor with art. V, p. 2, which declares that no executive state officer shall be eligible to any other state office. *Nebraska Telephone Co. v. Cornell*, 59 Neb. 737 (82 N. W. 1).

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——As to telephone, telegraph, or express companies.

16. (1895.) Section 7, article XI of our constitution, limits the legislature in the regulation of telegraph companies to the correction of abuses and prevention of unjust discrimination. *Western Union Telegraph Co. v. Call Publishing Co.*, 44 Neb. 326 (62 N. W. 506; 48 Am. St. Rep. 729; 27 L. R. A. 622).

16*a*. (1898.) Since the state board of transportation is vested by statute with authority to fix reasonable rates to be charged by telephone companies, a patron of such company should apply to that board for relief against unreasonable charges, and cannot resort to mandamus. *Nebraska Telephone Co. v. State, ex rel. Yeiser*, 55 Neb. 627 (76 N. W. 171; 45 L. R. A. 113).

16*b*. (1898.) The power—the jurisdiction—to determine what compensation a public service corporation may exact for services to be rendered by it is a legislative and not a judicial function. *Nebraska Telephone Co. v. State, ex rel. Yeiser*, 55 Neb. 627 (76 N. W. 171; 45 L. R. A. 113).

16*c*. (1900.) The act of 1897 (Session Laws, ch. 56) empowering the board of transportation to regulate the charges of express, telephone and telegraph companies, is an original and independent statute and is not violative of section 11, article III of the constitution, respecting amendatory legislation. *Nebraska Telephone Co. v. Cornell*, 59 Neb. 737 (82 N. W. 1).

16*d*. (1900.) The state board of transportation has power to inquire into the intra-state business of express, telephone and telegraph companies and to regulate their rates therefor. *Nebraska Telephone Co. v. Cornell*, 59 Neb. 737 (82 N. W. 1).

16*e*. (1908). Express companies operating over the lines of railroad corporations exercising a public franchise in this state are equally subject to state control and regulation with the railroad companies over whose lines they operate, within the limited field of the business of transportation which they occupy. *State v. Pacific Express Co.*, 80 Neb. 823 (115 N. W. 619).

17. (1900.) The jurisdiction of the board of transportation under the act of 1897 (Session Laws, ch. 56) is not limited to the regulation of specific charges for messages sent from one point to another within the state. The regulation of telephone rentals is also within the powers of the board. *Nebraska Telephone Co. v. Cornell*, 59 Neb. 737 (82 N. W. 1).

Power of board of transportation as to rates.

18. (1887.) The power to determine what is an unjust rate and charge, and the extent of the same, and to prevent unjust discrimination, carries with it the power to decide what is a just rate and charge, and authorizes the board to fix just and reasonable rates and charges. *State, ex rel. Board of Transportation, v. Fremont, E. & M. V. R. Co.*, 22 Neb. 313 (35 N. W. 118).

19. (1887.) The act to regulate railroads and to prevent unjust discrimination, approved March 31, 1887, provides that all charges made for services rendered, or to be rendered, by any railway company in this state, in the transportation of passengers or property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful; and requires such railway company to print and keep for public inspection schedules showing the rates and fares and charges which have been established and are in force at the time upon such railroad. *Held*, That the board of transportation has authority to determine, in the first instance, what are just and reasonable charges for the services rendered or to be rendered on such railways. *State, ex rel. Board of Transportation, v. Fremont, E. & M. V. R. Co.*, 22 Neb. 313 (35 N. W. 118).

20. (1887.) The state board of transportation has power to fix a reasonable and just rate, and also power to determine what is a reasonable or unjust rate. *State, ex rel. Board of Transportation, v. Fremont, E. & M. V. R. Co.*, 22 Neb. 313 (35 N. W. 118).

20*a*. (1906.) A side-track constructed and used by a railroad company, and which connects with its main line and occupies a portion of the public streets of a city under a grant from the city to such company, will be presumed, in the absence of evidence to the contrary, to be a part of the public highway system of such company, and a public highway within the meaning of section 4, article XI of the constitution. *Roby v. State, ex rel. Farmers Grain Co.*, 76 Neb. 450 (107 N. W. 766).

21. (1888.) Where the board of transportation finds that the charges on a line of railway are not reasonable and just,

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and orders a reduction of such rates 33 1-3 per cent., such board cannot enter into a compromise with the railway company by which the charges within the state shall be in excess of the rates found to be reasonable and just, in consideration of certain reductions in rates on in and out freight to and from Chicago and other common points. *State, ex rel. Board of Transportation, v. Fremont, E. & M. V. R. Co.*, 23 Neb. 117 (36 N. W. 305).

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Findings of board of transportation.

22. (1887.) The finding of fact by the board of transportation, in any matter submitted to it under act of March 31, 1887, for determination, is *prima facie* evidence of the existence of such facts, and of the reasonableness of an order made by said board in pursuance thereof. *State, ex rel. Board of Transportation, v. Fremont, E. & M. V. R. Co.*, 22 Neb. 313 (35 N. W. 118).

22*a*. (1897.) An order of the state board of transportation under the provisions of the act of March 31, 1887, entitled "An act to regulate railroads and prevent unjust discrimination," etc., which requires a railroad company to surrender a portion of its right of way for an elevator site to a person or corporation engaged in the buying and shipping of grain, contemplates the taking of property for mere private use within the prohibition of the United States constitution, and is accordingly without authority and void. *Chicago, B. & Q. R. Co. v. State, ex rel. Board of Transportation*, 50 Neb. 399 (69 N. W. 955).

23. (1888.) It is the duty of the board of transportation to fix rates and charges within the state at such sum as shall be reasonable and just, and make findings of the fact. Its findings are *prima facie* evidence of the truth of the same, but when issue is taken upon them in court, the question of what are reasonable and just charges must be determined like other questions of fact. *State, ex rel. Board of Transportation, v. Fremont, E. & M. V. R. Co.*, 23 Neb. 117 (36 N. W. 305).

Enforcement of order of board of transportation.

24. (1885.) The duty imposed upon a railroad, as a common carrier, growing out of the principles of common law, may be enforced by mandamus in the absence of statutory provisions. *State, ex. rel. Mattoon, v. Republican V. R. Co.*, 17 Neb. 647 (24 N. W. 329; 52 Am. Rep. 424).

25. (1887.) Where the board of transportation has investigated charges of unjust discrimination against a railroad company, and has found such unjust discrimination to exist, and ordered such railroad company to reduce its rates to conform to a schedule presented by such board, which order the railroad company neglected to comply with, mandamus is a proper remedy to enforce such order, and the mention of the district court in the statute (act of March 31, 1887) will not preclude bringing the action in the supreme court in any case where the latter court has original jurisdiction. *State, ex rel. Board of Transportation, v. Fremont, E. & M. V. R. Co.*, 22 Neb. 313 (35 N. W. 118).

26. (1887.) Where a railway company demurred to an alternative writ requiring it to reduce its rates and charges to conform to an order of the board of transportation, and denied the power of the board to reduce such rates and charges, the court would determine the question of the power of the board to make the order in question before entering upon an examination of the facts, and therefore would not permit the demurrer to be withdrawn. *State, ex rel. Board of Transportation, v. Fremont, E. & M. V. R. Co.*, 22 Neb. 313 (35 N. W. 118).

27. (1907.) A court has no power to issue a peremptory mandamus without notice in an action brought to compel a railroad company to furnish cars to a shipper at a certain time and place, since it cannot be "apparent that no valid excuse can be given." *State, ex rel. Chicago & N. W. R. Co., v. Harrington*, 78 Neb. 395 (110 N. W. 1016).

Interstate commerce.

28. (1894.) The act of congress entitled "An act to regulate commerce," when it took effect, abrogated all existing contracts with common carriers for special interstate commercial rates, and especially vested in the federal tribunals described in that act exclusive jurisdiction to inquire into and adjust such interstate rates as are alleged to be unfair or discriminative. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374 (59 N. W. 838).

Jurisdiction of state courts over interstate commerce.

29. (1906.) The allowance by railroad companies of certain charges, as elevator charges, to terminal elevators on shipments of grain from points in this state to points

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without the state is an incident of interstate commerce, and this court has no jurisdiction to limit or control the same. *State v. Omaha Elevator Co.*, 75 Neb. 654 (106 N. W. 979).

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30. (1893.) The state courts have not lost jurisdiction of the subject matter of actions against carriers of interstate commerce by reason of legislation by congress upon that subject. *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb. 463 (56 N. W. 957).

Maximum rate law.

31. (1896.) Chapter 11, Laws of 1893, requiring railroad companies, without the right of judicial investigation, to carry freight over longer lines at the rates for carrying it over shorter lines between the same points, conflicts with the fourteenth amendment to the federal constitution prohibiting a state from depriving a person of property without due process of law. *State, ex rel. Board of Transportation, v. Sioux City, O'N. & W. R. Co.*, 46 Neb. 682 (65 N. W. 766; 31 L. R. A. 47).

32. (1899.) The law of 1893, known as the maximum rate law, or the portion thereof which contained the schedule of rates, was declared unconstitutional, under the then existing conditions, by the supreme court of the United States. This carried with it section 6 of the act, which could have no operation except in connection with the rates as fixed in the schedule. Such law is now as if non-existent, and does not interfere with the enforcement of the law of 1887 by the board and in the method provided in the law of 1887. *Pacific Express Co. v. Cornell*, 59 Neb. 364 (81 N. W. 377). [Overruled. *Nebraska Telephone Co. v. Cornell*, 59 Neb. 737.]

33. (1900.) The enactment of 1893, known as the "Maximum Rate Law" (Session Laws, ch. 24), appears upon its face to be a constitutional and valid act; and there is no presumption that its immediatte execution would deprive freight carriers of their property without due process of law, or deny them the equal protection of the laws. *Nebraska Telephone Co. v. Cornell*, 59 Neb. 737 (82 N. W. 1).

34. (1900.) The supreme court does not take judicial cognizance of the net earnings of railroad companies, and can not assume, without proof, that the "Maximum Rate Law" (Session Laws, 1893, ch. 24) is now, or was at the time of its enactment, confiscatory legislation. *Nebraska Telephone Co. v. Cornell*, 59 Neb. 737 (82 N. W. 1).

35. (1902.) The provisions of section 9 of the act of 1893, known as the "Maximum Freight Law," being punitive and not remedial, are to be enforced in accordance with the procedure of the criminal code. *State v. Missouri P. R. Co.*, 64 Neb. 679 (90 N. W. 877).

36. (1904.) The title "An act to fix a maximum standard of freight charges on railroads, and to prevent unjust discrimination therein, or secret rates, rebates or drawbacks therefor," contains only one subject. *Chicago, B. & Q. R. Co. v. Anderson*, 72 Neb. 856 (101 N. W. 1019).

Action for penalty for violation of statute.

37. (1887. Railroads being public ways, and subject to legislative control, any violation of the statute by them is a matter of public right, and to procure the enforcement of a public duty it is sufficient for the complainant to show that he is a citizen, and, as such, is interested in the execution of the laws. *State, ex rel. Board of Transportation, v. Fremont, E. & M. R. Co.*, 22 Neb. 313 (35 N. W. 118).

38. (1903.) An action by the state to collect the penalty of a railroad under the Maximum Freight Law is criminal in nature, and can not be originated in the supreme court in the first instance. *State v. Union P. R. Co.*, 67 Neb. 141 (93 N. W. 222).

II. CARRIAGE OF GOODS.

A. In General.

Duty to provide shipping facilities.

Stations for passengers, see *post*, §§ 198.

39. (1885.) It is the duty of railways as common carriers to furnish suitable warehouses at all appropriate points on their lines for the receipt and discharge of freight. *State, ex rel. Mattoon, v. Republican V. R. Co.*, 17 Neb. 647 (24 N. W. 329; 52 Am. Rep. 424).

40. (1890.) Facilities for the erection of elevators, which a railroad is required to furnish need not necessarily be upon the right of way, but may be along the side thereof; but if facilities are granted to one or more for that purpose on the right of way, the same privilege, upon like terms and conditions, must be granted to others who are engaged, or desire in good faith to engage, in the business at that point, of receiving, storging, and shipping produce over such railway. *State, ex rel. Board of Trans-*

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portation, v. Missouri P. R. Co., 29 Neb. 550 (45 N. W. 785).

41. (1890.) Under the provisions of the act to regulate railroads, etc., which took effect July 1, 1887, the board of transportation of the state may institute an action in a proper case to require a railway company to furnish like facilities to erect an elevator at one of its stations, to any person engaged, or who desires in good faith to engage, in the business of receiving, handling, and shipping grain over the railway. *State, ex rel. Board of Transportation, v. Missouri P. R. Co.*, 29 Neb. 550 (45 N. W. 785). [Overruled. 164 U. S. 403; 50 Neb. 399.]

42. (1890.) A railway company may impose reasonable terms and conditions upon persons who erect, or are about to erect, elevators at stations on the line of such road, but such conditions and terms must be the same to all such persons. *State; ex rel. Board of Transportation, v. Missouri P. R. Co.*, 29 Neb. 550 (45 N. W. 785.)

43. (1904.) A common carrier of goods is required to provide facilities for and to receive and ship goods tendered at its stations on payment or tender of the usual tariff rates, and has no right to discriminate or favor one shipper over another in rates or facilities. *State, ex rel. Crandall v. Chicago, B. & Q. R. Co.*, 72 Net. 542 (101 N. W. 23).

Duty to furnish cars to shipper.

See, also, *post*, § 186.

44. (1904.) During a temporary scarcity of cars, a railroad company is entitled to consider, in apportioning cars among grain dealers, their relative volume of business and facilities for the loading of cars. Though there may be a difference in the number of cars furnished different grain dealers at the same railroad station, still, if no favoritism or discrimination is shown and the number of cars furnished each in is a fair proportion to his volume of business, facilities of loading and grain in sight, no shipper has a right to complain of this difference, though he may not obtain all the cars he deems necessary for his business. *State, ex rel. McComb, v. Chicago, B. & Q. R. Co.* 71 Neb. 593 (99 N. W. 309).

45. (1904.) It is the duty of a railroad company to furnish the necessary cars to transport the goods which are offered to it for carriage, but, when the carrier has furnished itself with the appliances necessary to transport an amount of freight which may, in the usual course of events, be reasonably expected to be offered to it for carriage, taking into consideration the fact that at certain seasons more cars are needed, it has fulfilled its duty in that regard, and it will not be required to provide for such a rush of grain or other goods for transportation as may only occur in any given locality temporarily or at long intervals of time. *State, ex rel. McComb, v. Chicago, B. & Q. R. Co.*, 71 Neb. 593 (99 N. W. 309).

46. (1904.) "Chop" or "cracked corn" *held* properly classified as grain and not as a mill product, in apportioning cars to rival shippers of grain. *State, ex rel. Crandall, v. Chicago, B. & Q. R. Co.*, 72 Neb. 542 (101 N. W. 23).

47. (1904.) If the carrier has furnished itself with cars sufficient to carry the freight which may reasonably be expected to be offered for carriage, taking into consideration the fact that at certain seasons more cars are needed, it has exercised due diligence in that regard, and where through causes which are not within its control it cannot supply the cars temporarily made necessary by unusual demand therefor, it is entitled to apportion the same in a fair and equitable manner among its patrons, and cannot be compelled to provide one shipper with cars to the exclusion of others. *State, ex rel. Crandall, v. Chicago, B. & Q. R. Co.*, 72 Neb. 542 (101 N. W. 23).

48. (1904.) It is the duty of a railroad corporation, both under the common law, and by statute in this state, to supply cars to all persons or associations handling or shipping grain, without favoritism or discrimination in any respect whatever. *State, ex rel. McComb, v. Chicago, B. & Q. R. Co.*, 71 Neb. 593 (99 N. W. 309).

Rules and regulation for reception and transportation of goods.

49. (1903.) The reasonableness of rules, regulations and classification for the reception, carriage and delivery of freight, made by a carrier, is a question of law for the court; and it is reversible error to submit that question to the jury. *Chicago, R. I. & P. R. Co. v. Colby*, 69 Neb. 572 (96 N. W. 145).

50. (1903.) A railroad company, as a

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common carrier, may make reasonable rules and regulations for the reception, carriage and delivery of freights, including the classification and suitable preparation of articles for shipment; and such rules and regulations shippers are to conform to. *Chicago, R. I. & P. R. Co. v. Colby*, 69 Neb. 572 (96 N. W. 145).

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B. Bills of Lading and Special Contracts.

Bill of lading as affecting connecting lines.

51. (1897.) Bill of lading examined, and construed as an agreement for the carriage of goods over the defendant's line of road only, and not over the line of a connecting carrier. *Fremont, E. & M. V. R. Co. v. Waters*, 50 Neb. 592 (70 N. W. 225).

Negotiability and assignment.

52. (1878.) An assignment of a bill of lading and draft by a consignee of goods conveys his entire interest in the shipment to the assignee. *Wright v. Greenwood Warehouse Co.*, 7 Neb. 435.

53. (1894.) The bill of lading issued by carrier to the owner or shipper is the symbol of ownership of the goods shipped, and though not negotiable is assignable. *Gates v. Chicago, B. & Q. R. Co.*, 42 Neb. 379 (60 N. W. 583).

54. (1895.) A bill of lading, when properly indorsed, operates as a delivery of the property, investing the indorsee with a constructive custody which serves all the purposes of an actual possession. *Union P. R. Co. v. Johnson*, 45 Neb. 57 (63 N. W. 144; 50 Am. St. Rep. 540).

Rules and customs as affecting shipper.

55. (1884.) A rule or custom adopted by a railroad company concerning its contracts with its patrons for the transportation of grain, cannot operate upon those of its patrons who have no knowledge of the existence of such rule, and such persons will not be legally bound thereby. *Atchison & N. R. Co. v. Miller*, 16 Neb. 661 (21 N. W. 451).

C. Custody and Control of Goods.

Title to goods.

56. (1899.) The presumption that a shipper who consigns goods to himself intended to retain title may be rebutted by proof; and where the question of the intention is litigated, it is one of fact for the jury, unless conclusively established by the evidence. *Missouri P. R. Co. v. Lau*, 57 Neb. 559 (78 N. W. 291).

57. (1899.) Where the seller delivers the goods to a carrier for transit, and causes them to be consigned to himself, the presumption arises that he intended to retain the title. *Missouri P. R. Co. v. Lau*, 57 Neb. 559 (78 N. W. 291).

58. (1902.) That the articles were paid for and were to be shipped with freight prepaid, and were guaranteed to be according to sample, does not take them out of the general rule that the title to goods ordered from a distant point passes to the purchaser when they are consigned to him and delivered to a common carrier. *Harding v. State*, 65 Neb. 238 (91 N. W. 194).

Stoppage in transitu.

See, also, *Sales*, §§ 287-294.

59. (1884.) The right of stoppage *in transitu* by the vendor continues until the goods have reached the buyer and the delivery is complete. *Chicago, B. & Q. R. Co. v. Painter & Sons*, 15 Neb. 394 (19 N. W. 488).

60. (1872.) The term "transit" as used in the law relative to the right of the creditor to retake goods sold before delivery, is not confined in its meaning to the passage of the goods through the country, but includes their situation in every stage, from the time of passing out of the control and possession of the vendor into that of the vendee, the accident of place is not a material circumstance; but the immediate relation of the parties to the goods is rather to be considered. *Sutro v. Hoile*, 2 Neb. 186).

61. (1872.) B and A, merchants in Omaha, ordered, through plaintiff's agent, goods of him, agreeing to give their notes at four months; and the defendant, as marshal, was in possession of their store on delivery of the goods. B and A had filed petition in bankruptcy at arrival of goods, which were delivered to him by an expressman, without the presence or direction of the plaintiffs, or knowledge of B and A, and without delivery of the notes of B and A. *Held*, That the right of stoppage remained in plaintiffs, notwithstanding delivery to the defendant. *Sutro v. Hoile*, 2 Neb. 186.

62. (1884.) The right of stoppage *in transitu* may be asserted by the vendor of goods at any time before their delivery to the vendee by the carrier. But if the goods are by the vendee sold to a third party, in good faith, for value, and they are by the

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carrier delivered to the vendee, who delivers them to his vendee, the lien of the consignor is lost, and he cannot retake the goods in the pososession of such vendee of his vendee. *U. S. Engine Co. v. Oliver*, 16 Neb. 612 (21 N. W. 463).

——— **Effect of garnishment.**

63. (1884.) The right of stoppage *in transitu* is not impaired or extinguished by service of process of garnishment upon the carrier. *Chicago, B. & Q. R. Co. v. Painter & Sons*, 15 Neb. 394 (19 N. W. 488).

64. (1884.) The fact that a carrier has been garnisheed by a creditor of an insolvent debtor to whom property is assigned, is no defense to an action of replevin, by the vendor, who has given notice to the carrier and demanded the goods. *Chicago, B. & Q. R. Co. v. Painter & Sons*, 15 Neb. 394 (19 N. W. 488).

D. Transportation and Delivery by Carrier.

As shipments of live stock, see *post*, §§ 144-151.

Duty to deliver in general.

65. (1894.) The duty of a common carrier of goods is not only to safely carry, but to deliver; and delivery must be made within a reasonable time, at the place, and to the person to whom the goods were consigned. *Gates v. Chicago, B. & Q. R. Co.*, 42 Neb. 379 (60 N. W. 583).

Delivery on direction of consignor's agent.

66 (1894.) Where a railroad company receives a car of potatoes to deliver to an agent of the shipper, and on arrival at the place of destination the consignee, the owner's agent, directs the delivery to another, such delivery was in effect a delivery to the agent, and the person to whom the delivery was actually made failed to pay for the potatoes, the carrier was not liable to the owner thereof for their value, although the bill of lading for the goods was not surrendered to the carrier before delivery, as the instruction of W. to deliver to K., was, in effect, the owner's instruction, and it not appearing that the bill of lading for the goods had been assigned or indorsed to any one by the owner or shipper. *Gates v. Chicago, B. & Q. R. Co.*, 42 Neb. 379 (60 N. W. 583).

Delivery to consignee.

67 (1894.) The delivery of goods by a common carrier to the consignee thereof is made at the peril of the carrier, unless when made the consignee surrenders the bill of lading either made or indorsed to himself. *Gates v. Chicago, B. & Q. R. Co.*, 42 Neb. 379 (60 N. W. 583).

68. (1895.) The delivery of goods by a common carrier to the consignee thereof is made at the peril of the carrier, unless when made the consignee surrenders the bill of lading either made or indorsed to himself. *Union P. R. Co. v. Johnson*, 45 Neb. 57 (63 N. W. 144; 50 Am. St. Rep. 540).

69. (1895.) A railway company issued to shippers of grain in Nebraska several bills of lading as follows: "Received of ——— [the name of the shipper] the following described freight * * * marked and consigned as noted below * * * to be transported to ———, and delivered at the railway depot on payment of freight charges together with such charges as have been advanced to the same. Consignee, Brown Bros. Grain Company. Destination, Milwaukee, Wis." The bills of lading contained the following notations: "Care Union Elevator, Council Bluffs, Iowa. Stop at Brown Bros. Elevator Company to clean. Transfer at Council Bluffs." *Held*, That such bills of lading were contracts to deliver in Milwaukee, and the notations on the bills of lading meant nothing more than that the grain should go by way of Council Bluffs to be cleaned there, or transferred to other carriers through the instrumentality of the elevator located there. *Union P. R. Co. v. Johnson*, 45 Neb. 57 (63 N. W. 144; 50 Am. St. Rep. 540).

70. (1895.) Where grain was delivered to a carrier, consigned to Milwaukee, and while in transit, was sold and the bill of lading assigned to a party in Milwaukee, the carrier by delivering the grain to the original consignee, at an intermediate point, without a surrender of the bill of lading, renders itself liable to the assignee. *Union P. R. Co. v. Johnson*, 45 Neb. 57 (63 N. W. 144; 50 Am. St. Rep. 540).

71. (1896.) A carrier delivering property to anyone except the owner and holder of the bill of lading is liable for resulting loss. *Union Stock Yards Co. v. Westcott*, 47 N. W. 300 (66 N. W. 419).

72. (1896.) Directions contained in a bill of lading to notify a certain person of the arrival of the shipment at the place of destination is no authority to the carrier to make delivery of such shipment to the

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person so to be notified, without the production of the bill of lading. *Union Stock Yards Co. v. Westcott*, 47 Neb. 300 (66 N. W. 419).

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73. (1903.) Where a mortgagee consigned a shipment of cattle, described in his mortgage, to a commission firm in order to protect the payment of his mortgage debt, and as soon as payment thereof was made directed the delivery of the shipment to the firm designated by the mortgagor, no action will lie against the carrier for nondelivery to the party designated by such mortgagor. *Johnston v. Chicago, B. & Q. R. Co.*, 70 Neb. 364 (97 N. W. 479).

Delivery to warehouse.

74. (1885.) The common law rule requiring common carriers to make personal delivery to the consignee, has been so far relaxed as regards railways, from necessity, as in most cases to substitute in place of personal delivery a delivery at the warehouse of the company. But this is upon the ground that a railway has no means of delivery beyond its own lines. *State, ex rel. Mattoon, v. Republican V. R. Co.*, 17 Neb. 647 (24 N. W. 329; 52 Am. Rep. 424).

Liability for failure or refusal to deliver.

75. (1895.) The refusal of a common carrier to surrender goods in its possession to the rightful owner amounts to conversion, for which the latter may recover if entitled to possession at the time of the demand therefor. *Shellenberg v. Fremont, E. & M. V. R. Co.*, 45 Neb. 487 (63 N. W. 859; 50 Am. St. Rep. 561).

76. (1895.) The rightful owner of goods in possession of a common carrier may enforce his right thereto, although a stranger to the contract of bailment. *Shellenberg v. Fremont, E. & M. V. R. Co.*, 45 Neb. 487 (63 N. W. 859; 50 Am. St. Rep. 561).

77. (1903.) Where the conditions of a valid chattel mortgage have been broken, and the mortgagee is entitled to take possession of the mortgaged property, wherever found, a common carrier is not liable to the mortgagor for a diversion of a shipment of such property and a delivery of the same to the mortgagee demanding possession thereof while it is still in the carrier's hands. *Johnston v. Chicago, B. & Q. R. Co.*, 70 Neb. 364 (97 N. W. 479).

Action for failure to deliver.

78. (1897.) One with whom a carrier has made a contract for transporting his goods, may, in case of breach, elect to sue for damages for failure to perform the public duties of a carrier, or he may waive the tort and sue for breach of the special contract. *Denman v. Chicago, B. & Q. R. Co.*, 52 Neb. 140 (71 N. W 967).

——— Pleading.

79. (1897.) An action against a carrier for failure to deliver goods cannot be maintained by the consignor in the absence of averments that he was the owner of the goods, that he was liable for their loss, or that he had sustained special damage. *Union P. R. Co. v. Metcalf & Wood*, 50 Neb. 452 (69 N. W. 961).

E. Delay in Transportation or Delivery.

As to live stock, see *post*, §§ 144-151.

Time for performance.

80. (1897.) A contract of carriage which contains no specified time for performance, implies, as one of its terms, performance within a reasonable time, and an action may be maintained on the contract for unreasonable delay in performance. *Denman v. Chicago, B. & Q. R. Co.*, 52 Neb. 140 (71 N. W. 967).

81. (1906.) Where a carrier unnecessarily delays the continuation of shipment of goods from a point of transfer of the goods was to be had the carrier is liable for damage that is the result of an act of God. *Wabash R. Co. v. Sharpe*, 76 Neb. 424 (107 N. W. 758).

Act of God as defense.

82. (1888.) High water in a river rendering a railway over it impassable whereby a shipment of perishable goods was delayed, is an act of God, in the absence of proof that such a flood was not to be anticipated, and could not be guarded against. *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb. 552 (37 N. W. 462).

83. (1906.) A common carrier is responsible for injury to goods where the goods were exposed to injury by the carrier's inexcusable detention, and the carrier cannot, in such case, plead the act of God as a defense. *Wabash R. Co. v. Sharpe*, 76 Neb. 424 (107 N. W. 758).

Actions.

84. (1897.) An action to recover for breach of contract of carriage is not for a liability created by statute within the meaning of section 11, code of civil procedure, because of the duties imposed on railroad

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companies by section 111, chapter 16, Compiled Statutes. *Denman v. Chicago, B. & Q. R. Co.*, 52 Neb. 140 (71 N. W. 967).

84*a*. (1907.) Claims against a carrier for an overcharge on a shipment of goods, and for damages for delay in the shipment and for negligence in handling the goods, are all for breaches of the same contract, and may be joined in one cause of action, a petition thereon not being subject to a motion to separately state and number. *Haurigan v. Chicago & N. W. R. Co.*, 80 Neb. 132 (113 N. W. 983).

85. (1897.) A petition which alleges what is the reasonable and usual time for transporting goods and that the goods were not transported in that time but were unreasonably delayed, states in that respect a cause of action. Justifiable delay beyond the usual and ordinarily reasonable time is matter of defense. *Denman v. Chicago, B. & Q. R. Co.*, 52 Neb 140 (71 N. W. 967).

F. Loss of, or Injury to, Goods.

Liability of carriers in general.

Liability of connecting line, see *post*, §§ 106-113.

86. (1873.) Common carriers of goods are not only responsible for any loss or injury to the goods they carry, but the law raises an absolute and conclusive presumption of negligence whenever the loss occurs from any other cause than the act of God or the public enemy. *McClary v. Sioux City & P. R. Co.*, 3 Neb. 44.

87. (1873.) Common carriers of goods are not only responsible for any loss or injury to the goods they carry, but the law raises an absolute and conclusive presumption of negligence whenever the loss occurs from any other cause than the act of God or the public enemy. *McClary v. Sioux City & P. R. Co.*, 3 Neb. 44.

88. (1883.) Certain household goods were carried by a railway company to H. in this state, reaching that point on November 14, 1879, and were placed in the company's depot. Soon afterwards the owner called for the goods, but was informed by the agent that they had not arrived. Certain friends of the owner at his request, also, on the 19th, 20th, and about the 22d of that month, made a similar inquiry of the agent and were informed that the goods had not been received. The depot was burned November 24, 1879, and the goods destroyed. The custom of the railway company was to give notice through the mail to all persons who were not regular shippers of the arrival of their goods, but no such notice was sent to the consignee in this case. *Held*, That the railway company was liable for the value of the goods. *Burlington & M. R. R. Co. v. Arms*, 15 Neb. 69 (17 N. W. 351).

89. (1906.) The general rule is that a common carrier of goods insures their safe delivery to the consignee against loss or injury from whatever cause arising, except only the act of God or the public enemy. *Wabash R. Co. v. Sharpe*, 76 Neb. 424 (107 N. W. 758).

When liability attaches.

90. (1905.) The liability of a carrier of goods does not attach until the goods are unconditionally delivered by the shipper and accepted by the carrier. *Chicago, B. & Q. R. Co. v. Powers*, 73 Neb. 816 (103 N. W. 678).

91. (1905.) When a shipper surrenders the entire custody of his goods to a common carrier for immediate transportation, and the carrier so accepts them, the liability of the carrier at once attaches. *Chicago, B. & Q. R. Co. v. Powers*, 73 Neb. 816 (103 N. W. 678).

Oral contract.

92. (1890.) On an oral contract between a shipper and station agent, that a stove should be shipped at carrier's risk and the subsequent delivery to shipper of bill of lading with the clause, "stoves at owner's risk of breakage," which condition was not brought to shipper's notice, the carrier was liable for breakage. *Union P. R. Co. v. Marston*, 30 Neb. 241 (46 N. W. 485).

Actions.

——— Jurisdiction of state courts.

93. (1893.) The state courts have not lost their jurisdiction of the subject-matter of actions against carriers because of interstate shipments by reason of the fact that congress has legislated upon the subject. *St. Joseph & G. I. R. R. Co. v. Palmer*, 38 Neb. 463 (56 N. W. 957; 22 L. R A. 335).

——— Damages.

94. (1894.) Where property delivered to a common carrier for shipment is destroyed while in transit, the measure of the shipper's damages is the market value of the property at its place of destination at the time it should have been delivered there. *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb. 356 (58 N. W. 968).

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——— Admissibility of evidence.

95. (1899.) The bill of lading and waybill made by the authorized agent of a common carrier of freight are competent evidence tending to prove that the articles therein described were delivered to such carrier for shipment. *Chicago, M. & St. P. R. Co. v. Johnston*, 58 Neb. 236 (78 N. W. 499).

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——— Sufficiency of evidence.

96. (1890.) Where, in an action on a contract of carriage, to recover for breakage to a stove, evidence that the shipper, at suggestion of the defendant's agent paid a higher rate with the understanding that it was at the carrier's risk, and the bill of lading was handed to plaintiff when he was boarding the train and he did not examine it, is sufficient to sustain a finding of such special contract, and a verdict for plaintiff. *Union P. R. Co. v. Marston*, 30 Neb. 241 (46 N. W. 485).

97. (1906.) The delivery of the goods to the carrier in good order, and their arrival at the place of destination in bad order, makes a *prima facie* case against the carrier. *Wabash R. Co. v. Sharpe*, 76 Neb. 424 (107 N. W. 758).

——— Instructions.

98. (1890.) Instructions bearing on a carrier's liability for breakage of a stove shipped by plaintiff, under a special oral contract with defendant's agent, approved. *Union P. R. Co. v. Marston*, 30 Neb. 241 (46 N. W. 485).

G. Limitation of Liability.

By connecting lines, see *post*, §§ 114, 115.

As to shipments of live stock, see *post*, §§ 152-157.

As to passengers, see *post*, §§ 239, 240.

Right to limit liability.

99. (1876.) An incorporated railroad company is a common carrier as to all property within the scope of its chartered powers, and it cannot by special agreement divest itself of such character, and therefore it is liable for the negligence of its servants. *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117.

100. (1889.) A railroad company operating a line of railroad in this state, is a common carrier, and cannot, under the provisions of the constitution, limit its liability as such by special agreement with a shipper. *Missouri P. R. Co. v. Vandeventer*, 26 Neb. 222 (41 N. W. 998; 3 L. R. A. 129).

101. (1901.) Section 5, article I, chapter 72, Compiled Statutes, does not impliedly give the right to a railway company to limit its liability, under section 3 of the same article, by stipulation. *Chicago, R. I. & P. R. Co. v. Collier*, 1 Unof. 278 (95 N. W. 472).

Validity of contract limiting liability.

102. (1893.) A railroad company, in the carriage of goods, is subject to the liability of a common carrier, and must answer for all losses not occasioned by the act of God or the public enemy, and cannot in this state by special contract limit or relieve itself from this liability, and the fact that the contract was for the carriage of goods from a point in this state to a point in another state does not change the rule. *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb. 463 (56 N. W. 957; 22 L. R. A. 335).

103. (1894.) A contract between a shipper and a common carrier, which, by its terms, limits the liability of the carrier and relieves it from either entirely or partially responding in damages for injury or loss to property shipped under such contract, resulting from negligence of the carrier, is invalid or void under the common law rule, as against public policy. *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb. 356 (58 N. W. 968).

104. (1899.) Under the constitution of this state a common carrier of freight can not lawfully stipulate for the release from liability for loss or damage occasioned by its own negligence, and such a stipulation in a contract of affreightment is illegal and void. *Pennsylvania Co. v. Kennard Glass & Paint Co.*, 59 Neb. 435 (81 N. W. 372).

——— What law governs.

105. (1897.) A limitation of the liability of a common carrier contained in a shipping contract will not be recognized or enforced in this state, though valid in the state where made, when such attempted restriction of liability is illegal and contrary to the public policy of this state. *Chicago, B. & Q. R. Co. v. Gardiner*, 51 Neb. 70 (70 N. W. 508).

H. Connecting Carriers.

Liability in general.

See, also, *ante*, §§ 86-98.

106. (1890.) In an action against a railroad for injury to goods shipped on its line and a connecting line, to escape liability, the defendant is burdened proving the injury was done on some other line. *Union*

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P. R. Co. v. Marston, 30 Neb. 241 (46 N. W. 485).

107. (1902.) An agent employed to solicit traffic for a foreign railroad company, having no line of road in this state, has implied authority to bind his principal for the safe delivery of goods at a point beyond its own line, and to contract over what road beyond that line the property shall be transported. *Fremont, E. & M. V. R. Co. v. New York C. & St. L. R. Co.*, 66 Neb. 159 (92 N. W. 131; 59 L. R. A. 939).

108. (1892.) Where several common carriers unite to form a line for the transportation of goods and give a through bill of lading, each becomes the agent of the other, and damages for negligence may be recovered from the carrier committing the injury or from the one that undertook to transport the goods. *Missouri P. R. Co. v. Twiss*, 35 Neb. 267 (53 N. W. 76; 37 Am. St. Rep. 526).

109. (1897.) A railroad company receiving for shipment goods consigned to a point on the line of a connecting carrier, under an agreement to transport them to the terminus of its own road, is neither at common law nor by statute of this state answerable therefor after their safe delivery to the connecting line named in the bill of lading or contract of shipment. *Fremont, E. & M. V. R. Co. v. Waters*, 50 Neb. 592, (70 N. W. 225).

Delivery to succeeding carrier.

110. (1897.) It is the duty of a railroad company to receive and transport to the terminus of its line, and to safely deliver to a connecting carrier, goods offered for shipment and consigned to a place beyond its line. *Fremont, E. & M. V. R. Co. v. Waters*, 50 Neb. 592 (70 N. W. 225).

111. (1889.) The M. P. Railway Company received a piano at W., to be carried to L. and "delivered to a connecting carrier" for transportation to P. At L. the track of the M. P. railway crossed the track of the B. & M. railroad, the tracks and stations being connected by a "Y." The piano was carried to L. by the M. P. Railway Co., and delivered to two draymen to be transferred to the B. & M. Railroad Co. at its station. Before delivery to the last named railroad company, and while in the possession of the draymen, it fell out of the wagon and was broken, and was not received by the agent of the B. & M. Railroad Company. *Held*, That delivery to the draymen was not a compliance with the contract to deliver to a connecting carrier, and hence the M. P. Railway Company was liable. *Missouri P. R. Co. v. Young*, 25 Neb. 651 (41 N. W. 646).

Duty to receive cars of connecting line.

112. (1897.) It is the duty of a railroad company to receive and transport over its line cars of other companies if the gauge of the road is suitable and the cars are not defective or out of repair. *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442 (71 N. W. 42; 66 Am. St. Rep. 456).

Agency for each other.

113. (1892.) Where several lines of railroads undertake to transport and deliver goods of a shipper, each line is the agent of the other to accomplish the carriage and delivery of the goods. *Missouri P. R. Co. v. Twiss*, 35 Neb. 267 (53 N. W. 76; 37 Am. St. Rep. 526).

Limitation of liability.

See, also, *ante*, §§ 99-105.

114. (1902.) Although a railroad company enters into a joint contract with another company for the transportation of goods to a point beyond the end of its own line, it is competent for it to enter into an express contract with the shipper limiting its liability to the transportation of the property over its own line. *Fremont, E. & M. V. R. Co. v. New York, C. & St. L. R. Co.*, 66 Neb. 159 (92 N. W. 131; 59 L. R. A. 939).

115. (1902.) When a railway company receives goods for shipment to a point beyond the terminus of, or at a distance from, its own line, so that for a part of the distance they will require to be transported over the lines of other carriers and collects the entire charge for transportation, it will be held to have assumed responsibility for safe carriage over every part of the route, and the liability so incurred can not be evaded or limited even by express contract. *Chicago, R. I. & P. R. Co. v. Western Hay & Grain Co.*, 2 Unof. 784 (90 N. W. 205).

Actions.

116. (1892.) When a party ultimately liable knows that an action is pending against the carrier who undertook to transport the goods, it is his duty to defend the action. *Missouri P. R. Co. v. Twiss*, 35 Neb. 267 (53 N. W. 76; 37 Am. St. Rep. 526).

Measure of damage.

117. (1892.) The measure of damages recoverable by a connecting carrier, for loss by reason of a judgment recovered for

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injuries to a piano while in the hands of the connecting line, is the amount of the judgment with interest and costs. *Missouri P. R. Co. v. Twiss*, 35 Neb. 267 (53 N. W. 76; 37 Am. St. Rep. 526).

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I. Charges.

Regulation of rates, see *ante*, § 12.

Discrimination in rates, statutory provisions, see *ante*, §§ 3-9

Joinder of action for damages for delay with claim for overcharge, see *ante*, § 84*a*.

Amount of charge by express companies.

117*a*. (1908.) Until otherwise prescribed by competent authority, by the provisions of sections 2, 3, ch. 91, laws 1907, express companies doing business in this state after the law took effect may charge for the transportation of merchandise within this state any sum not exceeding 75 per cent of the rate in force on the 1st day of January, 1907, and thirty days were allowed after the act was in force for such companies to file with the state railway commission the schedule of rates and classifications in force on that date. *State v. Pacific Express Co.*, 80 Neb. 823 (115 N. W. 619).

Charges for unloading.

118. (1884.) A railroad company cannot collect charges for unloading freight which it converts to its own use at the time of such unloading. *Burlington & M. R. R. Co. v. Chicago Lumber Co.*, 15 Neb. 390 (19 N. W. 451).

Demurrage.

119. (1884.) A railroad company is not entitled to charge demurrage for freight standing in its cars, unless by virtue of contract or statutory law, or possibly by such use and custom as may have acquired the force of law. *Burlington & M. R. R. Co. v. Chicago Lumber Co.*, 15 Neb. 390 (19 N. W. 451).

Liability for advances by agent.

See, also, *Money Lent*.

120. (1900.) Plaintiff, a freight agent of a railroad company, delivered to defendant, upon his promise to pay therefor, freight upon which was an unpaid balance of charges. *Held*, That on plaintiff being compelled to pay the charges to company, defendant became liable to plaintiff therefor. *Grand Island Mercantile Co. v. McMeans*, 60 Neb. 373 (83 N. W. 172).

Additional charge.

121. (1884.) A railroad company, as a common carrier, cannot legally increase the charges for transportation by wrongfully diverting freight from its proper course in transit. *Burlington & M. R. R. Co. v. Chicago Lumber Co.*, 15 Neb. 390 (19 N. W. 451).

Actions for rebates.

122. (1888.) In an action against a railroad company brought by an assignee of a claim for rebates and overcharges admitted to be due by the defendant company, a judgment rendered in favor of a third party intervening and claiming the fund, cannot stand where there is nothing in evidence to show that he was entitled to the money. *Russell v. Rosenbaum*, 24 Neb. 769 (40 N. W. 287).

123. (1888.) In an action by an assignee of a contract against a railroad company for rebates and overcharges, no question as to the legality of the contract between the shipper and the railroad company was presented by the answer of an intervener, but upon the contrary he sought to obtain the benefit of the contract, and obtained a judgment in his favor, he could not afterwards be heard to insist upon the illegality of the contract. *Russell v. Rosenbaum*, 24 Neb. 769 (40 N. W. 287).

Effect of mistake in quoting rate.

124. (1897.) Where a railroad company, by mistake, quotes a rate on grain to be shipped to Colorado, less than the usual rate, and the shipper, basing the price of grain sold on such quoted rate, sold a large quantity of grain to one in Colorado, who is compelled to pay a connecting carrier the higher and usual rate, and the shipper is required to reimburse the buyer, the first railroad is liable to the shipper for the over-charge paid. *Missouri P. R. Co. v. Crowell Lumber & Grain Co.*, 51 Neb. 293 (70 N. W. 964).

124*a*. (1907.) Section 3, article V, chapter 72, Compiled Statutes 1907, does not render void a contract between a railroad company and a shipper to transport merchandise for less than the usual and regular freight rate, where such rate has been agreed to by mistake of the railroad company without intending any discrimination against other shippers. Where such contract had been entered into and the freight transported in pursuance thereof, if the railroad company compels the payment of

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freight charges in excess of the contract rate, such excess may be recovered by the shipper. *Haurigan v. Chicago & N. W. R. Co.*, 80 Neb. 132 (113 N. W. 983). [Overruled on rehearing. 80 Neb. 139.]

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Right of carrier to rescind contract.

125. (1884.) When a carrier offers to carry the goods of a shipper for a certain price per car-load, and the shipper accepts such offer and ships his goods thereunder, the carrier is bound thereby and cannot be heard to say he will not abide by its terms, and if a greater sum is retained by the carrier, upon sale of the goods, it will be required to respond to the shipper for such excess. *Atchison & N. R. Co. v. Miller*, 16 Neb. 661 (21 N. W. 451).

Restraining violation of statute as to rates.

125*a*. (1908.) The attorney general may, on behalf of the state, maintain an action in equity to enjoin common carriers whose rates are fixed by law from violating the terms of the statute and exacting unlawful and excessive rates and charges. *State v. Pacific Express Co.*, 80 Neb. 823 (115 N. W. 619).

III. CARRIAGE OF LIVE STOCK.

Relation of carrier and shipper.

126. (1876.) When a railroad company undertakes to carry live stock for hire, the fact that it does so establishes its relation as a common carrier, with the duties and obligations which grow out of it. *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117.

127. (1906.) When the railway company undertakes to carry live stock for hire, it assumes all the duties and liabilities of a common carrier with reference to such property, and it is liable for injuries thereto occasioned by the negligence of its servants. *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166 (108 N. W. 982).

Duty to provide fit cars.

See, also, *ante*, §§ 44-48.

128. (1901.) A railroad company is bound to provide cars fit and suitable for live stock under existing conditions, and to exercise due care to transport safely. *Chicago, B. & Q. R. Co. v. Williams*, 61 Neb. 608 (85 N. W. 832; 55 L. R. A. 289).

129. (1901.) A railway company acts in the capacity of a common carrier of live stock which it receives for transportation; and as such carrier it is bound to provide cars fit and suitable under existing conditions, and exercise due care to carry safely. *Chicago, B. & Q. R. Co. v. Williams*, 61 Neb. 608 (85 N. W. 832; 55 L. R. A. 289).

Care and protection of stock.

130. (1893.) Section 4386, Rev. Stat. U. S., imposes a penalty upon a railway company which transports live stock, if the animals are kept in the cars more than twenty-eight consecutive hours, "unless prevented from so unloading by storm or other accidental causes." There is further exception where animals "have proper food, water, space, and opportunity to rest" on the cars. *Held*, That in addition to the penalty imposed by statute, a railway company which failed to comply with the above requirement would be liable in damages to the owner of the stock, but to state a cause of action the petition must show that the case is not within the exceptions named. *Hale v. Missouri P. R. Co.*, 36 Neb. 266. (54 N. W. 517).

131. (1901.) Where a shipper of live stock agrees to furnish a caretaker and fails to do so, the carrier, if it has knowledge of such failure and proceeds under the shipping contract, is liable for any loss resulting from its failure to provide the stock with proper care and protection. *Chicago, B. & Q. R. Co. v. Williams*, 61 Neb. 608 (85 N. W. 832; 55 L. R. A. 289).

132. (1901.) Where the shipper of live stock does not agree to furnish caretaker, and some of the animals die or are injured for want of proper care and protection while in transit, the carrier is liable and must bear the loss. *Chicago, B. & Q. R. Co. v. Williams*, 61 Neb. 608 (85 N. W. 832; 55 L. R. A. 289).

133. (1906.) The provisions of sections 4386 and 4387, Revised Statutes of the United States, do not relieve a railway company engaged in conveying animals from one state to another from liability for damages arising through the failure to properly care for, feed and water animals in their charge, the transportation of which is delayed through an act of God. *Chicago, B. & Q. R. Co. v. Slattery*, 76 Neb. 721 (107 N. W. 1045).

134. (1906.) A common carrier is not relieved from its responsibility to care for animals entrusted to it for transportation by reason of the express terms of a written contract, whereby the shipper agreed to accompany the stock, where the company, with knowledge of the failure on the part

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of the shipper to accompany the stock, proceeds under the shipping contract. *Chicago, B. & Q. R. Co. v. Slattery*, 76 Neb. 721 (107 N. W. 1045).

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——— Neglect of owner accompanying stock.

135. (1902.) Where a shipper agrees to personally accompany and care for the watering of live stock transported by a railway company, and is given free transportation for that purpose and is supplied with proper facilities, he can not complain of an injury arising from lack of such care in the matter of watering, arising out of his own fault. *Chicago, St. P., M. & O. R. Co. v. Schuldt*, 66 Neb. 43 (92 N. W. 162).

Liability for stock in yards awaiting loading.

136. (1905.) A railroad company which constructs yards by the side of its track to facilitate the loading and unloading of stock is not responsible as a common carrier for stock placed in such yards for subsequent shipment, but subject to the right of the shipper to remove the stock from the pens for feed and water, before the shipment is actually made. In such a case the liability of the company is no greater than that of an ordinary depository, or bailee. *Chicago, B. & Q. R. Co. v. Powers*, 73 Neb. 816 (103 N. W. 678).

137. (1907.) When cattle have been delivered to and accepted by a railroad company in its loading pens for immediate shipment, the company is liable as a common carrier for damages to the cattle from the time of such delivery. *Nelson v. Chicago, B. & Q. R. Co.*, 78 Neb. 57 (110 N. W. 741).

Liability for delay in accepting for shipment.

138. (1905.) Where a railroad company negligently refuses to receive and transport freight intended for immediate sale upon the market, such as live stock, it is liable for the expense of keeping the stock, caused by such delay, and for the difference between the price of the stock when it should have arrived at the market and the price when it did actually arrive. *Chicago, B. & Q. R. Co. v. Todd*, 74 Neb. 712 (105 N. W. 83).

Act of God releasing carrier from liability.

139. (1890.) A snow storm of such violence as to prevent the moving of trains is an act of God, and releases a carrier from ordinary liability for loss to live stock. *Black v. Chicago, B. & Q. R. Co.*, 30 Neb. 197 (46 N. W. 428).

140. (1890.) The words "ordinary" and "reasonable," as used to define the degree of care required of a common carrier of live stock, when overtaken by the "act of God," are used interchangeably, and either word expresses the degree sufficiently. *Black v. Chicago, B. & Q. R. Co.*, 30 Neb. 197 (46 N. W. 428).

141. (1890.) A common carrier of live stock is not an insurer against injuries unavoidably resulting from the inherent nature or propensities of the animals, or against loss caused by the act of God. While a carrier, when overtaken by an occurrence known as the act of God, is not bound to the highest degree of diligence to preserve the property from injury, yet, in such an emergency, he is required to bestow such care as an ordinarily prudent person or carrier would use under like circumstances, and if he fail to do so and loss results therefrom, he is liable. *Black v. Chicago, B. & Q. R. Co.*, 30 Neb. 197 (46 N. W. 428).

Carrier as insurer of live stock.

142. (1906.) A common carrier of live stock is generally an insurer of their safe delivery to the consignee against loss or damage. *Chicago, B. & Q. R. Co. v. Slattery*, 76 Neb. 721 (107 N. W. 1045).

143. (1906.) A carrier of live stock is not an insurer against injury resulting from the inherent nature or propensities of the animals, and without fault of the carrier. *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166 (108 N. W. 982).

Delay in transportation or delivery.

In shipment of goods, see *ante*, §§ 80-85.

144. (1903.) In order to recover damages for an alleged delay in the shipment of live stock, it is necessary to introduce some competent evidence tending to show the length of time ordinarily required to transport the shipment from the place where received to the point of delivery, and that a longer time was actually consumed than was necessary for that purpose. *Johnston v. Chicago, B. & Q. R. Co.*, 70 Neb. 364 (97 N. W. 479).

145. (1906.) In an action by a shipper of stock, against a railroad company for damages sustained by reason of failing to deliver the stock on the destination marked on time, evidence showing several delays from side-tracking the train to permit oth-

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ers to pass justified sending the case to the jury. *Union P. R. Co. v. Thompson*, 75 Neb. 464 (106 N. W. 598).

146. (1906.) A cause for unavoidable delay in shipment affords no excuse for a failure to exercise that degree of care required of a common carrier in the transportation of stock. *Chicago, B. & Q. R. Co. v. Slattery*, 76 Neb. 721 (107 N. W. 1045).

147. (1907.) Where a consignor of a horse pays the carriage charges and demands the animal before delivery to a connecting carrier, it is the duty of the carrier to redeliver the horse without unreasonable delay. *Wente v. Chicago, B. & Q. R. Co.*, 79 Neb. 179 (115 N. W. 859).

148. (1906.) Where a carrier undertakes the carriage of live stock, part of the shipment to be over a branch line, it is immaterial whether a delay in shipment that occurs be on the main line or the branch. *Union P. R. Co. v. Nelson*, 76 Neb. 72 (106 N. W. 1036).

149. (1907.) The consignor of a horse shipped from one point to another, which will necessitate shipment over two connecting lines of railroad, on the arrival of the horse at the connecting point of said roads, may, if he so desires, decline to ship farther, and upon payment of the charges of the first carrier demand a redelivery of such horse. *Wente v. Chicago, B. & Q. R. Co.*, 79 Neb. 179 (115 N. W. 859).

150. (1907.) A railroad company is not an insurer of the arrival of its trains on schedule time in the transportation of live stock, but, where there is a material delay in the delivery of the stock, the company must, to exonerate itself from liability, show that the delay arose from some cause other than its own negligence. *Nelson v. Chicago, B. & Q. R. Co.*, 78 Neb. 57 (110 N. W. 741).

151. (1907.) Under the constitution and statutes of this state, the liability of a railroad company for unnecessary and unreasonable delay in the shipment of live stock is the same whether the contract of shipment is a written or an oral one *Nelson v. Chicago, B. & Q. R. Co.*, 78 Neb. 57 (110 N. W. 741).

Limitation of liability.

As to goods, see *ante*, §§ 99-105.

152. (1876.) An agreement that the railroad company and all connecting lines over which stock should be transported should be deemed merely forwarders and not common carriers, and only liable for such damage or injury of such freight as may be caused by gross negligence only, and not otherwise, is in violation of law and against public policy, and it does not change the character of the company from that of a common carrier to that of a bailee for hire; and such agreement does not lessen the responsibility of said company as such common carrier, nor remove its liability for negligence of its servants. *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117.

153. (1891.) A common carrier of live stock cannot, by contract with a shipper, relieve itself, either in whole or in part, from liability for injury or loss resulting from its own negligence. *Chicago, R. I. & P. R. Co. v. Witty*, 32 Neb. 275 (49 N. W. 183; 29 Am. St. Rep. 436).

154. (1906.) It is not an open question in this state that common carriers cannot, by contract, limit their common law liability. *Union P. R. Co. v. Thompson*, 75 Neb. 464 (106 N. W. 598).

155. (1906.) A stock shipping contract contained a provision to the effect that unless claims for loss, damage or detention are presented within ten days from the date of unloading the stock at destination and before said stock has been mingled with other stock, such claims shall be deemed to be waived, and the carriers and each thereof shall be discharged from liability is void. *Union P. R. Co. v. Thompson*, 75 Neb. 464 (106 N. W. 598).

156. (1902.) An agreement that the shipper shall accompany the stock and be responsible for its care, when proper facilities are supplied, is not a limitation of the carrier's liability, forbidden by article 11, section IV of the constitution. *Chicago, St. P., M. & O. R. Co. v. Schuldt*, 66 Neb. 43 (92 N. W. 162).

157. (1902.) The care of live stock while being transported is a mere incident to its transportation, and transportation agencies have the right to contract against their assumption of liability that accrues to them as bailees, and in common with other bailees, and not strictly as common carriers. *Chicago, St. P., M. & O. R. Co. v. Schuldt*, 66 Neb. 43 (92 N. W. 162).

Notice of claim for loss.

158. (1897.) A provision in a shipping contract that in case of damage sustained, a verified claim should be presented to the general freight agent or to the local station

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agent, is waived where, on oral notice to the local station agent that the horse shipped had been injured, the latter had the horse examined, and removed from the car, and steps were taken by the carrier to relieve the injuries. *Chicago, B. & Q. R. Co. v. Gardiner*, 51 Neb. 70 (70 N. W. 508).

159. (1907.) A condition in a contract for the shipment of live stock by a railway company, which provides that, unless claims for loss, damage or detention are presented within ten days from the date of the unloading of said stock at destination, and before said stock has been mingled with other stock, such claims shall be deemed to be waived, and the carriers and each thereof shall be discharged from liability, is in violation of the prohibition of section 4, article XI of the constitution of Nebraska. *Cook v. Chicago, R. I. & P. R. Co.*, 78 Neb. 64 (110 N. W. 718).

Actions.

——Parties.

160. (1899.) Where two persons ship their own stock in the same car of a railway company and that of one is injured, and, in an action for damages against the carrier, joins the other shipper as co-defendant because he refused to join as plaintiff, there is no misjoinder of parties. *Union P. R. Co. v. Vincent*, 58 Neb. 171 (78 N. W. 457).

——Damages.

161. (1905.) The class and condition of live stock are material matters in determining their market price, and, in the absence of evidence as to these matters and of what the market price of live stock of the class in question was, damages cannot be awarded from a claimed decline in the market price of stock of the general description of that which the carrier negligently refused to accept and transport. *Chicago, B. & Q. R. Co. v. Todd*, 74 Neb. 712 (105 N. W. 83).

——Burden of proof.

162. (1906.) In an action to recover damages from a carrier for injury sustained by live stock in transit, which are accompanied by the owner or his agents, the burden is on the owner to show that the loss complained of was occasioned by the carrier's negligence. *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166 (108 N. W. 982).

163. (1906.) Where by contract the shipper accompanies his live stock with tenders or caretakers, no presumption of negligence on the part of the carrier arises merely from the proof of the fact that loss or injury has attended the shipment, but the burden is on the shipper to show that the loss, if any, sustained was occasioned by the negligence of the carrier. *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166 (108 N. W. 982).

164. (1906.) The delivery of animals to a carrier in good order and their arrival at the place of destination in bad order makes a *prima facie* case against the carrier, and it devolves upon the carrier to show that the loss or damage resulted from some cause which would exempt it from liability. *Chicago, B. & Q. R. Co. v. Slattery*, 76 Neb. 721 (107 N. W. 1045).

——Sufficiency of evidence.

165. (1895.) Evidence *held* to sustain the allegation that the carrier was negligent in furnishing for the shipment of live stock cars which were dangerous and unfit for use on account of the broken condition thereof. *Chicago, St. P., M. & O. R. Co. v. Deaver*, 45 Neb. 307 (63 N. W. 790).

166. (1897.) Evidence, in an action by a shipper of sheep for loss and damage sustained by reason one end of the upper deck of one of the cars having fallen in, showing that the one car was taken from the train and the sheep placed in a suitable car and forwarded to another market by a following train, the owner's representative going on with the others, sustains a verdict for plaintiff for the full value of the sheep in such defective car. *Union P. R. Co. v. Langan*, 52 Neb. 105 (71 N. W. 979).

167. (1897.) In an action by a shipper against a railroad for damages to goods and live stock while being transported, the authority of defendant's agent to make the contract is denied by defendant, evidence introduced sufficient to sustain a finding to the contrary. *Burlington & M. R. R. Co. v. Kittridge*, 52 Neb. 16 (71 N. W. 986).

168. (1898.) Evidence, in an action against a railroad company for the loss of a horse, by reason of a collision, *held* to sustain a verdict for defendant. *McIntyre v. Union P. R. Co.*, 56 Neb. 587 (77 N. W. 57).

169. (1899.) In an action on a contract of shipment of horses, not naming the carrier, evidence examined, and *held* to sustain a finding that the defendant was the carrier making the contract. *Union P. R. Co. v. Vincent*, 58 Neb. 171 (78 N. W. 457).

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170. (1901.) Evidence showing defendant received a horse from a connecting carrier and after receding from a refusal to accept it for shipment because unattended with a caretaker, placed the horse in an open stock car in such a position it could not lie down, and was without feed or other care for thirty hours, and stood in rain and slush, contracting sickness resulting in its death, sustains a finding of negligence and a verdict for plaintiff. *Chicago, B. & Q. R. Co. v. Williams*, 61 Neb. 608 (85 N. W. 832; 55 L. R. A. 289).

171. (1906.) In order to recover damages for an alleged delay in the shipment of live stock, it is necessary to introduce some competent evidence tending to show the length of time ordinarily required to transport the shipment from the place where received to the point of delivery, and that a longer time was actually consumed than was necessary for that purpose. *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166 (108 N. W. 982).

172. (1907.) When facts are disclosed from which it appears that an animal has not suffered through the neglect of a carrier intrusted with its transportation, the rule that proof of the receipt of animals by a carrier in good order and delivery at destination in bad order makes a *prima facie* case of liability against the carrier has no weight as against such facts. *Wente v. Chicago, B. & Q. R. Co.*, 79 Neb. 175 (112 N. W. 300).

173. (1907.) In an action against a carrier for failure to furnish proper facilities for feeding and watering sheep while in transit, the evidence examined, and *held* sufficient to sustain the judgment of the trial court for plaintiff under the instruction given. *Cook v. Chicago, R. I. & P. R. Co.*, 78 Neb. 64 (110 N. W. 718).

——— Question for jury.

174. (1907.) Where the owner of a horse, after it is unloaded, acting under the supervision of a competent veterinary surgeon whom he has employed, leads said horse, in the storm which has arisen, through the streets of the city for a distance of two miles to the veterinary hospital; *held*, a question of fact for the jury whether a reasonably prudent man under like circumstances would have so done. *Wente v. Chicago, B. & Q. R. Co.*, 79 Neb. 179 (115 N. W. 859).

175. (1907.) Where a shipper, in conformity to an agreement whereby a valuable horse was to be shipped on a certain fast train to a point in Missouri, delivers the animal to the carrier in proper time, but the car in which the horse is placed is not attached to the fast train but to a slower one and is twenty-four hours later in reaching the junction of a connecting carrier, and has, in the meantime, contracted a cold on its lungs, and on a demand of the caretaker to unload at such junction that the horse may be cared for, the carrier is several hours late in so unloading, when a severe snow storm is raging, such evidence is sufficient to sustain a finding of negligence on the part of the carrier. *Wente v. Chicago, B. & Q. R. Co.*, 79 Neb. 179 (115 N. W. 859).

176 (1907.) In an action for damage to a shipment of sheep from failure of defendant to furnish reasonable facilities for feeding and watering them, the evidence held sufficient to sustain the judgment for plaintiff under the instruction given. *Cook v. Chicago, R. I. & P. R. Co.*, 78 Neb. 64 (110 N. W. 718).

——— Instructions.

177. (1906.) Instructions in an action for damages for delay in a contract of carriage of live stock approved. *Union P. R. Co. v. Nelson*, 76 Neb. 72 (106 N. W. 1036).

IV. CARRIAGE OF PASSENGERS.

Location of railroad stations, see *Railroads*, §§ 39-45.

A. Relation Between Carrier and Passengers.

Who are passengers.

——— Approaching or leaving station.

178. (1904.) In order to bring a person within the station house or upon the platform of a railroad station within the protection of the legal duties owing by a common carrier to its passengers, a person intending to become a passenger must go to the station at a reasonable time before the time fixed for the departure of the train upon which he intends to take passage, in a proper manner, and there, either by the purchase of a ticket or in some other manner, indicate to the carrier his intention to take passage and thus place himself in the carrier's charge. *Fremont, E. & M. V. R. Co. v. Hagblad*, 72 Neb. 773 (101 N. W. 1033; 4 L. R. A. [n. s.] 254).

179. (1904.) From the time a passenger places himself under the charge of the car-

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rier as he begins his journey until he is afforded the opportunity to leave the premises of the carrier at its termination, he is "a passenger being transported," unless by some act not attributable to the carrier the relation ceases. *Fremont, E. & M. V. R. Co. v. Hagblad*, 72 Neb. 773 (101 N. W. 1033; 4 L. R. A. [n. s.] 254).

180. (1906.) One who enters a railway station, or other place provided for the reception of passengers, and does nothing to indicate that he intends becoming a passenger and in no way committed himself to the custody of the railroad company, cannot be regarded as a passenger and within the protection of the statute. *Hicks v. Union P. R. Co.*, 76 Neb. 496 (107 N. W. 798).

181. (1907.) One holding a permit to ride on a freight train, by which he assumes the risk incident to boarding the caboose at any place where it may be stopping, while on his way through the station grounds and yards of the company to board the caboose of a freight train which does not carry passengers except by special permission, is not a passenger being transported over the company's road, within the meaning of section 3, article 1, chapter 72, Compiled Statutes, and the duty which the company owes to him is only that of ordinary care and such a passenger cannot recover for injuries sustained by him while on his way to board the caboose of a freight train without proof of negligence on the part of the company in the construction or maintenance of its station, station grounds or yards, which is the proximate cause of such injuries. *Chicago, B. & Q. R. Co. v. Mann*, 78 Neb. 541 (111 N. W. 379).

——Stealing a ride or trespassing.

182. (1903.) A party who boards a railway train with the intention of "beating" his way or "stealing a ride," and, to that end, secretes himself on such train, does not stand in the relation of passenger to the common carrier, and the latter owes him no active duty as such passenger. *Pledger v. Chicago, B. & Q. R. Co.*, 69 Neb. 456 (95 N. W. 1057).

——Riding on engine and working passage.

183. (1894.) To constitute one a passenger on a railway train he must be lawfully there, with the carrier's consent. It is not sufficient that he agrees to shovel coal for the fireman in return for the privilege of riding. *Woolsey v. Chicago, B. & Q. R Co.*, 39 Neb. 798 (58 N. W. 444; 25 L. R. A 79).

184. (1894.) A person riding on the locomotive engine of a freight train by agreement with the fireman of such engine to shovel coal for the privilege of riding, such person being on such train without the knowledge or consent of the conductor in charge thereof, is not a passenger of the carrier operating such train. *Woolsey v. Chicago, B. & Q. R. Co.*, 39 Neb. 798 (58 N. W. 444; 25 L. R. A. 79).

——Termination of relation by leaving car.

185. (1902.) A passenger on a railroad train does not lose his character as such by leaving his car at a regular station from motives of either business or curiosity, although he has not yet arrived at the terminus of his journey. *Chicago, R. I. & P. R. Co. v. Sattler*, 64 Neb. 636 (90 N. W. 649; 97 Am. St. Rep. 666; 87 L. R. A. 890).

Rules of company as defense for breach of contract.

186. (1880.) The rules and regulations of a railroad company can not be pleaded as an excuse for not performing an express contract of carriage, when a ticket was obtained by false representations the contract is voidable, not void. *Gregory v. Burlington & M. R. R. Co.*, 10 Neb. 250 (4 N. W. 1025).

Nature of relation.

187. (1896.) The relation existing between a common carrier and a passenger is a contractual one, the undertaking of the carrier being to safely transport and deliver the passenger at his destination, and the violation of this contract by the carrier entitles the passenger to recover such damages as will fully compensate him for the injury and loss sustained; but the passenger is not entitled to damages that will put him in a better position than he would have been in had the carrier complied with its contract. *Fremont, E. & M. V. R. Co. v. French*, 48 Neb. 638 (67 N. W. 472).

Shipper riding on drover's pass.

188. (1896.) A shipper of cattle, who, for the purpose of enabling him to care for his stock in transit, receives a drover's pass, is not, while accompanying his stock, entitled to all the rights and privileges of an ordinary passenger for hire, and an instruction to the contrary effect was erroneous. *Omaha & R. V. R. Co. v. Crow*, 47 Neb. 84 (66 N. W. 21).

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189. (1896.) One who ships cattle and undertakes, upon a pass given him for that purpose, to accompany and care for his stock in transit does so under the implied conditions that he will submit to whatever inconveniences are necessarily incident to his undertaking. *Omaha & R. V. R. Co. v. Crow*, 47 Neb. 84 (66 N. W. 21).

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190. (1898.) By accepting a drover's pass the shipper does not become the servant of the railroad company, and is not within the fellow-servant rule. *Omaha & R. V. R. Co. v. Crow*, 54 Neb. 747 (74 N. W. 1066; 69 Am. St. Rep. 741)

191. (1898.) A shipper riding on a drover's pass does not assume the risk of negligence by the carrier, but only such dangers as result from his peculiar duties while the railroad is being carefully operated. *Omaha & R. V. R. Co. v. Crow*, 54 Neb. 747 (74 N. W. 1066; 69 Am. St. Rep. 741).

192, 193. (1896.) A shipper of live stock who receives from the railroad company undertaking the transportation of such stock a free pass, to enable him to care for his stock in transit, assumes such risks and inconveniences as necessarily attend upon caring for such stock, and, modified accordingly, the liability of the railroad company to such shipper for personal injuries by him sustained, by reason of the negligence of its employees, is that of a common carrier for hire. *Missouri P. R. Co. v. Tietken*, 49 Neb. 130 (68 N. W. 336; 59 Am. St. Rep. 437); (1903) *Chicago, B. & Q. R. Co. v. Troyer*, 70 Neb. 287 (97 N. W. 308).

194. (1903.) A person traveling on a freight train on a stock shipper's pass or contract, for the purpose of attending to and caring for the live stock being shipped on such train, sustains the relation to the carrier of passenger but in a restricted and modified sense. *Chicago, B. & Q. R. Co. v. Troyer*, 70 Neb. 293 (103 N. W. 680).

195. (1903.) A person traveling on a freight train on a stock shipper's pass, assumes such risks and inconveniences as necessarily attend upon caring for such stock and such as are incident to the means and methods employed by the company in the operation of its freight trains, and, as thus modified, the liability of the railway company to such shipper for personal injuries by him sustained, by reason of the negligence of its employees, is that of a carrier for hire. *Chicago, B. & Q. R. Co. v. Troyer*, 70 Neb. 293 (103 N. W. 680).

196. (1903.) A shipper traveling on a pass on a freight train carrying live stock does not assume the risk of negligence by the carrier, but only such dangers as result from his peculiar duties while the railroad is being carefully operated. In such a case, the duty devolves upon the carrier to exercise the highest degree of care, skill and diligence for the safety of the passenger practically consistent with the efficient use and operation of the mode of transportation adopted. *Chicago, B & Q. R. Co. v. Troyer*, 70 Neb. 293 (103 N. W. 680).

197. (1907.) One who under contract with a railroad company accompanies a shipment of live stock is not a passenger within the meaning of section 3, article I, chapter 72, Compiled Statutes 1907, and, in an action for personal injuries received by such person, the common law and not the statutory rule of liability applies. *Riley v. Chicago, B. & Q. R. Co.*, 78 Neb. 748 (111 N. W. 847).

Duty to provide stations.

198. (1885.) It is the duty of railroads as common carriers to furnish stations at all appropriate points along its line for receipt and discharge of passengers. *State, ex rel. Mattoon, v. Republican V. R. Co.*, 17 Neb. 647 (24 N. W. 329; 52 Am. Rep. 424).

B. Fares, Tickets, and Special Contracts.

Charges for freight, see *ante*, §§ 118-125.

Special contract, who may use.

199. (1880.) A land exploring coupon railroad ticket is a special contract between the railroad company, and no one but the purchaser may use such a ticket. *Gregory v. Burlington & M. R. R. Co.*, 10 Neb. 250 (4 N. W. 1025).

200. (1883.) A regulation of a railroad company providing for the sale of tickets at a reduced rate upon condition that they be used only by the persons purchasing the same is reasonable and proper, and a third party cannot by purchasing such ticket acquire the right to travel on the same. A party holding such ticket who refused to pay his fare and was expelled from the cars cannot recover damages therefor. *Post v. Chicago & N. W. R. Co.*, 14 Neb. 110 (15 N. W. 225; 45 Am. Rep. 100)

Effect of failure to sign special contract.

201. (1880.) The possession of a coupon railroad ticket is *prima facie* evidence

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of ownership, and failure to sign his name to the special contract on the ticket, then bring no evidence of his request to so do, does not invalidate the ticket. *Gregory v. Burlington & M. R. R. Co.*, 10 Neb. 250 (4 N. W. 1025).

Right to take up ticket in hands of third party.

202. (1883.) Where a non-transferable ticket contained a condition that "I, failing to comply with this agreement, either of the companies may refuse to accept this ticket," this did not give the conductor the right to take it up, but merely to refuse to receive it. *Post v. Chicago & N. W. R. Co.*, 14 Neb. 110 (15 N. W. 225; 45 Am. Rep. 100).

Damages recoverable for wrongful taking up ticket.

203. (1883.) Where a conductor of a railroad train wrongfully takes up a non-transferable ticket from a passenger not entitled to ride upon the same, the measure of damages is the value of a ticket of the same class between the points named in the ticket taken up. *Post v. Chicago & N. W. R. Co.*, 14 Neb. 110 (15 N. W. 225; 45 Am Rep. 100).

Sale of tickets of street railways.

204. (1893.) A street railway has no depots. Its stopping places are on each street corner and it transacts its business with the public in its cars, and its tickets should be kept for sale where it transacts its business with the public. *Sternberg v. State*, 36 Neb. 307 (54 N. W. 553; 19 L. R. A. 570).

C. Personal Injuries.

Contributory negligence of person injured, see *post*, §§ 301-347.

Statutory liability.

——In general.

205. (1894.) Section 3, article I, chapter 72, Compiled Statutes, providing that every railroad company shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, etc., is not restricted in its application to actions by the passengers so injured, but extends to actions by third persons for damages sustained in consequence of such injuries to passengers. Therefore, the rule of liability in this case by the husband for injuries sustained by the wife is to be determined by the statute referred to. *Omaha & R. V. R. Co. v. Chollette*, 41 Neb. 578 (59 N. W. 921).

206. (1898.) Section 3, article I, chapter 72, Compiled Statutes, relating to the liability of railroad companies for injuring passengers, does not apply to street railways. *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672 (74 N. W. 1074; 69 Am. St. Rep. 736).

——Validity and constitutionality of act.

207. (1899.) The act of June 22, 1867 (Session Laws, p. 88), making railroad companies liable, in absence of negligence, for injuries to passengers neither deprives carriers of property without due process of law, nor denies them the equal protection of the laws. *Chicago, R. I. & P. R. Co. v. Young*, 58 Neb. 678 (79 N. W. 556).

208. (1900.) Section 3, article I, chapter 72, Compiled Statutes, making carriers presumptively liable for injuries to passengers, is not inimical to the fourteenth amendment of the constitution of the United States, nor to section 3, article I of the constitution of this state, as tending to deprive railroad companies of their property without due process of law. *Chicago, R. I. & P. R. Co. v. Zernecke*, 59 Neb. 689 (82 N. W. 26; 55 L. R. A. 610).

209. (1900.) A statute making carriers liable for injuries to passengers, in the absence of negligence, is within the police power of the state. *Chicago, R. I. & P. R. Co. v. Zernecke*, 59 Neb. 689 (82 N. W. 26; 55 L. R. A. 610).

210. (1901.) Section 3, article I, chapter 72, Compiled Statutes, making railroads liable for injuries to passengers, does not contravene the fourteenth amendment to the constitution of the United States. *Chicago, B. & Q. R. Co. v. Wolfe*, 61 Neb., 502 (86 N. W. 441).

211. (1901.) Section 3, article I, chapter 72, Compiled Statutes, imposing liability on railroads for injuries to passengers, was passed at a special session of the legislature held in 1867, and is within the scope of the third object designated by the governor in his proclamation. *Chicago, B. & Q. R. Co. v. Wolfe*, 61 Neb. 502 (86 N. W. 441).

212. (1902.) Section 3, article I, chapter 72, Compiled Statutes, is not inimical to the fourteenth amendment to the constitution of the United States, nor to section 3, article I of the constitution of this state, as tending to deprive railroad companies of their property without due process of law.

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Chicago, R. I. & P. R. Co. v. Hambel, 2 Unof. 607 (89 N. W. 643).

Street railways as common carriers.

See, also, *ante*, §§ 1, 2.

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213. Street railways are common carriers of passengers and are liable upon common law principles for all injuries. (1893) *Spellman v. Lincoln Traction Co.*, 36 Neb. 890 (55 N. W. 270; 38 Am. St. Rep. 753); (1895) *Pray v. Omaha Street R. Co.*, 44 Neb. 167 (62 N. W. 447; 48 Am. St. Rep. 717).

214. (1904.) Street railways are common carriers of passengers. *Lincoln Traction Co. v. Heller*, 72 Neb. 127 (100 N. W. 197); *Lincoln Traction Co. v. Webb*, 73 Neb. 136 (102 N. W. 258).

215. (1897.) A street railway company, by undertaking the transportation of passengers for hire, assumes toward its patrons the relation of a common carrier, without regard to the character of the easement possessed by it in its right of way. *East Omaha Street R. Co. v. Godola*, 50 Neb. 906 (70 N. W. 491).

216. (1897.) Street railway companies are common carriers, and as such are required to exercise more than ordinary skill and precaution in order to insure the safety of passengers. *East Omaha Street R. Co. v. Godola*, 50 Neb. 906 (70 N. W. 491).

Care required of carrier.

217. (1873.) Common carriers of passengers are liable only where the injury has arisen from their own neglect. And while it is a general rule that, if they are in the least degree negligent, they are liable, yet only for such damages as are the natural and direct result of the act complained of. *McClary v. Sioux City & P. R. Co.*, 3 Neb. 44 (20 Am. Rep. 631).

218. (1889.) An instruction that a railroad company owes a much higher degree of care to passengers than it does to the public generally, going upon its tracks at public crossings, taken in connection with the other instructions given to the jury, *held* to be correct. *Union P. R. Co. v. Sue*, 25 Neb. 772 (41 N. W. 801).

219. (1893.) Common carriers for the protection of their passengers, are bound to the exercise of more than ordinary care; they are bound to exercise extraordinary care and the utmost skill, diligence and human foresight, and are liable for the slightest negligence. *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890 (55 N. W. 270; 38 Am. St. Rep. 753; 20 L. R. A. 316).

220. (1894.) Common carriers of passengers should be held to the strictest accountability and be required to exercise the highest degree of care and forethought of which the human mind is capable. This rule is founded on principles of public policy and enforced by the courts for the protection of the traveling public. *Chicago, B. & Q. R. Co. v. Landauer*, 39 Neb. 803 (58 N. W. 434).

221. (1896.) It is the duty of a street railway company, as a carrier of passengers, to exercise the highest degree of care for their safety. *Omaha & C. B. R. Co. v. Levinston*, 49 Neb. 17 (67 N. W. 887).

222. (1898.) Street railways are common carriers of passengers, and are required to exercise the utmost skill, diligence and foresight, consistent with the business in which they are engaged, for the safety of their patrons, and are liable for the slightest negligence. *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672 (74 N. W. 1074; 69 Am. St. Rep. 736).

223. (1898.) Definition of ordinary care. *Omaha & R. V. R. Co. v. Crow*, 54 Neb. 747 (74 N. W. 1066; 69 Am. St. Rep. 741).

224. (1904.) Street railway companies are common carriers of passengers. As such they are bound to exercise for the safety of their patrons more than ordinary care. They are required to exercise the utmost skill, diligence and foresight consistent with the business in which they are engaged, and are liable for the slightest negligence. *Lincoln Traction Co. v. Haller*, 72 Neb. 127 (100 N. W. 197).

224*a*. (1908.) When a passenger, a girl under 14 years of age, unaccustomed to riding upon street cars, becomes frightened and frenzied by the negligence of the defendant's servants in carrying such passenger past her known destination, and the conductor knows, or by the exercise of due care and diligence under the circumstances should know, of such passenger's frightened and frenzied condition, and that she is about to leave the moving car, it is his duty to exercise the highest degree of care possible under the circumstances to prevent such passenger from alighting from the moving car and if the conductor fails to exercise the degree of care required of him, and the passenger in consequence of such

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failure receives injuries while alighting from the moving car, the street railway company is liable in damages for the resulting injuries. *Kruger v. Omaha & C. B. St. R. Co.*, 80 Neb. 490 (114 N. W. 571).

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225. (1905.) Street railway companies are common carriers of passengers, and are liable as other common carriers upon common law principles. They are required to exercise the utmost skill, diligence and foresight consistent with the business in which they are engaged for the safety of their passengers, and they are liable for the slightest negligence. *Lincoln Traction Co. v. Webb*, 73 Neb. 136 (102 N. W. 258).

Liability for injuries in general.

226. (1901.) A carrier is liable for damages resulting from injuries sustained by a passenger, unless the latter was guilty of criminal negligence. *Chicago, B. & Q. R. Co. v. Wolfe*, 61 Neb. 502 (86 N. W. 441).

Carrier as insurer.

As to goods, see *ante*, §§ 86-89.

As to animals, see *ante*, §§ 142, 143.

227. (1894.) By the statutes of this state a common carrier is made an insurer of the safety of its passengers, except as against the gross negligence of such passenger, or his violation of some rule of the carrier brought to such passenger's notice. *Chicago, B. & Q. R. Co. v. Landauer*, 39 Neb. 803 (58 N. W. 434).

228. (1896.) By the statutes of this state a common carrier is made an insurer of the safety of its passengers, except as against the criminal negligence of such passenger or his violation of some rule of the carrier actually brought to such passenger's notice. (Comp. Stats., ch. 72, art. I, sec. 3.) *Fremont, E. & M. V. R. Co. v. French*, 48 Neb. 638 (67 N. W. 472).

229. (1905.) A street railway company is not an insurer of its passengers. It is not bound to do everything that can be done to insure their safety. It fulfills its obligations in that regard when it exercises the utmost skill, diligence and foresight consistent with the practical conduct of the business in which it is engaged. *Omaha Street R. Co. v. Boesen*, 74 Neb. 764 (105 N. W. 303).

Acts of carrier's employees.

230. (1895.) Street railway companies in this state are common carriers, and are presumptively liable for the concurrent negligence of their servants and third persons resulting in personal injuries to passengers. *Pray v. Omaha Street R. Co.*, 44 Neb. 167 (62 N. W. 447; 48 Am. St. Rep. 717).

231. (1895.) A common carrier of passengers is liable for personal injuries to passengers produced by the concurrent negligence of its servants and third persons. *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb 448 (62 N. W. 887).

232. (1905.) In order to render a street railway company liable for injuries received by a person traveling upon one of its cars, the negligence of its servants, either alone of in concurrence with the negligence or wrongful act of other persons, must be the proximate cause of the injuries. *Bevard v. Lincoln Traction Co.*, 74 Neb. 802 (105 N. W. 635).

Acts of third persons.

233. (1905.) The wrongful act of a stranger is not sufficient to make a street railway company liable to a passenger for an injury caused thereby, unless it might reasonably have been foreseen and guarded against by the carrier. *Bevard v. Lincoln Traction Co.*, 74 Neb. 802 (105 N. W. 635).

234. (1905.) Defendant street railway company *held* not liable for an injury to a passenger resulting from explosives placed on the rail by third persons on the Fourth of July. *Bevard v. Lincoln Traction Co.*, 74 Neb. 802 (105 N. W. 635).

Negligence of connecting carrier.

235. (1898.) A railroad company which issues a through ticket, and so contracts to carry a passenger beyond its own terminus, constitutes the connecting carrier its agent for the purpose of performing the contract, and is liable for the negligence of such connecting carrier. *Omaha & R. V. R. Co. v. Crow*, 54 Neb. 747 (74 N. W. 1066; 69 Am. St. Rep. 741).

Duty as to trespassers.

236. (1903.) A person who attempts to board a railway train in such a way as to avoid the payment of his fare, and intending to "beat his way," is a trespasser, and the railway company owes him no duty to keep its right of way free from obstructions. *Pledger v. Chicago, B. & Q. R. Co.*, 69 Neb. 456 (95 N. W. 1057).

Boarding train.

237. (1889.) Where a railroad company receives its passengers from a space between parallel tracks, it is bound to pro-

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vide such safeguards as will protect such passengers, in the exercise of ordinary care, from injury from passing trains. And if it fail to do this, whether its negligence consists in its failure to provide a proper platform, or to notify passengers who have gone between its tracks to enter its cars of the approach of a train on a track parallel and near to that on which its passenger train is standing, and an injury results from such failure to one of the passengers who is about to enter its car, and without negligence on the part of such passenger, the railroad company will be liable for the damage resulting from such injury. *Union P. R. Co. v. Sue*, 25 Neb. 772 (41 N. W. 801).

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Entering baggage car for baggage.

238. (1896.) In an action to recover for injuries sustained by a passenger of a railroad, who, at a request of the conductor, entered the express car to receive a consignment, there being no agent at that station, and when the train starts the conductor, it is alleged, pushed him out of the car, under the allegations of the petition herein a recovery might be had for any injuries proved to have been sustained by the party plaintiff in the character of a passenger, as a licensee on the company's premises, or as a trespasser thereon. *Fremont, E. & M. V. R. Co. v. Root*, 48 Neb. 900 (69 N. W. 397).

Limitation of liability.

As to goods, see *ante*, §§ 152-157.

As to live stock, see *ante*, §§ 152-157.

239. (1083.) Section 3, article I, chapter 72, Compiled Statutes, prevents any limitation on the liability of a railroad company for a passenger's safety unless within the exceptions provided in the section, and section 5 of the same chapter does not impliedly give the right to a railway company to limit its liability under section 3 by stipulation. *Chicago, R. I. & P. R. Co. v. Hambel*, 2 Unof. 607 (89 N. W. 643).

240. (1907.) A railroad company may make suitable and reasonable conditions and regulations for carrying passengers on its freight trains from which they are excluded except by special permission; and an agreement on the part of one holding a special permit, by which he assumes the risks incident to boarding the caboose of such trains at any place where it may be stopped for the purpose of conducting the freight business of the company, does not amount to a limitation of the carrier's liability for its own negligence. *Chicago, B. & Q. R. Co. v. Mann*, 78 Neb. 541 (111 N. W. 379).

Crowded cars.

241. (1895.) It is evidence of negligence on the part of a street railway company to carry passengers greatly in excess of the seating capacity of its trains, and permitting them to stand on the platforms and steps of the cars. *Pray v. Omaha Street R. Co.*, 44 Neb. 167 (62 N. W. 447; 48 Am. St. Rep. 717).

242. (1895.) A person standing on the steps of a moving street car, being unable to secure a seat or standing room within, is presumed to be there with the consent of the servants in charge of the train. *Pray v. Omaha Street R. Co.*, 44 Neb. 167 (62 N. W. 447; 48 Am. St. Rep. 717).

243. (1907.) A party cannot be charged with contributory negligence on account of taking a place on a crowded street car designated by the conductor of the car. *Boesen v. Omaha Street R. Co.*, 79 Neb. 381 (112 N. W. 614).

Companies liable, lessee.

244. (1889.) A railroad company that has leased its road to another company that operates the same as a branch of its road is liable to a passenger who is injured by reason of the negligent operation of the train by the lessor company. *Chollette v. Omaha & R. V. R. Co.*, 26 Neb. 159 (41 N. W. 1106; 4 L. R. A. 135*n*).

Setting down passengers.

245. (1891.) In an action to recover for personal injuries sustained by the plaintiff while alighting from defendant's train, each alleging negligence in the other, instructions to the effect that the plaintiff in order to recover must prove by a preponderance of the evidence each material allegation; and that such preponderance of the testimony does not necessarily mean the number of witnesses testifying, but includes the interest of the witnesses in the result of the verdict and their relationship to the parties in interest, their intelligence, and means of opportunity of, for knowing the truth of the matters in issue, correctly states the law. *Omaha & R. V. R. Co. v. Chollette*, 33 Neb. 143 (49 N. W. 1114).

246. (1893.) It is the duty of railroad compnies to stop their trains at stations a sufficient length of time for passengers to get on and off, and it is negligence for the conductor or other servant of the com-

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pany to start a train while passengers are obviously in the act of getting on or alighting therefrom. *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642 (54 N. W. 976).

247. (1893.) When a train has made a reasonable stop and passengers have not given notice or other evidence of their intention to alight, the starting of the train is not *per se* negligence for which the company will be held liable. *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642 (54 N. W. 976).

248. (1903.) Where a passenger of a railroad train holds a ticket to a station beyond her place of destination and in attempting to alight, at the latter place, is injured, an instruction, in an action therefor, that if the jury find plaintiff notified the conductor that she wanted to get off the train at that particular place, it was the duty of the defendant to stop the train and allow plaintiff a reasonable time to alight, properly states the law. *Chicago, B. & Q. R. Co. v. Winfrey*, 67 Neb. 13 (93 N. W. 526).

Safety of stations and platforms.

249. (1897.) It is the duty of a railroad company to keep in safe repair the approaches to its platforms at stations. *Union P. R. Co. v. Evans*, 52 Neb. 50 (71 N. W. 1062).

250. (1889.) As a general rule, railroad companies are bound to keep in a safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort, and all portions of their station grounds reasonably near to the platforms, where passengers taking passage on their cars would naturally or ordinarily be likely to go. *Union P. R. Co. v. Sue*, 25 Neb. 772 (41 N. W. 801).

Proximate cause of injury.

251. (1873.) Where a train of cars was running three-quarters of an hour behind the usual, ordinary, and advertised time, and was upset by a sudden gust of wind which crossed the tracks, but not that portion of the track where the train would have been if running on time, whereby a passenger was injured, an injury is not the natural result of the train being behind time, and the damages sustained were too remote to entitle a recovery against the carrier. *McClary v. Sioux City & P. R. Co.*, 3 Neb. 44 (20 Am. Rep. 631).

252. (1896.) The contract between a railroad company, as a carrier, and a passenger, does not contemplate that the passenger shall go into the express car of the train; and if he go there, and while there is injured, if his going or being in such car entered into the injury, as an element thereof, as its proximate cause or rendering its reception more liable to occur, it would be a matter of defense for the carrier; but if not the proximate cause of the injury, or the risk of such particular injury was not increased by the action of the passenger, then that he assumed the position in the express car voluntarily would be no defense to an action for damages resultant from the injury. *Fremont, E. & M. V. R. Co. v. Root*, 49 Neb. 900 (69 N. W. 397).

Actions for injuries.

——— Right of action.

253. (1900.) By section 3, article 1, chapter 72, Compiled Statutes, a right of action is given to a person for all injuries sustained while a passenger of a railroad company, except where the injury was occasioned by his own criminal negligence, or by his violation of some express rule or regulation of the carrier actually brought to his notice. *Chicago, R. I. & P. R. Co. v. Zernecke*, 59 Neb. 689 (82 N. W. 26; 55 L. R. A. 610); *Chicago, R. I. & P. R. Co. v. Hambel*, 2 Unof. 607 (89 N. W. 643).

——— Pleading.

254. (1899.) A passenger injured by derailment of a train is not, in suing for damages, required to allege that the injury resulted from the wrongful act of the carrier. *Chicago, R. I. & P. R. Co. v. Young*, 58 Neb. 678 (79 N. W. 556).

255. (1904.) Petition examined, and *held* not to set forth facts sufficient to constitute the plaintiff a passenger while standing on defendant's platform, so as to bring him within the provisions of section 3, article 1, chapter 72, Compiled Statutes, 1903. *Fremont, E. & M. V. R. Co. v. Hagblad*, 72 Neb, 773 (101 N. W. 1033; 68 L. R. A. [n. s.] 254).

256. (1904.) Petition examined, and *held* not to state a cause of action *ex contractu* against a common carrier of passengers, nor a cause of action at common law for the carrier's negligence. *Fremont, E. & M. V. R. Co. v. Hagblad*, 72 Neb. 773 (101 N. W. 1033; 4 L. R. A. [n. s.] 254).

257. (1904.) In order to state a cause of action upon the statutory duty of a railroad company to a passenger who has not actually taken passage upon the train, it is

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necessary that the facts stated show that the person suing is one of the class of persons to whom the remedy is afforded by the statute. To plead that he is a passenger, in a case where the existence of such relation to the carrier is at issue, pleads a mere conclusion of law and is not sufficient. *Fremont, E. & M. V. R. Co. v Hagblad*, 72 Neb. 773 (101 N. W. 1033; 4 L. R. A. [n. s.] 254).

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——— **Admissibility of evidence.**

258. (1894.) Under an issue as to whether an injured person had an opportunity to alight from a train, the remark of a brakeman, at the time, concerning the length of the stop was properly admitted in evidence. *Omaha & R. V. R. Co. v. Cholette*, 41 Neb. 578 (59 N. W. 921).

259. (1895.) Under an allegation that "the braking apparatus of said car * * * was in bad repair, the brake chains broken, and said brake useless for the purpose of stopping said car or controlling its movements," does not disclose such a relation of the chain mentioned to the braking apparatus as to warrant the inference that the escape of the car resulted from that cause alone, and that it was not error to receive evidence tending to prove that the brake was broken and useless. *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448 (62 N. W. 887).

——— **Sufficiency of evidence.**

260 (1893.) Evidence *held* insufficient to charge defendant with negligence in the injury of a passenger who jumped from a train after it had started. *Chicago, B. & Q. R Co. v. Landauer*, 36 Neb. 642 (54 N. W. 976).

261. (1984.) In an action to recover for injuries against a street railway company by a woman for injuries sustained while alighting from a car, the jury's finding that plaintiff was thrown from the platform by the cause and in the manner she testified, would not be set aside as not supported by the evidence because two witnesses testified that she stepped from the platform onto the street, nor because two witnesses swore there was no sudden acceleration of the speeed of the car, and three witnesses swore that they did. *Omaha Street R. Co. v. Craig*. 39 Neb. 601 (58 N. W. 209).

262. (1895.) It is sufficient under the provisions of section 3, article 1, chapter 72, Compiled Statutes, in an action to recover for injuries received by the plaintiff while a passenger on a railroad train in this state, to prove that such injuries resulted from the operation and management of the road. *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448 (62 N. W. 887).

263. (1895.) In an action to recover for personal injuries evidence that shows plaintiff, a messenger boy, while boarding a street car in the middle of a block was thrown from the step of a south bound car by a north bound car and injured, and a claim by the boy that the motorman of the north bound car grabbed him by the neck as he passed, thus causing him to fall, is unsupported by the evidence. *Omaha Street R. Co. v. Baker*, 44 Neb. 511 (63 N. W. 25).

264. (1896.) In an action against a railroad company evidence showing that plaintiff, a passenger on defendant's train, entered the express car to get a hive of bees, there being no agent at the station, but as the train started the conductor, who had requested plaintiff to get the bees, pushed him out of the car door, sustains a finding that the conductor was, at the time, acting for the company and within the line of his duties. *Fremont, E. & M. V. R. Co. v. Root*, 49 Neb. 900 (69 N. W. 397).

265. (1896.) Evidence that plaintiff while a passenger on defendant's train entered the baggage car, at request of the conductor, to get a hive of bees, there being no agent at the station of his destination, and before having time to get the bees the train started and the conductor pushed plaintiff out of the car door, sustains a verdict for plaintiff, in an action to recover for injuries received. *Fremont, E. & M. V. R. Co. v. Root*, 49 Neb. 900 (69 N. W. 397).

266. In an action to recover for the death of a stock man who was killed while a passenger on a freight train on a drover's pass, evidence showed deceased, while standing in the freight yards while the train was being made up and transferred to a connecting road was struck by a switch engine that had passed and was returning without warning or sufficient head light to attract attention, sustains a verdict and judgment for plaintiff. *Omaha & R. V. R. Co. v. Crow*, 54 Neb. 747 (74 N. W. 1066; 69 Am. St. Rep. 741).

267. (1905.) In an aetion for damages for an injury received while being transported by a street railway, proof of mere injury, without more, does not raise the raise the presumption of negligence sufficient to impose on the company the burden to prove

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due care on its part. *Lincoln Traction Co. v. Webb*, 73 Neb. 136 (102 N. W. 258).

268. (1906.) Evidence, in an action against a street railway for injuries sustained while alighting from a car, showing plaintiff procured a transfer just before alighting at a place other than the junction for such transfer; that the car had stopped at a regular stopping place, sustains a verdict for plaintiff. *McCarty v. Lincoln Traction Co.*, 76 Neb. 819 (107 N. W. 1021).

269. (1907.) In an action to recover damages for being thrown from a street car while attempting to enter, testimony showing plaintiff, in reply to the conductor after re-entering, said she was hurt, properly retained in evidence. *Nixon v. Omaha & C. B. Street R. Co.*, 79 Neb. 550 (113 N. W. 117).

——— **Presumptions and burden of proof.**

270. Under the provisions of section 3, article 1, chapter 72, Compiled Statutes of Nebraska, it is only necessary to a right of recovery against a railroad company, to show that the person injured was at the time being transported as a passenger over the defendant's line of railroad, and that the injury resulted from the management or operation of said railroad, a presumption thereupon arises that such management or operation was negligent, and it can be met only by showing that the injury arose from the criminal negligence of the party injured, or, that the injury complained of was the result of the violation of some express rule or regulation of said railroad company actually brought to the notice of the party injured. (1893) *Missouri P. R. Co. v. Baier*, 37 Neb. 235 (55 N. W. 913)); (1893) *Union P. R. Co. v. Porter*, 38 Neb. 226 (56 N. W. 808); (1896) *Fremont, E. & M. V. R. Co. v. French*, 48 Neb. 638 (67 N. W. 472); (1896) *Chicago, B. & Q. R. Co. v. Hague*, 48 Neb. 97 (66 N. W. 1000).

271. (1893.) Where a street railway car is derailed and a passenger injured thereby, the presumption is that the casualty was due to the negligence of the carrier, and the burden is on it to rebut that presumption. *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890 (55 N. W. 270; 38 Am. St. Rep. 753; 20 L. R. A. 316).

272. (1893.) Where a passenger, without engligence on his part, is injured by the derailment of the car in which he is traveling, the carrier, to overcome the presumption of negligence caused by such derailment, must show that the accident was produced by causes wholly beyond his control, and that it had not been guilty of the slightest negligence contributing thereto, and that by the exercise of the utmost human care, diligence, and foresight the casualty could not have been prevented. *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890 (55 N. W. 270; 38 Am. St. Rep. 753; 20 L. R. A. 316).

273. (1895.) The law infers negligence from the fact of an injury and imposes upon the carrier the burden of proving that the case is within one of the exceptions mentioned in the statute. *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448 (62 N. W. 887).

274. (1896.) In a suit by a passenger against a common carrier for damages for an injury alleged to have been sustained while such passenger, when the passenger has shown that the defendant is a common carrier, that he was the carrier's passenger, and while such was injured, and the extent of such injury, he has made out his case. The carrier then, to escape liability, must show that the injury of the passenger was the result of his criminal negligence, or the result of a violation by him of some express rule or regulation of the carrier actually brought to the passenger's notice. *Fremont, E. & M. V. R. Co. v. French*, 48 Neb. 638 (67 N. W. 464).

275. (1898.) The law presumes that one injured while being transported by a common carrier was injured in consequence of the latter's negligence. *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672 (74 N. W. 1074; 69 Am. St. Rep. 736).

276. (1898.) In a suit against a street railway company for injuring a passenger the burden is on the defendant, the injury being shown, to show that it was in nowise at fault. *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672 (74 N. W. 1074; 69 Am. St. Rep. 736). [Overruled. *Lincoln Traction Co. v. Webb*, 73 Neb. 136.]

277. (1899.) In an action for injuries to a passenger resulting from the derailment of a train, the presumption is that the accident was caused by the carrier's negligence, and it is unnecessary to plead what the law presumes. *Chicago, R. I. & P. R. Co. v. Young*, 58 Neb. 678 (79 N. W. 556).

278. (1900.) In an action for injuries sustained by derailment of a train, on which plaintiff was a passenger, the statute creates

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a presumption that the accident was caused by the negligence of the carrier, or by its wrongful act, neglect or default. *Chicago, R. I. & P. R. Co. v. Zernecke*, 59 Neb. 689 (82 N. W. 26; 55 L. R. A. 610).

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279. (1901.) When one is injured while a passenger on a railroad train, the presumption is that such injury was caused by the negligence of the carrier. *Chicago, B & Q. R. Co. v. Wolfe*, 61 Neb. 502 (86 N. W. 441).

280. (1903.) It is the settled law of this state that when, in the operation of a train carrying passengers, an injury results to one of them, the imputation of negligence arises, and the liability to respond in damages becomes fixed, unless it is made to appear that the injury arose from the criminal negligence of the passenger, or was the result of the violation of some express rule or regulation of the carrier, actually brought to the notice of the party injured. *Chicago, B. & Q. R. Co. v. Winfrey*, 67 Neb. 13 (93 N. W. 526).

281. (1903.) Where plaintiff, admittedly a passenger on defendant's street car, alleged that he was thrown therefrom by reason of a derailment of the car, and defendant denies the derailment, and alleges that plaintiff jumped off the car while it was in motion, an instruction that "the burden of proof is upon the defendant to show by a preponderance of the evidence that such injuries, if any, were received while a passenger, by being thrown from a car because of the derailment thereof, were without fault on defendant's part, and that they could not have been avoided by the exercise of the highest degree of skill and diligence on the part of the defendant, consistent with its business," is erroneous. *Omaha Street R. Co. v. Boesen*, 68 Neb. 437 (94 N. W. 619).

282. (1904.) The law presumes that one injured while being transported by a common carrier was injured in consequence of the latter's negligence; and, to escape liability, it must show that it has discharged the full measure of its legal duty, and was in nowise to blame for the accident, unless defendant's negligence contributed thereto. *Lincoln Traction Co. v. Heller*, 72 Neb. 127 (100 N. W. 197). [Overruled on rehearing. 72 Neb. 134.]

283. (1904.) In an action against a common carrier on its common law liability for negligence to recover damages for an injury causing the death of a passenger, it is error to instruct the jury that, "When the plaintiff has shown that the deceased met with an injury while being transported by the defendant, and the plaintiff has sustained damages thereby, then the burden of proof is upon the defendant to prove by a preponderance of the evidence that it was not guilty of negligence, the proximate cause of his death." *Lincoln Traction Co. v. Heller*, 72 Neb. 134 (102 N. W. 262).

284. (1905.) In an action against a street railway company for damages for injuries sustained by one of its passengers, the burden of proof on the question of negligence does not shift to the defendant upon proof that the injuries resulted from a derailment of the car. *Omaha Street R. Co. v. Boesen*, 74 Neb. 764 (105 N. W. 303).

285. (1905.) In an action by a passenger in a street car, to recover for injuries sustained, the burden is on the plaintiff to prove that he was a passenger, was injured, extent of his injuries, the accident from which the injury resulted, and circumstances of such a character as to impute negligence. *Lincoln Traction Co. v. Webb*, 73 Neb. 136 (102 N. W. 258).

286. (1905.) When it appears, in an action against a common carrier for personal injury caused by the negligence of the carrier, that some defect in the appliances of the carrier, or some act of its employees in the conduct of its business, contributed to the accident which caused the injury complained of, a presumption of negligence on the part of the carrier arises, and unless there is evidence against the presumption it will be sufficient to establish the allegation of negligence of the carrier. *Lincoln Traction Co. v. Shepherd*, 74 Neb. 374 (107 N. W. 764).

287. (1905.) In an action for damages by a passenger against a street railway company, where the defendant's liability rests upon the question whether or not a street car was suddenly and carelessly started as the plaintiff was about to alight therefrom, which is denied, the defendant is only required to furnish sufficient proof to rebut that produced by the plaintiff upon this point, and is not required to establish its freedom from negligence by a preponderance of the evidence. *Lincoln Traction Co. v. Shepherd*, 74 Neb. 369 (104 N. W. 882).

288. (1905.) In an action against a street railway company for injuries to a

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passenger resulting from the derailment of a car, a presumption of negligence arises from the fact of derailment, but when that presumption is met by evidence which makes it equally probable that the accident was not due to negligence on the part of the defendant, in the absence of other evidence tending to establish the affirmative of the issue, the defendant is entitled to a verdict. *Omaha Street R. Co. v. Boesen*, 74 Neb. 764 (105 N. W. 303).

289. (1905.) In an action for injuries received by a passenger in a street car it is error to instruct the jury, in substance, that it is only necessary for the plaintiff to prove that he was a passenger and was injured, and that the burden of proof is then upon the defendant to show by a preponderance of the evidence that it was not guilty of the negligent act complained of. *Lincoln Traction Co. v. Webb*, 73 Neb. 136 (102 N. W. 258).

290. (1906. In an action for damages against a street railway company for a personal injury caused by the alleged negligent starting of one of its cars when the plaintiff, a passenger, was in the act of alighting, the defense being a general or special denial, the burden of proof never shifts, but remains with the plaintiff to prove that the injury was received substantially as alleged. *Lincoln Traction Co. v. Brookover*, 77 Neb. 217 (109 N. W. 168).

——— Questions for jury.

291. (1895.) Whether the natural connection of events is maintained or interrupted by the introduction of a new and independent cause is usually a question of fact and not of law. *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448 (62 N. W. 887).

292. (1895.) Where a boy of fourteen boarded a crowded street car, as a passenger, and was compelled to stand on the platform of the car, and later to step to the ground to permit a passenger to get off the car, when he lost his place on the platform and was required to stand on the step from whence, by the pushing of the crowd on the platform he fell off, there being evidence tending to show that the conductor pushing his way onto the platform from within the car caused the crowd to sway back, thus causing the plaintiff to fall, the question of negligence is for the jury. *Pray v. Omaha Street R. Co.*, 44 Neb. 167 (62 N. W. 447; 48 Am. St. Rep. 717).

293. (1896.) In an action for damages from injuries inflicted by an engine upon a shipper of live stock, who was accompanying and caring for such stock, the question of the existence of negligence, such as would give rise to a cause of action, or of such contributory negligence as would defeat it, is one of fact to be determined by the jury. *Omaha & R. V. R. Co. v. Crow*, 47 Neb. 84 (66 N. W. 21).

294. (1896.) Where a passenger on a railroad train, having a hive of bees in the express car, enters such car to receive the same, there being no agent at the station of his destination, and as the train starts the conductor pushes him out, whether or not injuries sustained were received after he had ceased to be a passenger is a question for the jury. *Fremont, E. & M. V. R. Co. v. Root*, 49 Neb. 900 (69 N. W. 397).

295. (1903.) Ordinarily the existence of negligence such as will justify or defeat a right of recovery for damage for an injury received by a passenger is for the jury to determine. *Chicago, B. & Q. R. Co. v. Winfrey*, 67 Neb. 13 (93 N. W. 526).

296. (1903.) In an action for damages for negligence against a railway company for personal injury to a shipper of stock, riding in a freight train, by coming in collision with a moving switch engine in the yards of the defendant company, it is made to appear that the train upon which the plaintiff was being carried came into the defendant's freight yards about midnight, and that he was required to change way-cars before proceeding farther on his journey. The way-car upon which he had been riding was left about thirty car-lengths from the place where he was required to take another. To reach the other way-car the plaintiff and other passengers were required to walk the length of the train between the track on which it stood and another track eight feet distant. The distance between the cars or engines on these two adjacent tracks was four feet. While walking along the train and toward its head, where the other way-car was supposed to be, a switch engine passed the plaintiff on the adjacent track, going in an opposite direction; and about the time he reached the head of the train on his way to the other way-car, the same switch engine returning and moving in the same direction overtook and struck him, inflicting an injury which is sought to be compensated in damages. *Held*, Under the evidence, that the question of the alleged neg-

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ligence of the company and contributory negligence was a matter for the jury to determine under proper instructions of the court, and that the evidence is sufficient to warrant a finding that the defendant company was guilty of actionable negligence which was the proximate cause of the injury complained of. *Chicago, B. & Q. R. Co. v. Troyer*, 70 Neb. 293 (103 N. W. 680.)

297. (1907.) Evidence, in an action for damages to a passenger on a street car who while riding on the step was thrown therefrom and killed, that shows the car was crowded, and that the deceased stood upon the step; that the conductor requested him to get upon the platform, but such request was more to clear the steps for others to get off and onto the car; that the car was traveling at a great rate of speed, justifies submission of the case to the jury. *Coffey v. Omaha & C. B. Street R. Co.*, 79 Neb. 286 (112 N. W. 589).

——— Instructions.

298. (1906.) When, in an action for damages for a personal injury inflicted while the plaintiff, a passenger, was in the act of alighting from a street railway car, the evidence is conflicting as to where the plaintiff alighted, an instruction that "plaintiff became a passenger to the company, and continued to be its passenger up to and including the act of alighting at his proper stopping place," is erroneous. *Lincoln Traction Co. v. Brookover*, 77 Neb. 217 (109 N. W. 168).

299. (1907.) Instructions in an action to recover for negligently operating a street car, thereby causing a passenger to fall, causing injuries resulting in death, *held*, properly given. *Coffey v. Omaha & C. B. Street R. Co.*, 79 Neb. 286 (112 N. W. 589).

300. (1907.) In an action against a street railway company to recover for injuries sustained while alighting from a car, the court properly instructed the jury that they may consider the absence of a conductor and inexperience of the motorman in determining the negligence of defendant. *Shepherd v. Lincoln Traction Co.*, 79 Neb. 834 (113 N. W. 627).

D. Contributory Negligence.

Statutory provisions.

301. (1893.) The term criminal negligence, as used in section 3, article I, chapter 72, Compiled Statutes, means gross negligence, such as amounts to reckless disregard of one's own safety and a willful indifference to the consequences liable to follow. *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642 (54 N. W. 976).

302. (1894.) Section 110 of chapter 16, Compiled Statutes, providing that in case any passenger of a railroad shall be injured while on the platform of a car while in motion, in violation of the printed regulations of the company posted up at the time, in a conspicious place inside of its passenger cars, then in the train, said company shall not be liable for the injury, etc., being a limitation upon a recognized liability, it is to be strictly construed; and in order that such statute shall be applicable the car must be in motion when the accident occurs and there must be some connection of cause and effect between the injury of the passenger and of his being upon the platform, and the notices required by the statute must be posted in the cars of the train wherein the accident occurs. *Omaha & R. V. R. Co. v. Chollette*, 41 Neb. 578 (59 N. W. 921).

303. (1896.) It is the settled law of this state that the term "criminal negligence," as employed in section 3, article 1, chapter 72, Compiled Statutes, means gross negligence, such as amounts to a reckless disregard of one's own safety and a willful indifference to the consequences liable to follow. *Chicago, B. & Q. R. Co. v. Hyatt*, 48 Neb. 161 (67 N. W. 8).

304. (1896.) Criminal negligence of a passenger, as the term is used in section 3, article 1, chapter 72, Compiled Statutes, means such negligence as amounts to a flagrant and reckless disregard of one's own safety, and the willful indifference to the injury liable to follow. *Chicago, B. & Q. R. Co. v. Hague*, 48 Neb. 97 (66 N. W. 1000).

305. (1902.) The words "while being transported over its road" in section 3 of the Passenger Act (ch. 72, Comp. Stat.) is a qualifying phrase intended to limit the liability of the company, and must be given be given the force of the legislative intent; but it was not intended to exclude all passengers who leave the car provided for them by the carrier. *Chicago, R. I. & P. R. Co. v. Sattler*, 64 Neb 636 (90 N. W. 649; 97 Am. St. Rep. 666; 57 L. R. A. 890).

306. (1902.) The phrase "while being transported over its road" used in the Passenger Act, at section 3, chapter 72, Compiled Statutes, was intended to include all

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passengers actually on the train, whether the train is moving or standing, and all such as leave the train for any necessary purpose incident to the journey, *e. g.*, change of cars, procuring refreshments at a point where the same are furnished by the company, and where an express or implied invitation is extended for passengers to leave the car for that purpose. *Chicago, R. I. & P. R. Co. v. Sattler*, 64 Neb. 636 (90 N. W. 649; 97 Am. St. Rep. 666; 57 L. R. A. 890).

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Effect of contributory negligence.

307. (1898.) A passenger on a street railway cannot recover for an injury resulting in part from his own negligence. *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672 (74 N. W. 1074; 69 Am. St. Rep. 736).

Extending person through window.

308. (1903.) If a passenger on a steam railroad extends his person through the window of the car of a rapidly moving train in which he is riding, he is chargeable with such gross negligence as will prevent a recovery of damages for an injury to which such act on his part contributes. *Union P. R. Co. v. Roeser*, 69 Neb. 62 (95 N. W. 68).

Acts by direction of carrier's employees.

309. (1896.) A shipper of live stock, who was riding on a drover's pass, while in a station lunch room being informed to get on the train at once or he would be left, and by reason of such direction of the conductor attempts to climb up the ladder of a freight car, is not necessarily guilty of such contributory negligence as will defeat his right to recover for the loss of a foot. *Missouri P. R. Co. v. Tietken*, 49 Neb. 130 (68 N. W. 336; 59 Am. St. Rep. 437).

310. (1903.) The caboose of a stock train was left about thirty car-lengths from the station, and the defendant in error and other passengers were directed to leave the caboose and take another which would be attached to a train to be made up. To reach the station the passengers were required to walk the length of the train between the train and another track eight feet distant from the track on which their train stood. The distance between the cars or engines, occupying these two adjacent tracks, was four feet. While walking along the track a switch engine passed defendant in error, going north, and about the time he reached the south end of the train the same engine, returning south, overtook and struck him. *Held*, That while the company might rightfully stop its caboose at the place it did, it was bound to furnish defendant in error a safe passage way to the station, and that no duty devolved on him to be watchful for any but apparent and known danger, and he would not be negligent in failing to do so, it being the duty of the company to refrain from any act which threatened him with danger of which he was not given warning and time to guard against. *Chicago, B. & Q. R. v. Troyer*, 70 Neb. 287 (97 N. W. 308).

Using track as way to station.

311. (1902.) A passenger is not guilty of negligence in walking along the track to the station where that is the only practical route by which to reach the station. *Chicago, B. & Q. R. Co. v. Lagerkrans*, 65 Neb. 566 (91 N. W. 358).

Acts in emergencies.

312. (1895.) Independent of the statutory rule, a passenger who is placed in a position of apparent imminent peril through the negligence of a carrier may recover for injuries received while endeavoring to escape in obedience to the natural instinct of self-preservation, provided he exercise ordinary prudence in view of the circumstances, as they appear to him at the time. *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448 (62 N. W. 887).

313. (1895.) A carrier, whose negligence is the proximate cause of the injury, cannot complain on the ground that the passengers err in their estimate of the danger confronting them or the choice of means to insure their safety. *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448 (62 N. W. 887).

Entering express car for baggage.

314. (1896.) The fact that a passenger goes into the baggage car for a package belonging to him, there being no agent to receive it at the place of destination, does not relieve the carrier from liability for injuries sustained by the conductor pushing him out of the car door when the train starts. *Fremont, E. & M. V. R. Co. v. Root*, 49 Neb. 900 (69 N. W. 397).

Riding on steps or platform.

315. (1895.) It is not such negligence for a passenger to stand on the front steps of a crowded street car while in motion as will *per se* prevent a recovery for injuries received in consequence of the negligence of

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persons in charge thereof. *Pray v. Omaha Street R. Co.*, 44 Neb. 167 (62 N. W. 447; 48 Am. St. Rep. 717).

316. (1897.) It is not such negligence for a passenger to stand upon the platform of a crowded street car while in motion as will *per se* defeat a recovery for injuries received in consequence of the negligence of the persons in charge thereof. *East Omaha Street R. Co. v. Godola*, 50 Neb. 906 (70 N. W. 491).

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Leaving car while on siding.

317. (1902.) A through train ran onto a side track at an intermediate station to allow the passage of another train. A through passenger left his car, crossed the main track to the depot, for a drink of water. He filled his cup from the pump, but heard the whistle of the incoming train, and started on a rapid run to regain his car. From the pump the track over which the incoming train was approaching could be seen for about one hundred feet, and three steps from the pump toward the track over which the train was approaching the track was visible for a mile or more. When the passenger reached the track the approaching train was about fifty feet distant from him, and running at a high rate of speed, he attempted to pass in front of the train, and was struck by the engine and killed. *Held*, That he was not "a passenger being transported over the road," within the meaning of section 3, chapter 72 of the Compiled Statutes, and the railroad was not liable for damages on account of his death because of his own negligence. *Chicago, R. I. & P. R. Co. v. Sattler*, 64 Neb. 636 (90 N. W. 649; 97 Am. St. Rep. 666; 57 L R. A. 890).

318. (1902.) Where a passenger leaves his car of his own volition for some purpose of his own not incident to the journey he is pursuing, at a place not designed for the discharge of passengers, he cannot claim the protection of section 3, chapter 72 of the Compiled Statutes, although the carrier may, under some exceptional circumstances, still owe him the duty imposed on it by the common law. *Chicago, R. I. & P. R. Co. v. Sattler*, 64 Neb. 636 (90 N. W. 649; 97 Am. St. Rep. 666; 57 L. R. A. 890).

319. (1902.) While, if a railway company permits the practice of passengers leaving and re-entering their train, while at a sidetrack at an intermediate station for the purpose of letting another train pass on the main track, it is bound to use reasonable care not to expose such passengers to unnecessary danger, yet it is not bound to so regulate its business as to make the side-track as safe a place of ingress and egress as the station platform; nor does it give any assurance, under such circumstances, to passengers that no trains will pass while they are crossing or recrossing the main track. Neither does the call of "all aboard," by the conductor of the side-tracked train, give any assurance to those who have left their train that they may cross the track in safety without looking for approaching trains. *Chicago, R. I. & P. R. Co. v. Sattler*, 64 Neb. 636 (90 N. W. 649; 97 Am. St. Rep. 666; 57 L. R. A. 890).

320. (1902.) Where the train in which the passenger is being transported is run upon a switch to allow the passage of another train, or is stopped at a place other than that used by the carrier for receiving and discharging passengers, and the stoppage is not for the purpose of allowing passengers to board the train or alight therefrom, one who leaves the train must usually assume all the ordinary risks incident to his action. *Chicago, R. I. & P. R. Co. v. Sattler*, 64 Neb. 636 (90 N. W. 649; 97 Am. St. Rep. 666; 57 L. R. A. 890).

321. (1904.) Where a passenger on a through fast train, that has side-tracked at a small way station to permit another fast train to pass, leaves the train and crosses the main track to a pump for a drink and, on hearing the approaching train, which is running at a high rate of speed, starts to cross the track ahead of it and is struck and killed, he is guilty of such contributory negligence as to defeat a recovery. *Sattler v. Chicago, R. I. & P. R. Co.*, 71 Neb. 213 (98 N. W. 663).

Leaving car while in motion.

322. (1894.) Where a woman who is a passenger on a railroad train starts from her seat after the train has started from the station of her destination and she steps from the car step after passing the platform, she is guilty of such negligence as relieves the defendant of liability for her injuries sustained. *Chicago, B. & Q. R. Co. v. Landauer*, 39 Neb. 803 (58 N. W. 434).

323. (1903.) Evidence that shows plaintiff to have purchased a ticket to a station beyond her real destination, because the selling agent would not sell to the latter station, and upon arrival at her destina-

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tion she started to leave the car, but before reaching the door the train started, but plaintiff continued the act of alighting, and was injured, sustains a verdict in favor of plaintiff. *Chicago, B. & Q. R. Co. v. Winfrey*, 67 Neb. 13 (93 N. W. 526).

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323*a*. (1908.) Where plaintiff was negligent in attempting to alight from a moving car, she cannot recover although defendant's conductor was negligent in not preventing her from making the attempt, the doctrine of "last clear chance" not applying in such a case. *Kruger v. Omaha & C. B. Street R. Co.*, 80 Neb. 490 (114 N. W. 571).

324. (1903.) It is not necesarily gross negligence in every case for a passenger to attempt to leave a train, even though at the time it be in motion. *Chicago, B. & Q. R. Co. v. Winfrey*, 67 Neb. 13 (93 N. W. 526).

Jumping from moving train.

325. (1896.) Where a passenger knowingly jumps from a moving train under such circumstances as to render the act obviously and necessarily perilous and to show a willful disregard of the danger incurred thereby, it will prevent a recovery for the injuries received therefrom. *Chicago, B. & Q. R. Co. v. Hyatt*, 48 Neb. 161 (67 N. W. 8).

326. (1894.) Where one who is riding on an engine under an agreement with the fireman to shovel coal for his passage, and having been told to get off before reaching a certain station as he would be arrested if found on the engine, he jumped while the train was running at a great rate of speed and is killed, the court did not err in charging the jury to return a verdict for the defendant in an action by his administrator. *Woosley v. Chicago, B. & Q. R. Co.*, 39 Neb. 798 (58 N. W. 444; 25 L. R. A. 79).

327. (1893.) It is not such contributory negligence for a passenger to jump from a moving train as will in every case prevent a recovery under section 3, article I, chapter 72, Compiled Statutes, but where the circumstances are such as to render it obviously and necessarily perilous, and to show a willful disregard of the danger incurred thereby, such act amounts to criminal, negligence. *Chicago, B. & Q. R. Co. v Landauer*, 36 Neb. 642 (54 N. W. 976).

328. (1902.) A passenger who has been carried past his place of destination by a train which did not stop for him to alight, without notice to or knowledge of those in charge of the train, simply to avoid being carried to the next station, jumps from the steps of the car to the ground while the train is in rapid motion, and is injured thereby, can not maintain an action against the railroad company to recover damages therefor. *Chicago, B. & Q. R. Co. v. Martelle*, 65 Neb. 540 (91 N. W. 364).

Proximate cause of injury.

329. (1894.) Where a person who is riding on the engine of a railroad train by permission of the enginemen, agreeing to shovel coal to pay for his passage, and is told to get off before coming into a town or he would be arrested if found on the engine, and he jumps while the train is moving at a rapid rate of speed and is killed, such act of the deceased was criminal negligence and the proximate cause of his death. *Woosley v. Chicago, B. & Q. R. Co.*, 39 Neb. 798 (58 N. W. 444; 25 L. R. A. 79).

Burden of proof.

330. (1898.) In a suit against a street railway company for injuring a passenger it is error to instruct that, the injuries being shown, the carrier, to escape liability, must prove that the passenger was guilty of gross negligence. *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672 (74 N. W. 1074; 69 Am. St. Rep. 736).

331. (1903.) Where plaintiff, admittedly a passenger on defendant's street car, alleged that he was thrown therefrom by reason of a derailment of the car, and defendant denies the derailment and alleges that plaintiff jumped off the car while it was in motion, an instruction that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that he was injured while a passenger of the defendant, the extent of his injuries and the damage occasioned thereby, is misleading. *Omaha Street R. Co. v. Boesen*, 68 Neb. 437 (94 N. W. 619).

332. (1905.) Where negligence is proved, or where from the nature of the accident which was the proximate cause of the injury negligence is presumed, the carrier is then required to show that it was in nowise at fault, or that the plaintiff was guilty of some negligent act which contributed to the injury complained of. *Lincoln Traction Co. v. Webb*, 73 Neb. 136 (102 N. W. 258).

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Sufficiency of evidence.

333. (1896.) *Held*, Under the facts proven in the case, that plaintiff was not guilty of such negligence in alighting from a moving train as to defeat a recovery for injuries received therefrom. *Chicago, B. & Q. R. Co. v. Hyatt*, 48 Neb. 161 (67 N. W. 8).

334. (1896.) Evidence *held* to so clearly disclose crimininal negligence on the part of a railway passenger as to permit no reasonable inference to the contrary. *Chicago, B. & Q. R. Co. v. Hague*, 48 Neb. 97 (66 N. W. 1000).

335. (1893.) Evidence examined and *held* to show that plaintiff was guilty of contributory negligence in jumping from a moving train. *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642 (54 N. W. 976).

336. (1904.) Evidence showing that a passenger of a fast through train left the train when on a side-track waiting for another fast train to pass, and was killed while attempting to cross the main track in front of the approaching train, warrants a peremptory instruction for the defendant in an action to recover for such death. *Sattler v. Chicago, R. I. & P. R. Co.*, 71 Neb. 213 (98 N. W. 663).

Question for jury.

337. (1889.) Where a railroad company constructed its platforms for the accommodation of passengers getting on and off its cars between a side-track and the main line track, the distance between the two tracks being about six feet, and where a passenger approaching the train for the purpose of taking passage sought to enter the train from the platform of the rear car, and upon approaching the door, found that that portion of the car into which the door opened was set apart exclusively for baggage, and then sought to leave the car and enter a passenger car, by stepping upon and passing along the platform between the two tracks to the passenger car, but finding the platform crowded with other passengers, he sought to pass through and around the company of passengers, but in doing so was struck by a passing train moving at a rapid rate of speed, it was *held*, the question of his want of care was properly submitted to the jury, and that his conduct was not such as would require the court to declare it negligent. *Union P. R. Co. v. Sue*, 25 Neb. 772 (41 N. W. 801).

338. (1891.) In an action to recover for personal injuries sustained by reason of alleged negligence of defendant in starting its train while plaintiff was alighting therefrom, by which the defendant charged contributory negligence on the part of plaintiff, there being questions of fact to determine, the court properly refused to take the case from the jury. *Omaha & R. V. R. Co. v. Chollette*, 33 Neb. 143 (49 N. W. 1114).

339. (1894.) In an action to recover for injuries sustained by a woman for an alleged sudden jerking of a street car, as she was in the act of alighting, whether she was guilty of contributory negligence in stepping onto the platform of the car while in motion, and in not using the handholds on the uprights, were questions of fact for the jury. *Omaha Street R. Co. v. Craig*, 39 Neb. 601 (58 Neb. N. W. 209).

340. (1894.) Whether alighting from a moving train constitutes negligence or not is a fact to be determined by the jury, taking into consideration all the circumstances in evidence in the case. *Omaha Street R. Co. v. Craig*, 39 Neb. 601 (58 N. W. 209).

340*a*. (1894.) Where a passenger upon a street car, alighted on the side next a parallel track, and was struck and killed by a car upon that track, and the car from which he alighted had steps upon that side, with no gate or barricade to prevent their use, and no warning was given to him as to the danger of dismounting on that side, nor of the approach of the car on the other track, the questions of negligence and contributory negligence were properly left to the jury. *Omaha Street R. Co. v. Loehneisen*, 40 Neb. 37 (58 N. W. 535).

341. (1896.) Whether the act of a person in attempting to board a moving street car is negligence is generally a fact to be determined by the jury. *Omaha Street R. Co. v. Martin*, 48 Neb. 65 (66 N. W. 1007).

342. (1897.) The question of defendant's negligence and of plaintiff's contributory negligence, unless conclusively established by the evidence, should be submitted to the jury. *Union P. R. Co. v. Evans*, 52 Neb. 50 (71 N. W. 1062).

343. (1903.) Whether or not a passenger on a railroad train was guilty of such contributory negligence in attempting to leave the car at her destination, and before she reached the door the train started and she continued the act of alighting, which

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resulted in an injury to her, was properly submitted to the jury *Chicago, B. & Q. R. Co. v. Winfrey*, 67 Neb. 13 (93 N. W. 526.)

344. (1906.) In an action for damage sustained by one as a passenger, who, while running to catch a train that had been announced as about to leave the station, and while crossing the main tracks to where such train stood was struck by a fast train that passed the station without stopping, the question of contributory negligence is for the jury. *Hicks v. Union P. R. Co.*, 76 Neb. 496 (107 N. W. 798).

344*a*. (1907.) In the circumstances of this case, the question of whether a passenger was guilty of negligence in going from the platform to the step of a moving street car with the intention of alighting therefrom is a question of fact for the jury, and not one of law for the court. *Bendekovick v. Omaha & C. B. Street R. Co.*, 80 Neb. 174 (113 N. W. 988).

345. (1907.) Whether a passsenger on a street car is guilty of negligence in riding on a step of a platform of a crowded car is a question for the jury. *Coffey v. Omaha & C. B. Street R. Co.*, 79 Neb. 286 (112 N. W. 589).

Instructions.

346. (1893.) In an action to recover for the death of one who was injured while alighting from a railroad train, the existence of negligence should be proved and passed upon by the jury as any other fact. It is improper to state to the jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct that such fact or group of facts amount to negligence *per se*. At most, the jury should duly be instructed that such circumstances, if established by a preponderance of the evidence, are properly to be considered in determining the existence of negligence. *Missouri P. R. Co. v. Baier*, 37 Neb. 235 (55 N. W. 913).

346*a*. (1894.) In an action for death of a passenger who dismounted from a street car on the side next a parallel track and was struck by a car coming on such track, the instructions set out in the opinion, *held* to state the law correctly. *Omaha Street R. Co. v. Loehneisen*, 40 Neb. 39 (58 N. W. 535).

347. (1894.) Such expressions as "slight negligence" and "slight want of ordinary care" should never be used in instructions to juries, as such expressions tend to obscure and confuse what should be stated in plain and concise language. *Omaha Street R. Co. v. Craig*, 39 Neb. 601 (58 N. W. 209).

E. Ejection of Passengers.

Right to eject passenger.

348. (1881.) The right of expulsion of a passenger for non-compliance with a regulation requiring a ticket may be exercised after leaving the station, at any suitable place, under all the circumstances of the particular case. *Burlington & M. R. R. Co. v. Rose*, 11 Neb. 177 (8 N. W. 433).

349. (1892.) In ejecting a passenger from the street car the conductor can use no more force than is necessary for that purpose, and if he do so the company will be liable. *Haman v. Omaha Street R. Co.*, 35 Neb. 74 (52 N. W. 830).

Nature of action.

350. (1897.) Parties rightfully on a railroad train by virtue of a contract for their carriage to an agreed destination, and who are wrongfully ejected before the journey is completed, may sue for a breach of the contract, or in an action *ex delicto* for tort or negligence of the carrier. *Chicago, B. & Q. R. Co. v. Spirk*, 51 Neb. 167 (70 N. W. 926).

Ejecting trespasser.

351. (1903.) While the common carrier owes a person who boards a train for the purpose of stealing a ride, no active duty as a passenger, yet, if it uses unnecessary force to remove him, or expel him at a dangerous place, or while the train is moving at a dangerous rate of speed, and he thereby sustains injury, the carrier is liable in damages. *Pledger v. Chicago, B. & Q. R. Co.*, 69 Neb. 456 (95 N. W. 1057).

351*a*. (1905.) One stealing a ride on a freight train is a trespasser and may be ejected by force under proper circumstances. *Chicago, B. & Q. R. Co. v. White*, 73 Neb. 870 (103 N. W. 661).

Rules and regulations of carrier.

352. (1881.) A railroad company has the power to make, and in a reasonable manner to enforce, a rule or regulation to carry passengers on its freight trains, either not at all, or only upon the condition that they provide themselves with tickets. *Burlington & M. R. R. Co. v. Rose*, 11 Neb. 177 (8 N. W. 433).

Notice of rules and regulations.

353. (1881.) In the enforcement of a regulation that passengers will not be car-

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ried on a freight train unless they have tickets, previous notice thereof must be given. It is not, however, required of a railroad company to bring home to a passenger actual notice of the regulation before the train leaves the station where he entered the car, to justify his expulsion therefrom, for want of a ticket, at any other than a regular stopping place. All that is required is, that a suitable general notice to the public be given for such length of time before the regulation is put into operation, as to make it reasonably certain that all passengers in the exercise of due diligence must become aware of its existence. *Burlington & M. R. R. Co. v. Rose*, 11 Neb. 177 (8 N. W. 433).

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354. (1881.) Notices published notifying passengers that none without tickets would be carried on freight trains sufficient to put passengers on their guard and passengers are bound thereby; and a tender of a fare to the conductor was a void act conferring no right on the passenger. *Burlington & M. R. R. Co. v. Rose*, 11 Neb. 177 (8 N. W. 433).

Ejection at wrong station.

355. (1897.) Where passengers on a railroad train which does not stop at the station to which their tickets entitled them to be carried, and their being so situated is not the result of their own negligence but that of the company or its employees, were ejected from the train by the conductor and other employes of the company in obedience to a rule of the company for the guidance of the conductor in such cases, at a station other than the one to which they were to be carried, the company is liable in an action *ex delicto* for all damages which result or flow directly from the negligence. *Chicago, B. & Q. R. Co. v. Spirk*, 51 Neb. 167 (70 N. W. 926).

Damages.

356. (1892.) The measure of damages recoverable for an assault in a street car conductor ejecting a passenger from the car is actual damages sustained in the assessment of which the jury may consider the character and extent of the injuries, the pain suffered, loss of time, and cost of medical attendance. *Haman v. Omaha Horse Car Co.*, 35 Neb. 74 (52 N. W. 830).

357. (1897.) Injuries incident to a trip across a prairie *held* not elements of damage in a suit against a carrier for wrongfully ejecting plaintiff from a train. *Chicago, B. & Q. R. Co. v. Spirk*, 51 Neb. 167 70 N. W. 926).

358. (1897.) If an action is brought for the tort or negligence in the ejection of a passenger the measure of damages will be compensation for all injuries which are directly caused or flow from the wrongful act or acts. *Chicago, B. & Q. R. Co. v. Spirk*, 51 Neb. 167 (70 N. W. 926).

359. (1897.) If action is brought for a breach of the contract resulting from ejection of a passenger, the measure of damages will be such as may fairly be considered as arising naturally, or in the usual course of things from the breach, or such as may reasonably be supposed to have been in contemplation of the parties to the contract when it was made, as the probable result of its breach. *Chicago, B. & Q. R. Co. v. Spirk*, 51 Neb. 167 (70 N. W. 926).

360. (1899.) Damages assessed *held* inadequate and did not furnish compensation for the loss shown. *Spirk v. Chicago, B. & Q. R. Co.*, 57 Neb. 565 (78 N. W. 272).

Pleading.

361. (1897.) Petition alleging that plaintiffs purchased tickets which entitled them to a safe passage on or over plaintiff in error's road from a named starting point to a designated destination, and that they became passengers on said railroad accordingly, and took seats in the cars of the plaintiff in error, to be carried to their journey's end, and were carried directly toward their destination until a station called Benkelman, on the line of the road, was reached, where they were unlawfully and forcibly ejected from the train or car in which they were riding, *held* to state a cause of action. *Chicago, B. & Q. R. Co. v. Spirk*, 51 Neb. 167 (70 N. W. 926).

361*a*. (1905.) Petition in an action for negligence in ejecting plaintiff, a trespasser, from a train, when construed in the light of the entire record, *held* sufficient to support a judgment for plaintiff. *Chicago, R. I. & P. R. Co. v. Kerr*, 74 Neb. 1 (104 N. W. 49).

Evidence.

361*b*. (1905.) Evidence *held* sufficient to sustain verdict for plaintiff in an action for injuries received by a trespasser ejected from a freight train. *Chicago, R. I. & P. R. Co. v. Kerr*, 74 Neb. 1 (104 N. W. 49).

Question for jury.

362. (1899.) Whether passengers on a railway train have exercised the required

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care to ascertain whether they are on the right train or in the proper car of the train to reach their destination is generally a question of fact to be submitted to the jury. *Spirk v. Chicago, B. & Q. R. Co.*, 57 Neb. 565 (78 N. W. 272).

F. Passenger's Effects.

Liability for baggage.

363. (1895.) A common carrier undertaking to transport the baggage of its passengers is held by the law to the strictest accountability; and if the carrier receives such baggage, and undertakes its carriage, it cannot be relieved from liability therefor by anything save the act of God or of the public enemy. *Ringwalt v. Wabash R. Co.*, 45 Neb. 760 (64 N. W. 219).

364. (1895.) A carrier is not liable for the baggage of its passenger unless the evidence shows that the baggage claimed to be lost and sued for came into the possession of the carrier. *Ringwalt v. Wabash R. Co.*, 45 Neb. 760 (64 N. W. 219).

365. (1907.) Where a railway company gives no explanation as to the loss of a passenger's baggage while in the baggage room at its station, the presumption arises that it resulted from the negligence of the bailee. *Campbell v. Missouri P. R. Co.*, 78 Neb. 479 (111 N. W. 126).

366. (1907.) The liability of a railway company for the loss of baggage of a passenger, after it has been removed from the train and taken into the baggage room at a station, is that of a warehouseman. *Campbell v. Missouri P. R. Co.*, 78 Neb. 479 (111 N. W. 126).

——— **Loss by connecting carrier.**

367. (1895.) Where a trunk containing jewelry was delivered to a drayman and by him taken to a railroad station where it was checked under a passenger's ticket and delivered, after being transported by several connecting lines, to its destination when it was again taken by a drayman to the residence of the owner, in the absence of a showing that the trunk was not opened or tampered with by the drayman no recovery can be had against the railroad company for the loss of such jewelry. *Ringwalt v. Wabash R. Co.*, 45 Neb. 760 (64 N. W. 219).

368. (1907.) Where a carrier uses the railway station of another carrier, over whose lines it operates its trains, at which to discharge passengers and baggage, and the agent of the latter company removes and cares for such baggage the same as that coming on his own line, except that all checks are taken off before the baggage is removed from the train, such agent is the agent of the former carrier also, in the receipt and care of such baggage so as to render it liable for loss of baggage taken by him into the baggage room. *Campbell v. Missouri P. R. Co.*, 78 Neb. 479 (111 N. W. 126).

Baggage check as evidence.

369. (1897.) A carrier's check for baggage is *prima facie* evidence that the baggage was delivered to the carrier, and when such a check has been introduced in evidence the burden of proof is on the party alleging non-delivery. *Chicago, B. & Q. R Co. v. Steear*, 53 Neb. 95 (73 N. W. 466).

G. Palace Cars and Sleeping Cars.

Liability for loss to passenger.

370. (1889.) A sleeping car company, so far as it renders service similar in kind to an innkeeper, is subject to the same liabilities; and where an article of wearing apparel belonging to a passenger in one of such cars has been placed in the care of the porter, and is stolen from the car, the company will be liable therefor. *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239 (44 N. W. 226; 26 Am. St. Rep. 325; 6 L. R. A. 809).

371. (1889.) "Guest" and "lodger" defined. *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239 (44 N. W. 226; 26 Am. St. Rep. 325; 6 L. R. A. 809).

372. (1906.) Evidence in an action by a passenger against a sleeping car company *held* to sustain a finding of theft of jewelry from plaintiff while asleep in a sleeping car of defendants. *Pullman Palace Car Co. v. Woods*, 76 Neb. 694 (107 N. W. 858).

CATTLE.

See *Animals*.

Carriage of live stock, see *Carriers*, III.

CATTLE GUARDS.

Duty of railroad to erect, see *Railroads*, §§ 186-199.

CAVEAT EMPTOR.

Application of, to sale of lands by executor, see *Executors and Administrators*, §§ 232-334.

Purchaser at judicial sale, see *Judicial Sales*, §§ 510-518.

As applied to sale of chattels, see *Sales*.

Application of rule to purchaser at tax sale, see *Taxation*, §§ 739, 740.

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CEMETERIES.

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ANALYSIS.

Nature of private association, § 1.
Statutory provisions, §§ 2, 3.
Establishment and purchase of property for, § 4.
Exemptions, §§ 5-7.
Enjoining burial as a nuisance, §§ 8-13.

CROSS-REFERENCE.

Land donated as cemetery subject to creditor's suit, see *Creditor's Suit*, § 26.

Nature of private association.

1. (1894.) A cemetery association organized under section 45, chapter 16, Compiled Statutes, is a private corporation. *Pokrok Zapadu Publishing Co. v. Zizkovsky*, 42 Neb. 64 (60 N. W. 358).

Statutory provisions.

2. (1888.) As to whether chapter 15 of the Session Laws of 1887, providing for the establishment of cemeteries in cities, is repealed by the provisions of chapter 12 of the Session Laws of 1887 subsequently enacted, *quære*. *State, ex rel. Wyuka Cemetery Ass'n, v. Bartling*, 23 Neb. 421 (36 N. W. 811).

3. (1888.) The provisions of section 330, chapter 15 of the Session Laws of 1887, providing for the more efficient management and care of cemeteries and cemetery grounds in cities of the second class and villages, has no application to "cities of the second class of over 5,000 inhabitants," as created by article II of chapter 14 of the Compiled Statutes of 1885, but is limited to article I of said chapter, and to chapter 14 of the Compiled Statutes of 1881. *State, ex rel. Wyuka Cemetery Ass'n, v. Bartling*, 23 Neb. 421 (36 N. W. 811).

Establishment and purchase of property for.

4. (1888.) Nebraska City, being a city of the second class having over 5,000 inhabitants, is governed by the act of March 1, 1883, as amended by chapter 14 of the Session Laws of 1885, which act confers upon the city the right to enact ordinances for the purpose of purchasing, holding, and controlling cemeteries. *State, ex rel. Wyuka Cemetery Ass'n, v. Bartling*, 23 Neb. 421 (36 N. W. 811).

Exemptions.

5. (1902.) Real estate platted and dedicated for a public cemetery, which is used exclusively for burial purposes, is exempt from forced sale. *First Nat. Bank of Pawnee City v. Hazels*, 63 Neb. 844 (89 N. W. 378; 56 L. R. A. 765).

6. (1902.) The fact that the owner of the legal title to a portion of the lots in a cemetery receives a portion of the revenues derived from a sale thereof when required for burial purposes, does not render such unsold lots subject to execution, legal or equitable. *First Nat. Bank of Pawnee City v. Hazels*, 63 Neb. 844 (89 N. W. 378; 56 L. R. A. 765).

7. (1902.) Real estate platted into lots and blocks and dedicated for a public cemetery cannot be reached by an equitable proceeding in the nature of a creditor's bill. *First Nat. Bank of Pawnee City v. Hazels*, 63 Neb. 844 (89 N. W. 378; 56 L. R. A. 765).

Enjoining burial as a nuisance.

8. (1903.) A court of equity will enjoin the use of a tract of land for cemetery purposes so situated that the burial of the dead there will injure life or health, either by corrupting the surrounding atmosphere, or the water of wells or springs. *Braasch v. Cemetery Ass'n*, 69 Neb. 300 (95 N. W. 646).

9. (1903.) A burial ground near dwellings is not necessarily a nuisance, and the court will only interfere and enjoin its use on clear and convincing proof of probable injury. *Braasch v. Cemetery Ass'n*, 69 Neb. 300 (95 N. W. 646).

10. (1903.) Evidence *held* insufficient to sustain an injunction against the establishment of a cemetery near plaintiff's land and wells. *Braasch v. Cemetery Ass'n*, 69 Neb. 300 (95 N. W. 646).

11. (1905.) The cause upon which the

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order allowing a perpetual injunction against the use of a tract of land for burial purposes is not removed, and the threatened invasion of the plaintiff's rights is not obviated, by an ordinance of the city within which such tract of land is located, which authorizes the health commissioner in his discretion to provide rules and grant permits for the burial of dead bodies in a different manner than that ordinarily obtaining, by covering the bottom and walls of the grave with a coat of mortar, so as to render the same impervious to the fluids arising from decomposition of dead bodies. *Lowe v. Prospect Hill Cemetery Ass'n*, 75 Neb. 85 (106 N. W. 429).

12. (1905.) Evidence examined, and it is found that there has been no material change since the entry of the final order allowing a perpetual injunction in respect of the wells on the premises of the plaintiffs, and the threatened dangers to them because of the pollution of the underground waters from which such wells are supplied, by reason of the decomposition of dead bodies, if interred in the tract of land involved in the controversy, and that no such change has arisen since the rendition of the original decree in the action in respect of such matters as would justify the modification or vacation of the order of injunction therein allowed. *Lowe v. Prospect Hill Cemetery Ass'n*, 75 Neb. 85 (106 N. W. 429).

13. (1905.) Where, in an action in which the object is to enjoin the defendant from using a certain tract of land for the interment of dead bodies, one of the vital issues is whether such land is a part of an established cemetery, and it is in such action determined that it is not, a resolution afterwards passed by the city council of the city in which such grounds are situated to the effect that such disputed ground is a part of the cemetery, and is not therefore taxable, will not affect the question as litigated and determined, and will afford no sufficient basis for modification or vacation of an order for perpetual injunction restraining the defendants from the use of such ground for burial purposes. *Lowe v. Prospect Hill Cemetery Ass'n*, 75 Neb. 85 (106 N. W. 429).

CENSUS.

CROSS-REFERENCE.

School census, see *Schools and School Districts*, § 257.

1. (1898.) Courts will take judicial notice of a United States census and its results, a school census and its results; also of an authorized election and its results, and the number of votes cast thereat. *Kokes v. State, ex rel. Koupal*, 55 Neb. 691 (76 N. W. 467).

2. (1898.) Whether a person has been enumerated in the census taken by a school board, should be established by the production of the proper record disclosing the facts. *State v. School District*, 55 Neb. 317 (75 N. W. 855).

3. (1902.) Evidence *aliunde* the census reports may be resorted to for fixing the population of a county. *State, ex rel. Blessing, v. Davis*, 66 Neb. 333 (92 N. W. 740).

4. (1902.) The United States census reports, showing the population of a county, are not conclusive evidence that the population is in fact as given in such report. *State, ex rel. Blessing, v. Davis*, 66 Neb. 333 (92 N. W. 740).

CERTAINTY.

Of contract for sale of real property, see *Vendor and Purchaser*, §§ 27-30.

CERTIFICATE.

Of transcript in error proceedings, see *Appeal and Error*, §§ 1150-1166.

Of bank deposits, see *Banks and Banking*, §§ 170-180.

As to contents of bill of exceptions, see *Exceptions, Bill of*, §§ 203-228.

As to liens on property levied on, see *Execution*, §§ 83-85.

Of officer taking deposition, see *Depositions*, §§ 27, 28.

Compelling grant of certificate of election, see *Mandamus*, §§ 189, 190.

Of receiver, see *Receivers*, § 84.

Teacher's certificate, see *Schools and School Districts*, §§ 240, 241.

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See *Trusts*.

CHALLENGE.

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CHAMBERS.

Granting writ of assistance at, see *Assistance, Writ of*, § 1.

Granting license to administrator to sell realty, see *Executors and Administrators*, § 212.

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Confirming judicial sale at, see *Judicial Sales*, §§ 380-385.

Power of judge in general, see *Judges*, §§ 20, 21.

Issuing writ of mandamus at, see *Mandamus*, §§ 240-245.

CHAMPERTY AND MAINTENANCE.

CROSS-REFERENCES.

See, also, *Attorney and Client.*

Encouragement of litigation by attorney, *see Attorney and Client*, § 11.

1. (1894.) In order to constitute champerty the contract between the attorney and his client must not only provide that the attorney shall have a part of the money or thing recovered in the action, but it must also provide that the attorney shall at his own expense support the suit, be responsible for the costs, and take all the risks of the litigation. *Omaha & R. V. R. Co. v. Brady*, 39 Neb. 27 (57 N. W. 767).

2. (18994.) A railroad company sued for damages, alleged to have been sustained by plaintiff through its negligence, cannot interpose as a defense that the suit is being carried on by virtue of a champertous agreement between plaintiff and his counsel; this is a defense available only, if at all, to the plaintiff in a suit against him on the contract. *Omaha & R. V. R. Co. v. Brady*, 39 Neb. 27 (57 N. W. 767).

3. (1894.) Strangers to a contract cannot set up as a defense to an independent action that such contract was void as being champerty. *Chamberlain v. Grimes*, 42 Neb. 701 (60 N. W. 984).

CHANCERY.

See *Equity*.

CHARACTER.

Evidence of character of party to civil action, see *Evidence*, §§ 94, 137, 138.

Proving character of witness to impeach testimony, see *Witnesses*, IV, B.

Evidence as to character of defendant in criminal prosecution, see *Criminal Law*, §§ 263-275.

CHARITIES.

ANALYSIS.

Validity of devise, §§ 1, 2.
Enforcement of trust, §§ 3-6.
——— Power of trustee, § 7.
Action for accounting, §§ 8, 9.

Validity of devise.

1. (1900.) The provisions for the administration of charitable trusts under the statute of 43 Elizabeth *held* not to be in force in this state. *St. James Orphan Asylum v. Shelby*, 60 Neb. 796 (84 N. W. 273; 83 Am. St. Rep. 553).

2. (1900.) A devise of certain land to a certain bishop, or to his successors in case testator survive him, and "my wish and direction is that the said bishop * * * apply the said lands and proceeds arising therefrom to some charity according to his judgment," is not void for uncertainty. *St. James Orphan Asylum v. Shelby*, 60 Neb. 796 (84 N. W. 273; 83 Am. St. Rep. 553).

Enforcement of trust.

3. (1900.) Courts will view with favor donations by will for charitable purposes, and will endeavor to carry them into effect where the same can be done consistently with the rules of law. *St. James Orphan Asylum v. Shelby*, 60 Neb. 796 (84 N. W. 273; 83 Am. St. Rep. 553).

4. (1900.) Where the object of a testamentary trust is clearly charitable, and a trustee is named who is empowered to select for the testator, and as an expression of his will, a charity upon which the property is to be bestowed, and the trustee has accepted or is ready to accept the trust and is willing to carry out its provisions, such

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bequest, though entirely general and uncertain in its objects, will not be declared invalid because of the general nature of the object or objects of the charity. *St. James Orphan Asylum v. Shelby*, 60 Neb. 796 (84 N. W. 273; 83 Am. St. Rep. 553).

5. (1900.) The doctrine of charitable uses, being administered as a part of the common law jurisdiction of the courts of chancery of England exercising judicial power only, has been transplanted in this state and become a part of the jurisprudence of the courts possessing common law equity powers; and in the administration and enforcement of such trusts the courts can exercise only judicial powers, and not those of the extraordinary character mentioned. *St. James Orphan Asylum v. Shelby*, 60 Neb. 796 (84 N. W. 273; 83 Am. St. Rep. 553).

6. (1900.) In a devise, where a certain and ascertainable trustee or trustees are appointed, with full power to select the beneficiaries or designate the objects of the charity, and devise a plan for the application of the funds bestowed, the court will, through the trustee, execute the charity. *St. James Orphan Asyum v. Shelby*, 60 Neb. 796 (84 N. W. 273; 83 Am. St. Rep. 553).

——— Power of trustee.

7. (1900.) Where a devise is made to a certain and ascertainable trustee or trustees with full power to select the beneficiaries or designate the objects of the charity, the exercise of the discretion or power vested in the trustees will be deemed to be an expression of the will of the testator. *St. James Orphan Asylum v. Shelby*, 60 Neb. 796 (84 N. W. 273; 83 Am. St. Rep. 553).

Action for accounting.

8. (1907.) The supreme court will not entertain original jurisdiction in an action to compel a former manager of a private charitable corporations to account. *State v. Tabitha Home*, 78 Neb. 651 (111 N. W. 586).

9. (1907.) The state is not a proper party plaintiff to an action to compel the officers of a charitable institution to account. *State v. Tabitha Home*, 78 Neb. 651 (111 N. W. 586).

CHARTERS.

Special charter of corporation, see *Corporations*, § 20.

CHATTEL MORTGAGES.

ANALYSIS.

I. REQUISITES AND VALIDITY.

(A) Nature and essentials of transfer.

Nature of mortgage, §§ 1, 2.
Mortgage securing debts to different creditors, §§ 3, 4.
Property subject to mortgage.
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——— Priority over lien for keep of animals, §§ 126-128.
——— Lien for damages from trespassing animals, §§ 129, 130.
——— Priority as to purchasers, §§ 131-137.
——— Priority over vendor of property, §§ 138, 139.
——— Priority over tax lien, §§ 140-147.
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Chattel mortgage as assignment for creditors, see *Assignments for Benefit of Creditors*, §§ 8-21.

Validity of mortgage executed before assignment for creditors, see *Assignments for Benefit of Creditors*, §§ 65-71.

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I. REQUISITES AND VALIDITY.

A. Nature and Essentials of Transfer.

Necessity of change of possession as against creditors, see *Fraudulent Conveyances*, §§ 179-192.

Excessive security as element of fraud, see *Fraudulent Conveyances*, §§ 52-65.

Nature of mortgage.

1. (1873.) A mortgage of chattels is a conditional sale, with title in the mortgagee, subject to mortgagor's right to perform the conditions. *Tallon v. Ellison*, 3 Neb. 63.

2. (1894.) A chattel mortgage, whether in writing or not, is a pledge of personal property to secure the promise of the mortgagor or some one for whom he stands sponsor. *Musser v. King*, 40 Neb. 892 (59 N. W. 744; 42 Am. St. Rep 700).

Mortgage securing debts to different creditors.

3. (1899.) A chattel mortgage may be to a number of persons and may be to each a separate and several security of his claim or debt against the mortgagor. *Sloan v. Thomas Mfg. Co.*, 58 Neb. 713 (79 N. W. 728).

4. (1899.) A chattel mortgage given by a debtor to several creditors, who by the terms of the instrument are to prorate in the proceeds of the mortgaged property, is the legal equivalent of a separate mortgage to each of such creditors. *Skinner v. First Nat. Bank of Pawnee City*, 59 Neb. 17 (80 N. W. 42).

Property subject to mortgage.

——— Things non in esse.

Sufficiency of description, see *post*, §§ 59-61.

5. (1886.) A chattel mortgage executed upon a crop of corn to be planted at some future time on the premises described in the instrument creates no lien upon the crop when it comes into existence, until seized by the mortgagor. *Cole v. Kerr*, 19 Neb. 553 (26 N. W. 598).

6. (1888.) A mortgage of a crop of corn yet to be planted, conveys no title as against a levying creditor. *Johnson v. Walker*, 23 Neb. 736 (37 N. W. 639).

7. (1903.) It is no objection to an agreement to execute a mortgage on crops that the crops were not in being when it was made. *Sporer v. McDermott*, 69 Neb. 533 (96 N. W. 232).

8. (1901.) A mortgage on a thing *non in esse* discussed. *Brown v. Neilson*, 61 Neb. 765 (86 N. W. 498; 87 Am. St. Rep. 525; 54 L. R .A. 328).

9. (1901.) 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. *Battle Creek Valley Bank v. First Nat. Bank of Madison*, 62 Neb. 825 (88 N. W. 145; 56 L. R. A. 124).

10. (1901.) An instrument which assumes to convey or incumber a thing *non 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. *Battle Creek Valley Bank v. First Nat. Bank of Madison*, 62 Neb. 825 (88 N. W. 145; 56 L. R. A. 124).

——— Fixtures.

11. (1873.) Fixtures erected by a tenant during his term may be mortgaged as chattels. *Lamphere v. Lowe*, 3 Neb. 131.

——— After-acquired property.

12. (1885.) Where a party purchased horses upon condition that he should pay for them by a certain date, and paid for them at the time agreed upon, but before doing so he executed a chattel mortgage on them, *held*, that so far as the mortgage was concerned the title of the mortgagor related back to the date of purchase. *Peters v. Parsons*, 18 Neb. 191 (24 N. W. 687).

13. (1894.) A mortgage of chattels to be thereafter acquired is invalid as against purchaser and attaching creditors of the mortgagor. *Steele v. Ashenfelter*, 40 Neb. 770 (59 N. W. 361; 42 Am. St. Rep. 694).

Mortgage or indemnity.

14. (1899.) A mortgage in terms to secure the payment of a debt evidenced by a promissory note may be shown to be one of indemnity only. *Honaker v. Vesey*, 57 Neb. 413 (77 N. W. 1100).

Absolute bill of sale as mortgage.

15. (1880.) A bill of sale, absolute on its face, but accompanied by a verbal defeasance, is not only a chattel mortgage as

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between the parties to it, but also to third parties who have actual notice, or such knowledge of the facts as charges them with notice. And a sale of the chattels by the mortgagor to such third parties in payment of a debt due from him to them conveys no title. *Omaha Book Co. v. Sutherland*, 10 Neb. 334 (6 N. W. 367).

16. (1889.) Where a debtor, for the purpose of securing a debt, conveys personal property to his creditor, giving him the possession thereof with authority to the creditor to sell the same and account to the debtor for the surplus after paying the debt so secured, together with the necessary expenses of sale, etc., the instrument by which the conveyance was made will be treated as a chattel mortgage as well between the grantee and the creditors of the grantor as between the parties to the transfer. *Sloan v. Coburn*, 26 Neb. 608 (42 N. W. 726; 4 L. R. A. 470).

17. (1890.) A chattel mortgage in the form of a bill of sale, with a defeasance clause, given and received *bona fide*, though unfiled, *held* valid as against subsequent mortgagees having actual notice thereof at time of taking their respective mortgages. *Russell v. Longmoor*, 29 Neb. 209 (45 N. W. 624).

18. (1891.) An absolute deed of real estate, or a bill of sale of personal property absolute on its face, executed and intended as security for a debt or loan, will be construed as a mortgage as between the parties thereto, and all others, except *bona fide* purchasers for value without notice. *Kemp v. Small*, 32 Neb. 318 (49 N. W. 169).

19. (1891.) *Held*, That the deeds and bill of sale, referred to in the opinion, were given as security and were not intended as an absolute transfer of the property therein described. *Kemp v. Small*, 32 Neb. 318 (49 N. W. 169).

Mortgage distinguished from assignment.

20. (1899.) A chattel mortgage given by a debtor to several creditors, who by the terms of the instrument are to prorate in the proceeds of the mortgaged property, is not a voluntary assignment under the statute. *Skinner v. First Nat. Bank of Pawnee City*, 59 Neb. 17 (80 N. W. 42).

Consideration.

——In general.

21. (1887.) A purchased a span of horses of B, giving his note therefor, with C and D as sureties. To induce C to sign the note as surety, A promised to execute a chattel mortgage on said property to C, and further agreed that until the execution of said mortgage C should retain a lien on said property. Afterwards A executed a mortgage to one E, on said property, and soon afterwards left the state without having executed a mortgage to C. D thereupon, in consideration that C would release his claim on the property, executed a chattel mortgage upon other property to secure C against the payment of a part or all of the note held by B. *Held*, That the mortgage from D to C was not without a consideration. *Sparks v. Wilson*, 22 Neb. 112 (34 N. W. 111).

22. (1902.) Where chattel mortgagees hold mortgages of various priority on the same goods, the fact that one mortgage, executed at the same time and as a part of the same transaction, was without consideration, will not impeach the other mortgages, where the parties act in good faith, supposing the first mortgage valid. *Trompen v. Yates*, 66 Neb. 525 (92 N. W. 647).

——Pre-existing debt.

23. (1882.) A pre-existent debt already due, is good consideration for a chattel mortgage. *Turner v. Killian*, 12 Neb. 580, (12 N. W. 101).

24. (1891.) A pre-existing debt is a valuable consideration for a chattel mortgage. *Henry v. Vliet*, 33 Neb. 130 (49 N. W. 1107; 29 Am. St. Rep. 478). [Overruled. *Henry v. Vliet*, 36 Neb. 138.]

25. (1892.) When goods obtained by fraud have been mortgaged by the fraudulent vendee solely to secure a pre-existing debt due from him to the mortgagee, the latter cannot claim the protection which the law affords an innocent and *bona fide* purchaser of property from a fraudulent vendee. *Tootle v. First Nat. Bank*, 34 Neb. 863 (52 N. W. 396),

26. (1893.) The first paragraph of the syllabus in *Henry v. Vliet*, 33 Neb., 130: "A pre-existing debt is a valuable consideration for a chattel mortgage and protects the mortgagee to the same extent as had he paid a new consideration," is overruled. *Henry v. Vliet*, 36 Neb. 138 (54 N. W. 122; 19 L. R. A. 590).

27. (1893.) As to attachment creditors of the mortgagor, a pre-existing debt already due is a good consideration for a chattel mortgage and protects the mortgagee to the

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same extent as would a new consideration given at the time of making the mortgage. *Beagle v. Miller*, 37 Neb. 855 (56 N. W. 710).

28. (1895.) A pre-existing debt is a sufficient consideration for a chattel mortgage and protects the mortgagee to the same extent as a new consideration. *Chaffee v. Atlas Lumber Co.*, 43 Neb. 224 (61 N. W. 637; 47 Am. St. Rep. 753).

29. (1896.) A mortgage upon chattels given to secure a pre-existing demand will protect the mortgagee as fully as though a new consideration had been paid. *State Bank of Lushton v. Kelley*, 49 Neb. 242 (68 N. W. 481).

30. (1896.) A mortgage securing a pre-existing debt should not be declared void merely because the mortgagee had notice that the mortgagor intended to defraud creditors, mortgagee not participating in the fraudulent purpose. *Grosshans v. Gold*, 49 Neb. 599 (68 N. W. 1031).

31. (1903.) One F. deserted his wife and left the state, leaving a crop of standing matured corn and other personal property. The wife claimed all the property as exempt from attachment by the husband's creditors. Knowing of such claim the plaintiff took from the husband a chattel mortgage and bill of sale of the property as security for a pre-existing debt and an additional sum loaned to induce the husband to give the security. *Held*, In a replevin action for the corn, that the taking of such security was not *per se* a fraud upon the wife, that the husband's desertion did not transfer the title of his exempt property to his wife, nor divest him of power to create a lien thereon. *Farmers & Merchants Bank of Sterling v. Hoffman*, 5 Unof. 9 (96 N. W. 1044).

——— Extension of time or release of surety.

32. (1896.) Extension of time for the payment of a debt is a sufficient consideration for a chattel mortgage given by the debtor to secure such indebtedness. *Fuller v. Brownell & Co.*, 48 Neb. 145 (67 N. W. 6).

33. (1891.) The release of an indorser or surety of a promissory note, on a pre-existing debt in consideration of a chattel mortgage on the goods of the maker is a valuable consideration for the mortgage. *Henry v. Vliet*, 33 Neb. 130 (49 N. W. 1107; 29 Am. St. Rep. 478).

Specific enforcement of contract to execute mortgage.

34. (1903.) An agreement to execute, after they are growing, a mortgage upon crops, may be enforced specifically in equity if sufficiently definite in its terms and clearly established, and the situation of the parties and property is such that justice and equity call for such a remedy. *Sporer v. McDermott*, 69 Neb. 533 (96 N. W. 232)

B. Form and Contents, Execution and Validity.

Validity of mortgage given in preference to one creditor, see *Fraudulent Conveyances*, §§ 153-163.

Effect of retaining power of sale, see *Frandulent Conveyances*, §§ 187-192.

Necessity of writing.

35. (1878.) A verbal agreement to give and accept security upon personal property is valid between the parties, although of no validity as against creditors and subsequent purchasers in good faith. *Conchman v. Wright*, 8 Neb. 1.

36. (1887.) A verbal contract upon sufficient consideration, by which the owner of personal property gives a lien upon it is valid. *Sparks v. Wilson*, 22 Neb. 112, (34 N. W. 111).

37. (1888.) A verbal agreement between a debtor and creditor, by which the former gives a lien upon certain property to the latter, is valid between the parties, but void as to creditors and subsequent purchasers in good faith. *Ostertag v. Galbraith*, 23 Neb. 730 (37 N. W. 637).

38. (1902.) An oral chattel mortgage is good as between the parties thereto; it is invalid only as to creditors and subsequent purchasers in good faith. *Reiss v. Argubright*, 3 Unof. 756 (92 N. W. 988).

39. (1902.) Creditor as to whom an oral chattel mortgage would be void means judgment, execution or attachment creditor; a subsequent mortgagee with notice is not so regarded. *Reiss v. Argubright*, 3 Unof. 756 (92 N. W. 988).

Acknowledgment.

40. (1878.) The several sections of chapter 43 of the Revised Statutes 1866, in relation to the execution and acknowledgment of deeds, mortgages, and other instruments in writing required to be recorded, are to be construed together, and apply to and include chattel mortgages. *Hooker v. Hammill*, 7 Neb. 231.

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41. (1881.) Where the statute provides that a chattel mortgage shall be void "as against the creditors of the mortgagor" unless the mortgage or a true copy thereof shall be filed and recorded as directed by law, the mortgage is void unless properly acknowledged, since it must be acknowledged to entitle it to be recorded *Becker v. Anderson*, 11 Neb. 493 (9 N. W. 640). [Overruled. 13 Neb. 261; 49 Neb. 165.]

Acceptance and delivery.

42. (1897.) Acceptance by grantee of a mortgage beneficial to him will be presumed, but the presumption may be rebutted by proof that he did not accept it. *Atwood v. Marshall*, 52 Neb. 173 (71 N. W. 1064).

43. (1898.) An undated instrument signed by grantor and taken by grantee for retention until he is notified by grantor of a contingency, after which the instrument is to be filed, does not become a completed chattel mortgage until the grantor takes the action contemplated by the agreement. *Midland State Bank v. Kilpatrick-Koch Dry Goods Co.*, 54 Neb. 410 (74 N. W. 837).

Description of property.

——Sufficiency in general.

44. A description of property in a chattel mortgage is sufficient, where it will enable a third person, aided by inquiries which the instrument itself suggests, to identify the property. (1889) *Rawlins v. Kennard*, 26 Neb. 181 (41 N. W. 1004); (1894) *Love v. Putnam*, 41 Neb. 86 (59 N. W. 691); (1890) *Buck v. Davenport Savings Bank*, 29 Neb. 407 (45 N. W. 776; 26 Am. St. Rep. 392); (1901) *Union State Bank v. Hutton*, 61 Neb. 571 (85 N. W. 535).

45. (1886.) A chattel mortgage may be void as against the *bona fide* creditors of or purchasers from the mortgagor for defective description of the property mortgaged and yet good as between the immediate parties to the mortgage. *Leighton v. Stuart*, 19 Neb. 546 (26 N. W. 198).

46. (1886.) As between the mortgagor and mortgagee of personal chattels, a specific and particular description of the several articles mortgaged from which to identify them from other like articles of the mortgagor in the same collection, is not essential to the validity of the mortgage. *Leighton v. Stuart*, 19 Neb. 546 (26 N. W. 198).

47. (1892.) In an action of replevin founded on a chattel mortgage, the description of the property was *held* sufficient to entitle the plaintiff to recover, and there was testimony tending to show that the purchaser had actual notice of the mortgage. *Bartholomew v. Fisher*, 34 Neb. 98 (51 N. W. 599).

48. (1893.) A description of property covered by a chattel mortgage which will not enable third persons aided by inquiries which the mortgage itself suggests, to identify the mortgaged property is not constructive notice to good faith purchasers thereof for a valuable consideration. *Iowa Savings Bank v. Dunning*, 37 Neb. 322 (55 N. W. 1079).

49. (1893.) Whether the description of property in a chattel mortgage and the other inquiries which the mortgage itself suggests are sufficient to enable third persons to identify the mortgaged property is a question of fact for the jury. *Iowa Savings Bank v. Dunning*, 37 Neb. 322 (55 N. W. 1079).

50. (1894.) A description in a chattel mortgage, "One hundred thirty tons of hay now in stack upon east half northwest quarter of section 30, town 18, range 6; said property is now and will be kept on J. W. Love's farm northwest of town," was *held* sufficient although the land upon which the hay in controversy was standing was in range 7 and not in range 6. *Love v. Putnam*, 41 Neb. 86 (56 N. W. 691).

51. (1898.) A chattel mortgage specifically described the chattels, but described them as contained in a certain building where they had not yet been put, but where they were placed before any other rights intervened. *Held*, That the misdescription of the place did not render the mortgage void. *Arlington Mill & Elevator Co. v. Yates*, 57 Neb. 286 (77 N. W. 677).

52. (1901.) 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. *McCormick Harvesting Machine Co. v. Reynolds*, 62 Neb. 892 (88 N. W. 130).

53. (1903.) A chattel mortgage which would be invalid as against creditors and

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purchasers in good faith by reason of defective description of the property mortgaged, may be good as between mortgagor and mortgagee, where the property in fact mortgaged is identified, but where no specific chattels are mortgaged, but there is an attempt to mortgage a certain number out of a mass without separating or identifying them, no lien upon upecific chattels is created in a case of the latter sort until they are separated or identified and it is agreed that the mortgage shall apply to them. *First Nat. Bank of Holdrege v. Johnson*, 68 Neb. 641 (94 N. W. 837).

54. (1904.) The mortgage involved in this action properly filed, *held* to be sufficient notice of the lien thereof under the facts disclosed, notwithstanding a mistake in the description of the premises where the property is situated. *Hayes v. First State Bank of Bertrand*, 5 Unof. 298 (98 N. W. 423).

55. (1906.) While a mortgage is void as to third persons for failure of description of the property, it is not void between the parties thereto. It gives to the mortgagee the right of selection, and, when he has exercised that right, the lien of the mortgage ataches and will prevail over all after acquired interests in the mortgaged property. *South Omaha Nat. Bank v. McGillin*, 77 Neb. 6 (108 N. W. 257).

56. (1906.) A chattel mortgage giving a lien on the mortgaged property as against the mortgagor is, nothwithstanding an imperfect description of the property covered thereby, good as against a subsequest purchaser or mortgagee who fails to show that he purchased in good faith and without notice of the mortgage. *South Omaha Nat. Bank v. Stewart*, 75 Neb. 716 (106 N. W. 969).

57. (1906.) It is only where the rights of innocent third parties have intervened that an incorrect or faulty description in a chattel mortgage can be taken advantage of, and, even as against innocent third parties, a faulty description is sufficient if the mortgage contains such description as would lead to the identification of the chattels intended to be mortgaged on reasonable inquiry. *South Omaha Nat. Bank v. Stewart*, 75 Neb. 716 (106 N. W. 969).

58. (1906.) A defective or incorrect description of property covered by a chattel mortgage is immaterial, so far as the parties to the mortgage are concerned, when it is admitted by the mortgagor that the property claimed by the mortgagee as included therein is the identical property intended to be mortgaged. *South Omaha Nat. Bank v. Stewart*, 75 Neb. 716 (106 N. W. 969).

——— Crops.

Crops subject to mortgage, see *ante*, §§ 5-10.

59. (1888.) Where a chattel mortgage was given by certain owners of an elevator upon "ten thousand bushels of ear corn, contained in cribs 1 and 2, situated south of the B. & M. R. R. side track, in the town of Crab Orchard, on right of way of said railroad company," and the proof was that there were three cribs without any designation as to numbers or the particular cribs included in the mortgage, the mortgage is too indefinite to entitle the mortgagee to recover corn placed in one of the cribs by a depositor. *Grimes v. Connell*, 23 Neb. 187 (36 N. W. 479).

60. (1899.) A description in a chattel mortgage, "50 acres of corn planted on the S. E. ¼ of sec. 17-1-8, being the N. 30 of the S. 80 acres and the south 20 of the N. 80 acres," accompanied by the further statement that the mortgaged property is in the possession of the mortgagor in N. county, and that any attempt on his part to remove the property from said county would be a sufficient reason for an immediate foreclosure, is sufficiently definite to impart constructive notice. *Chicago Lumber Co. v. Hunter*, 58 Neb. 328 (78 N. W. 619).

61. (1900.) 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 or capable of identification. *Wattle v. Cobb*, 60 Neb. 403 (83 N. W. 195; 83 Am. St. Rep. 537).

——— Animals.

62. (1881.) A description of the property as "Two mules, one bay and one brown, aged eight years old. One mare, bay, eight years old. One bay horse, age five years old. One black mare, age five years old. One lumber wagon. One double harness. Nine acres of growing wheat, situated on south-west quarter of sec. 35, town 12, range 6," is sufficiently definite. *Jordan v. Hamilton County Bank*, 11 Neb. 499 (9 N. W. 654).

63. (1885.) Where the property was described in a chattel mortgage as "one bay horse eight years old, weight about

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1,200," and it was stated in the mortgage that the mortgagor, who was a resident of the county, was "lawfully possessed of said goods and chattels," *held*, sufficient to put a purchaser on inquiry. *Peters v. Parsons*, 18 Neb. 191 (24 N. W. 687).

64. (1887.) Where the description in a chattel mortgage was "twenty-three head of horses and mules, * * * all situated on their range on the South Loup river. * * * Above described chattels are now in their (the mortgagor's) possession and are owned by them," the testimony showed the range in question to be situated in Buffalo county, where the mortgage was filed for record, and that the horses and mules were all those possessed by the mortgagor; *held*, a sufficient description. *Wiley v. Shars*, 21 Neb. 712 (33 N. W. 418).

65. (1887.) Where a chattel mortgage on steers is void because the property mortgaged cannot be identified, the fact that before the levy of an attachment, certain steers had been separated from the whole number and claimed under the mortgage, would be unavailing as against such attaching creditor, unless it was also shown that at the time the mortgage was executed there was an agreement that it should apply to such steers. *Price v. McComas*, 21 Neb. 195 (31 N. W. 511).

66. (1887.) A chattel mortgage on "ten head of two year old steers valued at thirty-five dollars per head—now in my possession, owned by me, and free from incumbrances," executed by one who owned ninety head of steers of that description, is invalid for uncertainty where the steers mortgaged were not separated from the others. *Price v. McComas*, 21 Neb. 195 (31 N. W. 511).

67. (1889.) A mortgage executed upon "two brown mules, one four years old, the other five; weighing about nine hundred pounds each" is superior to a mortgage executed on "one bay mule, four years old; one bay mule, five years old," by the same person in favor to one who had knowledge of the first mortgage. *Rawlins v. Kennard*, 26 Neb. 181 (41 N. W. 1004).

68. (1890.) The fact that a mortgage on a cow erroneously described her as three years old instead of two years old, cannot be taken advantage of by one claiming under a subsequent mortgage which contains the same erroneous description. *Lininger & Metcalf Co. v. Mills*, 29 Neb. 297 (45 N. W. 463).

69. (1890.) A chattel mortgage on "one white cow, three years old, now in my possession in Harlan county" in sufficiently definite where the mortgagor had only one white cow. *Lininger & Metcalf Co. v. Mills*, 29 Neb. 297 (45 N. W. 463).

70. (1890.) A description in a chattel mortgage, "95 head of steers one year old this spring, marked as follows: Right ear cropped and notch cut out of the under side of the left, being the said catle I have this day purchased of Welcome Mowry, being all the cattle I have now thus marked. Said cattle are to be kept in Seward Co., Neb., except during the herding season, in which they are to be kept in Butler Co, Nebraska," is sufficient. *Buck v. Davenport Savings Bank*, 29 Neb. 407 (45 N. W. 776; 26 Am. St. Rep. 392).

71. (1891.) Where cattle were described in a chattel mortgage as "forty head of steers, three years old next spring, being all steers of that age owned by us; sixty head of steers, two years old next spring, being all of that age we own except forty head; all of the above are branded with figure 4 on left hip and are kept on the Verges farm," etc., the descriptions are to be considered in conjunction by the jury, and not in the disjunctive, and an instruction which submits each part of the description as though it was the whole is erroneous. *Norfolk Nat. Bank v. Wood*, 33 Neb. 113 (49 N. W. 958).

72. (1901.) 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. *Battle Creek Valley Bank v. First Nat. Bank of Madison*, 62 Neb. 825 (88 N. W. 145; 56 L. R. A. 124).

73 (1901.) A mortgage of chattels, where the property is described as "twenty-five (25) cattle, consisting of ten cows, seven steers, and eight heifers. The above described chattels are now in my possession, are owned by me," etc., and the parties mortgaging the same had in their possession at the time a larger number of the same kind and description, and there is no separation, designation or means of identification by which those mortgaged could be distinguished from the remainder of the herd, is void for uncertainty. *Union State Bank v. Hutton*, 61 Neb. 571 (85 N. W. 535).

74. (1902.) A man owning a herd of

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two hundred cows and a hundred and forty-three calves, executed a mortgage containing the following description: "Two hundred (200) head of native cows, in ages from three to seven years; some branded L and others SH; also with one hundred head of above mortgaged cows are included in this mortgage one hundred head of their calves, which are to be branded SH. The above described chattels are now in my possession on," etc. *Held*, That this description was so indefinite as to be void as against subsequent purchasers of a part of the herd of calves, without actual notice of the instrument. *First Nat. Bank of Chadron v. Hughes*, 3 Unof. 823 (92 N. W. 986).

75. (1903.) Where mortgaged stock are described as being upon a certain farm owned by the mortgagor in the county of his residence, the mortgage is not void for uncertainty, if the description of the animals is not applicable to any others kept on such farm. *Goff v. Byers Bros. & Co.*, 70 Neb. 1 (96 N. W. 1037).

76. (1906.) A chattel mortgage on a specified number of cattle, describing them by age and brands, and reciting that "the above described stock are in my undisputed possession, free from all liens and incumbrances, and kept on my premises on section No. 4, township No. 5, range No. 38, Chase county, Nebraska," is not void on its face for uncertainty of description. *South Omaha Nat. Bank v. McGillin*, 77 Neb. 6 (108 N. W. 257).

77. (1906.) If it is made to appear that a chattel mortgage was in fact given on a specified number of cattle out of a larger number of the same kind and description, or, in other words, on a part only of a herd of cattle of the same kind and bearing the same description, it is void as to third persons, unless there has been a separation or a delivery of the cattle mortgaged to the mortgagee. *South Omaha Nat. Bank v. McGillin*, 77 Neb. 6 (108 N. W. 257).

Duress.

78. (1901.) Evidence examined, and *held* to be sufficient to warrant the finding of the jury that the mortgage under which plaintiff claimed possession of certain grain was obtained by compulsion and was without consideration. *Iowa Savings Bank v. Frink*, 1 Unof. 14 (92 N. W. 916).

Retention of possession by mortgagor.

79. (1886.) A chattel mortgage on a stock of goods, executed to secure a creditor possession and power to sell, in the usual course of business, in the mortgagor is valid as between the parties thereto. *Ahlman v. Meyer & Schurman*, 19 Neb. 63 (26 N. W. 584).

Ratification of mortgage.

80. (1889.) A party being charged with embezzlement executed a chattel mortgage to secure the debt, and retained possession of the mortgaged property for about a year and a half, when he delivered the possession thereof to the mortgagee. In an action of replevin thereafter brought by the mortgagor to regain possession of the property, *held*, on the facts proved, that he had ratified the mortgage. *Sanford v. Sornberger*, 26 Neb. 295 (41 N. W. 1102).

81. (1892.) Instructions as to ratification of alleged void chattel mortgage by surrender of possession, *held* to state the law correctly. *Sornberger v. Sanford*, 34 Neb. 498 (52 N. W. 368).

II. FILING, RECORDING AND REGISTRATION.

Necessity to refile, see *post*, §§ 219-221.

Necessity of filing as against creditors of mortgagor, see *Fraudulent Conveyances*, §§ 217-236.

Failure to record as affecting creditors, see *Fraudulent Conveyances*, §§ 210-236.

Necessity of as between parties.

82. (1883.) A bill of sale in the nature of a chattel mortgage is good as between the parties to it without being filed, as the statute directs. *Fitzgerald v. Andrews*, 15 Neb. 52 (17 N. W. 370).

83. (1891.) As between the parties to a chattel mortgage the lien thereby created continues so long as theer is a subsisting debt, which can be enforced in the courts. The filing or refiling of a chattel mortgage, as required by statute, is for the protection of creditors and *bona fide* purchasers without notice, and not for the purpose of continuing the lien as between the parties to the mortgage. *Sanford v. Munford*, 31 Neb. 792 (48 N. W. 876).

84. (1893.) The filing of the mortgage is not essential as between the parties thereto. *Bush v. Bank of Commerce*, 38 Neb. 403 (56 N. W. 989).

85. (1896.) A chattel mortgage is good between the parties thereto, and all others, except creditors of the mortgagor or subsequent purchasers and mortgagees in good faith, though not filed as required by stat-

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ute. *Fuller v. Brownell & Co.*, 48 Neb. 145 (67 N. W. 6).

86. (1897.) A chattel mortgage delivered by the mortgagor unconditionally to an unauthorized third person, by whom, under the direction of the mortgagor, it was filed for record and subsequently accepted by the mortgagee, takes effect, as between the mortgagor and mortgagee, from the time of the first delivery; but not so as to persons who have acquired title to, an interest in, or a lien upon, the property, before the actual acceptance by the mortgagee. *Rogers v. Heads Iron Foundry*, 51 Neb. 39 (70 N. W. 527; 37 L. R. A. 429).

87. (1901.) Where a mortgage of real property is intended by the parties thereto to convey also personal property situated and in use upon the realty, while such mortgage would create a charge thereon between the parties, it cannot be given effect as against execution creditors of the mortgagor unless the instrument is duly filed as a chattel mortgage. *Hillebrand v. Nelson*, 1 Unof. 783 (95 N. W. 1068).

Method and sufficiency of filing.

88. (1884.) The object of the statute in requiring a copy of a chattel mortgage to be filed with the county clerk is to give notice to third parties of the existence of the mortgage, its terms and conditions, the amount secured thereby, and all other material conditions of the contract. In these respects the copy filed must be a "true copy" of the original mortgage. When this is done the law is complied with. *Gillespie v. Brown & Ryan Bros.*, 16 Neb. 457 (20 N. W. 632).

89. (1884.) A chattel mortgage contained a provision that, if the mortgagor made default in any of the conditions of the mortgage, the mortgagee might take possession of the mortgaged property, and upon giving "5" day's notice sell it at public auction, or a sufficient amount thereof to pay the debt. The figure "5" was placed over the word "twenty" in the printed blank used, and "twenty" was erased. In the copy filed in the office of the county clerk, a similar printed blank being used, the word "twenty" was not erased nor was the figure "5" interlined, *held*, a substantial compliance with the statute. *Gillespie v. Brown & Ryan Bros.*, 16 Neb. 457 (20 N. W. 632).

Evidence of filing.

90. (1899.) The filing of a chattel mortgage is not proven by the introduction in evidence of a copy of the instrument, even though the fact of filing may have been indorsed thereon. *Drexel v. Murphy*, 59 Neb. 210 (80 N. W. 813).

91. (1904.) Evidence, inferential in its nature, examined, and *held* sufficient to show that the mortgagor was a resident of the county where the mortgage was filed. *Gosnell v. Webster*, 70 Neb. 705 (97 N. W. 1060).

III. CONSTRUCTION AND OPERATION.

A. Parties and Debts or Liabilities Secured.

Debt secured in general.

92. (1887.) Where a mortgage is given by one co-surety to another, to secure him against a contingent liability as surety, and there is a conflict of testimony as to the amount to be secured, the question is one of fact for the jury. *Sparks v. Wilson*, 22 Neb. 112 (34 N. W. 111).

93. (1898.) A chattel mortgage generally will be construed to secure the debt and not merely its evidence. Therefore, while the original debt remains, the mortgage will not be defeated by a change in its form. *Arlington Mill & Elevator Co. v. Yates*, 57 Neb. 286 (77 N. W. 677).

Advances by mortgagee to save property.

94. (1904.) Evidence in an action to satisfy certain alleged advancements made to save and harvest a crop of mortgaged hemp, *held* sufficient to sustain a finding that such advancements were made for the benefit of subsequent mortgagees and should be allowed. *Dickenson v. Columbus State Bank*, 71 Neb. 260 (98 N. W. 813).

B. Property Mortgaged, and Estates and Interests of Parties Therein.

Property included.

95. (1882.) A chattel mortgage on "One bay mare eleven years old, named Tony; one grey horse about nine years old, named Pet; one sorrel mare four years old, named Bet;—fifty head of hogs from six weeks to two years old,—all of said property being owned and kept by me on my farm near Fort Calhoun, in Washington county, Nebraska," does not cover a colt and some pigs born after the mortgage was executed. *Boggs v. Stanky*, 13 Neb. 400 (14 N. W. 392).

96. (1884.) The question as to what

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property is covered by the description in the mortgage, is one of law for the court. *Osborne v. McAllister*, 15 Neb. 428 (19 N. W. 510).

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97. (1884.) A mortgage on a "threshing machine" covers the horsepower by which the separator is propelled. *Osborne v. McAllister*, 15 Neb. 428 (19 N. W. 510)

98. (1890.) Where the mortgagors were permitted after the execution of the mortgage to sell goods in the same manner as if no mortgage had been given, and a considerable portion of the property on which the mortgage lien existed had been sold and replaced by other goods the mortgage does not cover the latter, since a mortgage on goods in this state is a specific lien which attaches to the goods mortgaged and not to goods in general. *Wedgewood v. Citizens Nat. Bank*, 29 Neb. 165 (45 N. W. 289).

99. (1893.) A mortgage upon a stock of merchandise, under a general description, attaches only to such merchandise as was in the stock when the mortgage was executed, and not to any afterwards purchased. *Rockford Watch Co. v. Manifold*, 36 Neb. 801 (55 N. W. 236).

100. (1894.) An instruction that "the chattel mortgage given in evidence, and the transfer or assignment of the note by the mortgagee, I. B. Hickok, to the plaintiff, would pass the legal title to the hay therein described to the plaintiff, if from the evidence in this case the jury believe that the witness N. L. Hughes, at the time of the execution of said mortgage, was the owner of said hay," is not open to the objection that it assumes that the hay in question was intended to be embraced in the mortgage. *Love v. Putnam*, 41 Neb. 86 (59 N. W. 691).

101. (1898.) The lien of a chattel mortgage on a stock of merchandise attaches to the articles in stock at the time the mortgage is executed, but generally does not attach to future additions to the stock. *Midland State Bank v. Kilpatrick-Koch Dry Goods Co.*, 54 Neb. 410 (74 N. W. 837).

102. (1902.) A mortgage upon a stock of merchandise under the general description attaches only to such merchandise as was in stock when the mortgage was executed, and not to stock afterwards added by purchase. *Godfrey & Sons Co. v. Citizens' Nat. Bank of Norfolk*, 64 Neb 477 (90 N. W. 239).

Parol proof to aid in construction.

103. (1899.) Where the description of property in a chattel mortgage is clear, and free from all ambiguity, parol proof is inadmissible to show the extent and meaning of language employed. *Drexel v. Murphy*, 59 Neb. 210 (80 N. W. 813).

Title and ownership of property.

104. (1876.) A mortgage of chattels transfers to the mortgagee the whole legal title to the thing mortgaged, subject only to be defeated by performance of the condition, but the mortgagor may redeem the property at any time before sale. *Adams v. Nebraska City Bank*, 4 Neb 370. [Overruled. 40 Neb. 892; 42 Neb. 229; 42 Neb. 607; 44 Neb. 165; 45 Neb. 771; 47 Neb. 256; 47 Neb. 319; 50 Neb. 885.]

105. (1889.) A chattel mortgage is a security in which the legal title to the property mortgaged passes to the mortgagee but in which the mortgagor retains a beneficial interest. *Gillilan v. Kendall*, 26 Neb. 82 (42 N. W. 281; 18 Am. St. Rep. 766).

106. (1894.) The mortgagee under a chattel mortgage acquires a lien only upon the property conveyed and not the legal title thereof. *Bedford v. Van Cott*, 42 Neb. 229 (60 N. W. 572).

107. (1894.) The legal title to property pledged by a chattel mortgage remains in the mortgagor until divested by foreclosure proceedings and sale in pursuance of the statute; and until the title of the mortgagor is thus divested, the mortgagee has merely a lien upon the property. *Musser v. King*, 40 Neb. 892 (59 N. W. 744; 42 Am. St. Rep. 700); (1894) *Randall v. Persons*, 42 Neb. 607 (60 N. W. 898); (1895) *Camp v. Pollock*, 45 Neb. 771 (64 N. W. 231); (1896) *Murray v. Loushman*, 47 Neb. 256 (66 N. W. 413); (1896) *Gould v. Armagost*, 46 Neb. 897 (65 N. W. 1064); (1897) *Robinson v. Kilpatrick-Koch Dry Goods Co.*, 50 Neb. 795 (70 N. W. 378); (1897) *Omaha Fire Ins. Co. v. Thompson*, 50 Neb. 580 (70 N. W. 30); (1898) *Drummond Carriage Co. v. Mills*, 54 Neb. 417 (74 N. W. 966; 69 Am. St. Rep, 719; 40 L. R. A. 761); (1902) *Union Stock Yards Nat. Bank v. Thurston County*, 65 Neb. 410 (92 N. W. 1022).

C. Lien and Priority.

Liens.

——— Creation in general.

108. (1892.) Where two persons buy a stallion giving two notes, signed by each in payment and one note is paid with

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money largely derived from the horse, and, with consent of the other, one partner mortgages the horse to secure a loan in order to pay the second note, the mortgagee has a lien upon the horse for the amount of his loan. *Clay v Greenwood*, 35 Neb. 736 (53 N. W. 659).

109. (1899.) A mortgagee of chattels who files the instrument before the rights or liens of third parties intervene is entitled to the property as against them. *Nat. Bank of Commerce v. Bryden*, 59 Neb. 75 (80 N. W. 276).

——— **Priority as to assignee.**

110. (1896.) The holder of an unrecorded chattel mortgage from the assignor has a right to the mortgaged property superior to that of the assignee, unless the case is one where the statute expressly confers upon the assignee the powers of the creditor. *Lancaster County Bank v. Gillilan*, 49 Neb. 165 (68 N. W. 352).

111. (1896.) The holder of an unrecorded chattel mortgage from the assignor has a right to the mortgaged property superior to that of the assignee, unless the case is one where the statute expressly confers upon the assignee the powers of a creditor. *Lancaster County Bank v. Gillilan*, 49 Neb. 165 (68 N. W. 352).

112. (1906.) If the mortgagee transfers the same to a third party, and afterwards takes the second mortgage on the same description of property, he takes his right of selection subject to the right so transferred to the first assignee. And if he afterwards assigns the second mortgage, such assignee will take no greater right than his assignor had. *South Omaha Nat. Bank v. McGillin*, 77 Neb. 6 (108 N. W. 257).

——— **Priority over lien for rent.**

113. (1889.) A chattel mortgage executed upon a crop of growing wheat, and without notice of a landlord's unrecorded lien for rent, is superior to such lien for rent. *Gandy v. Dewey*, 28 Neb. 175 (44 N. W. 106).

114. (1899.) A lease executed October 16, 1890, contained a provision that it should operate as a lien on all the personal property of the lessees at any time in or upon the demised premises, to secure payment of rent. The building leased was in process of erection for use as a hotel and was not completed until January, 1891. The furniture was ordered for the hotel after the lease had been made; and because of delays in finishing the building was not placed in the hotel until in December, 1890, and January, 1891. In January, 1895, there was rent unpaid, and the lessees' successors mortgaged the furniture to secure debts by them owing to other parties who were aware of the above noted provisions in the lease. *Held*, That the mortgagees were entitled to the first lien upon the furniture mortgaged. *New Lincoln Hotel Co. v. Shears*, 57 Neb. 478 (78 N. W. 25; 73 Am. St. Rep. 524; 43 L. R. A. 588).

115. (1873.) A mortgage of fixtures erected by a tenant has a prior equity over the lien of the landlord for unpaid rent or taxes. *Lamphere v. Lowe*, 3 Neb. 131.

——— **Priority over subsequent mortgagee.**

116. (1881.) Where a senior mortgagee of chattels, for the purpose of depriving of his security a junior mortgagee of a part of the same property, fraudulently releases that portion on which his mortgage is the exclusive lien, the same being adequate security, he will not be permitted, to the prejudice of the latter, to go upon the property covered by the second mortgage for payment of his demand. *Jordan v. Hamilton County Bank*, 11 Neb. 499 (9 N. W. 654).

117. (1897.) In a replevin suit by a first mortgagee against an attaching officer, to which the holder of a second mortgagee was not made a party, the holder of the third mortgage intervened and obtained a judgment to the effect that the surplus proceeds of the sale of the property, after the satisfaction of plaintiff's mortgage, be paid to the intervener. *Held*, Not binding on the holder of the second mortgage, who was entitled to a prior lien on such surplus. *Sarpy County State Bank v. Hinkle*, 53 Neb. 108 (73 N. W. 462).

118. (1904.) A verbal chattel mortgage, not coupled with possession by the mortgagee, will not take precedence over a subsequent written mortgage, taken without notice of the secret lien of the verbal mortgage. *Mueller v. Parcel*, 71 Neb. 795 (99 N. W. 684).

119. (1906.) When two mortgages are executed on parts of the same herd of cattle, the mortgagees have an equal right of selection, and the one first exercising that right is entitled to the possession of the cattle so selected by him to the exclusion of the rights of the other, if need be. *South*

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Omaha Nat. Bank v. McGillin, 77 Neb. 6 (108 N. W. 257).

——— Priority over attachment or execution creditors.

120. (1883.) A debt being past due, a mortgagee of property securing such debt is entitled to possession of the property as against an execution purchaser of the same. *Stuart v. Alexander*, 14 Neb. 37 (14 N. W. 655).

121. (1886.) After the mortgagee has reduced the goods to possession for the purpose of foreclosing the mortgage in conformity to its stipulations his lien will take precedence of those of creditors whose attachments or executions are thereafter levied, nothwithstanding the existence of a stipulation such as above referred to or the fact that it has been acted upon by the mortgagor. *Kay v. Noll*, 20 Neb. 380 (30 N. W. 269).

122. (1888.) A party who obtains machinery on which there is a valid chattel mortgage cannot divest the lien by attaching such machinery as a fixture in a roller mill. *Grand Island Banking Co. v. Frey*, 25 Neb. 66 (40 N. W. 599; 13 Am. St. Rep. 478).

123. (1893.) Mortgagee of chattels in entitled to hold same as against an officer holding a writ of attachment that runs against his mortgagor. *Hakanson v. Brodke*, 36 Neb. 42 (53 N. W. 1033).

124. (1904.) A properly filed chattel mortgage upon "growing hay" stipulating that it shall be cut and stacked, and that the mortgage shall cover the same in stacks, creates a lien upon the hay in stacks upon the premises where cut, superior to the lien of a levy under execution issued upon a judgment against the mortgagor made at a time when it was apparent the hay in the stacks was of the annual crop described in the mortgage. *Hayes v. First State Bank of Bertrand*, 5 Unof. 298 (98 N. W. 423).

——— Priority of lien for repair.

125. (1898.) One bestowing labor and skill on a chattel bailed to him for that purpose, thereby increasing its value, has a lien thereon superior to the lien of a prior chattel mortgage. *Drummond Carriage Co. v. Mills*, 54 Neb. 417 (74 N. W. 966; 69 Am. St. Rep. 719; 40 L. R. A. 761).

——— Priority over lien for keep of animals.

126. (1881.) A mortgage on a team of horses is superior to the lien of a livery stable keeper, who has not retained possession. *Marseilles Mfg. Co. v. Morgan*, 12 Neb. 66 (10 N. W. 462. [Overruled. *Bedford v. Van Cott*, 42 Neb. 229.]

127. (1887.) The act of the council and house of representatives of the late territory of Nebraska, entitled "An act to provide for liens upon live stock for their keeping," approved February 18, 1867, examined, and *held*, not to give a lien upon live stock for their keep superior to the lien of a previously executed, delivered, and recorded mortgage thereon. *State Bank of Nebraska v. Lowe*, 22 Neb. 68 (33 N. W. 482).

128. (1902.) Under the statute of this state, an agister's lien is inferior to that of a prior valid chattel mortgage, properly of record, but is superior to a mortgage executed after it has attached and while the property is in the possession of the agister. *Becker v. Brown*, 65 Neb. 264 (91 N. W. 178).

——— Lien for damages from trespassing animals.

129. (1887.) The lien of a taker-up of animals is not superior to a prior recorded chattel mortgage. *State Bank of Nebraska v. Lowe*, 22 Neb. 68 (33 N. W. 482).

130. (1903.) A mortagee of cattle can not, in a proceeding under the herd law, be bound by an award made without giving him a hearing or an opportunity to be heard. Notice to the owner of cattle in such a proceeding is not notice to the mortgagee. *Goff v. Byers Bros. & Co.*, 70 Neb. 1 (96 N. W. 1037).

——— Priority as to purchasers.

131. (1882.) If a creditor receives his pay in mortgaged property, with knowledge of the mortgage, he will take it subject to the mortgage. *Earle v. Burch*, 21 Neb. 702 (33 N. W. 254).

132. (1889.) The holder of an unrecorded contract for the sale of a vacant lot, erected a building thereon which she mortgaged to plaintiff. She afterwards executed mortgages on the lot to defendant who also assumed a mechanic's lien on the property. After the plaintiff foreclosed its mortgage and bought in the building, defendant instead of standing on its rights under its mortgages, took an assignment of the contract of sale, and perfected the purchase thereunder, taking also a quitclaim deed from the mortgagor. *Held*, that plaintiff acquired a prior title to the building. *Holt*

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County Bank v. Tootle, Livingston & Co., 25 Neb. 408 (41 N. W. 291).

133. (1889.) A purchased property under an assumed name from B who was unacquainted with him, and gave a mortgage for the price in such name. The purchaser stated that his residence was in Webster county, which was correct, and the mortgage was duly filed in the proper office in that county. Subsequent to the filing of the mortgage. A sold the property to C, under his true name, after C had examined the records for chattel mortgages executed by A, and finding none. In an action of replevin by B against C for the possession of the mortgaged property, it was *held* that B should recover judgment. *Alexander Bros. v. Graves*, 25 Neb. 453 (41 N. W. 290; 13 Am. St. Rep. 501).

134. (1889.) A chattel mortgage upon growing grain is not constructive notice to third parties of a mortgage on the same grain thereafter lawfully placed in crib or bin; and a dealer in grain who in good faith in open market purchases such grain from the mortgagor, and receives it at his warehouse, will take it free from the lien of the mortgage. *Gillilan v. Kendall*, 26 Neb. 82 (42 N. W. 281; 18 Am. St. Rep. 766).

135. (1892.) A purchaser who has actual notice of the claim of a third party in the property, purchases subject to such rights, although the mortgage under which the third party claims is not upon record. *Railsback, Mitchell & Co. v. Patton*, 34 Neb. 490 (52 N. W. 277. [Overruled. 39 Neb. 343; 2 Unof. 157.]

136. (1893.) One who purchases personal property with knowledge of a prior, unrecorded mortgage thereon, takes subject to the lien created by such mortgage. *Wagner v. Steffn*, 38 Neb. 392 (56 N. W. 993).

137. (1896.) A mortgagee of a conditional vendee in possession of chattels is not a purchaser within the meaning of section 26, chapter 32, Compiled Statutes, and the rights of the conditional vendor thereof are prior and paramount to the lien of such mortgagee under his mortgage. *McCormick Harvesting Machine Co. v. Callen*, 48 Neb. 849 (67 N. W. 863).

——Priority over vendor of property.

138. (1887.) A chattel mortgage, executed by the mortgagor in possession as owner, although the legal title was not to pass to him until the chattels were paid for, where such contract of conditional sale was not filed for record, will take precedence over the secret lien of the party claiming to be the real owner of the property. *Manning v. Cunningham*, 21 Neb. 288, (31 N. W. 933).

139. (1907.) The mortgagee of a conditional vendee of personal property is not a purchaser within the meaning of section 26, chapter 32, Compiled Statutes, 1907. and cannot by his mortgage acquire any rights superior to the conditional vendor, even if the contract of conditional sale is not filed as required by said section. *Racine-Sattley Co. v. Meinen*, 79 Neb. 33 (114 N. W. 602).

——Priority over tax lien.

140. (1895.) The lien of taxes is superior to the lien of a chattel mortgage executed after the tax list has been delivered to the county treasurer. *Reynolds v. Fisher*, 43 Neb. 172 (61 N. W. 695).

141. (1896.) The lien of taxes assessed on personalty is paramount to the lien of a chattel mortgage executed after the delivery of the tax list to the county treasurer. *Farmers Loan & Trust Co. v. Memminger*, 48 Neb. 17 (66 N. W. 1014).

142. (1900.) A lien for taxes upon the property of the tax debtor is inferior to that of a chattel mortgage lien antedating the time the tax lien attaches. *Chamberlain Banking House v. Woolsey*, 60 Neb. 516 (83 N. W. 729).

143. (1900.) Where a sheriff levies distress warrant for delinquent taxes for several years upon property of the tax debtor. upon which a valid chattel mortgage exists, the seizure and sale of the property is wrongful and unauthorized to the extent and for the years the mortgage lien is prior and superior to the lien for delinquent taxes. *Chamberlain Banking House v. Woolsey*, 60 Neb. 516 (83 N. W. 729).

144. (1902.) A lien for taxes upon the property of the tax debtor is inferior to that of a chattel mortgage lien antedating the time the tax lien attaches. *Blanchard. Shelley & Rogers v. Logan County*, 2 Unof 516 (89 N. W. 376).

145. (1902.) Where a sheriff levies distress warrants for delinquent taxes for several years upon property of the tax debtor upon which a valid chattel mortgage exists, the seizure and sale of the property is wrongful and unauthorized to the extent, and for the years, the mortgage lien

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is prior and superior to the lien for delinquent taxes. *Blanchard, Shelley & Rogers v. Logan County*, 2 Unof. 516 (89 N. W. 376).

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146. (1903.) While the lien of a tax upon personal property is inferior to a chattel mortgage given after the taxes were levied, but before the tax books came into the hands of the collector, such mortgage is inferior to the lien of taxes levied and assessed against the mortgagor, for subsequent years, upon the property mortgaged remaining in his possession. *Woolsey v. Chamberlain Banking House*, 70 Neb. 194 (97 N. W. 241).

147. (1907.) The lien of a chattel mortgage taken before the tax books were delivered to the treasurer is superior to the lien for taxes for that year, created by such delivery, under the provisions of section 139 of the revenue law of 1879 (laws 1879, p. 332) but inferior to the lien for subsequent years. *Platte Valley Milling Co. v. Malmsten*, 79 Neb. 730 (113 N. W. 229).

——— Waiver or abandonment of lien.

148. (1882.) Where the mortgagee is surety on an undertaking in replevin and takes the property under his mortgage and delivers it to the judgment creditor in replevin, he thereby surrenders his claim to the property under the mortgage. *Rich v. Savage*, 12 Neb. 413 (11 N. W. 863).

149. (1888.) Evidence held to sustain finding that the mortgagee had released the lien of the mortgage as against a purchaser and had accepted mortgage on other property in lieu thereof. *Littlejohn v. Pearson*, 23 Neb. 192 (36 N. W. 477).

150. (1893.) The delivery of mortgaged property to a stranger by a mortgagee is not an abandonment of the lien of the mortgage, in favor of a subsequent mortgagee. *Rogers v. Heads Iron Foundry*, 51 Neb. 39 (70 N. W. 527; 37 L. R. A. 429).

151. (1896.) The evidence examined, and *held* to sustain the finding of the district court, that the appellants had by their conduct estopped themselves from claiming or asserting a mortgage lien upon certain chattel property. *Brown v. Eno*, 48 Neb. 538 (67 N. W. 434).

152. (1899.) Where a mortgagee of chattels authorizes the mortgagor to sell the property described in the mortgage at private sale, and with the proceeds pay the mortgage debt, and the sale is accordingly made, the mortgagee has thereby waived his lien. *Drexel v. Murphy*, 59 Neb. 210 (80 N. W. 813).

153. (1903.) A mortgagee of chattels does not waive or lose his lien by causing an attachment to be levied upon the mortgaged property. *First National Bank of Holdrege v. Johnson*, 68 Neb. 641 (94 N. W. 837).

Mortgage as notice to subsequent mortgagees or purchasers.

See, also, *ante*, §§ 82-91.

154. (1889.) A mortgage upon a growing crop of corn is not notice to a dealer who purchases the same in open market after it is husked and placed in cribs or piles. *Gillilan v. Kendall*, 26 Neb. 82 (42 N. W. 281; 18 Am. St. Rep. 766).

155. (1893.) A mortgage upon growing corn is not constructive notice to a dealer in grain who, in good faith, in open market purchases such corn from the mortgagor after the same has been husked by the latter and placed in a pile or crib. But the rule does not prevail where the person who assisted in husking the corn afterwards becomes the purchaser, while it is yet in the same pile or crib, and receives it there, having at the time actual knowledge that it is the same corn he helped harvest. In such case the purchaser will take the corn subject to the lien of the mortgage. *Fines v. Bolin*, 36 Neb. 621 (54 N. W. 990).

156. (1899.) When standing corn covered by a chattel mortgage which is sold for future delivery is husked and delivered in execution of the contract, the purchaser is presumed to know that it is part of the crop covered by the mortgage. *Chicago Lumber Co. v. Hunter*, 58 Neb. 328 (78 N. W. 619).

157. (1899.) One who bargains for the future delivery of a quantity of corn to be taken from the stalk in a designated field is charged with notice of a then existing and duly recorded chattel mortgage in which such corn is described as a growing crop. *Chicago Lumber Co. v. Hunter*, 58 Neb. 328 (78 N. W. 619).

158. (1899.) Although the description in a chattel mortgage may be insufficient to impart notice to innocent third parties, such fact will not avail a purchaser from the mortgagor who was appraised of the lien on the property before he parted with the consideration. *Drexel v. Murphy*, 59 Neb. 210 (80 N. W. 813).

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Record as notice.

159. (1886.) Where a chattel mortgage is duly filed in the county where the mortgagor resides, and is constructive notice there, it will be constructive notice into whatever county the mortgagor may remove with the property. *Cool v. Roche*, 20 Neb. 550 (31 N. W. 367).

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160. (1888.) A chattel mortgage duly filed in the county where the mortgagor resides is constructive notice of the existence of such mortgage and will be constructive notice in any county to which the mortgagor may remove the property. *Grand Island Banking Co. v. Frey*, 25 Neb. 66 (40 N. W. 599; 13 Am. St. Rep. 478).

161. (1889.) The filing of a chattel mortgage on a building erected by the holder of an unrecorded contract of sale of the lot, is not notice thereof as against a subsequent mortgage of the lot executed by the same party. *Holt County Bank v. Tootle, Livingston & Co.*, 25 Neb. 408 (41 N. W. 291).

Failure to file evidence of fraud.

162. (1895.) The mere failure to record a mortgage raises no presumption that it is void. *Grand Island Banking Co. v. Costello*, 45 Neb. 119 (63 N. W. 376).

Failure of clerk to index.

163. (1881.) If a chattel mortgage be duly filed in the office of the county clerk, as required by section 73, chapter 43, Revised Statutes 1866 (Gen. Stats., ch. 25, sec. 14), as amended by the act of February 15, 1877, the mere failure of the clerk to properly index the same, as required by the next section, will not render it void as to a subsequent mortgagee without actual notice of its existence. *Jordan v. Hamilton County Bank*, 11 Neb. 499 (9 N. W. 654).

Action to establish liens.

——— Nature and jurisdiction.

164. (1901.) An action by a mortgagee to ascertain the priorities of liens, and to charge a junior incumbrancer as trustee of the proceeds of a foreclosure sale, and to apply such proceeds to the prior mortgage, in an action properly cognizable as a proceeding in equity. *Bank of Stockham v. Alter*, 61 Neb. 359 (85 N. W. 300).

——— Evidence.

165. (1891.) In an action to enjoin the transfer of a mortgage on stock in an abstracting company and to establish priority of liens thereon, evidence *held* to establish the prior equities of defendant. *Holyoke v. McMurtry*, 33 Neb. 548 (50 N. W. 767).

166. (1892.) A chattel mortgage was made October 18, 1888, and filed for record December 21, 1888, at 1:15 P. M. On December 18, 1888, the same mortgagor made a second mortgage on the same and other property to secure certain sureties who had signed his notes. This mortgage was filed for record five minutes after the first. In a contest between the mortgagees, it did not appear that the second mortgagees had paid any actual consideration therefor. *Held*, That to entitle them to priority it must be made to appear that but for the failure of the first mortgagee to file his mortgage for record they would not have become sureties for the mortgagor; that he was insolvent and that they would be compelled to pay the debt. *Patrick v. Paulson*, 34 Neb. 416 (51 N. W. 1029).

167. (1893.) The question in this case being merely whether or not two certain chattel mortgages covered property sold, and the evidence being insufficient to establish the identity claimed, the mortgagee's claim of a lien upon the property is denied. *First Nat. Bank of Mount Pleasant v. Davis*, 38 Neb. 238 (56 N. W. 975).

168. (1898.) A chattel mortgage remaining in possession of the mortgagor without actual delivery may create a valid lien where the parties intend it shall have that effect; but such intention will not be presumed, and a finding on conflicting evidence that no lien was created will not be disturbed. *Western Assurance Co. v. Kilpatrick*, 54 Neb. 241 (74 N. W. 592).

IV. RIGHTS AND LIABILITIES OF PARTIES.

Possession or control of property.

169. (1883.) Where a bill of sale or chattel mortgage conveys, in absolute terms, the entire interest of the seller, without reservation, the vendee or mortgagee may, without demand take possession of the property whenever he sees fit to do so. In such case the instrument itself is a continuing authority to him to do so, which he may exercise at his own pleasure. *Fitzgerald v. Andrews*, 15 Neb. 52 (17 N. W. 370).

170. (1890.) After a debt secured by a chattel mortgage becomes due, the mortgagee is entitled to the possession of the mortgaged property and may maintain an

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action to recover the same, but after a judgment in his favor for the possession, unless there is a special finding as to his interest, he is liable to account to the mortgagor, and if more has been received for the property than the amount of the debt, an action will lie to recover the same. *Lathrop v. Cheney*, 29 Neb. 454 (45 N. W. 617).

171. (1894.) A mortgage gives to the mortgagee no right of possession of the chattels mortgaged when the note thereby secured is wholly without consideration. *McGhee v. First Nat. Bank of Tobias*, 40 Neb. 92 (58 N. W. 537).

172. (1895.) There is no presumption that a mortgagee of chattels before condition broken has any right to the possession as against the mortgagor. *Camp v. Pollock*, 45 Neb. 771 (64 N. W. 231).

173. (1896.) The indorsement of notes secured by chattel mortgage, as collateral security for a debt of the mortgagee, passes the mortgage security to the indorsee of the notes, and such indorsee is, as against both mortgagor and mortgagee, entitled, on breach of condition, to the possession of the mortgaged property. *Houck v. Linn*, 48 Neb. 227 (66 N. W. 1103).

174. (1898.) A chattel mortgage made and filed for record in accordance with an agreement between the parties thereto that the mortgagor would give security of that kind, *prima facie* vested the mortgagee with the right of possession of the property mortgaged as against an officer levying on the said property in the interval of time between such filing and the mortgagee's acquisition of knowledge that such filing had actually taken place. *Rein v. Kendall*, 55 Neb. 583 (75 N. W. 1104).

Conversion by mortgagor.

175. (1897.) Where the mortgagor converts the chattels into cash and deposits the money with an agent having notice of the lien, the mortgagee may sue the agent for the proceeds of the property, and the fact that the former did not pursue and seize the chattels does not afford the agent a defense to the action. *Alter v. Bank of Stockham*, 53 Neb. 223 (73 N. W. 667).

176. (1896.) The measure of damages in an action by a mortgagee for the conversion of mortgaged chattels is the amount of the mortgage, not exceeding the value of the property. *Kasper v. Walla*, 49 Neb. 288 (68 N. W. 476).

Conversion by mortgagee.

177. (1891.) Where a mortgagee of chattels unlawfully seizes the mortgaged property before there has been any default in payment, and before any condition in the mortgage has been broken, the mortgagor may at once maintain replevin or sue for conversion, and such actions are barred after four years from the date of the unlawful seizure, rather than the date of the maturity of the note. *Brashier v. Tolleth*, 31 Neb. 622 (48 N. W. 398).

177*a*. (1898.) A mortgagee of chattels who is out of possession, and not entitled to possession by his mortgage, cannot maintain an action against a stranger for conversion. *Hill v. Campbell Commission Co.*, 54 Neb. 59 (74 N. W. 388).

178. (1892.) A mortgagee, after due notice, may sell a sufficient amount of the mortgaged property to satisfy the mortgage debt; but if he sell more than sufficient to satisfy the same and costs necessarily incurred, he will be liable for conversion of such excess. *Omaha Auction & Storage Co. v. Rogers*, 35 Neb. 61 (52 N. W. 826); *Skow v. Locke*, 72 Neb. 681 (101 N. W. 340).

179. (1892.) In an action by a chattel mortgagor against the mortgagee for conversion of the property, where the defendant justifies under a provision in the mortgage authorizing him to take immediate possession when he felt insecure, he may prove any facts tending to show the conduct of the mortgagors in regard to the chattels, but cannot prove mere rumors or reports. *Rector-Wilhelmy Co. v. Nissen*, 35 Neb. 716 (53 N. W. 670).

180. (1896.) The mortgagee's right to the use of chattels mortgaged is, in the absence of a special agreement, merely such as is incident to the foreclosure proceeding, and the breach of his obligation in that regard is an actionable wrong. *Murray v. Loushman*, 47 Neb. 256 (66 N. W. 413).

181. (1896.) In an action of conversion by a mortgagee against an officer who seized the chattels under a writ in favor of mortgagor's creditors, the measure of damages is the market value of the property when converted, with interest, deducting the market value of any property returned to, and received by, the mortgagee and the proceeds of any property of which he has received the benefit. *Coburn v. Watson*, 48 Neb. 257 (67 N. W. 171).

182. (1903.) Where the mortgagee by its

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terms provides for a seizure of the property if it or any part of it is disposed of or taken out of the county without the mortgagee's assent, a sale in the open market of a substantial part of the wheat covered by the mortgage, without the mortgagee's assent, and against his express prohibition, will entitle the mortgagee to recover possession of enough of the remainder to satisfy his claim. *Allen v. Cerny*, 68 Neb. 211 (94 N. W. 151).

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183. (1901.) A second mortgageeof chattels cannot recover damages in conversion against the first mortgagee in possession unless the value of the property at the time of the alleged conversion was greater than the amount due upon the first mortgage. *Dempster Mill Mfg. Co. v. Wright*, 1 Unof. 666 (95 N. W. 806).

183*a*. (1901.) In an action for the wrongful conversion of a threshing machine by a mortgagee who claimed foreclosure by reason of failure of payment, it being claimed an extension of time was given in consideration of assignment of threshing accounts, an instruction that if the accounts were not turned over to defendant as agreed releases him from the contract, properly refused. *Huber Mfg. Co. v. Gottchall*, 1 Unof. 548 (96 N. W. 611).

184. (1902.) Where a mortgage has been taken upon a running stock of goods, expressly describing them as "goods now in stock," a mortgagee who has seized the stock by replevin from mortgagor should be required to account to the latter's garnishing creditor for all goods actually seized, and which were not in the stock when mortgaged. *Tolerton, Stetson & Co. v. First Nat. Bank of Wayne*, 63 Neb. 674 (88 N. W. 865).

Conversion by third persons.

185. (1882.) Where mortgaged chattels have been wrongfully seized and sold at the suit of a creditor of the mortgagor, the mortgagee has a choice of remedies; he may either replevy them, or recover their value at the time of the conversion in an action for damages. *Peckinbaugh v. Quillin*, 12 Neb. 586 (12 N. W. 104).

186. (1898.) Evidence *held* insufficient to show that a sheriff's seizure of chattels under writs of attachment resulted in injury to the interest of a junior mortgagee. *Locke v. Shreck*, 54 Neb. 472 (74 N. W. 970).

187. (1902.) Mortgagees holding mortgages of various priority on the same goods, who are jointly in possession of them, may join in an action against the sheriff for depriving them of possession and converting the goods to his own use. *Trompen v. Yates*, 66 Neb. 525 (92 N. W. 647).

Sale of property by mortgagor.

188. (1900.) Where mortgaged property has been sold by the mortgagor without the knowledge or consent of the mortgagee, such mortgagee may either disavow the sale and retake the property or ratify it and recover the proceeds of the sale. *Burke v. First Nat. Bank*, 61 Neb. 20 (84 N W. 408; 87 Am. St. Rep. 447).

189. (1906.) The making of a written contract by a mortgagor of chattels in possession, providing for the sale and future disposition of the property, and providing for the payment or satisfaction of the mortgage indebtedness, is neither *malum in se* nor *malum prohibitum*. *Morris v. Persing*, 76 Neb. 80 (107 N. W. 218).

Rights under insecurity clause.

190. (1887.) A provision in a mortgage that the mortgagee may take possession of the property at any time he feels insecure, and advertise and sell the same, does not authorize him to apply the proceeds to the payment of a note not then due. *Loeb & Hirsch v. Milner*, 21 Neb. 392 (32 N. W. 205).

191. (1888.) Where the mortgage provides that the debt shall draw interest and the debt is to be paid at certain times named, and thereby there is an implied agreement that the mortgagor shall remain in possession of the property until there is a default in the payment of the money or some part thereof, a provision in the mortgage that, "If the mortgagee shall at any time feel unsafe or insecure he may seize and sell, as aforesaid, the property," will not authorize such mortgagee without cause to seize and sell such property before the debt becomes due. The words "feels unsafe and insecure" do not mean that he may exercise an arbitrary discretion in the premises, but the mortgagor must be about to do or has done some act which tends to impair the security of the mortgagee. *Newlean & Hoard v. Oleson*, 22 Neb. 717 (36 N. W. 155; 3 Am. St. Rep. 286).

192. (1890.) Where a mortgage is executed on buildings situated on leased land and an assignment of the lease is made to the mortgagee and a contract entered into by the parties, which provided that the

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mortgagee and assignee should take immediate possession of the premises, but when he has been paid in full to surrender possession to the mortgagors and to reassign the lease to them, and the mortgage also contained a provision that the mortgagee should collect all rents, issues, and profits to be credited upon the notes secured as fast as collected, save so much as is necessary for the payment of the ground rent, insurance and taxes, it is the duty of such mortgagee to apply the rents collected to the payment of the insurance, rent and taxes, and he cannot declare a forfeiture and sell the property under the mortgage before the first note becomes due. The mortgagee is also entitled to an accounting. *Edling v. Bradford*, 30 Neb. 593 (46 N. W. 836).

193. (1891.) The fact of a mortgagee's insecurity must be apparent to justify advertisement and sale of the property before the debt falls due. *Hull v. Godfrey*, 31 Neb. 204 (47 N. W. 850).

194. (1891.) Evidence *held* insufficient to justify mortgagee to seize a harvester under an insecurity clause. *Case Plow Co. v. Marr*, 33 Neb. 215 (49 N. W. 1119)

195. (1891.) Where a chattel mortgage provides that the debt shall draw interest and shall be paid at certain stated times, and thereby is an implied agreement that the mortgagor shall remain in possession of the property until there is a default in payment, a provision that "if the mortgagee shall at any time feel unsafe or insecure, he may seize and sell the property," will not authorize such mortgagee, without evident cause, to seize and sell such property before the debt becomes due. The words "feels unsafe and insecure" do not mean that he may exercise an arbitrary discretion in the premises, but the mortgagor must be about to do, or has done, some act which tends to impair the security. *Lichtenberger v. Johnson*, 32 Neb. 185 (49 N. W. 336).

196. (1896.) The right of a mortgagee under a clause authorizing him to take the chattels, when he feels insecure, cannot be exercised arbitrarily, but depends upon some act of mortgagor which tends to impair the security. *Brown v. Hogan*, 49 Neb. 746 (69 N. W. 100).

197. (1903.) The discretion conferred upon the mortgagee by a clause in a chattel mortgage, authorizing him to take possession of the mortgaged property whenever he may deem himself unsafe or insecure, is not to be exercised arbitrarily; such belief must rest on reasonable grounds. *Meyer v. Michaels*, 69 Neb. 138 (95 N. W. 63).

198. (1903.) The words "feels unsafe and insecure," in a chattel mortgage do not mean that the mortgagee may exercise an arbitrary discretion in the premises, but the mortgagor must be about to do or must have done some act which tends to impair the security of the mortgagee in order that the latter's right to take possession may become operative. *Allen v. Cerny*, 68 Neb 211 (94 N. W. 151).

199. (1903.) The facts that would warrant mortgagee to believe himself insecure so as to justify him in taking possession of the property must be such as did not exist, or of which the mortgagee was ignorant, at the time of taking the mortgage. *Meyer v. Michaels*, 69 Neb. 138 (95 N. W. 63).

Costs on usurious contract.

200. (1893.) Where, in an action by a mortgagee against the mortgagor to recover the mortgaged chattels, it is established that the mortgage was given to secure a usurious loan of money, the defendant is entitled to recover costs, although the verdict is in favor of the plaintiff. *Rodgers v. Graham*, 36 Neb. 730 (55 N. W. 243).

Action for possession.

201. (1886.) Under a chattel mortgage of a stock of goods, with possession and power to sell in the mortgagor, an instruction that if such possession and control was found to be given the mortgage was void, was properly refused. *Ahlman v. Meyer & Schurman*, 19 Neb. 63 (26 N. W. 584).

202. (1895.) A mortgagee of chattels cannot maintain a possessory action against a stranger unless as between mortgagor and mortgagee the latter has the right of possession. *Camp v. Pollock*, 45 Neb. 771 (64 N. W. 231).

203. (1898.) An officer who seizes mortgaged chattels on mesne or final process against the mortgagor is not liable in an action by the mortgagee if he does nothing to place the property beyond the reach of the mortgagee or to prevent him from taking possession of it when his right of possession accrues. *Locke v. Shreck*, 54 Neb. 472 (74 N. W. 970).

204. (1903.) An allegation of possession under a chattel mortgage, by agreement with the mortgagor, renders unnecessary

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any allegation of demand of payment of demand notes secured by the mortgage, in order to show the mortgagee's right of possession. *Taylor v. Harle-Haas Drug Co.*, 69 Neb. 546 (96 N. W. 182).

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Finding in action for possession as bar to subsequent action.

205. (1890.) Where mortgagee, after an alleged default in the payment of the debt, takes possession of the mortgaged property and afterwards, when an action of replevin is brought by the mortgagor, is adjudged to be entitled to the right of property and right of possession thereof, there being no finding as to his special interest under his mortgage, the judgment will not bar an action for an accounting for the proceeds of the property mortgaged. *Lathrop v. Cheney*, 29 Neb. 454 (45 N. W. 617).

Rights and liabilities of junior and senior mortgagee.

206. (1888.) A executed to B a chattel mortgage upon a horse, and other property, and before the maturity of the notes secured by the mortgage, executed to C a chattel mortgage on the same property, expressly stating in the mortgage that it was subject to the mortgage executed to B. Afterwards A and B sold the horse to D for its full value, and applied the proceeds of the sale to the partial payment of A's debt to B. Upon the horse being delivered to D under his purchase, C asserted his mortgage, and took possession of the property for the purpose of foreclosure, when B replevied it. *Held*, That the sale of the horse to D by A and B, being made in good faith and for the full value, effectually foreclosed the title of A, as well as that of C, and that as against A and C, B was entitled to the property. *Faeth v. Leary*, 23 Neb. 267 (36 N. W. 513).

207. (1890.) In an action by a senior mortgagee against a junior mortgagee for the conversion of two mares which it is alleged were described in the senior mortgage as one dark brown mare, age five years, weight about 1,200 pounds, of the value of $175, and one dark brown mare, right hind foot white, age five years, weight about 1,200 pounds, of the value of $175, and in the junior mortgage as one dark brown mare five years old called "Dolly," and one light brown mare four years old called "Pet," *held*, that the testimony showed that the mares were properly described in the senior mortgage and that such mortgage was duly filed for record; it was notice therefore to the junior mortgagee, of the existence of the lien of the senior mortgagee, and that the senior mortgagee had the superior right. *Shreck v. Spain*, 30 Neb. 887 (47 N. W. 419).

208. (1890.) In a controversy between holders of chattel mortgages, *held* to be no error in giving and refusing instructions set out in opinion. *Wood River Bank v. Kelley*, 29 Neb. 590 (46 N. W. 86)

209. (1892.) In an action by a second mortgagee against a first mortgagee based on an allegation that a private sale of the mortgaged goods by defendant was for an inadequate price, the instructions given and refused and rulings thereon approved. *Raymond Bros. & Co. v. Miller*, 34 Neb. 576 (52 N. W. 573).

210. (1895.) Where the original plaintiff had dismissed his appeal, leaving a controversy solely between defendants as to respective priorities of mortgages, the defendants having stipulated, in effect, that the mortgage to one of their number was first recorded and that in terms every other mortgage was made subject to this particular one, *held*, in the absence of facts pleaded and corresponding relief prayed entitling to other relief, that this court should not reverse the judgment of the district court recognizing and confirming the priority of the mortgage as stipulated in the mortgages specially made subject thereto. *Gilmore v. Silver*, 45 Neb. 632 (63 N. W. 923)

211. (1898.) A junior mortgagee has an interest in the mortgaged property which the law will protect in an appropriate action. *Locke v. Shreck*, 54 Neb. 472 (74 N. W. 970).

V. RIGHTS AND REMEDIES OF CREDITORS AND PURCHASERS.

See, also, *Fraudulent Conveyances.*

Persons entitled to attack mortgage.

212. (1895.) Where a bank takes a mortgage to secure a debt, a third person cannot attack the transaction or treat the mortgage as void on the ground that it is *ultra vires* of the bank to take such security. *Smith v. First Nat. Bank of Chadron*, 45 Neb. 444 (63 N. W. 796).

213. (1901.) An attachment creditor who has actual notice that certain property is covered by a chattel mortgage, can take no advantage of insufficiency or inaccuracy of description of the property in the mortgage. *Cohee v. First Nat. Bank of West Point*, 1 Unof. 321 (95 N. W. 610).

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Bona fide mortgagee.

214. (1882.) To be a mortgagee in good faith, one must be without actual notice of prior incumbrances. *Ransom v. Schmela*, 13 Neb. 73 (12 N. W. 926).

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215. (1896.) One who accepted from a joint owner a chattel mortgage upon a threshing-machine incumbered by an unrecorded purchase-money mortgage of which the former had no knowledge, *held* a mortgagee in good faith within the meaning of section 14, chapter 32, Compiled Statutes, providing that unrecorded chattel mortgages shall be void as against subsequent purchasers in good faith. *State Bank of Lushton v. Kelley Co.*, 47 Neb. 678 (66 N. W. 619).

216. (1896.) A mortgagee in good faith, within the meaning of section 14, chapter 32, Compiled Statutes, is one who takes his mortgage to secure a debt actually and justly owing to him, without notice, actual or constructive, of other existing claims against the mortgaged property. *State Bank of Lushton v. Kelley Co.*, 47 Neb. 678 (66 N. W. 619).

217. (1896.) Under section 14, chapter 32, Compiled Statutes, a mortgagee in good faith is one who takes a chattel mortgage to secure a debt actually and justly owing to him, whether pre-existing or not, without actual or constructive notice of prior equities against the mortgaged property. *State Bank of Lushton v. Kelley Co.*, 49 Neb. 242 (68 N. W. 481).

218. (1901.) When goods obtained by fraud have been mortgaged by the fraudulent vendee to secure a present indebtedness, to a mortgagee in good faith, without notice of such fraud, the latter stands in the position of an innocent purchaser *bona fide* of property from a fraudulent vendee, but to the extent of the mortgage debt only. *Kellogg Co. v. Horkey*, 61 Neb. 751 (86 N. W. 497).

Necessity of refiling.

See, also, *ante*, §§ 82-87.

219. (1882.) After the repeal of section 74, chapter 43, Revised Statutes, by the act "to amend sections seventy-three," etc., the refiling and recording of chattel mortgages was rendered unnecessary thereafter for the protection of the interests of mortgagees. *Ransom v. Schmela*, 13 Neb. 73 (12 N. W. 926).

220. (1882.) Failure to refile and record a chattel mortgage as required by chapter 43, page 74, Revised Statutes, cannot be taken advantage of by a subsequent mortgagee who had actual knowledge of the prior mortgage. *Ransom v. Schmela*, 12 Neb. 73 (12 N. W. 926).

221. (1898.) The statute, whereby a chattel mortgage ceases to be valid as against creditors or subsequent purchasers or mortgagees in good faith after the expiration of five years from the filing thereof, protects only creditors, purchasers, and mortgagees whose rights accrued after the five years. *Arlington Mill & Elevator Co. v. Yates*, 57 Neb. 286 (77 N. W. 677).

Bona fide purchasers.

222. (1886.) Where the mortgagee releases certain mules from the mortgage and accepts other stock in its stead, and such mules are sold at public auction, the evidence tending to show that the mortgagee had full notice of the sale and the property so sold; a purchaser in good faith is not subject to replevin of the same. *Bullis v. Drake*, 20 Neb. 167 (29 N. W. 292).

223. (1888.) A receipt of the mortgagor in favor of a purchaser from him, did not affect the rights of the mortgagee when the purchaser had notice of the mortgage. *Grand Island Banking Co. v. Frey*, 25 Neb. 66 (40 N. W. 599; 13 Am. St. Rep. 478).

224. (1893.) No one can acquire title to a mortgaged chattel as against the mortgagee thereof, no matter under what circumstances he may purchase the chattel, or what its description may be in the mortgage. *Iowa Savings Bank v. Dunning*, 37 Neb. 322 (55 N. W. 1079).

225. (1894.) It seems that a "subsequent purchaser in good faith," within the mean- of section 14, chapter 32, Compiled Statutes, 1893, is one who acquires title to mortgaged property by contract with the mortgagor or his vendee, after the execution of the mortgage and without notice thereof; and that a purchaser of such property at execution sale would take it discharged of the mortgage lien, irrespective of such purchaser's knowledge of the existence of such mortgage lien. *Farmers & Merchants Bank of York v. Anthony*, 39 Neb. 343 (57 N. W. 1029).

226. (1896.) A mortgagee of a conditional vendee in possession of chattels is not a purchaser within the meaning of section 26, chapter 32, Compiled Statutes. *Campbell Printing Press & Mfg. Co. v. Dyer*, 46 Neb. 830 (57 N. W. 904).

227. (1896.) Essential element of "good

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faith," is that the subsequent purchaser must have acquired the mortgaged chattels for a valid consideration, and without actual knowledge of the existence of the mortgage, or notice of such facts as would put an ordinarily prudent man on inquiry. *Sanford v. Jensen*, 49 Neb. 766 (69 N. W. 108).

228. (1901.) The doctrine of *caveat emptor* applies to the mortgagee of chattels or live stock. *Sweeney v. Rejto*, 1 Unof. 409 (95 N. W. 669).

229. (1901.) A mortgagee who has brought suit on his claim, attached goods and garnisheed debtors, and who, in consideration of the giving of the mortgage, dismisses his attachment and garnishment proceedings, and pays the costs, if not chargeable with notice, is a *bona fide* purchaser for value of the mortgaged goods as against the vendor of the goods who seeks to rescind the sale on account of fraud. *Large & Amsden Co. v. Nott & Son*, 1 Unof. 147 (95 N. W. 489).

Determining validity.

230. (1872.) In determining the *bona fides* of the mortgage, it is immaterial what the assignee of the mortgagee may have paid for it. *Pyle v. Warren*, 2 Neb. 241.

231. (1886.) Where there is no evidence of fraud in the execution of a mortgage it is error to submit to the jury for their special finding the question whether the mortgage of plaintiff is fraudulent and void as against the defendant. *Kay v. Noll*, 20 Neb. 380 (30 N. W. 269).

Title to property of void mortgage on death of mortgagor.

232. (1881.) When chattel mortgage is void, the property, on the death of the mortgagor, leaving an insolvent estate, becomes assets in hands of executor. *Becker v. Anderson*, 11 Neb. 493 (9 N. W. 640).

Private sale by mortgagee.

233. (1890.) Where a merchant in failing circumstances executes a mortgage to one of his creditors, and on the following day executes a second mortgage to another creditor, with knowledge of the first mortgagee, and after private sale by the first mortgagee of the goods other creditors garnishee the surplus in the hands of the mortgagee, who pays over the same, he is liable to the second mortgagee for the amount of such surplus. *Russell v. Lau*, 30 Neb. 805 (47 N. W. 193).

234. (1893.) A junior mortgagee of chattels, who agrees with the senior mortgagee and the mortgagor that the goods mortgaged may be sold and the proceeds applied to the payment of the mortgages in the order of their priority as disclosed by the records, cannot, after such sale and appropriation of the proceeds, maintain an action to avoid the senior mortgage for fraud in its inception without proof that the facts constituting the fraud were discovered after the agreement and sale. *Rockford Watch Co. v. Manifold*, 36 Neb. 801 (55 N. W. 236).

Subrogation of attaching creditor after payment of mortgage.

235. (1898.) An attaching creditor against whom a judgment for conversion has been recovered is rightfully subrogated to the mortgagees right to have the property subjected to the payment of the sum paid to satisfy the conversion judgment. *Aultman, Miller & Co. v. Bishop*, 53 Neb. 545 (74 N. W. 55).

Pleading.

236. (1882.) A subsequent mortgagee claiming as against a prior mortgagee who failed to refile his mortgage as required by statute, must allege and prove that he took without knowledge of the prior mortgage. *Ransom v. Schmela*, 13 Neb. 73 (12 N. W. 926).

VI. ASSIGNMENT OF MORTGAGE OR DEBT.

In general.

Indorsement of note as transfer of mortgage given to secure it, see *Bills and Notes*, § 170.

237. (1876.) Notes secured by mortgages were assigned to a national bank, and by it to plaintiff. *Held*, In an action of foreclosure, that the mortgages were not extinguished by the assignment to the bank, and were valid in the hands of the plaintiff, he being a *bona fide* purchaser. *Richards v. Kountze*, 4 Neb. 200.

238. (1886.) Where one executed a number of promissory notes secured by a chattel mortgage on certain furniture and the holder transferred a portion of the notes, either absolutely or as collateral security to another, the transfer of the notes was an assignment *pro tanto* of the mortgage. *Harman v. Barhydt*, 20 Neb. 625 (31 N. W. 488).

239. (1894.) The assignment and delivery of a note as collateral will carry the mortgage also; and the assignee may sue in his own name. *Kavanaugh v. Brodball*,

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40 Neb. 875 (59 N. W. 517; 25 L. R. A. 774).

240. (1905.) If an assignor of a chattel mortgage given to secure a promissory note which is past due at the time of the assignment has, prior thereto, become estopped by his own conduct from enforcing it against an innocent subsequent mortgage for value, his assignee is also estopped. *May v. First Nat. Bank of Mendota*, 74 Neb. 251 (104 N. W. 184).

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VII. REMOVAL OR TRANSFER OF PROPERTY BY MORTGAGOR.

A. Rights and Liabilities of Parties.

Right to convey and title acquired.

241. (1889.) The mortgagor of chattels, until foreclosure, possesses a beneficial interest in the property mortgaged, and will convey a good title by a sale of such property to one who purchases in the open market in good faith and without notice, actual or constructive, of the mortgage. *Gillilan v. Kendall*, 26 Neb. 82 (42 N. W. 281; 18 Am. St. Rep. 766).

Estoppel of mortgagee.

242. (1889.) If a mortgagee of chattels stands by and knowingly permits the goods to be sold to another, he will be estopped from afterwards asserting his title thereto. *Gillilan v. Kendall*, 26 Neb. 82 (42 N. W. 281; 18 Am. St. Rep. 766).

243. (1896.) A chattel mortgage is not avoided by the fact that subsequent to its execution the mortgagee consented to a sale of the property by the mortgagor for the benefit of both parties, no other liens existing and the sale not having been consummated. *Houck v. Linn*, 48 Neb. 227 (66 N. W. 1103).

Ratification of sale by mortgagee.

244. (1902.) A mortgagee of chattels will be held to have ratified an unauthorized sale of the mortgaged property by knowingly receiving and retaining the proceeds of such sale. *Ayres v. McConahey*, 65 Neb. 588 (91 N. W. 494).

245. (1904.) Where a mortgagor, without authority from the mortgagee, sold property covered by a chattel mortgage, and paid a debt to the mortgagee, other than the one secured by the mortgage, with a portion of the purchase money, which was received and credited by the mortgagee without knowledge of the fact that the money had been so obtained, the failure of the mortgagee to refund the money so received, upon learning the source from which it was derived after commencing an action against third parties to whom the mortgagor's vendee had sold the chattels, does not thereby ratify the sale and deprive himself of the right to recover possession of the chattels. *Gosnell v. Webster*, 70 Neb. 705 (97 N. W. 1060).

B. Criminal Responsibility.

Nature and elements of offense.

246. (1893.) To constitute the offense of selling mortgaged chattels, the sale must have been made during the existence of the mortgage lien without the consent of the owner and holder of the debt secured and the indictment must so charge. *State v. Hughes*, 38 Neb. 366 (56 N. W. 982).

247. (1895.) Under the statute, the gist of the offense for which punishment is therein prescribed is the fraudulent removal of mortgaged personal property out of the county with the intent to deprive the owner of the mortgage of his security. The mortgagor who fraudulently removes from the county any portion of the mortgaged chattels, during the existence of the lien or title created by the mortgage, is equally amenable to the provisions of the law as the mortgagor who so removes the entire property mortgaged. *Wilson v. State*, 43 Neb. 745 (62 N. W. 209).

Statutory provisions.

248. (1884.) That part of "An act to prevent the fraudulent transfer of personal property," approved February 13, 1877, which makes it criminal to remove mortgaged property out of the county within which such property was at the time of the execution of the mortgage, *held* unconstitutional, as not being expressed in the title of the act. *Ex parte Thomason*, 16 Neb. 238 (20 N. W. 312).

249. (1901.) The title of the act of the legislature of 1877 (Session Laws, 1877, p. 5), "to prevent the fraudulent transfer of personal property," with sufficient clearness indicates the subject of the proposed legislation, which is limited to transfers of mortgaged chattels. *State v. Heldenbrand*, 62 Neb. 136 (87 N. W. 25; 89 Am. St. Rep. 493).

250. (1901.) Section 9, chapter 12, Compiled Statutes, making it a crime to sell mortgaged chattels without "the written consent" of the mortgagee, is not violative of section 3, article I, of the constitution, which decrees that "no person shall be deprived of life, liberty or property, without

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due process of law." *State v. Heldenbrand*, 62 Neb. 136 (87 N. W. 25; 89 Am. St. Rep. 493).

Indictment and information.

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251. (1886.) In an indictment for selling mortgaged chattels it is not necessary to charge that the act was done with intent to defraud. *State v. Hurds*, 19 Neb. 316 (27 N. W. 139).

252. (1893.) In an indictment for selling or transferring mortgaged personal property, it is necessary to allege the name of the person or corporation to whom such sale or transfer was made. *State v. Hughes*, 38 Neb. 366 (56 N. W. 982).

253. (1893.) It is not sufficient in an indictment for selling mortgaged personal property to allege that the sale was made without the consent of the mortgagee, naming him. To constitute the offense the sale of the property must have been made by the mortgagor during the existence of the mortgage lien, without the written consent of the owner and holder of the debt secured by the mortgage, and the indictment must so charge. *State v. Hughes*, 38 Neb. 366 (56 N. W. 982).

254. (1895.) In the prosecution for the removal of mortgaged property contrary to the provisions of the statute the value of the property at the time of the removal need not be alleged in the information, nor proved upon the trial. *Wilson v. State*, 43 Neb. 745 (62 N. W. 209).

255. (1895.) Information under section 10, chapter 12, Compiled Statutes, charging the mortgagor with fraudulently removing mortgaged property, *held* sufficient. *Wilson v. State*, 43 Neb. 745 (62 N. W. 209).

256. (1895.) It is sufficient in an information for fraudulently removing mortgaged property from the county, to allege that the mortgaged property was fraudulently removed from the county where the same was situated at the time the mortgage was given thereon, with the intent to deprive the owner of said mortgage of his security, without averring that the owner of the mortgage was the owner of the debts thereby secured. *Wilson v. State*, 43 Neb. 745 (62 N. W. 209).

257. (1895.) In an information under section 10, chapter 12, Compiled Statutes, for fraudulently removing mortgaged property out of the county, it is unnecessary to aver that the mortgage was in writing. The allegation that the defendant "duly mortgaged and thereby conveyed" meets the requirements of said section. *Wilson v. State*, 43 Neb. 745 (62 N. W. 209).

258. (1895.) It is not necessary to set out in the information for fraudulently removing mortgaged property from the county the mortgage *in hæc verba*, nor to aver the amount of the indebtedness the mortgage was given to secure. *Wilson v. State*, 43 Neb. 745 (62 N. W. 209).

259. (1895.) An information for fraudulently removing mortgaged property from the county need not allege that the mortgage was given to secure a valid indebtedness. *Wilson v. State*, 43 Neb. 745 (62 N. W. 209).

VIII. PAYMENT, RELEASE, AND SATISFACTION.

Claim for penalty for failure to release, as ground for canceling, see *Cancelation of Instrument*, § 11.

New note as payment.

260. (1900.) Where on the sale of mortgaged property, the note and mortgage evidencing the prior indebtedness are retained by the creditor, and a new note and mortgage taken from the purchaser, for the amount due on the same indebtedness, the taking of such new note and mortgage will not effectuate payment of the prior indebtedness, unless there is an express agreement of the parties that such new note and mortgage were received in payment and satisfaction of such prior indebtedness. *Chamberlain Banking House v. Woolsey*, 60 Neb. 516 (83 N. W. 729).

261. (1900.) Where on a sale of mortgaged personal property, a new note and mortgage are executed by the purchaser, the note evidencing the original indebtedness being canceled and surrendered, the presumption of law is that the execution and delivery of the new note and mortgage is in payment and satisfaction of the prior indebtedness, and the burden is on the creditor to provce to the contrary. *Chamberlain Banking House v. Woolsey*, 60 Neb. 516 (83 N. W. 729).

262. (1901.) 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*, 62 Neb. 689 (87 N. W. 539).

263. (1905.) Where a mortgagee of chattels, part of the debt having been satisfied out of a portion of the property, took a new note and mortgage for a portion only

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of the balance due, on the entire remaining property, the mortgage reciting that the property was in the undisputed possession of the mortgagor and free from all liens and incumbrances, and assigned the same to an innocent purchaser, he is estopped to deny that the first mortgage was satisfied. *May v. First Nat. Bank of Mendota*, 74 Neb. 251 (104 N. W. 184).

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Tender after default.

264. (1881.) A mere tender of the amount secured by a chattel mortgage to the creditor on the day fixed for payment, although not accepted, nor kept good, has the effect to release the property from the lien of the mortgage. But if the tender be made after default of payment at the stipulated time, it must be kept good, or it will be entirely unavailing. *Thompkins v. Batie*, 11 Neb. 147 (7 N. W. 747; 38 Am. Rep. 361).

265. (1888.) An absolute tender of the amount due upon a promissory note secured by chattel mortgage—the tender being made the day after the debt is due, but kept good—will have the effect to divest the lien of the mortgage. *Knox v. Williams*, 24 Neb. 630 (39 N. W. 786; 8 Am. St. Rep. 220).

266. (1896.) An unconditional tender by a purchaser at execution sale of chattels of the entire debt secured by a chattel mortgage existing against said property, the debt being at the time of the tender due and the tender being kept good, divests the lien of the mortgage and entitles the purchaser to the possession of the property. *Gould v. Armagost*, 46 Neb. 897 (65 N. W. 1064).

Alteration affecting terms of payment.

267. (1888.) Notes accompanying a mortgage are evidence of the debt and times of payment; but a provision inserted in the mortgage without the mortgagor's knowledge or consent, changing the times of payment from that stated in the notes, was not binding on him. *Ward v. Watson*, 24 Neb. 592 (39 N. W. 615).

Modes of release.

268. (1895.) By section 15, chapter 32, Compiled Statutes, two modes are prescribed for discharging chattel mortgages, viz.: By an entry by the mortgagee, his agent or assignee, on the margin of the index, duly attested by the county clerk; and by the county clerk, when authorized so to do by a written order signed by the mortgagee and attested by a justice of the peace, or some officer having a seal. *Boyes v. Summers*, 46 Neb. 308 (64 N. W. 1066).

Order for release.

269. (1395.) An order to the county clerk to release a mortgage, is invalid, as a release, unless attested by the county clerk as provided for by section 15, chapter 37, Compiled Statutes. *Boyes v. Summers*, 46 Neb. 308 (64 N. W. 1066).

Evidence of release.

270. (1891.) Evidence *held* sufficient to show that a chattel mortgage had been released by a consent to a sale of the mortgaged property. *Sanford v. Munford*, 31 Neb. 792 (48 N. W. 876).

271. (1894.) The execution and filing of a release of a chattel mortgage is not conclusive evidence of the payment of the debt secured by such mortgage, in favor of the mortgagee of the property whose mortgage lien attached prior to the execution and filing of such release. *Waggoner v. First Nat. Bank of Creighton*, 43 Neb. 84 (61 N. W. 112).

Penalty for failure to enter satisfaction.

272. (1891.) Where a chattel mortgage is paid in full it is the duty of the mortgagee or his agent to release the same, acknowledge satisfaction of the debt in the proper office, and if such release is delayed for an unreasonable time, and damage thereby ensue to the mortgagor, he may recover the same by action, but only such damages can be recovered as naturally result from the wrong complained of. *Deering v. Miller*, 33 Neb. 654 (50 N. W. 1056).

273. (1891.) The statute which provides for a penalty in case the mortgagee, etc., delay releasing the mortgage for a certain number of days, is merely cumulative and will not prevent a recovery for actual damages. *Deering v. Miller*, 33 Neb. 654 (50 N. W. 1056).

274. (1891.) In an action to recover $50 for neglect of the agent of the mortgagee of a chattel mortgage to release the same the district court struck out all that part of of the petition relating to the penalty, and the action thereupon proceeded as a common law action for actual damages, the question of the validity of the statute not being before the court. *Held*. That the testimony failed to show any legitimate actual damages, and that a judgment for $50 could not be sustained. *Deering v. Miller*, 33 Neb. 654 (50 N. W. 1056).

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275. (1895.) Under section 15, chapter 32, Compiled Statutes, a mortgagee is liable for the damages therein specified for failure to satisfy of record a chattel mortgage within the period therein named, after demand and the payment of mortgage debt whether the mortgagee acted in good faith or not, or whatever may have been the motives of such mortgagee. A mere mistake or ignorance, without a corrupt intent, is no defense to such an action. *Boyes v. Summers*, 46 Neb. 308 (64 N. W. 1066).

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276. (1895.) The entry of satisfaction after the statutory period will not defeat an action to recover the penalty fixed by the statute (Compiled Statutes, ch. 32, sec. 15). *Clearwater Bank v. Kurkonski*, 45 Neb. 1 (63 N. W. 133).

277. (1895.) The provision of section 15, chapter 32, Compiled Statutes, making a mortgagee of chattels liable to the mortgagor for fifty dollars as damages for a failure to satisfy the mortgage, is not unconstitutional. *Clearwater Bank v. Kurkonski*, 45 Neb. 1 (63 N. W. 133).

278. (1902.) The penal provisions of section 15, chapter 32, Compiled Statutes, for failure to satisfy a chattel mortgage, have no application to the instruments enumerated in section 26 of said chapter. *McCormick Harvesting Machine Co. v. Mills*, 64 Neb. 166 (89 N. W. 621).

279. (1902.) Section 15, chapter 32, Compiled Statutes, entitled "Frauds," prior to its amendment in 1885, provided for the filing of chattel mortgages and for their release on performance of conditions. Such amendment, authorizing liquidated damages for refusal to release after conditions performed and demand made, was germane to the subject-matter contained in the original section, and does not violate section 11, article III of the constitution, prohibiting duplex legislation. *Van Duzer v. Mellinger*, 66 Neb. 508 (92 N. W. 738).

280. (1902.) A claim not reduced to judgment, for the statutory penalties for a failure to release paid chattel mortgages, does not furnish such a cross-demand as can be used for the basis of an equitable action to cancel another mortgage between the same parties which has not been paid. *Meredith v. Lyon & Healy*, 3 Unof. 485 (92 N. W. 122).

——— Demand for satisfaction before suit.

281. (1895.) A demand must be made upon the mortgagee or his assignee for the satisfaction of a mortgage, before an action can be maintained to recover the fixed sum named in section 15, chapter 32, Compiled Statutes. *Clearwater Bank v. Kurkonski*, 45 Neb. 1 (63 N. W. 133).

IX. FORECLOSURE.

Recovery of deficiency judgment on foreclosure of pledge, see *Pledges*, § 57.

Right to foreclose.

282. (1899.) Each of the persons secured by a chattel mortgage given to secure several debts, may enforce a separate foreclosure of his interest in the property, and may also maintain a separate action to recover from the wrongful taker thereof, the possession of such property. *Sloan v. Thomas Mfg. Co.*, 58 Neb. 713 (79 N. W. 728).

Option to foreclose.

283. (1891.) A mortgage contained a provision that in case of default in the payment of any interest for the space of three days, after the same becomes due and payable, the whole debt should, at the option of the mortgagee, become due and payable forthwith. *Held*, That the mortgagee, in case of a default in payment of interest for three days, may elect to declare the entire debt due, and bring an action to foreclose the mortgage. *Coad v. Home Cattle Co.*, 32 Neb. 761 (49 N. W. 757; 29 Am. St. Rep. 465).

284. (1891.) The bringing of a replevin action by a mortgagee to recover possession of the mortgaged property, is a sufficient notice to the mortgagor, of an election to declare the entire sum due, for a default in the payment of interest. *Coad v. Home Cattle Co.*, 32 Neb. 761 (49 N. W. 757; 29 Am. St. Rep. 465).

Right to foreclose before default.

285. (1891.) A clause in a chattel mortgage providing that the mortgagee may, at any time he feels insecure, treat the debt as due and take and sell the property, will not authorize the seizure and sale of the property unless the mortgagor is about to do, or has done, some act which tends to impair the security. *Case Plow Co. v. Marr*, 33 Neb. 215 (49 N. W. 1119).

286. (1892.) Where a mortgage is executed upon a stock of goods wherein the mortgage is authorized to take immediate possession of the goods when he felt insecure, the mortgagors must be in default or be about to do or have done some act which

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tends to impair the security, to authorize the mortgagee to take possession before the maturity of the notes. *Rector-Wilhelmy Co. v. Nissen*, 35 Neb 716 (53 N. W. 670).

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Delay or failure to foreclose.

287. (1896.) One who takes possession of mortgaged chattels in order to satisfy his lien thereon by means of notice and sale in the manner prescribed by law, does so with the implied obligation to proceed without unreasonable delay and with due regard for the rights of the mortgagor. *Murray v. Loushman*, 47 Neb. 256 (66 N. W. 413).

288. (1896.) A chattel mortgage is not avoided by the failure of the mortgagee to foreclose immediately upon default *Houck v. Linn*, 48 Neb. 227 (66 N. W. 1103).

Foreclosure of indemnity mortgage.

289. (1898.) An indemnity mortgage may not be foreclosed by the original mortgagee or an assignee after maturity until the damages have been suffered, against or for which the indemnity was sought to be provided. *Honaker v. Vesey*, 57 Neb. 413 (77 N. W. 1100).

Property in custody of court pending foreclosure.

290. (1903.) The pendency of an action for the foreclosure of an alleged chattel mortgage, in which a temporary injunction has been granted restraining the defendant from selling, consuming or disposing of the property in controversy during the pendency of the action, withdraws the property from pursuit, by general creditors of the alleged mortgagor, in another court by means of the ordinary procedure of a suit at law, judgment and execution. In such case the property is in the constructive custody of the law. *Ryan v. Donley*, 69 Neb. 623 (96 N. W. 231).

Mode of foreclosure.

291. (1887.) A sale by the mortgagee under the statute in which he fails to comply with any essential requirement of such statute will render him liable to the mortgagor for the damages which the latter may thereby sustain. *Loeb & Hirsch v. Milner*, 21 Neb. 392 (32 N. W. 205).

292. (1901.) 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. *Meeker v. Waldron*, 62 Neb 689 (87 N. W. 539); *Meeker v. Waldron*, 2 Unof. 867 (90 N. W. 755).

293. (1891.) A mortgagee of chattels must comply substantially with the requirements of the statute in foreclosing a chattel mortgage. If he fails so to do in an essential particular, and the property is sold for less than its value, the mortgagor is entitled to have the value of the property applied to the extinguishment of the debt, and if such value is greater than such debt, the mortgagee is liable to the mortgagor for the difference. *Coad v. Home Cattle Co.*, 32 Neb. 761 (49 N. W. 757; 29 Am. St. Rep. 465).

294. (1901.) The first mortgagee of chattels in possession who sells the chattels without substantially complying with the statute must account to subsequent lienholders for the value of the property sold. *Dempster Mill Mfg. Co. v. Wright*, 1 Unof. 666 (95 N. W. 806).

295. (1893.) Unsecured creditors of a mortgagor of chattels are entitled to have the mortgages foreclosed as required by law, and a sale otherwise than as the law provides, although in accordance with an agreement of the mortgagor and mortgagees, is no protection to those participating in the proceeds of the sale. They are liable to account to such creditors for the value of the goods, less the valid liens thereon. *Rockford Watch Co. v. Manifold*, 36 Neb. 801 (55 N. W. 236).

296. (1894.) If chattels seized by virtue of a mortgage are sold in a manner other than is provided by law, without the consent of the mortgagor, said mortgagor will be entitled to any damages caused by such illegal sale. *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123 (58 N. W. 734).

297. (1895.) Mortgaged chattels should be disposed of according to the stipulation of the mortgage and the provisions of the statute relating to the foreclosure of chattel mortgages. If the mortgagee does not do so, that, of itself, will not invalidate the lien of the mortgage. If he fails to sell the property, or if he disposes of the same in a mode contrary to the stipulation of the parties, or the requirements of the statute, the mortgagee must account for its value. *Chaffee v. Atlas Lumber Co.*, 43 Neb. 224 (61 N. W. 637; 47 Am. St. Rep. 753).

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298. (1896.) A mortgagee who fails to comply with the statutory requirements relating to foreclosure is liable to the mortgagor for the value of the property, less the mortgage lien. *Callen v. Rose*, 47 Neb. 638 (66 N. W. 639).

299. (1896.) Verdict for plaintiff in a suit for damages against a chattel mortgagee who failed to comply with the statute relating to foreclosure, *held* not excessive. *Callen v. Rose*, 47 Neb. 638 (66 N. W. 639).

300. (1902.) Where a mortgagee, in the foreclosure of his mortgage, fails to comply in an essential particular with the requirements of the statute, he will be liable to the mortgagor for any damage the latter may thereby sustain. *McCormick Harvesting Machine Co. v. Preitauer*, 3 Unof. 230 (91 N. W. 499).

301. (1903.) 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. *Monnich v. Schwartz*, 4 Unof. 811 (96 N. W. 636).

——— **Waiver of regularity.**

302. (1897.) The mortgagor of chattels waives the benefit of the statute by stipulating in the mortgage for the sale of the property by the mortgagee, "at public or private sale with or without, as the holder may deem best, an advertisement, and sale according to law, being hereby expressly waived." *Lexington Bank v. Wirges*, 52 Neb. 649 (72 N. W. 1049).

303. (1897.) Section 6, chapter 12, Compiled Statutes, prescribing the mode of conducting a chattel mortgage sale, was designed for the protection of the mortgagor, and he may waive his right thereunder to have the mortgaged property in view at the time of sale. *Lexington Bank v. Wirges*, 52 Neb. 649 (72 N. W. 1049).

304. (1901.) A mortgagor of chattels can waive the benefit of the provisions of the statute relating to foreclosures. *Marseilles Mfg. Co. v. Perry*, 62 Neb. 715 (87 N. W. 544).

Granting inspection before sale.

305. (1899.) It is the duty of a mortgagee of chattels, in selling under foreclosure, to give a reasonable opportunity to persons desiring to purchase to see the goods and to offer bids. Failing in this the mortgagor may hold him accountable for the sacrifice thereby resulting. *Langdon v. Wintersteen*, 58 Neb. 278 (78 N. W. 501).

Place of sale.

306. (1887.) Under the act of 1867, in foreclosing a chattel mortgage by a sale of the property, such sale is to take place in the county where the mortgage was first recorded, or in any county where the property may have been removed by consent of parties, and in which the mortgage was duly recorded. Under the act of 1879 the proper filing of a chattel mortgage takes the place of recording. But to authorize a sale under the statute where the property has been removed by consent of parties, into a county other than that where the mortgage was first filed, the mortgage must be duly filed in the county where the sale is to take place. *Loeb & Hirsch v. Miller*, 21 Neb. 392 (32 N. W. 205).

307. (1887.) A provision in the mortgage that the mortgaged property may be sold in a county other than that in which the mortgagor resides does not waive the statutory requirement that the mortgage is to be filed in the county where the sale is to take place. *Loeb & Hirsch v. Miller*, 21 Neb. 392 (32 N. W. 205).

308. (1888.) The mortgagee of chattels cannot withdraw the original instrument from the clerk's office, when filed, and proceed under the statutes to foreclose. *Ward v. Watson*, 24 Neb. 592 (39 N. W. 615).

309. (1889.) Where a chattel mortgage is duly filed, as required by section 2 of chapter 12 of the Compiled Statutes, a duly certified copy thereof would be sufficient authority under which the mortgagee could take possession of the property and foreclose the mortgage. In case such foreclosure were not resisted, not the authority of the mortgagee questioned, a certified copy would not be necessary, the original mortgage on file would be sufficient to justify the proceeding when collaterally attacked. *Hall v. Aitkin*, 25 Neb. 360 (41 N. W. 192).

310. (1894.) Mortgaged chattels may be sold under the mortgage in a county other than the one in which they were at the time of the execution of the mortgage, and were afterwards kept up to the time of seizure under same, when the mortgage by its terms provides that the sale may take place in such other county, if the mortgagee,

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prior to the sale, files or causes the mortgage to be filed in the county where the sale is made. *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123 (58 N. W. 734).

311. (1902.) Where a mortgagee takes mortgaged property to another county and there sells it without first filing his mortgage in such other county, the mortgagor may maintain an action against the mortgagee and recover the value of the property taken, less the amount of the debt due to the mortgagee. *McCormick Harvesting Machine Co. v. Preitauer*, 3 Unof. 230 (91 N. W. 499).

312. (1902.) By the provisions of section 6, chapter 12, Compiled Statutes, 1899, before mortgaged chattels can be sold in a county other than that in which the mortgage was originally filed, the mortgage must be filed in the office of the county clerk of the county where the property is to be sold. *McCormick Harvesting Machine Co. v. Prietauer*, 3 Unof. 230 (91 N. W. 499).

Accounting for surplus.

313. (1901.) 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 provisions 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. *Marseilles Mfg. Co. v. Perry*, 62 Neb. 715 (87 N. W. 544).

314. (1879.) A mortgagee of chattels on foreclosure, must sell the property as provided by law and any surplus over the amount of his claim should be paid to junior lien holders or the owner of property. *Aultman & Taylor Co. v. Steinan*, 8 Neb. 109.

315. (1882.) The mortgagee of chattels is not the holder of the legal title thereto and should be held to a strict account for the surplus. *Mathews v. Smith*, 13 Neb. 178 (12 N. W. 821).

Rights of purchaser.

316. (1897.) One who claims an interest in chattels by virtue of his bid therefor upon the foreclosure of a mortgage thereon by sale at public auction cannot be heard to question the regularity of a subsequent sale of the same chattels rendered necessary by his own refusal, by payment, to make good his bid. *Undeland v. Stanfield*, 53 Neb. 120 (73 N. W. 459).

317. (1896.) A purchaser of mortgaged chattels at execution sale is subrogated to the mortgagor's rights in the property at the time of the levy. *Gould v. Armagost*, 46 Neb. 897 (65 N. W. 1064).

318. (1896.) A tender by a purchaser of chattels at an execution sale of the amount of a chattel mortgage against the property, to be good and divest the lien of the mortgage, in addition to the amount of the mortgage debt, must include all reasonable and necessary expenses which have been incurred by the holder of the mortgage in taking possession of the mortgaged property and in enforcing his lien thereon. *Gould v. Armagost*, 46 Neb. 897 (65 N. W. 1064).

319. (1901.) Where the mortgagee of chattels is not in possession and his mortgage is not on file at the date of the levy, a purchaser at execution sale under a judgment against the mortgagor will take free of the mortgage though he had notice thereof prior to the sale. *Johns v. Kamarad*, 2 Unof. 157 (96 N. W. 118).

320. (1907.) A purchaser of personal property under mortgage sale, before the tax lien has attached, takes it free of all claims for the taxes. *Platte Valley Milling Co. v. Malmsten*, 79 Neb. 735 (116 N. W. 962).

Notice of sale or postponment.

321. (1891.) When a chattel mortgage sale is postponed, notice of such adjournment, in case a newspaper is published in the county where the sale is to take place, and the adjournment is for a sufficient length of time to permit, must be published in the paper in which the original notice of sale was given, and be continued therein in each issue of the paper until the day of sale. *Coad v. Home Cattle Co.*, 32 Neb. 761 (49 N. W. 757; 29 Am. St. Rep. 465).

322. (1886.) Mere certificate of an officer is not evidence of the service of a notice of sale. *Hale v. Wigton*, 20 Neb. 83 (29 N. W. 177).

Purchase by mortgagor's agent.

323. (1893.) An agent for the purpose of selling goods will not be permitted to sell to himself, even though the sale be public, and no actual fraud appear. In case he do so, he will be required to account to

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his principals for any profit he may have realized. *Rockford Watch Co. v. Manifold*, 36 Neb. 801 (55 N. W. 236).

Injunction to aid foreclosure.

324. (1903.) Where an injunction is necessary to a successful foreclosure of a chattel mortgage, it is error to refuse one. *Monnich v. Schwartz*, 4 Unof. 811 (96 N. W. 636).

Who may attack validity of sale.

325. (1886.) Mere absence from the place of sale will not estop the absent party from denying its legality. *Hale v. Wigton*, 20 Neb. 82 (29 N. W. 177).

Effect of irregularity.

326. (1899.) The lien is not divested, nor the mortgagee's right of possession impaired, by any mere irregularity in the manner of conducting the foreclosure sale. *Tackaberry & Co. v. Gilmore*, 57 Neb. 450 (78 N. W. 32).

Order of sale.

327. (1901.) Where the mortgagee of chattels receives notice of the rescission of a fraudulent sale to his mortgagor before the sale of property included in the mortgage, he must first sell the mortgaged goods not involved in such fraudulent sale. *Kellogg Co. v. Horkey*, 61 Neb. 751 (86 N. W. 497).

Disposition of proceeds of sale.

328. (1890.) A stipulation between a creditor of the mortgagor of chattels and the mortgagee, it being claimed that the mortgage was fraudulent as against creditors, whereby the proceeds from an advertised foreclosure sale should be deposited in a certain bank to be held pending the termination of the right of the parties, and further that any property bid in by the mortgage to be held by him in the same terms as the proceeds held by the bank, recognizes the right of the mortgagee to bid off property, and it was the amount of his bid for the property struck off to him that was to be held by him pending the termination of their rights. *South Omaha Nat. Bank v. Chase*, 30 Neb. 444 (46 N. W. 513).

329. (1904.) Advancements by a mortgagee made to harvest and market a crop of hemp, under an oral agreement with the owner and another mortgagee that they shall be repaid out of the proceeds of the crop before the mortgagees, warrant the application of the proceeds to such payment as against a subsequent mortgagee with notice, who is also the assignee with notice of the other mortgage. *Dickenson v. Columbus State Bank*, 71 Neb. 260 (98 N. W. 813).

——— Limitation of action for proceeds.

330. (1901.) Where, in an action to reach the proceeds of a sale of mortgaged property to apply on a mortgage note, the makers deny anything was due, the statute of limitations does not run during litigation, though the payee of the note had not declared thereon. *Bank of Stockham v. Alter*, 61 Neb. 359 (85 N. W. 300).

Demand for proceeds as affecting costs.

331. (1901.) A demand by a party claiming the proceeds of the sale of mortgaged property from another is unnecessary to affect the question of costs, where both parties claim a prior right. *Bank of Stockham v. Alter*, 61 Neb. 359 (85 N. W. 300).

Actions to foreclose.

——— Petition.

332. (1900.) A petition which calls for the foreclosure of a chattel mortgage and for a personal judgment in case of a deficiency states but one cause of action. *Richardson v. Opelt*, 60 Neb. 180 (82 N. W. 377).

——— Limitations.

333. (1898.) A chattel mortgage is not barred by the statute of limitations on the ground that the original evidence of the debt would be barred, where it has been kept alive by renewal notes. *Arlington Mill & Elevator Co. v. Yates*, 57 Neb. 286 (77 N. W. 677).

——— Finding and judgment.

334. (1893.) The findings and judgment in a case must be based upon the pleadings. A decree in an action between a mortgagor and certain mortgagees of chattels whereby a mortgage not attacked by the pleadings, and the holder whereof is not a party to the action, is declared void, is erroneous. *Rockford Watch Co. v. Manifold*, 36 Neb. 801 (55 N. W. 236).

Wrongful foreclosure.

335. (1892.) In an action to recover the value of household goods wrongfully sold under a chattel mortgage, executed on a usurious contract, the instructions given *held* to correctly state the law. *Omaha Auction & Storage Co. v. Rogers*, 35 Neb. 61 (52 N. W. 826).

Right to redeem.

336. (1881.) The mortgagor has the right to redeem at any time before sale of

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the property by paying the mortgage debt. *Tompkins v. Batie*, 11 Neb. 147 (7 N. W. 747; 38 Am. St. Rep. 361).

337. (1891.) A junior mortgagee has a legal right to redeem the prior mortgage, upon tender of the amount of the debt. *Hull v. Godfrey*, 31 Neb. 204 (47 N. W. 850).

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CHATTELS.

See *Property; Chattel Mortgages.*

Creating trust by parol, see *Trusts*, §§ 15, 16.

CHEAT.

See *False Pretenses; Fraud.*

CHECKS.

See *Banks and Banking*, §§ 158-169; *Bills and Notes.*

CHOSES IN ACTION.

See, also, *Property.*

Assignment of, see *Assignment*, § 10.

Conversion of, see *Trover and Conversion*, § 120.

CHURCHES.

See *Religious Societies.*

CIGARETTES.

1. (1905.) The act making it unlawful to give away cigarettes or cigarette paper is not unconstitutional as clearly expressing in the title the subject-matter of the act. *Alperson v Whalen*, 74 Neb. 680 (105 N. W. 474).

2. (1906.) The act of "rolling cigarettes" from one's own materials and for one's own use is so connected with the use as to be a part of such use, and this it was clearly not intended by the legislature to prohibit. *Dempsey v. Stout*, 76 Neb. 152 (107 N. W. 235).

3. (1906.) A complaint, which alleges that the defendant "having in his possession solely for his own use, as his own property, tobacco and a paper commonly known as cigarette paper, did place certain of said tobacco within said paper, and did proceed to roll the same into form as a cigarette, solely for his own use," does not charge the "manufacture" of cigarettes within the meaning of the statute. *Dempsey v Stout*, 76 Neb. 152 (107 N. W. 235)

CIRCUMSTANTIAL EVIDENCE.

Weight and effect in civil actions, see *Evidence*, §§ 646, 647.

Proof of conspiracy by, see *Conspiracy*, §§ 14, 15.

Weight and sufficiency of, in criminal prosecution, see *Criminal Law*, §§ 376-384.

Instructions as to, in criminal prosecutions, see *Criminal Law*, §§ 708-713.

CITIES.

See *Municipal Corporations.*

CITIZENS.

ANALYSIS.

Relation to state and city, §1.
Date of citizenship, § 2.
Nature of act admitting alien, § 3.
Who are citizens, §§ 4-10.

CROSS-REFERENCES.

See, also, *Aliens; Domicile; Indians.*

Residence of, as affecting jurisdiction of courts, see *Courts*, §§ 14-16.

Relation to state and city.

1. (1871.) The relations of a citizen to the state are different from that to a particular city. *Bradshaw v. City of Omaha*, 1 Neb. 16.

Date of citizenship.

2. (1891.) Where an alien is naturalized under the naturalization laws, his citizenship dates from the time the order of the court is made admitting him to citizenship, and does not relate back to the time he made his declaration of intention. *State ex rel. Thayer, v. Boyd*, 31 Neb. 682 (48 N. W. 739).

Nature of act admitting alien.

3. (1891.) The order of a court admitting an alien to citizenship is a judicial act, in the nature of a judgment. Such proceedings are required to be made a matter of record. The record must be pleaded and

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proved the same as any other judicial records. Naturalization cannot be established by parol. *State, ex rel. Thayer, v. Boyd*, 31 Neb. 682 (48 N. W. 739).

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Who are citizens.

4. (1891.) Under the fourth section of the act of congress, entitled "An act to establish an uniform rule of naturalization," approved April 14, 1802, the child of an alien, under twenty-one years of age, although born in a foreign country, becomes a citizen by the naturalization of his parent, if dwelling within the United States at the time the parent is admitted to citizenship; but it does not have that effect if he is over twenty-one years old at the time the parent is naturalized. *State, ex rel. Thayer, v. Boyd*, 31 Neb. 682 (48 N. W. 739).

5. (1891.) The fact that an alien has for many years voted at elections held in this state, and filled important public offices, does not establish the fact that he is a citizen of the United States. *State, ex rel. Thayer, v. Boyd*, 31 Neb. 682 (48 N. W. 739).

6. (1891.) The alien inhabitants of the territory of Nebraska at the time of its admission as a state, did not become citizens of the United States by virtue of the acts of congress admitting the state into the Union. *State, ex rel. Thayer, v. Boyd*, 31 Neb. 682 (48 N. W. 739).

7. (1891.) The words "citizens of the United States," as used in section 2 of article V of the state constitution, construed to mean a person who is an American citizen by birth, or a person of foreign birth who has been duly naturalized under the provisions of the uniform rule of naturalization established by congress. *State, ex rel. Thayer, v. Boyd*, 31 Neb. 682 (48 N. W. 739).

8. (1893.) The actual issuance or receipt by an Indian of a patent for lands allotted to him under the act is not necessary to constitute him a citizen of the United States. When he has accepted the land allotted, taken possession thereof and otherwise complied with the law, he becomes entitled to his patent and his citizenship attaches. *State, ex rel. Crawford, v. Norris*, 37 Neb. 299 (55 N. W. 1086).

9. (1893.) All Indians born within the territorial limits of the United States to whom allotments of land in severalty have been made under the provisions of the act of congress of February 8, 1887, law, or other law or treaty, and all Indians, born as aforesaid, who have voluntarily taken up their residence in the United States separate and apart from any tribe of Indians therein, and adopted the habits of civilized life, are made citizens of the United States, and such Indians residing in this state are citizens thereof. *State, ex rel. Crawford, v. Norris*, 37 Neb. 299 (55 N. W. 1086).

10. (1897.) Though a declaration of intention to become a citizen may constitute a resident alien an elector, this status does not extend to his son because the declaration was made before the son attained his majority. *Haywood v. Marshall*, 53 Neb. 220 (73 N. W. 449).

CIVIL LAW.

Applicability to water rights, see *Water and Watercourses*, § 12.

CIVIL RIGHTS.

CROSS-REFERENCES.

See, also, *Constitutional Law*.

Disabilities of convicts, see *Convicts*.

Right of cities to limit liberties of citizens, see *Municipal Corporations*, § 580.

1. (1872.) A colored man has the right to sit on a jury under the constitution of the state of Nebraska. *Brittle v. People*, 2 Neb. 198.

2. (1873.) The word "any other right," as used in the act of congress admitting Nebraska into the Union, are not limited to natural rights, but include the right of colored males to sit on the jury. *Brittle v. People*, 2 Neb. 198.

3. (1889.) "An act to provide that all citizens shall be entitled to the same civil rights and to punish all persons for violations of its provisions," Compiled Statutes, chapter 14*a*, is within the power of the legislature, and valid so far as it relates to citizens. *Meisinger v. State*, 25 Neb. 674 (41 N. W. 638).

4. (1889.) Barber shops cannot discriminate against a colored person and deny him any rights therein to which a white person would be entitled if requiring the services of a barber, except for reasons applicable alike to all persons. *Meisinger v. State*, 25 Neb. 674 (41 N. W. 638).

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5. (1889.) Where the act "to provide that all citizens shall be entitled to the same civil rights" etc., is broader than its title, that portion in excess of the title will be declared void; as where the title of the act relates to "all citizens," and the body to "all persons." In such case, in order to entitle a party to the benefits of the act, it must be alleged and proved that he is a citizen. *Meisinger v. State*, 25 Neb. 674 (41 N. W. 638).

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CLAIMS.

Particular claims, see specific topics.

See, also, *Homesteads; Insolvency.*

Against banks, see *Banks and Banking*, §§ 76-93b.

Against counties, see *Counties*, V.

Against estate, see *Executors and Administrators*, IV.

Of exemptions, see *Exemptions.*

Against cities, see *Municipal Corporations*, XII.

Allowance and payment by receiver, see *Receivers*, §§ 99-106.

Against state, see *States*, §§ 212-236.

CLASSIFICATION.

Of freight, see *Carriers*, §§ 49, 50.

Of cities, see *Municipal Corporations*, §§ 36-40.

CLERK OF COURTS.

ANALYSIS.

Appointment, election and tenure, §§ 1-4.
Additional bond required, §§ 5, 6.
Duties in general, §§ 7-9.
Liability for negligence, §§ 10-14.
Accounting for fees collected, §§ 15-19.
Liability on official bond, §§ 20-30.
Mandamus to compel performance of duty, §§ 31-33.
Custodian of funds and liability therefor, §§34-46.
Compensation and fees, §§ 47-53.
——— Clerk of supreme court, §§ 54-56.
Liability for taking excessive fees, § 57.
Action for penalty and recovery of illegal fees, §§ 58, 59.

CROSS-REFERENCES.

County clerks, see *Counties.*

Right to take acknowledgment, see *Acknowledgment*, §§ 14-21.

Liability of surety of district clerk for approving insufficient bond, see *Attachment*, § 44.

Right to take depositions, see *Depositions*, § 3.

Authority to settle bill of exceptions, see *Exceptions, Bill of*, §§ 187-202.

May take verification of criminal information, see *Indictment and Information*, §§ 34-36.

Appointment, election and tenure.

1. (1880.) Where a county clerk issued notice of an election of a clerk of the district court, as one of the officers to be elected, the person receiving the majority of the votes cast is not entitled to possession of the office, by means of *quo warranto*, where it appears that the last census the county had a population of only fifty-five hundred, but that the population has been constantly increasing since, without showing that the present population is over eight thousand. *State, ex rel. Welna, v. Steuffer*, 10 Neb. 506 (6 N. W. 604).

2. (1881.) Thee act approved March 1, 1879, authorizing an election of clerks of district courts in the year 1879, and every four years thereafter, in counties containing not less than eight thousand inhabitants, does not authorize an election of such clerks in other counties during the intervening years upon attaining that population. *State, ex rel. Newman, v. Stauffer*, 11 Neb. 173 (8 N. W. 432); *State, ex rel. Graybill, v. Whittemore*, 11 Neb. 175 (9 N. W. 93).

3. (1885.) A county having less than 8,000 inhabitants at the time a census was taken, but more than that number thirty days before a general election, is authorized to elect a clerk of the district court. *State, ex rel. McBride, v. Long*, 17 Neb. 502 (23 N. W. 337).

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3a. (1908.) Chapter 34, laws 1897, entitled "An act to authorize the county judge in counties where said judge has been previously authorized by the board of county commissioners to employ one or more clerks, to designate and appoint, in writing, one of said clerks to be the clerk of the county court, and prescribing the duties and compensation of the clerk of the county court," examined, and *held* not in conflict with section 11, article III of the constitution, providing that "no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." *Zimmerman v. Trude*, 80 Neb. 503 (114 N. W. 641).

4. (1887.) Under section 7, chapter 26, Compiled Statutes, providing that "In each county having a population of eight thousand inhabitants or more, there shall be elected in the year 1879, and every four years thereafter, a clerk of the district court in and for such county," and section 105, providing that "Appointments under the provisions of this chapter shall be in writing and continue until the next election at which the vacancy can be filled and until a successor is elected and qualified," etc., a vacancy in the office of clerk of the district court, occurring in 1886, may be filled by an election held subsequently in that year, it not being necessary to wait until a quadrennial year from 1879. *State, ex rel. Francl, v. Dodson*, 21 Neb. 218 (31 N. W. 788).

Additional bond required.

5. (1871.) The statute making county clerks *ex officio* clerks of the district court in their respective counties, does not require of them bonds in their character of court clerks, separate or additional to such as they give as county clerks. *People v. McCallum*, 1 Neb. 182.

6. (1871.) Failure of a county clerk to give an additional bond, where he is *ex-officio* clerk of the court, will not exclude him from the performance of his duties as such officer. *People v. McCallum*, 1 Neb. 182.

Duties in general.

Duties as to deposits in court, see *Deposits in Court*, §§ 2, 3.

7. (1891.) It is the duty of the clerk to make a complete record of a case as soon as it is finally determined unless it is waived by an agreement of both parties. *Colonial & U. S. Mortgage Co. v. Foutch*, 31 Neb. 282 (47 N. W. 929).

8. (1898.) Ordinarily, the clerk of one court has not the authority to authenticate transcripts of the records kept by another court. *Comstock v. Kerwin*, 57 Neb. 1 (77 N. W. 387).

9. (1900.) The non-performance of some condition in a decree for the specific execution of a contract of sale is no defense to an action against the clerk of the court for conversion of money paid to him in accordance with the requirements of the decree, if it be made to appear that the party for whose benefit the condtion was inserted has waived it. *Bantley v. Baker*, 61 Neb. 92 (84 N. W. 603).

Liability for negligence.

Liability for negligence in approval of stay bond, see *Execution*, §§ 116-118.

10. (1876.) The clerk of the district court is not liable for taking insufficient security, if he exercises a reasonable degree of care in the performance of his duty. *Brock v. Hopkins*, 5 Neb. 231.

11. (1876.) The clerk of a district court is a ministerial officer, and is liable for damages occasioned by his "negligently and carelessly" taking insufficient security. *Brock v. Hopkins*, 5 Neb. 231.

12. (1880.) In a petition to recover for damages occasioned by the neglect of the clerk of a district court to properly enter a transcript of judgment on the judgment record, so as to create a lien on real estate of the defendant, it is not necessary to allege that an execution has been issued on the judgment, and returned unsatisfied for want of property whereon to levy, but an allegation showing that the defendant owned no other property than that on which the lien was sought, and that owing to such neglect this has become lost to him, is sufficient. *Ryan v. State Bank*, 10 Neb. 524 (7 N. W. 276).

13. (1880.) To prove the neglect of the clerk of a district court to enter a transcript of judgment filed in his office on the judgment record so as to make the judgment a lien on real estate it is necessary to show that he was requested to do so. *Ryan v. State Bank*, 10 Neb. 524 (7 N. W. 276).

14. (1892.) Instructions in an action against a clerk of the district court and his sureties for the expense of replacing books of record destroyed by fire through negli-

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gence of the clerk, examined and approved. *Toncray v. Dodge County*, 33 Neb. 802 (51 N. W. 235).

Accounting for fees collected.

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15. (1882.) In counties containing less than 8,000 inhabitants county clerks are also clerks of the district courts of their respective counties. The duties being imposed upon them as county clerks, they must report the fees received by virtue of their office. *State, ex rel. County Commissioners, v. Whittemore*, 12 Neb. 252 (11 N. W. 310).

16. (1905.) The clerk of the district court is not required to account to the county for fees collected by him for services rendered by his predecessor before section 3, chapter 28, Compiled Statutes, as amended April 3, 1899, went into effect, although the act was in effect when such fees were collected. *Boettcher v. Lancaster County*, 74 Neb. 148 (103 N. W. 1075).

17. (1905.) Under act April 3, 1899, amending section 3, chapter 28, Compiled Statutes, a clerk of the district court is required to account for the fees earned by him as a member of the board of commissioners of insanity. *Boettcher v. Lancaster County*, 74 Neb. 148 (103 N. W. 1075).

18. (1905.) The clerk of the district court is not required to account to the county for fees collected by him for services rendered by his predecessor before section 3, chapter 28, Compiled Statutes, as amended April 3, 1899, went into effect, although the act was in effect when such fees were collected. *Boettcher v. Lancaster County*, 74 Neb. 148 (103 N. W. 1075).

19. (1905.) Under act April 3, 1899, amending section 3, chapter 28, Compiled Statutes, the clerk of the district court extends credit at his peril, and will be required to account for the fees earned by him for official services, whether the same are collected or not. *Boettcher v. Lancaster County*, 74 Neb. 148 (103 N. W. 1075).

Liability on official bond.

20. (1879.) The making of a false certificate that a sum of money has been allowed a county clerk, whereby he was enabled to sell the same, not being an official act or within his duties, his sureties are not liable to purchaser thereof. *Ottenstein v. Alpaugh*, 9 Neb. 237 (2 N. W. 219).

21. (1882.) The receipt of money by the clerk of a court of record upon a judgment in his office, whether paid voluntarily or made by the sheriff on execution, is an official act, and his failure to faithfully account for such money is a breach of his bond, for which his sureties are liable in an action upon it. *McDonald v. Atkins*, 13 Neb. 568, (14 N. W. 532).

22. (1892.) While the record of a district court is supposed to contain a history of the proceedings before that tribunal, and is under the conrtol of the judge, so far that it shall be a truthful statement of the proceedings, yet the ownership of the books themselves is in the county; and for any dereliction of official duty in the clerk of the court, by reason of which the county sustains pecuniary loss, the officer and sureties will be liable on his bond. *Toncray v. Dodge County*, 33 Neb. 802 (51 N. W. 235).

23. (1892.) A county may recover from a clerk of the district court and his sureties for expenses in reproducing records destroyed through the negligence of such clerk, though his bond runs to the people and not to the county. *Toncray v. Dodge County*, 33 Neb. 802 (51 N. W. 235).

24. (1895.) The sureties on the bond of a district clerk are not liable for the approval of an insufficient delivery on an attachment. *Dewey & Stone v. Kavanaugh*, 45 Neb. 233 (63 N. W. 396).

25. (1895.) The mere facts that the clerk of the district court, without authority, approved a delivery bond and directed the sheriff to release the attached property, in the absence of evidence of fraud or deceit practiced by the clerk, were not alone sufficient to render him liable to the plaintiffs in attachment for the loss sustained by reason of the clerk's approval of the bond and the release of the property by the sheriff in obedience to the order of the clerk. *Dewey & Stone v. Kavanaugh*, 45 Neb. 233 (63 N. W. 396).

26. (1903.) Where the sureties deny the execution and delivery of the official bond of the clerk of court and the clerk defends on the ground that he merely received the money as bailee, and not in his official capacity as clerk, a tender of part payment by him does not impair the defense of the sureties. *Craw v. Abrams*, 68 Neb. 553 (97 N. W. 296).

27. (1903.) The sheriff and the purchaser at a judicial sale disobey the statute making the sheriff the sole custodian of the proceeds of the sale, at their peril, but they cannot by such disobedience, and the

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payment of the money to the clerk of the court, impose obligations upon him, as such clerk, foreign to the duties of his office. *Craw v. Abrams*, 68 Neb. 546 (94 N. W. 639).

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28. (1905.) Before the act amendatory of section 3, chapter 28, Compiled Statutes, 1903, limiting the salary of clerks of the district court went into effect, a clerk had collected the fees for making complete records, but died before such records were made. At the request of his representatives, and after said act went into effect, his successor made up these records and received the fees therefor from such representatives. In an action by the county on the official bond of such successor, *held*, that he was properly chargeable with such fees. *Boettcher v. Lancaster County*, 74 Neb. 148 (103 N. W. 1075).

29. (1907.) In an action on the bond of a clerk of the district court for negligence in failing to index certain judgments, resulting in the loss of the lien thereof, defended on the ground that plaintiff had negligently failed to enforce his judgments against certain property of the judgment debtor, the instructions examined, and *held* not to be prejudicial to the plaintiff. *German Nat. Bank of Beatrice v. Laflin*, 78 Neb. 715 (111 N. W. 578).

30. (1907.) In an action on the bond of a clerk of the district court for negligence in failure to index certain judgments, resulting in a loss of the lien thereof, defended on the ground that plaintiff had negligently failed to enforce his judgment against certain property of the judgment debtor, the evidence examined and held to sustain a judgment for defendants. *German Nat. Bank of Beatrice v. Laflin*, 78 Neb. 715 (111 N. W. 578).

Mandamus to compel performance of duty.

31. (1890.) Section 889 of the code confers authority upon the district court to direct its clerk in the performance of his official duties, and the supreme court will not issue a mandamus to compel such clerk to issue an order of sale upon a decree of foreclosure, where there has been no application to and refusal by the district court to direct its clerk to issue such order of sale. *State, ex rel. Sloman, v. Moores*, 29 Neb. 122 (45 N. W. 278).

32. (1897.) The supreme court will not issue mandamus to compel the clerk of the district court to issue execution on a judgment when no application to, and a refusal by, the district court to so issue. *State, ex rel. Ogden, v. Frank*, 52 Neb. 553 (72 N. W. 857).

33. (1888.) Section 27, chapter 19, Compiled Statutes, 1887, makes it the duty of the clerk of the district court to keep a record of the proceedings of the court, under the direction of the judge of such court. The supreme court has no jurisdiction or authority to exercise the functions of the district court in the matter of the preparation of the records of said court, its jurisdiction, except in certain cases, being appellate and not original. *State, ex rel. Wilkins, v. Le Fevre*, 25 Neb. 223 (41 N. W. 184).

Custodian of funds and liability therefor.

34. (1893.) Where real estate has been sold under proceedings in partition and on the discharge of the referee he is ordered to turn over the proceeds in his possession to the clerk of the court for the benefit of the persons entitled thereto, the clerk holds such funds as a mere trustee and not strictly as clerk of the court, and it is his duty to deliver it to the persons entitled to it. *State, ex rel. Levy, v. Spicer*, 36 Neb. 469 (54 N. W. 849).

35. (1893.) On the facts stated in the petition, the defendant, a district clerk, held certain money and notes in controversy in trust, and it was his duty to pay and deliver the same to the parties entitled thereto. *State, ex rel. Levy, v. Spicer*, 36 Neb. 469 (54 N. W. 849).

36. (1893.) In an action to compel a clerk to pay over money in his hands, a demurrer overruled and five days given to answer. *State, ex rel. Levy, v. Spicer*, 36 Neb. 469 (54 N. W. 849).

37. (1897.) A clerk of the district court, as to moneys received by him in payment of fines and penalties imposed in his court, is a collector and custodian of public money within the meaning of section 2, article XIV of the constitution. *State, ex rel, Broatch, v. Moores*, 52 Neb. 770 (73 N. W. 299).

38. (1897.) An action in equity will not lie to subject to the payment of the claim of a judgment creditor money held by the clerk of a court in his official capacity. *Anheuser-Busch Brewing Ass'n v. Hier*, 52 Neb. 424 (72 N. W. 588).

39. (1898.) A clerk of the district court who, knowingly and intentionally deposits

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public money received in payment of fines imposed in his court, and his own private funds in a bank in one general account, to his own individual credit, and before paying the fines to the county treasurer withdraws all of the funds from the bank and uses the same for his own use, is properly held in default within the meaning of section 2, article XIV of the constitution, and is ineligible to any office of trust or profit during the existence of such default. *State, ex rel. Broatch, v. Moores*, 56 Neb. 1 (76 N. W. 530).

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40. (1893.) The clerk of the court is the proper custodian of money paid into court pursuant to an order or judgment of the court. *Dirks v. Juel*, 59 Neb. 353 (80 N. W. 1045).

41. (1899.) Bringing money into court is the act of depositing money in the hands of the proper officer of the court for the purpose of satisfying a debt or duty. *Dirks v. Juel*, 59 Neb. 353 (80 N. W. 1045).

42. (1899.) Where, by his answer, defendant concedes that he received and receipted for certain money as clerk of the district court, and has paid a portion of it to his successor in office, he is still presumed to retain the balance *in custodia legis*, notwithstanding the fact that he may actually have paid it out on an ineffectual garnishment. *Baker v. Peterson*, 57 Neb. 375 (77 N. W. 774).

43. (1900.) Money paid to the clerk under an order of the court is received by him in his official capacity. *Bantley v. Baker*, 61 Neb. 92 (84 N. W. 603).

44. (1900.) Where, in an action for specific performance, the decree provides that notes evidencing part of the purchase price shall be deposited with the clerk of the court pending the execution of a deed by the vendor, such clerk is neither charged with the duty, nor given the right, to collect or receive in his official capacity the money due upon the notes. *Bantley v. Baker*, 61 Neb. 92 (84 N. W. 603).

45. (1901.) Where the clerk of a state court for a certain county has possession of the records of the territorial court for the same county, both courts being of the same description, it will be presumed his possession was rightful. *McPherson v. Commercial Nat. Bank*, 61 Neb. 695 (85 N. W. 895).

46. (1904.) When the clerk of the district court pays money in his hands belonging to A, over to B, as attorney for C, and B pays the same, less his fee, to C, they are all three liable to A therefor regardless of whether their act was the result of intention, or ignorance of the law. *Story v. Robertson*, 5 Unof. 404 (98 N. W. 825).

Compensation and fees.

47. (1880.) Whether the language of the statute includes anything more than clerk's fees for transcript of the record of the case, *quære*. *Stanton County v. Madison County*, 10 Neb. 304 (4 N. W. 1055).

48. (1882.) The act to regulate fees, approved February 15, 1877, is not an amendment of sections 1, 5, 8, and 14, chapter 19, Revised Statutes 1866, but an original act. *State, ex rel. County Commissioners, v. Whittemore*, 12 Neb. 252 (11 N. W. 310).

49. (1900.) Act of 1899 (Laws 1899, ch. 31) amending section 3, chapter 28, Compiled Statutes, entitled "Fees," does not intrench upon or amend section 43, chapter 19, Compiled Statutes, 1899, respecting the appointment of deputies by clerks of the district court. *State, ex rel. Douglas County, v. Frank*, 60 Neb. 327 (83 N. W. 74).

50. (1900.) The act of 1899 (Session Laws, ch. 31) amending section 3, chapter 28, Compiled Statutes, 1897, entitled "Fees," limits the compensation which the clerk of the district court may receive for his services, is germane to the section amended, and its provisions are within its title. *State, ex rel. Douglas County, v. Frank*, 60 Neb. 327 (83 N. W. 74).

51. (1901.) Chapter 31, Session Laws, 1899, amending section 3, chapter 28, Compiled Statutes, 1897, is germane to the section amended, and its provisions are within its title. *State, ex rel. Douglas County, v. Frank*, 61 Neb. 679 (85 N. W. 956).

52. (1903.) Under the authority of chapter 34 of the laws of 1897, the county board may, in the exercise of good faith, make a supplemental allowance of compensation for the services of the clerk of the county court after the services have been rendered. *County of Adams v. Bowen*, 69 Neb. 405 (95 N. W. 869).

53. (1905.) The clerk of the district court cannot be required to search the records of his office to ascertain what liens, if any, exist against lands described in an abstract of title, and make and enter upon the abstract a compilation and statement of the result of such search. If he performs such service, he is entitled to reasonable

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compensation for making such statement and entering it upon the abstract. He is not entitled to a fee for making a search of his records necessary to the performance of another service "to which a fee is attached." *Sheibley v. Hurley*, 74 Neb. 31 (103 N. W. 1082).

——— Clerk of supreme court.

54. (1884.) The salary of the clerk of the supreme court is exclusive of the modes of compensation for preparing the state reports for publication. *In re Brown*, 15 Neb. 688 (50 N. W. 273).

55. (1884.) Under the provisions of section 19, laws 1879, p. 82, in connection with section 8, article VI of the constitution, the reporter of the supreme court is only entitled to draw from the state treasury the cost of printing, stereotyping, and binding each volume of reports not exceeding $2.25 per volume. Expenses incurred by the reporter in preparing copy, reading proof, and packing and shipping are not properly chargeable against the appropriation made by the legislature for payment of said volumes. The salary paid to the reporter is exclusive of any and all other modes of compensation for work on the reports. *In re Brown*, 15 Neb. 688 (50 N. W. 273).

56. (1902.) The appropriation for the salary of the reporter and ex-officio clerk and librarian of the supreme court is made by section 25, article XVI, of the constitution, and requires no special legislative enactment. *Weston v. Herdman*, 64 Neb. 24 (89 N. W. 384).

Liability for taking excessive fees.

57. (1891.) Where a clerk of the district court takes fees, is excess of that limited by law, he is liable to the party injured for the penalty provided by section 34, chapter 28, Compiled Statutes. *Lydick v. Palmquist*, 31 Neb. 300 (47 N. W. 918).

Action for penalty and recovery of illegal fees.

58. (1889.) In an action to recover the penalty for taking illegal fees for making out and certifying to certain transcripts of judgments the testimony tended to show that eight of the transcripts were demanded at one time, and were received together and paid for in one sum, although separately itemized in the bill, an instruction which in effect directed the jury to find that there were eight separate causes of action was properly refused. *Phœnix Ins. Co. v. Bohman*, 28 Neb. 251 (44 N. W. 111).

59. (1891.) Receipt by a public officer of several items of illegal fees from the same person, in the same transaction, gives but one cause of action for the penalty provided by section 34, chapter 28, Compiled Statutes. *Lydick v. Palmquist*, 31 Neb. 300 (47 N. W. 918).

CLOUD ON TITLE.

See *Quieting Title.*

CLUBS.

See *Associations.*

CODE.

See *Statutes*, §§ 255-258, 372, 373.

CODICIL.

See *Wills.*

COHABITATION.

See *Adultery; Bigamy; Fornication; Husband and Wife; Marriage.*

COLLATERAL ATTACK.

On particular orders or proceedings, see specific topics.

On discharge in bankruptcy, see *Bankruptcy*, §§ 59, 60.

On organization of corporation, see *Corporations*, §§ 30-34.

On decree in divorce, see *Divorce*, § 114.

On bill of exceptions, see *Exceptions, Bill of*, §§ 223-228.

Appointment of administrator, see *Executors and Administrators*, §§ 34-39.

On petition for appointment of administrator, see *Executors and Administrators*, § 23.

On sale of realty of estates, see *Executors and Administrators*, §§ 213-215, 246-248.

On removal of administrator, see *Executors and Administrators*, § 40.

Allowance of claim against estates, see *Executors and Administrators*, § 142.

On void liquor license, see *Garnishment*, § 21.

On order to pay over money in garnishment, see *Garnishment*, § 114.

On license to sell liquor, see *Intoxicating Liquors*, § 119.

On judgments, see *Judgment*, XI.

On appraisement on judicial sale, see *Judicial Sales*, § 95.

Confirmation of judicial sale, see *Judicial Sales*, §§ 428-430.

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Setting aside judicial sale, see *Judicial Sales*, §§ 478, 479.

On existence of city, see *Municipal Corporations*, §§ 27-29.

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Of annexation of territory to city, see *Municipal Corporations*, §§ 59, 60.

On act of board of equalization in assessment, see *Municipal Corporations*, § 533.

On receivers' sale, see *Receivers*, § 98.

On order of county board establishing irrigation district, see *Water and Watercourses*, § 212.

On probate of will, see *Wills*, §§ 173-175.

COLLECTIONS.

By assignee for creditors, see *Assignments for Benefit of Creditors*, §§ 100-102.

By banks, see *Banks and Banking*, §§ 218-255.

Of assets of insolvent, see *Insolvency*.

By agent for principal, see *Principal and Agent*, §§ 128-141.

Of taxes, see *Taxation*, VIII.

COLLEGES AND UNIVERSITIES.

ANALYSIS.

Nature and status of organization, §§ 1-5.
Officers, §§ 6-8.
Salaries, §§ 9-11.
Custody and control of funds, §§ 12-18.
Appropriating funds to, §§ 19, 20.
Actions, §§ 21-24.

CROSS-REFERENCE.

See, also, *Corporations; Schools and School Districts.*

Nature and status of organization.

1. (1877.) The corporate body known as "The Regents of the University of Nebraska," is, in its strictest sense, a public corporation. *Regents of the University v. McConnell*, 5 Neb. 423.

2. (1877.) The creation of the University of Nebraska, as a public corporation by legislative authority, is not repugnant to the constitution. *Regents of the University v. McConnell*, 5 Neb. 423.

3. (1877.) The University of Nebraska corporation is but part of the machinery employed in carrying on the affairs of state, and is subject to be changed, modified, restrained or destroyed as the general interests and public exigencies may require. *Regents of the University v. McConnell*, 5 Neb. 423.

4. (1903.) The State University of Nebraska is a state institution, and its board of regents is an agent of the state. *Von Forel v. State, ex rel. Ansley*, 4 Unof. 843 (96 N. W. 648).

5. (1903.) The fact that an educational institution may acquire and convey property necessary to the accomplishment of its object, and may charge tuition for instruction, does not render it an incorporation for the pecuniary benefit of its members. *McLeod v. Lincoln Medical College*, 69 Neb. 550 (96 N. W. 265).

Officers.

6. (1880.) The state treasurer is not the treasurer of the board of regents of the state university. *State, ex rel. McLean, v. Leidtke*, 9 Neb. 468 (4 N. W. 61).

7. (1905.) The provisions of the biennial election law (laws 1905, ch. 65) are found to be in conflict with the paramount law relative to the election of judicial officers and regents of the university, and the time thereof, and of their terms of office; and are held to be inoperative and void. *State, ex rel. Polk, v. Galusha*, 74 Neb. 188 (104 N. W. 197).

8. (1905.) Under the constitution it is mandatory that a general election shall be held in each odd numbered year for the election of university regents. *State, ex rel. Polk, v. Galusha*, 74 Neb. 188 (104 N. W. 197).

Salaries.

Compelling allowance of salaries of instructors, see *Mandamus*, § 143.

9. (1880.) Under the appropriation bill of 1879, the salaries of the officers and professors of the State University for the years 1879 and 1880 are payable out of the general fund. *State, ex rel. McLean, v. Leidtke* 9 Neb. 468 (4 N. W. 61).

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10. (1885.) The regents of the university, in the absence of an appropriation by the legislature, have no power to dispose of the endowment fund or that derived from the three-eighths mill tax. *State, ex rel. Bessey, v. Babcock*, 17 Neb. 610 (24 N. W. 202).

11. (1903.) The board of regents of the State University, in allowing certificates for salaries of professors in that institution duly fixed by law, act ministerially, and mandamus will lie to compel their action in this particular. *Von Forel v. State, ex rel. Ansley*, 4 Unof. 843 (96 N. W. 648).

Custody and control of funds.

12. (1877.) Under the legislative acts of 1869 and 1875 the state treasurer is made the custodian of all the university funds, to be disbursed by him upon warrants drawn by the state auditor. *Regents of the University v. McConnell*, 5 Neb. 423.

13. (1893.) There is no authority for the secretary of the board of regents of the state university to draw any money appropriated for the university or any of its buildings except upon vouchers duly certified. *State, ex rel. Dales, v. Moore*, 36 Neb. 579 (54 N. W. 866).

14. (1893.) Under the provisions of the act making an appropriation for the current expenses of the state for the years ending March 31, 1892, and March 31, 1893, etc., approved April 6, 1891, whereby an appropriation of $37,000 was made for fire-proof library building at the state university, no part of said appropriation can be drawn except upon proper vouchers filed with the auditor of public accounts. *State, ex rel. Dales, v. Moore*, 36 Neb. 579 (54 N. W. 866).

15. (1893.) The term "voucher," when used in connection with the disbursement of money, means a written or printed instrument in the nature of a bill of particulars, accounts, etc., which shows by what authority a particular payment has been made. *State, ex rel. Dales, v. Moore*, 36 Neb. 579 (54 N. W. 866).

16. (1895.) Chapter 65, Session Laws, 1895, providing for a uniform system of vouchers, applies to claims against the state university. *State, ex rel. Regents of University, v. Moore*, 46 Neb. 373 (64 N. W. 975).

17. (1895.) Claims against the university must be presented to the auditor upon vouchers drawn in conformity with the act of 1895. *State, ex rel. Regents of University, v. Moore*, 46 Neb. 373 (64 N. W. 975).

18. (1906.) The money donated by the United States to the University of Nebraska by an act of congress approved March 2, 1887, and acts supplemental thereto, known as the "Experimental Station" fund, may be expended by the board of regents for the purposes expressed by the donation, without other or more specific legislative appropriation than that implied by section 2, article VIII of the constitution, and contained in section 19, chapter 87, Compiled Statutes 1905. *State, ex rel. Spencer Lens Co., v. Searle*, 77 Neb. 155 (108 N. W. 1119).

Appropriating funds to.

19. (1907.) The act of the legislature passed and approved April 4, 1907, appropriating the proceeds of taxes for the years 1907 and 1908, and so much of the proceeds of the one mill tax for the years 1905 and 1906, not heretofore appropriated, to the use of the State University for the biennium ending March 31, 1909, amounts to a specific appropriation within the meaning of section 22, article III of the constitution. *State, ex rel. Ledwith, v. Searle*, 79 Neb. 111 (112 N. W. 380).

20. (1907.) That part of section 19, chapter 87, Compiled Statutes 1905, which provides that in the year 1899, and annually thereafter, a tax of one mill on the dollar shall be levied on all of the taxable property in the state, the proceeds to constitute a fund for the maintenance of the university, was not repealed by implication by the revenue law of 1903. *State, ex rel. Ledwith, v. Searle*, 79 Neb. 111 (112 N. W. 380).

Actions.

21. (1877.) The regents of the University of Nebraska, as such corporation, may sue and be sued in matters over which express authority is given to such corporation. *Regents of the University v. McConnell*, 5 Neb. 423.

22. (1877.) The university corporation acts simply by delegated authority, and can exercise only such powers as are expressly given to it; and not having corporate power over the university funds, it has no authority to bring and maintain an action to recover such funds. *Regents of University v. McConnell*, 5 Neb. 423.

23. (1897.) In an action on a contract of employment as a teacher of elocution by the president of the defendant who exceeded

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his authority, it is error to instruct the jury that it should find for plaintiff if they find the defendant ratified the unauthorized contract, when there is no evidence to show that the defendant knew of the existence of the contract. *Nebraska Wesleyan University v. Parker*, 52 Neb. 453 (72 N. W. 470).

24. (1901.) Note and mortgage running to Creighton University, trustee for Creighton College, are valid and enforceable obligations, notwithstanding that there has been no legal incorporation of Creighton College. *Goddard v. Clarke*, 1 Unof. 769 (96 N. W. 350).

COLLUSION.

See, also, *Conspiracy; Frauds; Fraudulent Conveyances.*

To procure divorce, see *Divorce*, § 32.

COMBINATIONS.

See *Monopolies.*

COMITY.

Of courts, see *Courts*, § 131.

COMMERCE.

ANALYSIS.

Regulation of liquor traffic, § 1.
Application of state statutes to interstate commerce, §§ 2, 3.
Federal jurisdiction of interstate commerce, §§ 4, 5.
Jurisdiction of state courts, § 6.
Taxation of interstate telegraph messages, §§ 7, 8.

CROSS-REFERENCES.

Regulation of trusts, see *Monopolies.*

Commercial paper, see *Bills and Notes.*

Carriage of goods and passengers, see *Carriers.*

Liability of common carriers of intestate shipment, see *Carriers.*

License or occupation tax on, see *Licenses*, §§ 34-37.

Exercise of taxing powers, see *Taxation.*

Regulation of liquor traffic.

1. (1891.) Section 2360 of the code of Iowa prohibits the manufacture for sale or selling of intoxicating liquors within the state for any purpose except for pharmaceutical, medical, chemical, and sacramental purposes, and then only by persons holding permits from the proper authorities. The Franz Brewing Company, without such permit, manufactured and sold in that state a quantity of beer for the purpose of being transported to this state. *Held*, That the sale was in violation of said law, and that the Iowa statute does not conflict with section 8, article 1, of the federal constitution which confers upon congress the exclusive power to regulate interstate commerce. *Tredway v. Riley*, 32 Neb. 495 (49 N. W. 268; 29 Am. St. Rep. 447).

Application of state statutes to interstate commerce.

2. (1904.) Article I, chapter 77, pages 62-64, Compiled Statutes, imposing a penalty for peddling without a license, does not authorize a conviction of one who solicits orders in the state, which orders are sent to a business house in another state, which packs the goods ordered and ships them to the solicitor, who distributes them to the purchasers, collects the money therefore and remits the same to the shipper, since such a transaction constitutes interstate commerce. *Menke v. State*, 70 Neb. 669 (97 N. W. 1020).

3. (1904.) Sections 62, 63, and 64, article I, chapter 77, of the Compiled Statutes of 1903, providing for the licensing of peddlers, and imposing a penalty for their violation, are not void as being in contravention either of the constitution of this state, or of the constitution of the United States, but they are inapplicable to transactions constituting interstate commerce. *Menke v. State*, 70 Neb. 669 (97 N. W. 1020).

Federal jurisdiction of interstate commerce.

4. (1893.) The state courts have not lost their jurisdiction of the subject-matter of actions against carriers because of interstate shipments by reason of the fact that congress has legislated upon the subject. *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb. 463 (56 N. W. 957; 22 L. R. A. 335).

5. (1894.) The act of congress entitled an act to regulate commerce abrogated all existing contracts with common carriers

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for interstate commercial rates, and especially vested in the federal courts exclusive jurisdiction to inquire into and adjust such interstate rates as are alleged to be unfair or discriminative. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374 (59 N. W. 838).

Jurisdiction of state courts.

6. (1906.) The allowance by railroad companies of certain charges, as elevator charges, to terminal elevators on shipments of grain from points in this state to points without the state is an incident of interstate commerce, and the supreme court has no jurisdiction to limit or control the same. *State v. Omaha Elevator Co.*, 75 Neb. 654 (106 N. W. 979).

Taxation of interstate telegraph messages.

7. (1894.) Where a telegraph company is engaged in both interstate and intrastate business, an ordinance levying an occupation tax on that portion of such business which is carried on wholly within the state is not repugnant to section 8, article I of the constitution of the United States, since it in no way interferes with, or regulates, interstate commerce. *Western Union Telegraph Co. v. City of Fremont*, 39 Neb. 692 (58 N. W. 415).

8. (1894.) State and municipal authorities are powerless to impose a tax upon messages to or from other states, since such a tax would be in conflict with that clause of the federal constitution which gives to congress the exclusive power to regulate commerce among the several states. *Western Union Telegraph Co. v. City of Fremont*, 39 Neb. 692 (58 N. W. 415).

COMMISSIONER.

Of supreme court, see *Court Commissioners.*

Of counties, see *Counties.*

Appointment to make judicial sale, see *Judicial Sale*, §§ 17-21.

Railway commissioners, see *Carriers.*

COMMITMENT.

See *Criminal Law; Prisons.*

To reform school, see *Reformatories*, §§ 9-13.

COMMON CARRIERS.

See *Carriers.*

COMMON LAW.

ANALYSIS.

Common law in force, §§ 1-4.
Common law as vested right, § 5.
Power of courts to apply, § 6.
Applicability to riparian owners, §§ 7-9.

CROSS-REFERENCES.

See, also, specific topics.

Common law actions, see *Actions.*

Application to criminal offenses, see *Criminal Law*, §§ 6-8.

Rights of husband and wife, see *Husband and Wife*, § 1.

Liens of common law, see *Liens.*

Common law marriage, see *Marriage*, §§ 22, 23.

Application to trusts and monopolies, see *Monopolies*, § 8.

Application of, as to water rights, see *Water and Watercourses*, §§ 4-11.

Application of civil or Roman law to water rights, see *Water and Watercourses*, § 12.

Common law in force.

1. (1880.) So much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory, be and the same is adopted and declared to be law within this territory. *Delaney v. Errickson*, 10 Neb. 492 (6 N. W. 600; 35 Am. Rep. 487).

2. (1898.) While the law of England has been adopted by statute in this state, the statute does not extend to those rules of the English law which contravene the object and purpose of our own statutes. *Bloomfield State Bank v. Miller*, 55 Neb. 243 (75 N. W. 569; 70 Am. St. Rep, 381; 44 L. R. A. 387).

3. So much of the common law of England as is applicable and not inconsistent with the federal constitution and the state constitution and laws is in force. (1898.) *Lorance v. Hillyer*, 57 Neb. 266 (77 N. W.

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755); (1900) *Kerner v. McDonald*, 60 Neb. 663 (84 N. W. 92; 83 Am. St. Rep. 550); *St. James Orphans Asylum v. Shelby*, 60 Neb. 796 (84 N. W. 273; 83 Am. St. Rep. 553).

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3a. (1905.) By statute so much of the common law of England as is applicable and not inconsistent with the constitution of the United States or the constitution and statutes of this state is in force in this state. *Kinkead v. Turgeon*, 74 Neb. 580 (109 N. W. 744).

4. (1903.) The term "common law of England," as used in chapter 15a, Compiled Statutes, refers to that general system of law which prevails in England, and in most of the United States by derivation from England, as distinguished from the Roman or civil law system. Hence the statute does not require adherence to the decisions of the English common-law courts prior to the Revolution in case this court considers subsequent decisions, either in England or America, better expositions of the general principles of that system. *Williams v. Miles*, 68 Neb. 463 (94 N. W. 705; 110 Am. St. Rep. 431; 62 L. R. A. 383).

Common law as vested right.

5. (1901.) There is no vested right in any rule of the common law. *State v. Heldenbrand*, 62 Neb. 136 (87 N. W. 25; 89 Am. St. Rep. 493).

Power of courts to apply.

6. (1903.) The power of the courts to declare established doctrines of the common law inapplicable to this state should be used somewhat sparingly, and its exercise is not to be justified unless the inapplicability of a rule is general, extending to the whole or the greater part of the state, or, at least, to an area capable of definite judicial ascertainment. *Meng v. Coffee*, 67 Neb. 500 (93 N. W. 713; 108 Am. St. Rep. 697; 60 L. R. A. 910).

Applicability to riparian owners.

7. (1903.) The common-law rule with respect to the rights of private riparian proprietors has been a part of the laws of the state ever since the organization of a state government. *Crawford Co. v. Hathaway*, 67 Neb. 325 (93 N. W. 781; 108 Am. St. Rep. 647; 60 L. R. A. 889).

8 (1903.) It can not be said that the common-law rule defining the rights of riparian proprietors is inapplicable to the conditions prevailing in the state because irrigation is found essential to successful agriculture in some portions thereof. *Crawford Co. v. Hathaway*, 67 Neb. 325 (93 N. W. 781; 108 Am. St. Rep. 647; 60 L. R. A. 889).

9. (1903.) The common-law rules as to the rights and duties of riparian owners are in force in every part of the state, except as altered or modified by statutes. *Meng v. Coffee*, 67 Neb. 500 (93 N. W. 713; 108 Am. St. Rep. 697; 60 L. R. A. 910).

COMPENSATION.

Of attorney, see *Attorney and Client*, §§ 88-129.

Of real estate agent, see *Brokers*, §§ 25-67.

Of clerks of courts, see *Clerk of Courts*, §§ 47-56.

Of officers and professors of state university, see *Colleges and Universities*, §§ 9-11.

Of county officers, see *Counties*, §§ 165-236.

County commissioners, see *Counties*, § 97.

County attorney, see *County Attorneys*, §§ 15, 16.

Assistant county attorney, see *County Attorneys*, §§ 24-28.

For taking property under eminent domain, see *Eminent Domain*, II.

Of jurors, see *Jury*, § 93.

Of guardian, see *Guardian and Ward*, § 81.

Of insurance agent, see *Insurance*, §§ 62-66.

Of justice of the peace, see *Justices of the Peace*, §§ 15-29.

Employee, see *Master and Servant*, II.

Of city officers, see *Municipal Corporations*, §§ 167-176.

Of public officers, see *Officers*, §§ 89-123.

For winding up partnership business, see *Partnership*, §§ 308-310.

Of receiver, see *Receivers*, §§ 123-125.

Of register of deeds, see *Register of Deeds*, § 2.

Of school teachers, see *Schools and School Districts*, §§ 248-250.

Of sheriffs or constables and their assistants, see *Sheriffs and Constables*, §§ 7-44.

Of tax collector, see *Taxation*, §§ 498-500.

Of witnesses, see *Witnesses*, §§ 3-8.

COMPLAINT.

In civil actions, see *Pleadings*, II.

In criminal prosecutions, see *Indictment and Information*.

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COMPOSITION WITH CREDITORS.

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See, also, *Accord and Satisfaction; Bankruptcy; Compromise and Settlement; Insolvency; Release.*

1. (1891.) The maker of notes placed with a bank as trustee to secure the claims of certain creditors of the payee, cannot purchase such claims at a discount and set off their face value against the notes; he can be credited only with the amounts actually paid by him. *Hughes v. Swartz*, 33 Neb. 276 (50 N. W. 5).

2. (1893.) The main issue in this case being whether the note sued upon was given by the defendant as payment for the other 50 per cent. due from defendant to plaintiffs (50 per cent. having already been paid upon a general composition agreement of Treitschke with his creditors), or whether said note was given plaintiffs for services by plaintiffs' agent rendered for defendant, independently of such agency; it was proper to instruct the jury: 1. That if plaintiffs with Treitschke entered into such a composition agreement a note taken for the 50 per cent. by said composition rebated would be a fraud upon the rights of the other compounding creditors, and that payment thereof would not therefore be enforced. 2. Instructions as to the rights of plaintiffs, upon plaintiffs' theory of the transaction, properly required upon the evidence adduced that the jury should "believe from the testimony that such transaction was made in good faith, and not as a device to evade the effeect of a payment to the plaintiffs directly." *Freiberg v. Treitschke*, 36 Neb. 880 (55 N. W. 273).

COMPOUNDING FELONY.

As defense to action on notes, see *Bills and Notes*, § § 71, 72.

Validity of contract compounding felony, see *Contracts*, §§ 140-142.

COMPROMISE AND SETTLEMENT.

ANALYSIS.

Subject matter, § 1.
Parol compromise, § 2.
Acceptance of offer, §§ 3-4.
Consideration, §§ 5-16.
Operation and effect, §§ 17-23.
Ratification of settlement by pleading, § 24.
Setting aside, §§ 25-30.
——— Parties, § 31.
——— Evidence of fraud, §§ 32-34.
——— Burden of proof, § 35.
Pleading, §§ 36-38.
Evidence.
——— Admissibility, §§ 39-47.
——— Burden of proof, §§ 48, 49.
Instructions, §§ 50, 51.

CROSS-REFERENCES.

See, also, *Accord and Satisfaction; Composition with Creditors; Release; Payment.*

Authority of assignee for creditors to compromise claims, see *Assignments for Benefit of Creditors*, § 133.

Authority of receiver of bank to compromise claims, see *Banks and Banking*, §§ 80-82.

Authority of attorney to compromise and settle claim, see *Attorney and Client*, §§ 68-73.

Protection of attorney's lien on settlement, see *Attorney and Client*, §§ 158-164.

Settlement by parents of bastard child, as bar to action, see *Bastards*, § 23.

Compromise of judgment in bastardy proceedings, see *Bastards*, § 124.

Set-off against claim due from county, see *Counties*, § 661.

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Power of corporation to compromise claim on *ultra vires* contract, see *Corporations*, § 269.

Settlement as bar to suit for alimony, see *Divorce and Alimony*, § 158.

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Action for criminal conversation, see *Husband and Wife*, § 266.

Authority of cities to compromise suits, see *Municipal Corporations*, § 1082.

Power of city to settle suit on assessment, see *Municipal Corporations*, § 525.

Compromise by one joint tort feasor as releasing other, see *Torts*, §§ 13, 14.

Admissibility of offers of compromise in action for conversion, see *Trover and Conversion*, § 67.

Settlement by trustees, see *Trusts*, §§ 110, 111.

Subject matter.

1. (1898.) The same right to compromise an action for criminal conversation, and the same privileges with regard to offers to compromise exists as in other actions. *Smith v. Meyers*, 54 Neb. 1 (74 N. W. 277).

Parol compromise.

2. (1881.) A verbal agreement to compromise, not founded on any consideration, and under which no right has been surrendered, is unenforceable. *Boyce v. Berger*, 11 Neb. 399 (9 N. W. 545).

Acceptance of offer.

3. (1903.) In the case at bar, the trial court erred in overruling a motion to vacate a judgment rendered on an offer to compromise made in pursuance of the provisions of section 565, code of civil procedure, it being disclosed by the record that there was no acceptance of such offer and no notice of acceptance given within the time and manner required by statute. *Becker v. Breen*, 68 Neb. 379 (94 N. W. 614).

4. (1903.) A written offer to allow judgment to be taken against a defendant for a sum specified, made under the provisions of section 565 of the code of civil procedure, to be available for the purpose of the rendition of a judgment on such offer of compromise, must be accepted and notice thereof given to the party making the offer within five days from the time of making the same. *Becker v. Breen*, 68 Neb. 379 (94 N. W. 614.)

Consideration.

5. (1881.) The prevention of litigation is a sufficient consideration to support a compromise of a claim, and courts will not inquire into the relative value of the claim and the property given in settlement thereof. *Boyce v. Berger*, 11 Neb. 399 (9 N. W. 545).

6. (1892.) Acceptance of a check for a less amount than the contract price of a steam boiler, without any condition as to its acceptance save a statement in the nature of a counter-claim, which would balance the account, does not bar an action, by the creditor, to recover the balance of the account. *Fremont Foundry & Machine Co. v. Norton*, 3 Unof. 804 (92 N. W. 1058).

7. (1902.) When there is a *bona fide* dispute between parties as to the amount due upon an account, and the debtor tenders a less amount than the claim in full settlement, which the creditor accepts, with knowledge that it was tendered as a full settlement, the dispute will be a sufficient consideration to uphold the settlement, and will bar a recovery upon the remainder of the claim. *Chicago, R. I. & P. R. Co. v. Buckstaff*, 65 Neb. 334 (91 N. W. 426).

8. (1895.) The settlement of a doubtful or disputed claim is generally a sufficient consideration for a compromise, but to have such effect it is essential that there be in fact a dispute or doubt of the rights of the parties. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463 (62 N. W. 899).

9. (1895.) An arbitrary refusal to pay, based on the mere pretense of the debtor, made for the purpose of exacting terms which are inequitable and oppressive, is not such a dispute as will of itself support a compromise resulting in a reduction of the amount of indebtedness. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463 (62 N. W. 899).

10. (1896.) If a consideration is necessary to sustain a settlement made by the payment and receipt in full satisfaction of the sum which the debtor admits to be due, it is found in the fact that the creditor by accepting such sum thereby avoids the delay, expense, and labor of an accounting, and avoids threatened litigation. *Treat v. Price*, 47 Neb. 875 (66 N. W. 834.)

11. (1897.) The settlemen of a doubtful or disputed claim is generally a sufficient consideration for a compromise, but in order to have such effect it is essential that there be in fact a dispute or doubt of the rights of the parties. An arbitrary refusal to pay,

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based on the mere pretense of the debtor, made for the obvious purpose of exacting terms which are inequitable and oppressive, is not such a dispute as will of itself support a compromise resulting in a reduction of the amount of his indebtedness. *Home Fire Ins. Co. v. Skoumal*, 51 Neb. 655 (71 N. W. 290).

12. (1904.) An accord, even between the plaintiff and a third party, as to the subject matter of an action, and a satisfaction moving from such third party to the plaintiff, are available in bar of the action, if the defendant has authorized or ratified the settlement. *Chicago, R. I & P R. Co., v. Brown*, 70 Neb. 696 (97 N. W. 1038).

13. (1904.) That it is uncertain which of two parties, both of whom deny liability, is liable for a debt of a fixed and certain amount, is a sufficient consideration to support a settlement betweeen one of such parties and the creditor, whereby the creditor accepts a part of the amount due in discharge of the debt. *Chicago, R. I. & P. R. Co. v. Brown*, 70 Neb. 696 (97 N. W. 1038).

14. (1906.) If the claimant, knowing that his claim is groundless, forces the other party to a compromise by threats of suit, there is no consideration and the compromise will not be enforced. *Gering v. School District*, 76 Neb. 219 (107 N. W. 250).

15. (1906.) Forbearance to prosecute proceedings for the reversal of a judgment is a sufficient consideration for a compromise, and, unless the good faith of the claimant in pressing his claim is put in issue, whether he intended to prosecute such proceedings is immaterial. *Gering v. School District*, 76 Neb. 219 (107 N. W. 250).

16. (1906.) A compromise, whereby one party agrees to pay and the other to receive a certain sum in satisfaction of a doubtful claim, rests upon a sufficient consideration. *Gering v. School District*, 76 Neb. 219 (107 N. W. 250).

Operation and effect.

17. (1872.) If two parties claim property adversely, and the subject is in litigation, and they come to an agreement in respect of their rights without fraud on the part of either, beyond the representation by one that he owns the property, the other, after a judicial decision in favor of his claims, cannot avoid the compromise. *Mills v. Miller*, 2 Neb. 299.

18. (1893.) A conveyed certain real estate to B by an absolute deed to secure the payment of a loan. The trust character of this deed was recognized by the grantee, who at various times promised that upon a sale of the property he would pay him the surplus in excess of the loan and interest. Afterwards A brought an action against B to redeem, and offered to pay the loan with interest. While the action was pending A and B entered into a stipulation as to the amount which A should pay B, whereupon he would recover the premises. *Held*, That in the absence of fraud or misrepresentation the agreement was binding upon the parties, and would be enforced. *Hamley v. Doe*, 36 Neb. 398 (54 N. W. 673).

19. (1894.) A compromise of honest differences whereby a less sum than that claimed has been paid and accepted in full of plaintiff's claim bars the right of plaintiff to recover the balance. *Slade v. Swedeburg Elevator Co.*, 39 Neb. 600 (58 N. W. 191).

20. (1896.) Where a creditor accepts from his debtor a part of an unliquidated demand against him in full settlement and compromise thereof, such an act is a defense and bar to an action by the creditor against the debtor for the original demand, unless it be pleaded and proved that the settlement was procured by fraud, mistake, or duress. *Home Fire Ins. Co. v. Bredehoft*, 49 Neb. 152 (68 N. W. 400).

21. (1896.) A being indebted to B in an uncertain amount, sent to the C bank the amount which A conceded to be due, with instructions to pay the sum to B but only in full settlement, and on his signing a receipt to that effect. B, protesting that more was due, accepted the money and signed the receipt, but caused the bank to send back, accompanying the receipt, a letter declaring that he only received the money on account and not in settlement. *Held*, That by receiving the money he had accepted the condition on which it was tendered, and that his protest availed nothing. The terms of the receipt and the refusal of the bank to pay the money except upon his signing it, were notice to him that the bank had no authority to pay it except on the condition that it should be received in full settlement. *Treat v. Price*, 47 Neb. 875 (66 N. W. 834).

22. (1902.) Where parties enter into an agreement whereby the one agrees to pay, and the other to accept, a certain sum in full satisfaction and discharge of a disputed

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claim urged by the latter against the former, such agreement constitutes a valid contract between the parties. *Massillon Engine & Thresher Co. v. Prouty*, 65 Neb. 496 (91 N. W. 384).

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22*a*. (1908.) When, in an action to set aside a conveyance of land as having been fraudulently procured, the plaintiff obtains a decree in his favor by means of a compromise and settlement, in which he agrees to pay and discharge a mortgage upon the premises executed by his fraudulent grantee, he is not entitled to object, in a subsequent action to foreclose that mortgage, that the same is for a sum in excess of the just indebtedness of the mortgagor to the mortgagee, or that prior to the settlement the mortgagee might have obtained a partial satisfaction from a source other than the land. *Hannan v. Rihner*, 80 Neb. 521 (114 N. W. 605).

23. (1902.) If an agreement for satisfaction and discharge of a disputed claim contemplates the surrender of evidence of indebtedness, on the part of the creditor, on payment of the amount agreed upon, in an action on such contract, the creditor is entitled to recover on a showing of readiness and willingness to perform his part of such contract. *Massillon Engine & Thresher Co. v. Prouty*, 65 Neb. 496 (91 N. W. 384).

Ratification of settlement by pleading.

24. (1904.) A plea interposing the defense of accord and satisfaction made between plaintiff and a third person, is of itself a ratification of the settlement. *Chicago, R. I. & P. R. Co. v. Brown*, 70 Neb. 696 (97 N. W. 1038).

Setting aside.

25. (1887.) Where, in an action for divorce and alimony, an order is made by the court in which the cause is pending, requiring a sum of money to be paid into court as and for attorney's fees, and afterwards the parties to the action, by collusion and fraud and for the purpose of defrauding the attorney for plaintiff out of the allowance made for his compensation, with notice of an attorney's lien thereon in his favor, enter into an alleged settlement by which the cause is to be dismissed and the order for alimony satisfied, such fraudulent settlement will be set aside, on motion of the attorney entitled to the money, and the amount found due ordered to be paid into court by the defendant. *Aspinwall v. Sabin*, 22 Neb. 73 (34 N. W. 72; 3 Am. St. Rep. 258).

26 (1896.) A settlement of a disputed demand will be set aside when procured by fraud, mistake or duress. *Home Fire Ins. Co. v. Bredehoft*, 49 Neb. 152 (68 N. W. 400).

27. (1902.) One S. had conveyed, by a warranty deed absolute in form, to a bank certain real estate as security for an indebtedness owing by S. to the bank. S. was in financial distress and had no means of meeting his indebtedness save by a sale of the real estate. The bank thereafter assumed to be the absolute owner of the property and denied to S. any right, interest or equity therein, and by injunction proceedings undertoook to dispossess him of a portion of such land. S. procured a purchaser at an advantageous price, and endeavored to adjust his differences with the bank, so as to effectuate a sale of the property, and meet pressing demands against him. The bank refused to consent to a sale or release its interest or reconvey the premises to S., so that a sale might be consummated without the payment by S. of a large sum of money in excess of the amount justly due. *Held*, Under the facts and circumstances as disclosed by the record, that the payment of the excess over and above the amount justly due, and also a compromise and settlement, the basis thereof, were made under duress and compulsion, and might be recovered back in an action brought for that purpose. *First Nat. Bank of David City v. Sargeant*, 65 Neb. 594 (91 N. W. 595; 59 L. R. A. 296).

28. (1902.) The fact that the party taking the money and giving a receipt in full supposed that certain checks, for whose payment the other party refused to indemnify him unless they were produced, were irrecoverably lost, and also supposed his claim for their payment could not be maintained without them, does not constitute a mistake which permits the disregarding of the settlement and a recovery of the amount of the checks after finding them, no fraud being alleged, and the nature and amount of the claim being well known to both parties. *Connor v. Etheridge*, 3 Unof. 555 (92 N. W. 135).

29. (1902.) Where a settlement is entered into between two parties in reliance on the accuracy and correctness of boooks of account kept by one of the parties, and it is subsequently discovered that the books have been erroneously kept, and that the party keeping them has not accounted for

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all the money which he has received, such a settlement will be set aside and a new accounting had although there may have been no intentional fraud practiced by the bookkeeper, and the failure to account may have been due to mistakes alone. *Leidigh v. Keever*, 2 Unof. 343 (96 N. W. 106).

30. (1902.) One who, on a settlement with his principal of transactions by him as agent, writes a receipt in full of all demands and attaches it to a draft for the amount the other party has offered to pay for such a receipt, cannot after taking the money, in absence of fraud or mistake, renew a claim previously in dispute between the parties. *Connor v. Etheridge*, 3 Unof. 555 (92 N. W. 135).

——— **Parties.**

31. (1887.) Original plaintiff not necessary party to motion by her attorney to set aside settlement of case after an allowance of attorney's fees had been made to her, on ground of fraud. *Aspinwall v. Sabin*, 22 Neb. 73 (34 N. W. 72; 3 Am. St. Rep. 258).

——— **Evidence of fraud.**

32. (1896.) In an action on an insurance policy the defense of which was settlement as a bar, evidence showing the insured receipted for a draft from the insurer, in which it was stated to be in full settlement of all damage, it not appearing that the receipt was not read over to the plaintiff, who could neither read or write English, is insufficient to sustain a finding that such settlement was obtained by fraud. *Home Fire Ins. Co. v. Bredehoft*, 49 Neb. 152 (68 N. W. 400).

33. (1894.) The evidence relied on in this case to sustain the defense that the compromise or settlement pleaded herein had been procured by unfair means examined, and *held*, not to establish either fraud, duress, or undue influence. *Swartz v. Duncan*, 38 Neb. 782 (57 N. W. 543).

34. (1899.) The circumstances of a settlement held to include matters of mistake or fraud sufficient to avoid its effect against complaining party. *North Nebraska Driving Park Ass'n v. Box*, 57 Neb. 302 (77 N. W. 770).

——— **Burden of proof.**

35. (1896.) The burden of showing that a settlement was procured by fraud is on the party alleging it. *Home Fire Ins. Co. v. Bredehoft*, 49 Neb. 152 (68 N. W. 400).

Pleading.

36. (1893.) An answer, in an action for conversion of property, alleging, "that the defendant had a full and complete settlement of all matters and things in dispute—and more especially the things referred to in the petition," presents the issue of settlement as a distinct defense and defendant is not confined to proof of the arbitration alone. *Forbes v. Petty*, 37 Neb. 899 (56 N. W. 730).

37. (1899.) A pleading stating that if a settlement was made its effect was avoided by mistake of fraud is an admission of the settlement. *North Nebraska Fair & Driving Park Ass'n v. Box*, 57 Neb. 302 (77 N. W. 770).

38. (1907.) The giving of a note by one party to another in settlement of the differences betweeen them is a good defense in an action by the maker against the payee to recover prior existing claims, in the absence of fraud or mistake, but such defense must be pleaded. *Gandy v. Wiltse*, 79 Neb. 280 (112 N. W. 569).

Evidence.

——— **Admissibility.**

See, also, *Bastards*, §§ 65-68.

39. (1891.) Offer of compromise made by defendant and not accepted is inadmissible in evidence in a bastardy proceeding. *Olson v. Peterson*, 33 Neb. 358 (50 N. W. 155).

40. (1876.) The rule excluding evidence of offers to compromise does not apply to offers to compromise a dispute which forms the basis or constitute a part of a contract actually compromising such dispute. *Stuht v. Sweesy*, 48 Neb. 767 (67 N. W. 748).

41. (1896.) Unaccepted propositions of compromise are inadmissible in evidence. *Callen v. Rose*, 47 Neb. 638 (66 N. W. 639); *Eldridge v. Hargreaves*, 30 Neb. 638 (46 N. W. 923).

42. (1897.) An offer of compromise made by one party to an action and not accepted by the other is not generally admissible in evidence. *Hanover Fire Ins. Co. v. Stoddard*, 52 Neb. 745 (73 N. W. 291).

43. (1897.) An offer to compromise a matter in dispute cannot be given in evidence against the party by whom such offer was made. *Wright v. Morse*, 53 Neb. 3 (73 N. W. 211).

44. (1898.) In an action for damages

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for inducing the purchase of property by false representations an offer of plaintiff to compromise before suit was brought is incompetent evidence. *Boice v. Palmer*, 55 Neb. 389 (75 N. W. 849).

45. (1903.) An amicable adjustment of a controversy between two parties is not admissible for the purpose of showing any liability of either. *Creighton v. Chicago, R. I. & P. R. Co.*, 68 Neb. 456 (94 N. W. 527).

46. (1906.) In an action upon the promise of a school district to pay a certain amount in composition of a doubtful claim, one of the defenses was that the claimant secured the adoption of a resolution for the compromise by threats and intimidation, and there is evidence tending to support such defense. *Held*, That evidence as to his reputation in the vicinity, as to being peaceable or otherwise, was properly received. *Gering v. School District*, 76 Neb. 219 (107 N. W. 250).

47. (1906.) Declarations of parties made at a meeting where resolutions of a compromise of a claim against an officer of a school district were adopted, tending to show that they were intimidated and for that reason left the meeting and refrained from voting on the resolution, are properly receivable in evidence as a part of the *res gestæ*. *Gering v. School District*, 76 Neb. 219 (107 N. W. 250).

——— Burden of proof.

48. (1885.) Where there has been a settlement of accounts and a promissory note has been given for the amount found due, the burden of proving the settlement did not include debts owing to the maker of the note is upon him. *Keller v. Keller*, 18 Neb. 366 (25 N. W. 364).

49. (1903.) The burden of proof is upon the party admitting a settlement to establish the facts relied on in avoidance thereof. *Linton v. Cathers*, 70 Neb. 598 (97 N. W. 799).

Instructions.

50. (1888.) An action on an alleged compromise agreement, an instruction, "No particular form of words is necessary to constitute a settlement in law, nor is it necessary for the plaintiff to prove a promise to pay the balance found to be due, provided a balance be found in his favor, as hereafter explained," is not open to the objection that it assumes that there was a settlement between the parties. *Brewer v. Wright*, 25 Neb. 305 (41 N. W. 159).

51. (1893.) An instruction, "Where a settlement is made, and a promissory note is given as a result of the settlement, the giving of the note is *prima facie* evidence that all matters in difference between the parties at the time of the settlement were settled in the settlement; and this presumption must prevail until a preponderance of the evidence shows that there were matters in the difference at the time between the parties that were not included in such settlement," *held* applicable to the testimony and not erroneous. *Wagner v. Ladd*, 38 Neb. 161 (56 N. W. 891).

CONCEALMENT.

Element of fraud, see *Fraud*, §§ 25, 26.

As affecting subscription, see *Subscription*, § 4.

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CONDITIONS.

In assignment for creditors, see *Assignments for Benefit of Creditors* §§ 38-41.

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Of acts of spouse as defense to divorce, see *Divorce*, §§ 30-37.

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Admissibility in evidence, see *Criminal Law*, X, K.

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Plea of confession and avoidance, in action on covenant, see *Covenant*, § 62.

Pleading avoidance in general, see *Pleading*, §§ 100-104.

CONFIRMATION.

Of sales by administrator, see *Executors and Administrators*, § 241.

Of judicial sale, see *Judicial Sales*, §§ 369-430.

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Contract of carrier limiting liability, see *Carriers*, § 105.

As to validity of contract, see *Contracts*, §§ 1-6.

As to construction of contracts, see *Contracts*, §§ 163-166.

Actions on contracts, see *Contracts*, § 361.

As to covenants in conveyances, see *Covenants*, § 39.

As affecting breach of covenant, see *Covenants*, § 39.

What law governs as to validity of deed, see *Deeds*, § 1.

Law governing attestation of deeds, see *Deeds*, §§ 65-68.

As to descent of property, see *Descent and Distribution*, § 1.

Foreign decree of divorce, see *Divorce*, §§ 216, 217.

Law governing exemptions, see *Exemptions*, §§ 1-4.

Effect of order of foreign court to pay claim garnished, see *Garnishment*, §§ 148, 149.

Law governing homestead exemptions, see *Homesteads*, §§ 2 4.

Validity of contract by unmarried woman, see *Husband and Wife*, §§ 52, 53.

Of insurance, see *Insurance*, § 75.

Law governing rate of interest, see *Interest*, §§ 28-30.

As to limitations of actions, see *Limitations of Actions*, §§ 9-11.

As to marriage, see *Marriage*, § 2.

Law governing construction of mortgages see *Mortgages*, §§ 113, 114.

Law governing property rights, see *Property*, § 1.

Law governing contracts of sale, see *Sales*, § 1.

What law governs tax sale, see *Taxation*, §§ 573, 574.

Law governing rights under void tax sale, see *Taxation*, § 812.

As to usurious contracts, see *Usury*, §§ 6-10.

What law governs as to validity of contract to sell real property, see *Vendor and Purchaser*, § 1.

CONFUSION OF GOODS.

CROSS-REFERENCE.

See, also, *Accession; Warehousemen.*

1. (1888.) Where chattels of the same nature and quantity belonging to different persons are mingled in one mass—as corn in a crib—any owner may recover his aliquot part by an action in replevin. *Grimes v. Cannell*, 23 Neb. 187 (36 N. W. 479).

2. (1893.) Where wheat is ordered by a mill and is shipped, and before it is received, the owner of the mill executes a bill of sale of the mill, such wheat, being received and ground into flour, is no part of the property, and the present owner is liable for the value of the wheat. *First Nat. Bank of Denver v. Scott*, 36 Neb. 607 (54 N. W. 987).

3. (1893.) Where wheat has been delivered to a mill and wrongfully converted into flour and stored with other flour belonging to the mill owner, the owner of the wheat will be entitled to such portion of the flour as the wheat would probably produce. *First Nat. Bank of Denver v. Scott*, 36 Neb. 607 (54 N. W. 987).

4. (1897.) A vendee of a stock of drugs on condition that he would pay a certain sum per month to the seller from the proceeds of the business, a mixing of goods bought afterwards by absolute purchase with those bought under the conditional sale was neither wrongful or fraudulent. *Richardson Drug Co. v. Teasdall*, 52 Neb. 698 (72 N. W. 1028).

CONNECTING CARRIERS.

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Of accord and satisfaction, see *Accord and Satisfaction*, §§ 4-9.

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For modification of contract, see *Contracts*, §§ 242, 243.

For agreement to pay costs, see *Costs*, § 2.

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Guaranty of claims by administrator in forebearance of suit, see *Executors and Administrators*, §§ 134, 135.

Sufficiency of, for conveyance of property by debtor, see *Fraudulent Conveyances*, §§ 43-75.

Inadequacy of, as avoiding chattel mortgage as to creditors, see *Fraudulent Conveyances*, §§ 52-65.

Evidence sustaining, as arising from wager, see *Gaming*, §§ 13, 14.

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For indemnity bond, see *Indemnity*, §§ 7-9.

For insurance policy, see *Insurance*, § 89.

For lease, see *Landlord and Tenant*, § 18.

For mortgage, see *Mortgages*, §§ 21-23.

For assignment of mortgage, see *Mortgages*, § 274.

For release, see *Release*, § 2.

For contract of sale, see *Sales*, §§ 16, 17.

Of subscription contract, see *Subscription*, §§ 1-2.

Contract for sale of land, see *Vendor and Purchaser*, §§ 24-26.

CONSOLIDATION.

Of actions, see *Actions*, III.

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Of street railroads, see *Street Railroads*, §§ 24-26.

CONSPIRACY.

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See, also, *Monopolies*.

Conspiracy to steal, see *Larceny*, §§ 23, 24.

Evidence of acts and declarations of corporations, see *Evidence*, §§ 252-255.

Nature and right of action.

1. (1879.) Where journeyman tailors conspire to strike and return unfinished garments to their employer to his damage, the latter may maintain an action for a recovery thereof. *Mapstrick v. Ramge*, 9 Neb. 390 (2 N. W. 739; 31 Am. Rep. 415).

2. (1880.) A conviction for conspiracy to violate a law of the United States, under section 5440 of the Revised Statutes of the United States, is not a conviction of a felony, but of a misdemeanor merely. *Gandy v. State*, 10 Neb. 243 (4 N. W. 1019).

3. (1901.) In an action for conspiracy, the damage, and not the wrongful confederation, is the gist of the action. *Commercial Union Assurance Co. v. Shoemaker*, 63 Neb. 173 (88 N. W. 156).

4. (1902.) An action for conspiracy whereby plaintiff was driven out of business as a lumber dealer, under section 11, chapter 91*a*, Compiled Statutes, is an action in tort. *Cleland v. Anderson*, 66 Neb. 276 (98 N. W. 1075).

Pleading.

5. (1879.) A petition setting out that a number of tailors employed by plaintiff conspired to stop work and return all work unfinished, and so did, states a cause of action. *Mapstrick v. Ramge*, 9 Neb. 390 (2 N. W. 739; 31 Am. St. Rep. 415).

6. (1889.) Petition in an action for conspiracy *held* to state a cause of action against the several defendants. *Booker v. Puyear*, 27 Neb. 346 (43 N. W. 133).

7. (1901.) To state a cause of action for conspiracy, it is necessary to allege not only

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the confederation and conspiracy and doing of the wrongful act, but also the facts from which damages have resulted. *Commercial Union Assurance Co. v. Shoemaker*, 63 Neb. 173 (88 N. W. 156).

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Evidence.

——— **Admissibility.**

8. 1897.) In order to justify the admission in evidence, for the purpose of establishing an alleged conspiracy, of acts of individuals charged with the conspiracy, it is not necessary to first prove by other evidence the existence of the conspiracy. *Farley v. Peebles*, 50 Neb. 723 (70 N. W. 231).

9. (1894.) Acts and declarations of conspirators which are parts of the *res gestæ*, and therefore admissible against their co-conspirators, include those only which are done and made during the pendency of the conspiracy and in furtherance of its objects. *Stratton v. Oldfield*, 41 Neb. 702 (60 N. W. 82).

10. (1897.) Declarations made in pursuance of the object are admissible, but to be so they must not be merely narrative of past occurrences or statements of future purposes; they must tend so directly toward the accomplishment of the alleged common object as to constitute a part of the *res gestæ*. *Farley v. Peebles*, 50 Neb. 723 (70 N. W. 231).

11. (1897.) Evidence of acts or declarations of alleged conspirators may have a twofold purpose: First, the proof of the existence of the conspiracy; second, the conspiracy having been proved, to charge each member thereof with the consequence of such acts or declarations. For the first purpose the evidence is admissible generally as against all. For the second purpose it cannot be considered against those not participating in the acts or declarations, unless from all the evidence the existence of the conspiracy has been proved. *Farley v. Peebles*, 50 Neb. 723 (70 N. W. 231).

——— **Sufficiency.**

12. (1889.) Evidence in an action for conspiracy *held* to sustain a verdict and judgment for plaintiff. *Booker v. Puyear*, 27 Neb. 346 (43 N. W. 133).

13. (1889.) Although a petition charged a conspiracy on the part of the three defendants to defraud plaintiff, it is not necessary to his recovery that there should be actual evidence that the defendants conspired together, nor that any of the peculiar rules governing the trial of an indictment for criminal conspiracy prevail on the trial of the case at bar. Hence, if the jury believed that plaintiff was defrauded by one defendant who turned the property obtained over to the other defendants they might return their verdict for the plaintiff for the amount of his damages so sustained, though there might have been no proof that any two of the defendants actually conspired together for the purpose of perpetrating such wrong upon the plaintiff. *Booker v. Puyear*, 27 Neb. 346 (43 N. W. 133).

14. (1897.) A conspiracy, like other facts, may be proved by circumstantial evidence, and one means of proof is by showing overt acts of the individuals charged with conspiring. From the fact that different persons at different times by their acts pursue the same object, the jury may, in connection with other facts, infer the existence of a conspiracy to effect that object. *Farley v. Peebles*, 50 Neb. 723 (70 N. W. 231).

15. (1903.) A conspiracy, like any other fact which is the subject of judicial investigation, may be proved inferentially or by circumstancial evidence. *O'Brien v. State*, 69 Neb. 691 (96 N. W. 649).

16. (1906.) Where several defendants are proceeded against as conspirators in the commission of a tort, which would be actionable if committed by one alone, a judgment against one or more of such defendants may be sustained without proof of a conspiracy among all of them. *Harvey v. Harvey*, 75 Neb. 557 (106 N. W. 660).

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CONSTITUTIONAL LAW.

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I. ESTABLISMENT AND AMENDMENT OF CONSTITUTION.

Adoption of state constitution.

1. (1872.) Territorial legislatures have not inherent power to make or submit constitutions. Whatever they may do in that direction is without authority and is done only by indulgence of congress. *Brittle v. People*, 2 Neb. 198.

2. (1872.) The question, whether a state constitution was regularly and legally adopted after the same has been acted upon, and the state government is, in fact, being administered under it, is a political rather than a judicial question. A court organized under a constitution would be *felo de se* if it should declare such constitution null for irregularity and illegality in its adoption. *Brittle v. People*, 2 Neb. 198.

3. (1872.) When a constitution has been adopted by the people of a territory preparatory to admission as a state, and congress prescribes certain changes and additions to be adopted by the legislature as part of the constitution, and such changes and additions are declared to be fundamental conditions of the additions of the state, and the legislature accepts such changes, additions, and conditions, and the state is thus admitted, they become thereby a part of the constitution, and binding as such, although not submitted to the people for their approval. *Brittle v. People*, 2 Neb. 198.

Amendment of state constitution.

4. (1885.) The votes necessary to adopt an amendment to the constitution under the provisions of section 1, article XV of the same must be a majority of all those cast in the state at that election for senators and representatives. *State, ex rel. Stevenson, v. Babcock*, 17 Neb. 188 (22 N. W. 372).

5. (1889.) A proposed amendment to the constitution possesses no efficacy until approved by a majority of the electors of the state voting at the election, and the approval of the governor is unnecessary, and adds nothing to the validity of such proposed amendments. *In re Senate File 31*, 25 Neb. 864 (41 N. W. 981).

6. (1889.) A proposition to amend the constitution was passed by the senate by the necessary three-fifths majority, and entered at length on the journal. The proposition was then amended by the house, and as amended was passed by that body by the requisite majority, and entered at length on the house journal. Afterwards the house amendments were concurred in by the requisite majority of the senate, and such amendments entered at length on the senate journal. *Held*, That there was a sufficient compliance with section 1, article XV of the constitution. *In re Senate File 31*, 25 Neb. 864 (41 N. W. 981).

7. (1889.) A title stating the object of a bill or provision to amend the constitution is unnecessary, and if added may be disregarded, such title being necessary only in cases of ordinary legislation. In *re Senate File 31*, 25 Neb. 864 (41 N. W. 981).

8. (1889.) Proposed amendments to the constitution, being the proposition to prohibit "the manufacture, sale, and keeping for sale of intoxicating liquors as a bever-

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erage," and to the proposition to license and regulate by law "the manufacture, sale, and keeping for sale of intoxicating liquors as a beverage," are independent, and to be separately submitted to the electors of the state for approval or rejection. Any elector may vote for either, or against either or both of such propositions. *In re Senate File 31*, 25 Neb. 864 (41 N. W. 981).

9. (1889.) Section 1, article XV of the constitution of Nebraska, does not prescribe the form in which propositions by the legislature to amend the constitution shall be made, whether by bill or joint resolution. Therefore, if an amendment is proposed by a bill duly passed by the requisite three-fifths majority of the members elected to each house, and entered upon the journals thereof, and afterwards presented to the governor for his approval, who retains the same for more than five days, Sundays excepted, the supreme court will not for such causes declare the propositions in conflict with the constitution, and void. *In re Senate File 31*, 25 Neb. 864 (41 N. W. 981).

10. (1897.) A proposition to amend the constitution of the state can only be submitted at a general election at which there are elected senators and representatives. *Tecumseh Nat. Bank v. Saunders*, 51 Neb. 801 (71 N. W. 779).

11. (1897.) To effect the adoption of an amendment to the constitution of this state submitted by the legislature it must receive more than one-half the highest number of votes cast at such general election, whether such highest number be for the filling of an office or for the adoption of a proposition. *Tecumseh Nat. Bank v. Saunders*, 51 Neb. 801 (71 N. W. 779).

12. (1903.) Something more than mere irregularities and improprieties in declaring the result of an election adopting a constitutional amendment should appear, to warrant the supreme court in attempting to set aside the solemn acts of the legislative bodies and the executive of the state as to the fundamental law of the state, especially after such legislative and executive action has been acquiesced in for sixteen years. *Weston v. Ryan*, 70 Neb. 211 (97 N. W. 347).

13. (1903.) When a proposed constitutional amendment has been duly submitted to the people without prescribed regulations with reference to the manner of counting, canvassing or returning the ballots or ascertaining or authenticating the result of the election, it is competent for the legislature to provide by special enactment for so doing. *Weston v. Ryan*, 70 Neb. 218 (97 N. W. 347).

14. (1903.) The submission by the legislature to the electors of a proposed constitutional amendment is not a legislative act. In making such a submission, the legislature acts in a capacity strictly analogous to that of a constitutional convention and subject to such constitutional restricions and limitations only as have direct reference to the exercise of that power. *Weston v. Ryan*, 70 Neb. 218 (97 N. W. 347).

15. (1907.) The self-imposed limitations of the power of the people to amend their fundmental law should not be so construed as to defeat the will of the people, plainly expressed, on account of a slight and unimportant failure to comply literally with such limitations, if the requirements are substantially observed. *State, ex rel. Thompson, v. Winnett*, 78 Neb. 379 (110 N. W. 1113).

16. (1907.) The constitution requires that, when proposed amendments thereto are submitted to a vote of the people, said proposed amendments shall be "published once each week in at least one newspaper in each county, where a newspaper is published, for three months immediately preceeding the next election of senators and representatives, at which election the same shall be submitted to the electors for approval or rejection." Where there is a substantial compliance with this requirement, the fact that the publication was made for one week less than the required time in one county of the state will not invalidate the amendment. *State, ex rel. Thompson, v. Winnett*, 78 Neb. 379 (110 N. W. 1113).

17. (1907.) The manner of voting upon a constitutional amendment and the general conduct of the election are for the legislature to provide, subject to the limitation that, "When more than one amendment is submitted at the same election they shall be so submitted as to enable the electors to vote on each amendment separately." And when the legislature by resolution submits such question at a general election, as required by the constitution, it will be presumed that the legislature intends that the requirements of the general election law are to be observed. *State, ex rel. Thompson, v. Winnett*, 78 Neb. 379 (110 N. W. 1113).

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18. (1907.) The act of 1901 (laws 1901, ch. 29), amending various sections of the general election law so as to provide for counting straight party votes for a constitutional amendment when such party has indorsed such amendment, does not violate the constitution, and it is within the power of the legislature to provide such regulations. *State, ex rel. Thompson, v. Winnett*, 78 Neb. 379 (110 N. W. 1113).

19. (1907.) It is not necessary that the entire proposed amendment be printed upon the official ballot. If enough is printed upon the ballot to identify the amendment and show its character and purpose, it is sufficient. *State, ex rel. Thompson, v. Winnett*, 78 Neb. 379 (110 N. W. 1113).

20. (1907.) When an amendment to the constitution creates a public office, such office may be filled by vote of the electors at the same election at which the amendment is adopted. *State, ex rel. Thompson, v. Winnett*, 78 Neb. 379 (110 N. W. 1113).

II. CONSTRUCTION, OPERATION AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

General rules of construction.

21. (1877.) In the construction of a constitution its terms must be taken in the ordinary and common acceptation, because they are supposed to have been so understood by the framers and by the people who adopted it. It owes its whole force and authority to its ratification by the people: and they judged it by the meaning apparent on its face according to the general use of the words employed when they do not appear to have been used in a legal or technical sense. *State, ex rel. Davis, v. Bacon*, 6 Neb. 286.

22. (1877.) In the construction of a constitution its terms must be taken in the ordinary and common acceptation. *State, ex rel. Jones, v. Lancaster County*, 6 Neb. 474.

23. (1878.) In construing a section of the constitution, effect must, if possible, be given to every portion of it. *State, ex rel. Helmer, v. McConnel*, 8 Neb. 28.

24. (1902.) In construing constitutional provisions, the rule prevails that words shall be given their ordinary meaning, except where the context makes it plain that they have been used in a technical sense. *Hamilton Nat. Bank v. American Loan & Trust Co.*, 66 Neb. 67 (92 N. W. 189).

25. (1905.) Provisions found in the schedule of the constitution are not in all instances to be construed as of a temporary character. The language used should be given its ordinary meaning; and whether it is intended to be of a temporary or permanent character must be determined from the purpose of the enactment and the object sought to be accomplished thereby. The true meaning of the law is discovered by considering the reason and spirit of it, or the cause which moved the lawmaking body to enact it. *State, ex rel. Polk, v. Galusha*, 74 Neb. 188 (104 N. W. 197).

Construction by legislative or executive departments.

26. (1895.) A contemporaneous construction of a constitutional provision, which has for many years been adhered to by the legislative and executive departments of the government, will not be disregarded by the courts, and in doubtful cases will generally be held conclusive. *State, ex rel. Horne, v. Holcomb*, 46 Neb. 88 (64 N. W. 437).

27. (1900.) While a practical interpretation of the constitution by the legislature will not be lightly disregarded in doubtful cases, yet, when the language of the constitution is free from ambiguity, an interpretation thereof by the legislative department cannot be invoked to nullify the fundamental law. *State, ex rel. Hibbard, v. Cornell*, 60 Neb. 276 (83 N. W. 72).

28. (1905.) Courts will give weighty consideration to the legislative construction of the constitution when legislation is had regarding subjects of a political nature. But when such construction clearly appears to be unwarranted it will not be followed. *State, ex rel. Polk, v. Galusha*, 74 Neb. 188 (104 N. W. 197).

29. (1907.) When the legislature has construed a provision of the constitution in an administrative matter in one of two equally reasonable ways, the court will not take the opposite view, but will adopt and follow the legislative construction. *State v. Sheldon*, 78 Neb. 552 (111 N. W. 372).

Construction of federal constitution.

30. (1896.) The construction placed upon provisions of the federal constitution by the supreme court of the United States must be followed by state courts in all maters to which such provisions are applicable. *State, ex rel. Board of Transportation, v. Sioux City, O. N. & W. R. Co.*, 46 Neb. 682 (65 N. W. 766; 31 L. R. A. 47).

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Grant or limitation of powers.

31. (1872.) The constitution of this state confers plenary legislative power upon the general assembly; and if an act is within the legitimate exercise of that power, it is valid, unless some express restriction or limitation can be found in the constitution itself. *Hallenbeck v. Hahn*, 2 Neb. 377.

32. (1876.) The constitution of the state is not regarded as a grant, but rather as a restriction of legislative power, and so in an inquiry as to whether a statute is constitutional, it is for those who question its validity to show that it is prohibited. *State, ex rel. Atchinson & N. R. Co., v. Lancaster County*, 4 Neb. 537.

33. (1879.) The constitution of a state is not a grant, but a restriction upon the power of the legislature. *State, ex rel. Abbott, v. Dodge County*, 8 Neb. 124 (30 Am. Rep. 819); (1890) *Magneau v. City of Fremont*, 30 Neb. 843 (47 N. W. 280; 27 Am. St. Rep. 436).

Self-executing provisions.

34. (1876.) The constitution fixing the salary of an officer and providing that "the auditor shall draw warrants of the state quarterly" therefor, "which shall be paid out of any funds not otherwise appropriated," appropriates by law the amount necessary to pay such salary, and no legislative act is necessary. *State, ex rel. Roberts, v. Weston*, 4 Neb. 216.

35. (1885.) The provision of the constitution of 1875, that "the private property of no person shall be taken or damaged for public use without just compensation therefor," is self-operating. *Harmon v. City of Omaha*, 17 Neb. 548 (23 N. W. 503; 52 Am. Rep. 420).

Validity of statutory provisions.

36. (1871.) The courts cannot declare an act unconstitutional, because the legislature, in passing it, was influenced by unworthy motives. *Bradshaw v. City of Omaha*, 1 Neb. 16.

37. (1877.) The court cannot pronounce an act of the legislature void merely because it may be imperfect or impolitic, or for any supposed inequality or injustice in its operation, if it be upon a subject-matter fairly within the scope of legislative authority. To bring the validity of a legislative act within the control of the judiciary, it must be clearly subversive of the constitution. *Turner v. Althaus*, 6 Neb. 54.

38. (1877.) The power of the courts to declare a legislative act a nullity because it infringes on the constitution should be "exercised with extreme caution, and never when a serious doubt exists as to the true interpretation of the provision alleged to be repugnant." *State, ex rel. Jones, v. Lancaster County*, 6 Neb. 474.

39. (1879.) The legislature can legalize no act which that body could not have authorized before it was done. It cannot validate that which the constitution, either in express terms or by necessary implication, prohibits. *City of Hastings v. Thorne*, 8 Neb. 160.

40. (1881.) All laws in force in force at the time of the adoption of the constitution of 1875 in conflict with its provisions, and under which rights had not become vested therewith, repealed. *Hanscom v. City of Omaha*, 11 Neb. 37 (7 N. W. 739).

41. (1885.) Legislative bodies are created by the constitution, and every act may be tested by that instrument and declared void if not in conformity to its requirements. *State, ex rel. Huff, v. McClelland*, 18 Neb. 236 (25 N. W. 77; 53 Am. St. Rep. 814).

42. (1888.) No act of the legislature will be declared void unless it is clearly so, and the party who claims that an act is unconstitutional must be able to point to the particular provision of the constitution with which it is in conflict. *State, ex rel. Singleton, v. Van Duyn*, 24 Neb. 586 (39 N. W. 612); (1899) *State, ex rel. Cornell, v. Poynter*, 59 Neb. 417 (81 N. W. 431); (1902) *Rosenbloom v. State*, 64 Neb. 342 (89 N. W. 1053; 57 L. R. A. 922); (1904) *State, ex rel. Prout, v. Nolan*, 71 Neb. 136 (98 N. W. 657).

43. (1897.) Every legislative act comes before the courts surrounded with the presumption of constitutionality, and this presumption continues until the act under review clearly appears to contravene some provision of the constitution. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

44. (1904.) An act of the legislature will not be declared unconstitutional and void on the presumption that it will be used as a basis to assert an unjust or illegal claim to the property of the state. *Marsh v. Stonebraker*, 71 Neb. 224 (98 N. W. 699).

45. (1904.) The constitutional validity of an act of the legislature is to be tested and determined, not by what has been or possibly may be done under it, but by what

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the law authorizes to be done under and by virtue of its provisions. *City of Beatrice v. Wright*, 72 Neb. 689 (101 N. W. 1039).

——Letter and spirit of constitution.

46. (1894.) The fact that a statute is within the letter of the constitution is not sufficient. It must also be in substantial compliance with the spirit and purpose thereof, and an act which violates the true meaning and intent of the constitution and is an evasion of its general express or plainly implied purpose is as clearly void as if in express terms prohibited. *State, ex rel. Stull Bros., v. Bartley*, 41 Neb. 277 (59 N. W. 907).

47. (1898.) The bill of rights of our constitution is not an enumeration of all the powers reserved to the people of this state. A statute is unconstitutional and void which is repugnant to the rights, expressed or implied, retained by the people. *State, ex rel. Attorney General, v. Moores*, 55 Neb. 480 (76 N. W. 175: 41 L. R. A. 624).

——Presentation of question.

48. (1874.) The constitutionality of a law will not be determined upon review where the question was not presented below. *Pill v. State*, 43 Neb. 23 (61 N. W. 96).

49. (1895.) When the supreme court is asked to declare a statute unconstitutional, the particular section of the constitution which it is claimed the law infringes should be pointed out in the brief filed. *Boyes v. Summers*, 46 Neb. 308 (64 N. W. 1066).

Persons who can raise constitutional question.

50. (1885.) A court will not ordinarily listen to an objection made to the constitutionality of an act of the legislature by a party whose rights it does not affect, and who has therefore no interest in defeating it. *State, ex rel. Morton, v. Stevenson*, 18 Neb. 416 (25 N. W. 585).

III. DISTRIBUTION OF GOVERNMENTAL POWERS.

Construction of constitution by legislative or judicial departments, see *ante*, §§ 26-29.

In general.

51. (1877.) The powers of the state government are divided into three distinct departments—the legislative, executive, and judicial—and no person or collection of persons, being one of these departments, can exercise any power properly belonging to either of the others, except expressly so authorized by the constitution. Under this division of distinct departments of the government, the apportionment of power to one department will of itself imply an inhibition of its exercise by the others. *Turner v. Althaus*, 6 Neb. 54.

Legislative powers and functions.

52. (1892.) Constitutional limitations upon the power of the legislature in respect to offices will be confined to those offices which are specially enumerated in the constitution unless the contrary clearly appears therefrom. *State, ex rel. Attorney General, v. Smith*, 35 Neb. 13 (52 N. W. 700).

53. (1901.) The function of expressing the public will is intrusted to the legislature, but not to the courts, and to this principle it is the duty of the latter to give practical force as well as theoretical recognition. *Adams v. Weisberger*, 62 Neb. 325 (87 N. W. 16).

54. (1904.) The scavenger law provides for one of two methods of collecting delinquent taxes on real estate, and permits the county board to choose which method it will pursue. This does not amount to a delegation of legislative authority. *Woodrough v. Douglas County*, 71 Neb. 354 (98 N. W. 1092).

55. (1907.) The division of powers between the several branches of the state government made by article II of the constitution is comprehensive and final, and the legislature can neither add to nor subtract from the classes or character of questions with which the courts are entitled to deal. *Tyson v. Washington County*, 78 Neb. 211 (110 N. W. 634).

55*a*. (1907.) The power of the legislature over the subject of procedure, within limits not impairing the inherent powers or jurisdiction of the courts, is not restricted; and it is competent to require, by statute, a preliminary judicial ascertainment of facts, the existence of which is made a condition precedent to the creation of a public corporation. *Barnes v. Minor*, 80 Neb. 189 (114 N. W. 146).

Judicial powers and functions.

56. (1871.) Courts have no jurisdiction over matters which are committed to the discretion of the legislature. *Bradshaw v. City of Omaha*, 1 Neb. 16.

57. (1898.) The power—the jurisdiction—to determine what compensation a public service corporation may exact for services

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to be rendered by it is a legislative and not a judicial function. *Nebraska Telephone Co. v. State, ex rel. Yeiser*, 55 Neb. 627 (76 N. W. 171; 45 L. R. A. 113).

58. (1898.) The jurisdiction of the courts is limited to declaring what the law is, and they are forbidden by the constitution to perform legislative functions. *Nebraska Telephone Co. v. State, ex rel. Yeiser*, 55 Neb. 627 (76 N. W. 171; 45 L. R. A. 113).

59. (1901.) Section 584 of the criminal code, by leaving it discretionary with the district court whether or not a grand jury shall be called, does not confer upon the judiciary legislative powers. *Dinsmore v. State*, 61 Neb. 418 (85 N. W. 445).

60. (1902.) The theory that the judiciary, in issuing a mandamus to a member of the executive branch of the government, is thereby indirectly, and in violation of the constitution, exercising power properly belonging to the executive department, has been repudiated by this court in a long line of decisions. *State, ex rel. Wright, v. Savage*, 64 N. W. 684 (90 N. W. 898).

61. (1902.) The right of the courts to determine all judicial questions, whenever or however they may arise, is given by the constitution in explicit terms and is indisputable. But equally clear and incontestable is the right of the executive officers named in the constitution to exercise all powers properly belonging to the executive department. *State, ex rel. Wright, v. Savage*, 64 Neb. 684 (90 N. W. 898).

IV. POLICE POWERS IN GENERAL.

Police power of cities, see *Municipal Corporations*, VIII.

Waiver of powers.

62. (1896.) The reserved powers of the state, including the police power, are inalienable, and cannot be surrendered or bartered away by the legislature. *West Point Water Power & Land Improvement Co. v. State, ex rel. Moodie*, 49 Neb. 218 (66 N. W. 6).

Protection of property.

63. (1875.) An ordinance passed by a city of the second class, punishing persons who wilfully, maliciously, or mischievously meddle with, or trespass upon, the personal or real property of others, is not repugnant to the constitution or laws of the state. *City of Brownville v. Cook*, 4 Neb. 101.

Promotion of public welfare.

64. (1905.) An act which is calculated to foster sentiments of patriotism, such as one to prevent and punish the desecration of the flag of the United States, by use in an advertisement is not vulnerable to the objection that it is not calculated to promote the welfare of society. *Halter v. State*, 74 Neb. 757 (105 N. W. 298). [Affirmed, 205 U. S. 34.]

Public health and safety.

65. (1896.) The legislative power to subserve the public welfare by regulations in the interest of health and safety is inherent in the sovereignty of the state and cannot be bartered away by contract or otherwise. *Chicago, B. & Q. R. Co. v. State, ex rel. City of Omaha*, 47 Neb. 549 (66 N. W. 624; 53 Am. St. Rep. 557; 41 L. R. A. 481).

66. (1896.) The essential quality of the police power as a governmental agency is that it imposes upon persons and property, burdens designed to promote the safety and welfare of the public at large. *Chicago, B. & Q. R. Co. v. State, ex rel. City of Omaha*, 47 Neb. 549 (66 N. W. 624; 53 Am. St. Rep. 557; 41 L. R. A. 481).

67. (1898.) A statute authorizing a city to assess against a lot on which a nuisance exists the entire cost of abating the nuisance by improving the lot does not violate the constitutional provision relating to special taxation for local improvements, but is a proper exercise of police power. *Horbach v. City of Omaha*, 54 Neb. 83 (74 N. W. 434).

68. (1900.) A statute making carriers liable for injuries to passengers in the absence of negligence, is within the police power of the state. *Chicago, R. I. & P. R. Co. v. Zernecke*, 59 Neb. 689 (82 N. W. 26; 55 L. R. A. 610).

69. (1903.) The act of 1905, forbidding the selling or keeping for sale "imitation butter" colored so as to resemble butter made from pure milk, or the cream thereof, and the other regulations imposed by the act, is a valid exercise of the police power of the state; and it is competent for the legislature to provide such regulations as therein prescribed and to enact suitable penalties for their violation, for the better protection of the public health, and to prevent fraud and deception. *Beha v. State*, 67 Neb. 27 (93 N. W. 155).

70. 1905.) Notwithstanding the four-

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teenth amendment to the federal constitution, the state, in the exercise of the police power, may enact such laws as are calculated to promote the health, comfort, safety and welfare of society, although such laws operate to restrict the liberty of citizens of the United States. But whether legislation thus operating is in fact calculated to promote such ends is a legitimate subject of inquiry by the court, when the constitutionality of the act is assailed. *Halter v. State*, 74 Neb. 757 (105 N. W. 298). [Affirmed, 205 U. S. 34.]

Maintenance and regulation of highways.

71. (1896.) The provision of the charter of the city of Omaha (Compiled Statutes, ch. 12*a*, sec. 48), authorizing said city, by ordinance, to require railroad companies to construct and keep in repair viaducts over streets therein, crossed by their tracks, is a valid exercise of the police power of the state. *Chicago, B. & Q. R. Co. v. State, ex rel. City of Omaha*, 47 Neb. 549 (66 N. W. 624; 53 Am. St. Rep. 557; 41 L. R. A. 481).

Invasion of private rights.

72. (1894.) The legislature cannot, under the guise of police regulation, arbitrarily invade private property or personal rights. The test when such regulations are called in question is whether they have some relation to the public health or public welfare, and whether such is, in fact, the end sought. *Smiley v. MacDonald*, 42 Neb. 5 (60 N. W. 355; 47 Am. St. Rep. 684; 27 L. R. A. 540); (1902) *Iler v. Ross*, 64 Neb. 710 (90 N. W. 869; 97 Am. St. Rep. 676; 57 L. R. A. 895).

73. (1896.) The legislature cannot, under the guise of police regulations, arbitrarily invade personal rights or private property. There must be some obvious and real connection between the actual provisions of such measures and their assumed purpose. *Chicago, B. & Q. R. Co. v. State, ex rel. City of Omaha*, 47 Neb. 549 (66 N. W. 624; 53 Am St. Rep. 557; 41 L. R. A. 481).

Delegation of power.

74. (1896.) The power of the legislature to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety, may be asserted directly by the legislature, or may, in the absence of constitutional restrictions upon the subject, be delegated to the several municipal corporations or other agencies provided for its exercise. *Chicago, B. & Q. R. Co. v. State, ex rel. City of Omaha*, 47 Neb. 549 (66 N. W. 624; 53 Am. St. Rep. 557; 41 L. R. A. 481).

V. PERSONAL, CIVIL AND POLITICAL RIGHTS.

Personal liberty.

75. (1906.) Section 7, chapter 82, laws 1905, providing for the commitment of dipsomaniacs, is unconstitutional, as in violation of the right to personal liberty. *In re Schwarting*, 76 Neb. 773 (108 N. W. 125).

Liberty to contract.

76. (1894.) Sections 1 and 3 of chapter 54 of the Session Laws of 1891 having provided, in effect, that for all classes of mechanics, servants and laborers, excepting those engaged in farm or domestic labor, a day's work should not exceed eight hours, and that for working any employe over the prescribed time the employer should pay extra compensation in increasing geometrical progression for the excess over eight hours (the rate of payment for the eighth hour being taken as the basis upon which to reckon such progression), *held*, that these provisions are unconstitutional, (1) because the discrimination against farm and domestic laborers is special legislation; (2) because by the act in question the constitutional right of parties to contract with reference to compensation for services is denied. *Low v. Rees Printing Co.*, 41 Neb. 127 (59 N. W. 362; 43 Am. St. Rep. 670; 24 L. R. A. 702).

77. (1902.) The act of March 31, 1899, is only a fair and reasonable exercise of the police power. It does not deprive any citizen of his property, or the reasonable use thereof, without due process of law. It does not prohibit the right of contract. It merely regulates the same in a reasonable manner. It is therefore not in conflict with the constitution, and is in all things valid. *Wenham v. State*, 65 Neb. 394 (91 N. W. 421; L. R. A. 825).

Religious liberty.

78. (1902.) Enforced attendance upon religious services is forbidden by the constitution, and pupils in a public school cannot be required either to attend such services or to join in them. *State, ex rel. Freeman, v. Scheve*, 65 Neb. 876 (93 N. W. 169).

79. (1902.) The right of all persons to worship Almighty God according to the dictates of their own consciences is declared by the constitution of this state to be a natural and indefeasible right. *State, ex rel.*

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Freeman, v. Scheve, 65 Neb. 876 (93 N. W. 169).

80. (1902.) Exercises by teacher in a public school in a school building, in school hours, and in the presence of the pupils, consisting of the reading of passages from the Bible, and in the singing of songs and hymns, and offering prayer to the Deity in accordance with the doctrines, beliefs, customs, or usages of sectarian churches or religious organizations, is forbidden by the constitution of this state. *State, ex rel. Freeman, v. Scheve*, 65 Neb. 853, 876 (91 N. W. 846).

81. (1902.) The law does not forbid the use of the Bible in the public schools; it is not proscribed either by the constitution or the statutes; and the courts have no right to declare its use to be unlawful because it is possible or probable that those who are privileged to use it will misuse the privilege by attemtping to propagate their own peculiar theological or ecclesiastical views and opinions. The point where the courts may rightfully interfere to prevent the use of the Bible in a public school, is where legitimate use has degenerated into abuse—where a teacher employed to give secular instruction has violated the constitution by becoming a sectarian propagandist. *State, ex rel. Freeman, v. Scheve*, 65 Neb. 853, 876 (93 N. W. 169).

VI. VESTED RIGHTS.

Political power.

82. (1880.) Political power conferred by the legislature can never become a vested right as against the government. Such power is a public trust, to be executed, not for the benefit alone or at the will of the trustee, but for the common good. *State, ex rel. Mayor, v. Palmer*, 10 Neb. 203 (4 N. W. 965).

Rules of common law.

83. (1901.) There is no vested right in any rule of the common law. *State v. Heldenbrand*, 62 Neb. 136 (87 N. W. 25; 89 Am. St. Rep. 493).

Rules of procedure.

84. (1886.) A defendant on trial for a criminal offense has no vested right in the manner of procedure established by law at the time of the commission of the alleged crime. It is within the power of the legislature to change the procedure or manner of enforcing a punishment after the commission of the offense, and such a law would not be void as an *ex post facto* law. *Marion v. State*, 20 Neb. 233 (29 N. W. 911; 57 Am. Rep. 825).

Rules of evidence.

85. (1901.) The legislature may change the rules of evidence. *State v. Heldenbrand*, 62 Neb. 136 (87 N. W. 25; 89 Am. St. Rep. 493).

Salaries of public officers.

86. (1886.) Where no salary is provided for an officer of a city, an ordinance providing for such salary during his term is not unconstitutional. *Wheelock v. McDowell*, 20 Neb. 160 (29 N. W. 291).

Disposition of public moneys.

87. (1884.) The provisions of the act of March 1, 1883, requiring the county treasurer to pay over to the treasurer of cities of the second class having over ten thousand inhabitants all moneys arising from the levy of road tax against or upon property in said city, are not in violation of the vested rights of the county or any officer thereof. *State, ex rel. Jones, v. Graham*, 16 Neb. 74 (19 N. W. 470).

VII. OBLIGATION OF CONTRACTS.

Power of states in general.

88. (1896.) The legislature cannot, by law, impair the obligation of contracts. *State, ex rel. Kearney Water Co., v. City of Kearney*, 49 Neb. 325 (68 N. W. 533).

Contracts of states and municipalities.

89. (1871.) An act requiring the holder of a county warrant, which is overdue and which draws ten per cent. per annum interest, to present the same at the treasury, and surrender it and take in its place bonds drawing interest at seven per cent. per annum, payable at a distant day, is unconstitutional as impairing the obligation of a contract. *Brewer v. Otoe County*, 1 Neb. 373.

90. (1874.) The constitutional provision inhibiting the impairment of the obligation of contracts applies to both those executory and those executed, and to contracts made with the state as well as those between individuals. *Koenig v. Omaha & N. W. R. Co.*, 3 Neb. 373.

91. (1874.) The act of the legislature, approved March 1, 1871, which undertakes to dispose of a portion of the lands, granted to railroad companies, for the purpose of building highway bridges across the Platte river, impairs the obligations of the con-

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tract between the state and the railroad companies above cited, and is unconstitutional and void. *Koenig v. Omaha & N. W. R. Co.*, 3 Neb. 373.

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92. (1891.) While the legislature may change the remedy for the enforcement of contracts, it cannot impair their obligation; hence, it cannot take away the right of a lessee of school land to select an arbitrator, as provided by his lease, to reappraise the land at the end of five years. *State, ex rel Brown, v. McPeak*, 31 Neb. 139 (47 N. W. 691).

Impairing remedy.

93. (1884.) Without impairing the obligation of contracts the legislature may enact laws affecting the remedy upon them. *Schoenheit v. Nelson*, 16 Neb. 235 (20 N. W. 205).

94. (1894.) Section 531c of the code, to prevent garnishment of wages, in its application to debts incurred prior to its passage, does not impair the obligations of contracts since an assignment for the purpose of evading the effect of our exemption laws was unlawful before as well as after the passage of the act, and the act affects only the remedy. *Bishop v. Middleton*, 43 Neb. 10 (61 N. W. 129; L. R. A. 445).

95. (1903.) An act of a state legislature which is designed, and if enforced would be effectual, to deprive the obligees of existing contracts of an important and efficient remedy for the enforcement of the same, is an act impairing the obligations of such contracts and is in contravention of section 10, article I of the constitution of the United States. *Burrows v. Vanderbergh*, 69 Neb. 43 (95 N. W. 57).

96. (1903.) The validity of the so-called deficiency judgment law of 1897 can be upheld only by construing it, in connection with section 2, chapter 88 of the Compiled Statutes, in such manner as to bring it into harmony with the supreme law of the land as interpreted by the supreme court of the United States. So construed, it does not impair or affect any remedy upon any contract entered into before its enactment. *Burrows v. Vanderbergh*, 69 Neb. 43 (94 N. W. 57).

Alteration of extent of liability.

97. (1888.) The act of 1881, section 2, chapter 59, (Laws 1881) entitled "Mechanics' Liens," is not unconstitutional as impairing the obligation of contracts, by reason of its provisions being construed to apply to buildings already under contract at the time of the taking effect of said act, so as to give a lien thereon for all labor, skill, and material furnished therefor after the taking effect of said act. *Colpetzer v. Trinity Church*, 24 Neb. 113 (37 N. W. 931).

Executed contracts.

98. (1874.) The provision of the constitution which inhabits any law impairing contractual obligations applies alike to executed and executory contracts. *Koenig v. Omaha & N. W. R. Co.*, 3 Neb. 373.

VIII. RETROSPECTIVE AND EX POST FACTO LAWS.

In general.

99. (1877.) An act which provides that a penalty shall attach to and become a part of a tax already delinquent, is void as being retroactive. *Ryan v. State*, 5 Neb. 276.

100. (1884.) Although the act of March 1, 1883, requiring the county treasurer to pay over to treasurers of cities of the second class having over ten thousand inhabitants all moneys arising from the levy of road tax against or on property in said cities, applies to moneys in the hands of the county treasurer when it went into effect, it is not for that reason objectionable as being retrospective. *State, ex rel. Jones, v. Graham*, 16 Neb. 74 (19 N. W. 470).

101. (1884.) A law which makes an action done before its passage, which was innocent when done, criminal, and punishes such action, or that aggravates a crime or makes it greater than when it was committed, or which, in relation to that offense or its consequences, alters the situation of the party to his disadvantage, or that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed, is an *ex post facto* law, and in so far as it affects the punishment of the party to his disadvantage is void. *Marion v. State*, 16 Neb. 349 (20 N. W. 289, 396).

102. (1884.) At the time of the commission of the alleged offense the punishment prescribed for the crime of murder was either death or imprisonment for life, the penalty to be fixed by the jury, in their verdict. After the commission of the offense the law was changed so as to make death the punishment for murder in the first degree, and divesting the jury of the authority to fix the penalty. *Held*, That so

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far as the law affected the rights of the party charged with the offense by depriving him of the right to the verdict of the jury upon the question of punishment it was *ex post facto* and void. *Marion v. State*, 16 Neb. 349 (20 N. W. 289, 396).

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IX. PRIVILEGES OR IMMUNITIES AND CLASS LEGISLATION.

In general.

103. (1885.) The act of the legislature approved February 28, 1881, commonly known as the Slocumb Liquor Law, is not unconstitutional as being in violation of the provisions of the constitution of the United States, which provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," it being the exercise of the police power of the state for the protection of its citizens, and not for the purpose of revenue or the regulation of commerce. In the exercise of such power, it is competent for the legislature to require that the licensee shall be a resident of the state, and subject to its laws and to the processes of its courts. *Mette v. McGuckin*, 18 Neb. 323 (25 N. W. 338).

104. (1902.) Chapter 91*a* of the Compiled Statutes, 1901, defines and prohibits trusts, but provides that nothing therein shall be construed to prevent any assembly or association of laboring men from adopting such regulations as they may think proper with reference to wages. The exception of labor unions from the operation of the statute is not contrary to the constitutional prohibition (constitution, art. III, sec. 15) of the grant of special or exclusive privileges and immunities. *Cleland v. Anderson*, 66 Neb. 252 (92 N. W. 306).

X. EQUAL PROTECTION OF LAWS.

In general.

105. (1899.) The act of June 22, 1867, (Session Laws, p. 88) making railroad companies liable, in absence of negligence, for injuries to passengers neither deprives carriers of property without due process of law, nor denies them the equal protection of the laws. *Chicago, R. I. & P. R. Co. v. Young*, 58 Neb. 678 (79 N. W. 556)

XI. DUE PROCESS OF LAW.

Constitutional guaranties in general.

106. (1877.) The legislative authority cannot reach the life, liberty, and property of the individual, except when he is convicted of crime, or when the sacrifice of his property is demanded by a just regard for the public welfare. *Atchison & N. R. Co. v. Baty*, 6 Neb. 37 (29 Am. Rep. 356).

107. (1877.) The terms "due process of law" and "the law of the land"—one or the other of which is found in all constitutions of the states—are said to mean the same thing. *Atchison & N. R. Co. v. Baty*, 6 Neb. 37 (29 Am. Rep. 356).

108. (1878.) Due process of law is a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. *South Platte Land Co. v. Buffalo County*, 7 Neb. 253.

109. (1895.) The term "due process of law" as used in section 3, article I of the constitution of this state, relates to the remedy for wrongs to persons and property rather than to matters of substantive law. *Board of Directors of Alfalfa Irrigation District v. Collins*, 46 Neb. 411 (64 N. W. 1086).

110. (1898.) Due process of law defined and discussed. *Cummins v. Hyatt*, 54 Neb. 35 (74 N. W. 411).

Statutory creation of offenses.

111. (1901.) Section 9, chapter 12, Compiled Statutes making it a crime to sell mortgaged chattels without "the written consent" of the mortgagee is not violative of section 3, article I of the constitution, which decrees that "no person shall be deprived of life, liberty or property, without due process of law. *State v. Heldenbrand*, 62 Neb. 136 (87 N. W. 25; 89 Am. St. Rep. 493).

112. (1905.) Chapter 139, laws 1903, entitled "An act to prevent and punish the desecration of the flag of the United States" is not obnoxious to the fourteenth amendment to the constitution of the United States, nor to the provisions of the state constitution against depriving any person of his property without due process of law, and against special or class legislation. *Halter v. State*, 74 Neb. 757 (105 N. W. 298). [Affirmed. 205 U. S. 34.]

Deprivation of property in general.

113. (1871.) The constitutional provision that private property shall not be taken for public use without just compensation, implies that it shall not be taken for private use at all; either with or without compensation. This is the same as the axiom of natural justice, that the state

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shall not take A's property and give it to B. *Bradshaw v. City of Omaha*, 1 Neb. 16.

114. (1877.) The private property of a citizen cannot, by the exercise of legislative power in any form, be taken from him and given to another, or to a corporation. Such act would be judicial, depriving the citizen of his property without due process of law. *Turner v. Althaus*, 6 Neb. 54.

115. (1896.) "Due process of law," as the term is used in the state and federal constitutions, does not necessarily imply a hearing, by one whose property is taken or damaged for public use, according to the established practice in courts of common law or equity, but is satisfied whenever an opportunity is afforded to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be attained. *Chicago, B. & Q. R. Co. v. State, ex rel. City of Omaha*, 47 Neb. 549 (66 N. W. 624; 53 Am. St. Rep. 557; 41 L. R. A. 481).

116. (1896.) The power of the legislature over private property is not absolute. But while it cannot at will impose upon property burdens so excessive and unreasonable as to work a practical confiscation thereof, the courts will never interfere to prevent the enforcement of statutes on account of any mere difference of opinion between them and the law-making power of the government respecting the wisdom or necessity of particular measures. *Chicago, B. & Q. R. Co. v. State, ex rel. City of Omaha*, 47 Neb. 549 (66 N. W. 624; 53 Am. St. Rep. 557; 41 L. R. A. 481).

117. (1897.) An order of the state board of transportation under the provisions of the act of March 31, 1887, entitled "An act to regulate railroads and prevent unjust discrimination," etc., which requires a railroad company to surrender a portion of its right of way for an elevator site to a person or corporation engaged in the buying and shipping of grain, contemplates the taking of property for mere private use within the prohibition of the United States constitution, and is accordingly without authority and void. *Chicago, B. & Q. R. Co. v. State, ex rel. State Board of Transportation*, 50 Neb. 399 (69 N. W. 955).

118. (1897.) Unclaimed witness fees and costs remaining in the hands of the clerk of the district court are not public moneys, and the legislation of the state, in so far as it attempts to divest the persons for whose benefit such fees and costs were paid of title thereto, is unconstitutional and void. *State, ex rel. Broatch, v. Moores*, 52 Neb. 770 (73 N. W. 299). [Overruled. *Douglas County v. Moores*, 66 Neb. 284.]

119. (1899.) Neither courts nor legislatures, except on the demand of the state and for its use, can compel one citizen to sell his property even for its full value to his neighbor for the latter's private use. *Lowe v. Prospect Hill Cemetery Ass'n*, 58 Neb. 94 (78 N. W. 488; 46 L. R. A. 237).

120. (1900.) No person can be deprived of his property or other valuable right by the exercise of judicial or other governmental power, without notice to such person and reasonable opportunity to be heard in his defense. *Horton v. State, ex rel. Hayden*, 60 Neb. 701 (84 N. W. 87).

121. (1902.) The act of March 31, 1899, is only a fair and reasonable exercise of the police power. It does not deprive any citizen of his property, or the reasonable use thereof, without due process of law. It does not prohibit the right of contract. It merely regulates the same in a reasonable manner. It is therefore not in conflict with the constitution, and is in all things valid. *Wenham v. State*, 65 Neb. 394 (91 N. W. 421; 58 L. R. A. 825).

——— Ex parte proceedings.

122. (1901.) An *ex parte* proceeding by which one person seeks to deprive another of his property, although adversary in its form, is in derogation of the common law and the statute authorizing it must be strictly followed or the entire transaction will be void. *Buchanan v. Edmisten*, 1 Unof. 429 (95 N. W. 620).

Taxation of property.

123. (1877.) Section 24 of the "act to incorporate cities of the first class," approved March 28, 1873, authorizing and empowering the mayor and council of such cities to levy and collect taxes for general purposes, is not unconstitutional; and under this law, all property within the limits of a city as incorporated, which is taxable according to the laws of the state, is subject to taxation by the municipal corporation for general purposes. *Turner v. Althaus*, 6 Neb. 54.

124. (1904.) The sale of real estate for the payment of delinquent taxes, under the

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provisions of section 1, article IX, chapter 77, Compiled Statutes, does not deprive the owner of his property without due process of law. *Woodrough v. Douglas County*, 71 Neb. 354 (98 N. W. 1092).

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125. (1904.) An owner is not deprived of his property without due process of law by means of taxation, if he has an opportunity to question its validity or the amount of such tax or assessment at some stage of the proceedings, either before that amount is finally determined, or in subsequent proceedings for its collection. *Hacker v. Howe*, 72 Neb. 385 (101 N. W. 255).

126. (1904.) Compiled Statutes, article I, chapter 77, pp. 39 and 40, as existing prior to their repeal by the revenue act of 1903, are not invalid as taking property by taxation without due process of law. *State, ex rel. Morton, v. Back*, 72 Neb. 402 (100 N. W. 952).

126*a*. (1908.) Due process of law does not necessarily require a judicial hearing in matters of taxation. *Trainor v. Maverick Loan & Trust Co.*, 80 Neb. 626 (114 N. W. 932).

126*b*. (1908.) A sale of real estate by the county treasurer, for delinquent taxes, without any proceeding in court, is not a taking of property without due process of law. *Trainor v. Maverick Loan & Trust Co.*, 80 Neb. 626 (114 N. W. 932).

Local improvements.

127. (1876.) A statute authorizing a city to grade and improve streets, one-half of the expense to be paid by special tax or assessment on lots abutting thereon is constitutional, under that provision authorizing the legislature to organize cities and towns and restrict their power of taxation, and assessment. *Hurford v. City of Omaha*, 4 Neb. 336.

128. (1888.) Under section 31, chapter 78, Compiled Statutes, providing for the establishment of roads, a party having due notice of the establishment of a public road over his premises, and having neglected, within the time provided, to remove his fences, the enforcement of penalty and costs for such neglect is not an abridgement of his rights under sections 3 and 15 of article I of the constitution of this state, and he is not thereby deprived of his property without due process of law. *Black v. Stein*, 23 Neb. 302 (36 N. W. 548).

129. (1895.) The district irrigation law does not conflict with the constitution by authorizing the taking of property for private use only. *Board of Directors of Alfalfa Irrigation Dist. v. Collins*, 46 Neb. 411 (64 N. W. 1086).

130. (1895.) The act providing for organization and promotion of irrigation districts, and the voting of bonds therefore, does not contemplate the taking of property without due process of law, by means of taxation, within the prohibition of the state or federal constitution. *Board of Directors of Alfalfa Irrigation District v. Collins*, 46 Neb. 411 (64 N. W. 1086).

131. (1898.) Taxation in aid of internal improvements such as irrigating canals or ditches does not involve the taking of property for private use, or without due process of law. *Cummings v. Hyatt*, 54 Neb. 35 (74 N. W. 411).

132. (1901.) Section 110 of the Omaha city charter act, giving to the mayor and city council unrestricted rights in the improvement of streets and alleys around the court house is not unconstitutional as taking property without due process of law. *Kountz v. City of Omaha*, 63 Neb. 52 (88 N. W. 117).

Imposition of penalty or forfeiture.

133. (1888.) Section 92, chapter 13, Compiled Statutes, 1887, providing that a license to sell intoxicating liquor shall be revoked upon the conviction of the licensee of any violation of any law, ordinance or reguation pertaining to the sale of such liquors, is not a taking of property without due process of law. *Martin v. State*, 23 Neb. 371 (36 N. W. 554).

134. (1904.) Under the police power of the state, the legislature has power to declare property which may be used only for an unlawful purpose to be a public nuisance and authorize the same to be abated summarily by public officers, but, if property of a nature innocent in itself and susceptible of a beneficial use, has been used for an unlawful purpose, a statutory provision subjecting it to summary forfeiture to the state as a penalty or punishment for the wrongful use, without affording the owner thereof opportunity for a hearing, deprives him of his property without due process of law. *McConnell v. McKillip*, 71 Neb. 712 (99 N. W. 505; 65 L. R. A. 607).

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Imposition of liability for injuries to persons.

135. (1899.) The act of June 22, 1867 (Session Laws, p. 88), making railroad companies liable, in absence of negligence, for injuries to passengers neither deprives carriers of property without due process of law, nor denies them the equal protection of the laws. *Chicago, R. I. & P. R. Co. v. Young*, 58 Neb. 678 (79 N. W. 556).

136. (1900.) Section 3, article I, chapter 72, Compiled Statutes, making carriers presumptively liable for injuries to passengers is not inimical to the fourteenth amendment of the constitution of the United States, nor to section 3, article I, of the constitution of this state, as tending to deprive railroad companies of their property without due process of law. *Chicago, R. I. & P. R. Co. v. Zernecke*, 59 Neb. 689 (82 N. W. 26; 55 L. R. A. 610).

Civil remedies and proceedings.

137. (1893.) Although the right to recover for damage to private property is reserved by the constitution, it is within the power of the legislature to regulate the remedy and prescribe the forms to be observed in order to enforce that right. The only limitation upon the power of the legislature in that respect is that the regulation must be reasonable, and provided by general laws of uniform application. *City of Lincoln v. Grant*, 38 Neb. 369 (56 N. W. 995).

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CONSTRUCTIVE TRUSTS.

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CONTEMPT.

ANALYSIS.

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Change of venue in contempt proceedings, see *Venue*, § 22.

I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

Kinds of contempt.

1. (1882.) Contempts are either direct or constructive, *i. e.*, in the presence of the court or acts or omission tending to prevent the administration of justice. *Gandy v. State*, 13 Neb. 445 (14 N. W. 142).

Refusal of attorney to appear before judge.

2. (1895.) A candid statement by an attorney, in respectful language, of his reasons for refusing to appear before a particular judge, will not, of itself, sustain a conviction on the charge of contempt. *Hawes v. State*, 46 Neb. 149 (64 N. W. 699).

3. (1895.) An attorney has a right to refuse a retainer which would require his appearance before a particular judge, and a candid statement to the court or judge, in respectful language of the reasons for such a course, will not of itself sustain a conviction on the charge of contempt. *Hawes v. State*, 46 Neb. 149 (64 N. W. 699).

Affidavit of prejudice of judge.

4. (1896.) It is not a contempt *per se* to present to a judge, in respectful language and in a proper manner, an application for a trial before another judge on account of the former's prejudice. *Le Hane v. State*, 48 Neb. 105 (66 N. W. 1017).

5. (1896.) In a summary proceeding, a person making an application for a transfer to another judge because of prejudice, cannot be punished for contempt because of the character of the original publication of such documents, or of improper motives in making the application. Such a proceeding must be based on information as for constructive contempt. *Le Hane v. State*, 48 Neb. 105 (66 N. W. 1017).

6. (1896.) When proof of prejudice of a judge in a contempt proceeding is of a documentary character, the presenting of the application, if it is so made in good faith, is not a contempt of court merely because the documents offered in evidence do reflect upon the character of the judge, and even though their original publication may have been contemptuous or libelous. *Le Hane v. State*, 48 Neb. 105 (66 N. W. 1017).

7. (1896.) An application to have another judge hear a contempt proceeding must be supported by evidence, and the tender of such evidence is not a contempt of court when made in good faith for the purpose of proving such prejudice and not for the purpose of reflecting upon the judge's honor, integrity, or character. *Le Hane v. State*, 48 Neb. 105 (66 N. W. 1017).

8. (1896.) An attorney at law applied to a district judge for an order transferring a cause to another judge for trial because of prejudice on the part of the first. He supported the application by proof that he had published a libel of and concerning the judge to whom the application was made, and attached a copy of the libelous publication to his affidavit. The application was itself made in respectful language and it did not appear that it was not presented in a respectful manner. *Held*, That the attorney could not be summarily convicted of contempt without an information and trial, because of matter contained in the libelous publication. *Le Hane v. State*, 48 Neb. 105 (66 N. W. 1017).

Refusal of witness to be sworn or to testify.

9. (1895.) A witness who contumaciously refuses to answer any legal and proper question asked him is guilty of a contempt. *Wilcox v. State*, 46 Neb. 402 (64 N. W. 1072).

9a. (1895.) When a witness is committed for contempt for refusing to testify, the questions asked and refused to be answered must be stated in the order of commitment. *Wilcox v. State*, 46 Neb. 402 (64 N. W. 1073).

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10. (1895.) It is not a contempt of court for a witness to decline merely to be sworn, but he must also refuse to be affirmed, and the record must so disclose. *Wilcox v. State*, 46 Neb. 402 (64 N. W. 1072).

Tampering with jury.

11. (1907.) All wilful attempts of whatever nature, seeking to improperly influence jurors in the impartial discharge of their duties, whether it be by conversations or discussions, or attempts to bribe, constitute contempts *Emery v. State*, 78 Neb. 547 (111 N. W. 347).

Disputing charge to grand jury.

12. (1894.) Where a court gives an inflammatory charge to a grand jury, attorneys for a person indicted thereby, who in good faith allege in respectful language that the charge is inflammatory, and move to quash the indictment on that ground, are not guilty of contempt, although he mistakes his remedy by motion instead of by plea. *Clair v. State*, 40 Neb. 534 (59 N. W. 118; 28 L. R. A. 367).

Misconduct of jury.

13. (1880.) A jury is liable to a fine for contempt if they return a verdict that they agree to disagree. *Green v. State*, 10 Neb. 102 (4 N. W. 422).

Publications relating to pending proceedings.

14. (1896.) Where a newspaper article is not *per se* contemptuous, or where it is susceptible of more than one reasonable construction, one of which is innocent and requires an innuendo to apply its meaning to the court, and the record fails to disclose that the language was employed in its culpable sense, the publisher is not liable for contempt. *Rosewater v. State*, 47 Neb. 630 (66 N. W. 640).

15. (1896.) To constitute any publication contemptuous it must reflect upon the conduct of the court in reference to a cause or proceeding then pending in court and undetermined, and be of a character tending to influence its decision, or obstruct, interrupt, or embarrass the due administration of justice. *Rosewater v. State*, 47 Neb. 630 (66 N. W. 640).

16. (1900.) A newspaper corporation which deliberately seeks to influence judicial action by the publication of articles threatening the judges with public odium and reprobation in case they decide a pending cause in a particular way, is guilty of constructive contempt. *State v. Bee Publishing Co.*, 60 Neb. 282 (83 N. W. 204; 83 Am. Rep. 531; 50 L. R. A. 195); *State v. Rosewater*, 60 Neb. 438 (83 N. W. 353).

17. (1900.) The press and the public have the right to freely discuss, criticise and censure the decisions of the courts; but they have no right, while a cause is pending, to attempt, by threats or other form of intimidation, to control judicial action. *State v. Bee Publishing Co.*, 60 Neb. 282 (83 N. W. 204; 83 Am. St. Rep. 531; 50 L. R. A. 195); *State v. Rosewater*, 60 Neb. 438 (83 N. W. 353).

18. (1895.) A publication regarding a cause during its pendency in court, which tends to corrupt or embarrass the administration of justice and to produce a prejudice in the minds of the public with respect to the merits of the cause, is a contempt and punishable. *Percival v. State*, 45 Neb. 741 (64 N. W. 221; 50 Am. St. Rep. 568).

Disobedience of order of court.

19. (1894.) When by an order of a district judge a county clerk has been required to place upon official and sample ballots the name of a candidatee and to make due return of his compliance at a time fixed, a failure to comply may be punished as being in contempt of the authority of such judge. *McAleese v. State*, 42 Neb. 886 (61 N. W. 88).

20. (1895.) A defendant in a civil action who has failed to comply with an order of court directing the payment by him of a certain sum of money to apply on a judgment recovered therein against him is not liable to punishment as for a contempt in refusing to comply with such order where such disobedience was not wilful, but was solely on account of his being insolvent and wholly unable to pay the amount in the order required. *Hawthorn v. State*, 45 Neb. 871 (64 N. W. 359).

21. (1895.) Unless the disobedience of an order of court is wilful there is no contempt. *Hawthorn v. State*, 45 Neb. 871 (64 N. W. 359).

22. (1895.) An order in proceedings in aid of execution as provided for in the code of civil procedure, to a third person to turn over property in his or her possession to be applied in discharge of the judgment, if disobeyed, cannot be enforced by imprisonment of the party so ordered, as for a contempt under section 546 of the

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code. *In re Havlik*, 45 Neb. 747 (64 N. W. 234).

23. (1899.) One who wilfully disobeys a restraining order is guilty of contempt. *Hydock v. State*, 59 Neb. 296 (80 N. W. 902).

24. (1899.) A party is guilty of contempt who wilfully disregards, or refuses to comply with, an order of court directing him to restore the subject-matter of litigation, if the court possessed jurisdiction to enter the same, although the proceedings may have been never so erroneous. *Jenkins v. State*, 59 Neb. 68 (80 N. W. 268).

25. (1898.) Ordinarily the non-compliance with an order for payment of permanent alimony is not punishable as for contempt of court. *Leeder v. State*, 55 Neb. 133 (75 N. W. 541).

26. (1900.) A party who, after vacation of judgment, wilfully fails to comply with a lawful order for restitution may be proceeded against as for a criminal contempt. *Jenkins v. State*, 60 Neb. 205 (82 N. W. 622).

Attempt to evade judgment by another proceeding.

27. (1906.) A proceeding commenced in a county court for the evident purpose and intent of evading the effect of a determination of a proceeding of the same cause in the district court is a contempt of the district court. *Terry v. State*, 77 Neb. 612 (110 N. W. 733).

Excuses or defenses.

28. (1899.) In a contempt proceeding based on the alleged violation of a judicial order, such order may be examined only with a view to ascertaining whether it was *coram judice*. No mere error or irregularity therein, or in the proceedings leading thereto, excuses its disobedience. *Nebraska Children's Home Society v. State*, 57 Neb. 765 (78 N. W. 267).

29. (1900.) One who is in contempt of court by reason of disobeying an order to restore the subject of litigation, may purge himself of such contempt by showing that his failure to comply with the order was not atributeable to mere contumacy, but was due to an inability (not voluntarily created) to comply with such order. *Jenkins v. State*, 60 Neb. 205 (82 N. W. 622).

30. (1900.) A disavowal by contemnor of intention to commit a contempt of court, when made in good faith, though insufficient to purge the contempt, is, at least, receivable in extenuation of the offense. *Mackay v. State*, 60 Neb. 143 (82 N. W. 372).

31. (1901.) Inability to obey a writ resulting from an act done knowingly and wilfully does not purge of contempt. *Huckins v. State*, 61 Neb. 871 (86 N. W. 485).

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

Nature and grounds of power.

32. (1899.) Contempt proceedings may be punitive merely, or they may be remedial, to compel obedience to an order for the time resisted. *Nebraska Children's Home Society v. State*, 57 Neb. 765 (78 N. W. 267).

Scope and extent of authority to punish.

——— Courts in general.

33. (1888.) The power to punish for violation of its orders or judgments is inherent in every court having common-law jurisdiction, without any expressed statutory authority. *Kregel v. Bartling*, 23 Neb. 848 (37 N. W. 668).

34. (1899.) The power to punish for contempt is incident to every judicial tribunal, derived from its very constitution, without any express statutory aid, and may generally be exercised only by that tribunal whose order has been violated or proceedings interfered with. *Nebraska Children's Home Society v. State*, 57 Neb. 765 (78 N. W. 267).

35. (1900.) The common law power of the courts to punish for constructive contempts is, in this state, expressly confirmed by legislative enactment. *State v. Bee Publishing Co.*, 60 Neb. 282 (83 N. W. 204; 83 Am. St. Rep. 531; 50 L. R. A. 195); *State v. Rosewater*, 60 Neb. 438 (83 N. W. 353).

——— Judges.

36. (1899.) A judge in vacation, vested by law with jurisdiction to conduct certain proceedings, has the inherent power, incident to that jurisdiction, to hear and determine proceedings for contempt for the purpose of enforcing his orders in the principal matter. *Nebraska Children's Home Society v. State*, 57 Neb. 765 (78 N. W. 267).

——— Notary public.

37. (1887.) A notary public has power to commit for contempt a witness who refuses to give his deposition in a proper case. *Dogge v. State*, 21 Neb. 272 (31 N. W. 929).

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38. (1891.) Notaries public, under section 7 of chapter 61, Compiled Statutes, are not authorized to punish by fine or imprisonment persons guilty of misdemeanor, or misbehavior, during the taking of depositions. *Courtnay v. Knox*, 31 Neb. 652 (48 N. W. 763).

39. (1906.) When a witness fails to attend before a notary public in obedience to a subpœna issued by that officer, he may be punished as for a contempt; but such punishment cannot exceed a fine of $50, and the notary is not authorized by statute to commit the witness to the county jail therefor. *In re Butler*, 76 Neb. 267 (107 N. W. 572).

——— County courts.

40. (1892.) A county judge has no power to commit for contempt one guilty of disobedience of an injunction allowed by him in an action in the district court. In such a case the contempt is against the district court. *Johnson v. Bouton*, 35 Neb. 898 (53 N. W. 995).

——— District courts.

41. (1882.) The district court has authority to punish by proceedings for contempt any person who attempts to corrupt or unlawfully influence jurors in a case pending before the court. *Gandy v. State*, 13 Neb. 445 (14 N. W. 143).

42. (1906.) The district court has jurisdiction to punish contempt by fine or imprisonment, or both. *Back v. State*, 75 Neb. 603 (106 N. W. 787).

——— Superior courts.

43. (1905.) A court of record may not punish, as for a criminal contempt, summarily, without formal accusation or complaint, and without affording the accused a reasonable time to prepare his defense, except in those cases in which the judge is, while in exercise of his office, an actual witness of the alleged contemptucus conduct, or, at least, of a substantial part thereof, so that he is not compelled to inform himself concerning it and of the circumstances of its commission by the testimony of witnesses. *Gordon v. State*, 73 Neb. 221 (102 N. W. 458).

Nature and form of remedy.

44. Proceedings in contempt are in their nature criminal, and the strict rules of construction applicable to criminal proceedings are to govern therein. (1882) *Gandy v. State*, 13 Neb. 445 (14 N. W. 143); (1886) *Boyd v. State*, 19 Neb. 128 (26 N. W. 925); (1895) *Hawes v. State*, 46 Neb. 149 (64 N. W. 699); (1895) *O'Chander v. State*, 46 Neb. 10 (64 N. W. 373); (1895) *Zimmerman v. State*, 46 Neb. 13 (64 N. W. 375).

45. (1896.) Proceeding for contempt under our system is in the nature of a criminal prosecution and that the same degree of certainty is required in stating the offense as in prosecutions under the criminal code. *Cooley v. State*, 46 Neb. 603 (65 N. W. 799).

46. (1896.) The rules of strict construction applicable to procedure in criminal cases should govern proceedings to punish one for contempt. *Beckett v. State*, 49 Neb. 210 (68 N. W. 473).

47. (1898.) A proceeding against a party for contempt is in the nature of a prosecution for a crime and the rules of strict construction applicable in criminal proceedings are governable therein. *Herdman v. State*, 54 Neb. 626 (74 N. W. 1097).

48. (1899.) Proceedings in contempt are in their nature criminal, the rules of strict construction applicable to criminal prosecutions obtain therein, and presumptions and intendments will not be indulged to sustain a conviction for contempt of court. *Hydock v. State*, 59 Neb. 296 (80 N. W. 902).

48a. (1907.) A prosecution for contempt of court is a criminal proceeding. The defendant is entitled to the benefit of and reasonable doubt as to his guilt. *Connell v. State*, 80 Neb. 296 (114 N. W. 294).

Joinder of causes.

49. (1897.) A charge of malpractice against an attorney and counselor at law may be joined with a prosecution for a contempt where both charges involve a single transaction. *Blodgett v. State*, 50 Neb. 121 (69 N. W. 751).

Transferring hearing to another judge.

50. (1899.) The power to punish for contempt being restricted to the tribunal whose authority is defied, it is not error for a judge, who within his authority has made an order in vacation, to refuse to transfer to another judge for hearing a proceeding in contempt based on the disobedience of such order. *Nebraska Children's Home Society v. State*, 57 Neb. 765 (78 N. W. 267).

51. (1906.) Upon prosecution for contempt in the district court, the judge before whom the cause is regularly to be heard may refuse to transfer the cause to another

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judge of the same court for hearing, unless it is made to appear by due proof that a fair and impartial trial cannot be had before him, or that some other ground for change of venue prescribed by statute exists. *Back v. State*, 75 Neb. 603 (106 N. W. 787).

Necessity of arraignment.

52. (1899.) It is not necessary in a contempt proceeding that the defendant be formally arraigned. *Nebraska Children's Home Society v. State*, 57 Neb. 765 (78 N. W. 267).

Affidavit.

53. (1891.) In all matters based on the oath of a party charging another with the commission of an offense by which he must be deprived of his liberty, the charge must be specific and direct. Mere heresay will not do. *Ludden v. State*, 31 Neb. 429 (48 N. W. 61).

54. (1894.) Proceedings for the punishment of contempt by a county clerk for failure to place names upon the sample ballots may be had upon an affidavit, sworn to before any officer by law authorized to administer an oath. *McAleese v. State*, 42 Neb. 886 (61 N. W. 88).

55. (1895.) In a proceeding to punish for an alleged contempt, not committed in the presence of the court, the affidavit upon which the proceeding is based is jurisdictional, and it must affirmatively disclose sufficient facts to show that the case is one over which the court has jurisdiction. *Hawthorne v. State*, 45 Neb. 871 (64 N. W. 359).

56. (1898.) The affidavit must state the acts of the asserted contempt with as much certainty as is required in a statement of an offense in a prosecution for a crime. The statements must be as of the personal knowledge of the affiant. They may not be on information and belief. *Herdman v. State*, 54 Neb. 626 (74 N. W. 1097).

57. (1898.) In a proceeding for contempt the affidavit is jurisdictional. *Herdman v. State*, 54 Neb. 626 (74 N. W. 1097).

Complaint or information.

58. (1882.) Proceedings for contempt not committed in the presence of the court are instituted by filing an information under oath stating the facts constituting the alleged contempt. An attachment or order to show cause will then be issued, and the party accused brought before the court. As the proceeding is solely to protect public justice from obstruction the accused is not entitled to trial by jury. *Gandy v. State*, 13 Neb. 445 (14 N. W. 143).

59. (1882.) Contempt proceedings are criminal in nature, and the same degree of certainty is required in stating the offense as would be required if instituted under the criminal law. The act itself must be set out. *Gandy v. State*, 13 Neb. 445 (14 N. W. 143).

60. (1891.) Proceedings for contempt not committed in the presence of the court are instituted by filing an information under oath stating the facts constituting the alleged contempt. The charge should be stated in a positive manner, and it is not sufficient for the affiant to allege that he "is informed and believes" certain material facts. *Ludden v. State*, 31 Neb. 429 (48 N. W. 61).

61. (1895.) A complaint on information in contempt based on the violation of an injunction, in force on an appeal under an invalid bond, is insufficient to sustain a conviction. *O'Chander v. State*, 46 Neb. 10 (64 N. W. 373).

62. (1896.) A complaint is insufficient as the foundation of proceedings for constructive contempt which fails to state the facts constituting the alleged offense, and showing that the act of the accused amounts to a fraud upon the court, or tends to hinder or embarrass it in the administration of justice. *Cooley v. State*, 46 Neb. 603 (65 N. W. 799).

63. (1896.) For acts contemptuous in their character, committed in the presence of the court, the court may inflict a summary punishment upon the offender without information filed or trial; but when the acts constituting a contempt are not committed in the presence of the court, an information under oath must be filed and the defendant is entitled to a trial of the facts therein alleged. *Le Hane v. State*, 48 Neb. 105 (66 N. W. 1017).

64. (1899.) If the terms of an information in contempt clearly show that the act complained of was wilful, the information will not be held bad for the failure to use the word "wilful." *Nebraska Children's Home Society v. State*, 57 Neb. 765 (78 N. W. 267).

65. (1903.) While a formal accusation is not necessary to a prosecution for contempt committed in the presence of the court, the record must show that such an

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offense has been committed in order to sustain a conviction. *Ogden v. State*, 3 Unof. 886 (93 N. W. 203).

66. (1903.) A recital that the accused addressed insulting and menacing language to the court is a mere conclusion; the language itself should be set out to enable the reviewing court to determine whether it was actually contemptuous. *Ogden v. State*, 3 Unof. 886 (93 N. W. 203).

67. (1906.) A prosecution for constructive contempt is based upon an affidavit or information alleging the facts constituting the contempt. If such information is amended by interlineation in matter of substance, it must be reverified, and there must be a trial thereon as upon a new prosecution. *Back v. State*, 75 Neb. 603 (106 N. W. 787).

68. (1906.) A prosecution for contempt is "in the nature of a prosecution for a crime," and the affidavit or information must state the acts constituting the offense with as great certainty as is required in criminal proceedings. *Back v. State*, 75 Neb. 603 (106 N. W. 787).

69. (1907.) Where the charge of contempt of court is set forth in an information in positive and direct terms, the statement by the public prosecutor in his verification thereto "that the allegations and charges in the within information are true, as he verily believes," does not render such information void. *Emery v. State*, 78 Neb. 547 (111 N. W. 347).

Answer.

70. (1895.) Where, in a proceeding for an indirect or constructive contempt, consisting of the publication in a newspaper, the article upon which the complaint is based is indefinite in its meaning and application, and is not libelous *per se*, and does not, unless aided by an innuendo, apply to the court, nor reflect upon its integrity or purpose, and, in so far as any reflection upon the court is concerned, is capable of an innocent interpretation; and the defendant, in an answer sworn to by him, positively asserts that he used the language employed in the article in a meaning other than libelous, and with no intent to reflect upon either the integrity or honesty of purpose of the judge, or to embarrass or impede the administration of justice, such answer will be taken as conclusive. *Percival v. State*, 45 Neb. 741 (64 N. W. 221; 50 Am. St. Rep. 568).

71. (1899.) Where a contempt proceeding is instituted by information and a rule to show cause, it is the duty of the defendant to file an answer if he desires to traverse the facts charged. Failing on sufficient opportunity to so do, the court may treat the facts alleged in the information as confessed. *Nebraska Children's Home Society v. State*, 57 Neb. 765 (78 N. W. 267).

72. (1903.) Where an information is filed charging defendant with a contempt of court and he is requested to file an answer to said charges but refuses to do so and stands mute, such refusal may be treated by the court as an admission of the charges contained in the information. *Toozer v. State*, 5 Unof. 182 (97 N. W. 584).

73. (1907.) In a prosecution for contempt where the act complained of is in itself a contempt of court, a denial on oath of its commission raises an issue of fact for trial, and does not entitle the accused to an acquittance. *Emery v. State*, 78 Neb. 547 (111 N. W. 347).

Questions of law and fact.

74. (1894.) In contempt proceedings, whether a failure to comply with an order has been satisfactorily explained is a question of fact for the trial court, and its judgment will not be reversed unless clearly wrong. *McAleese v. State*, 42 Neb. 886 (61 N. W. 88).

Evidence and proof of contempt.

75. (1891.) Proof examined, and *held* not to sustain the finding of the court that the plaintiff in error had violated the order of the court. *Ludden v. State*, 31 Neb. 429 (48 N. W. 61).

76. (1895.) To sustain a conviction for contempt it should appear that the language or conduct imputed to the accused is contemptuous *per se*, or, if it may be contemptuous or innocent according to the circumstances of the case, it should appear from the record to have been employed in its culpable sense. *Hawes v. State*, 46 Neb. 149 (64 N. W. 699).

77, 78. (1895.) Presumptions and intendments will not be indulged in, in order to sustain convictions for contempt of court. *Hawes v. State*, 46 Neb. 149 (64 N. W. 699); (1905) *Crites v. State*, 74 Neb. 687 (105 N. W. 469).

79. (1900.) Evidence in a contempt proceeding examined, and found to establish the defendant's guilt of the offense charged

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in the information. *State v. Rosewater*, 60 Neb. 438 (83 N. W. 353).

80. 1903.) Where the prosecution for contempt proceeds on the theory that such contempt was committed in the presence of the court, the record is insufficient unless it shows that the offense was thus committed. *Ogden v. State*, 3 Unof. 886 (93 N. W. 203).

Review.

Review of contempt for violating order of injunction, see *Injunction*, § 169.

81, 82. A judgment for contempt may be reviewed on error in the supreme court in the same manner as criminal cases. (1882) *Gandy v. State*, 13 Neb. 445 (14 N. W. 143); (1895) *Zimmerman v. State*, 46 Neb. 13 (64 N. W. 375).

83. (1895.) In order to secure a review of errors committed during a trial in proceedings for contempt such errors must first be submitted to the court wherein such proceedings were had by a motion for new trial. *Zimmerman v. State*, 46 Neb. 13 (64 N. W. 375).

84. (1896.) Where, although the alleged contemptuous acts are committed *in facie curiæ*, and, therefore, punishable summarily without the formality of a trial or hearing, witnesses are by the court called and examined touching the transaction involved, the prosecution will, for the purpose of review by means of proceedings in error, particularly where the record is ambiguous, be construed as one for a constructive contempt, in which the accused is entitled to be heard in his own defense. *Beckett v. State*, 49 Neb. 210 (68 N. W. 473).

85. (1897.) A finding without a judgment in a summary prosecution for contempt of court will not be reviewed by means of proceedings in error. *Blodgett v. State*, 50 Neb. 121 (69 N. W. 751).

86. (1903.) Orders and judgments of the district court in proceedings for contempt, are reviewable in the supreme court by petition in error only. *Thompson v. Nelson*, 4 Unof. 687 (96 N. W. 194).

87. (1904.) A sentence for contempt of court will not be reviewed in a proceeding to which the state is not a party. *Whitaker v. McBride*, 5 Unof. 411 (98 N. W. 877).

88. (1905.) A judgment in a summary proceeding for contempt *in facie curiæ*, where no complaint is filed, no evidence is taken, and no trial had, may be reviewed on the record made therein without the filing of a motion for a new trial. *Crites v. State*, 74 Neb. 687 (105 N. W. 469).

88*a*. (1907.) When the prosecution for contempt is based upon language used by counsel in open court in the trial of a cause, and the words used are not in themselves necessarily contemptuous, and the court orders a prosecution instituted by information filed by the county attorney, and a formal trial is had, there being no statement of the court in the record as to the conduct of counsel upon which the proceedings are based, general findings of the court will be considered as predicated on the evidence in the record, and unless supported by that evidence will not sustain a judgment of guilt. *Connell v. State*, 80 Neb. 296 (114 N. W. 294).

89. (1905.) The record in a contempt case must show forth the facts constituting the offense. A mere recital that the defendant is guilty of contemptuous and insolent behavior toward the court, and is in contempt of court, where the record of the proceedings does not warrant such recital, is a mere conclusion, and is insufficient to show that the offense was in fact committed. *Crites v. State*, 74 Neb. 687 (105 N. W. 469).

III. PUNISHMENT.

In general.

90. (1891.) A payment under protest of a fine for contempt, unlawfully imposed by a notary, under threat of imprisonment, is not voluntary and may be recovered back by action. *Courtnay v. Knox*, 31 Neb. 652 (48 N. W. 763).

91. (1895.) When a witness is committed for contempt for refusing to testify, the questions asked and refused to be answered must be stated in the order of commitment. *Wilcox v. State*, 46 Neb. 402 (64 N. W. 1072).

92. (1899.) Where the object of a contempt proceeding is to compel obedience to an order which may still be obeyed, it is not error to sentence the defendant to imprisonment until he shall obey such order, and in addition to impose a reasonable fine for past disobedience. *Nebraska Children's Home Society v. State*, 57 Neb. 765 (78 N. W. 267).

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CONTEST.

Of election, see *Elections*, IX.

Of wills, see *Wills*, V.

CONTINGENCY.

Dependence on performance of contract as affecting validity, see *Frauds, Statutes of*, § 46.

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CONTINUANCE.

ANALYSIS.

Grounds for continuance.
——— **Stipulations and agreements, §§ 1, 2.**
——— **Pending taking depositions, §§ 3, 4.**
——— **Amendment of pleading, § 5.**
——— **Want of preparation, §§ 6, 7.**
——— **Absence of counsel, §§ 8, 9.**
——— **Absence of witness, §§ 10-19.**
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——— **In general, §§ 30-33.**
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——— **Admissibility in evidence, § 49a.**
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Objections, and review.
——— **Necessity of exceptions, §§ 66, 67.**
——— **Sufficiency of record, §§ 68, 71.**
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Costs, §§ 74, 75.

CROSS-REFERENCES.

In particular proceedings, see specific topics.

In criminal prosecutions, see *Criminal Law*, §§ 438-468.

Ruling on application as matter of discretion, see *Appeal and Error*, §§ 1662-1667.

Application for, as appearance, see *Appearance*, § 27.

Continuance of hearing on motion to discharge attachment, see *Attachment*, § 339.

In justice or county court, see *Justice of the Peace and County Courts*, §§ 129-137.

Postponement of trial, see *Trial*, §§ 1-8.

Grounds for continuance.

——— **Stipulations and agreements.**

1. (1890.) A verbal agreement made out of court by the attorneys in the cause are unenforceable; and a refusal to continue a cause on such grounds is not error. *Hale v. Hess*, 30 Neb. 42 (46 N. W. 261).

2. (1890.) On a contingent and alternative agreement between attorneys of record to an action pending in a county court, for the continuance of the cause for trial to a day certain, by which the plaintiff's attorneys were misled as to the consent and fact of postponement of the trial, which was called in their absence and dismissed, and a motion to reinstate the case upon affidavits of the facts, and of merits, overruled, and which was subsequently reversed on error in the district court, *held*, that the evidence presented to the county court was sufficient to sustain the last judgment. *Bruce v. Sandwich Mfg. Co.*, 28 Neb. 827 (45 N. W. 250).

——— **Pending taking depositions.**

3. (1895.) A continuance should not be granted to enable a party, by proceedings for contempt in the courts of another state, to compel a witness to testify by deposition, there being no presumption that he would

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be guilty of contempt for refusing to answer questions. *Stratton v. Dole*, 45 Neb. 472 (63 N. W. 875).

4. (1903.) If sufficient time is given from denial of a motion for a continuance, sought in order to obtain a deposition, to enable it to be taken under ordinary circumstances, and from the showing made upon the motion there is no ground to believe it can be procured in any reasonable time if not in that allowed, it is not error to deny the continuance. *Gatzemeyer v. Peverson*, 68 Neb. 832 (94 N. W. 974).

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——— Amendment of pleading.

5. (1899.) Where the court, during the process of a trial, allows the defendant to amend his answer so as to present a new defense, the plaintiff, if not prepared to meet the new issue, may have a continuance of the cause upon such terms as the court may deem just. *Dunn v. Bozarth*, 59 Neb. 244 (80 N. W. 811).

——— Want of preparation.

6. (1891.) Where a case is called which a party is not prepared to try, he should move for a continuance, stating the grounds on which a continuance is sought, supported, if necessary, by affidavits. *City of Lincoln v. Staley*, 32 Neb. 63 (48 N. W. 887).

7. (1895.) An attorney whose case is called for trial, if unprepared, should at once make such showing to entitle him to a postponement as lies within his power, and if he fails so to do, he will not be permitted in support of a motion for a new trial to urge such matters within his knowledge as, properly presented, should have operated to excuse his entering upon a trial in the first instance. *Corbett v. Nat. Bank of Commerce*, 44 Neb. 230 (62 N. W. 445).

——— Absence of counsel.

8. (1895.) Where a case is regularly called for trial and one of the attorneys for defendant orally announces that another attorney for defendant is unavoidably absent but will return soon in case of postponement, for a short time, and attend to the trial, it is not an abuse of discretion for the judge to insist that the case be dismissed, continued, or tried. *Corbett v. Nat. Bank of Commerce*, 44 Neb. 230 (62 N. W. 445).

9. (1905.) It is not error to deny a motion for a continuance because of the absence of an attorney, if the party making the motion is represented at the trial by other competent counsel familiar with his case. *First Nat. Bank of Omaha v. Dye*, 73 Neb. 300 (102 N. W. 614).

——— Absence of witness.

10. (1884.) In an action for goods sold and delivered where the answer consists of denials alone, it is not error for the court to overrule a motion for a continuance based upon an affidavit of the defendant that he has recently discovered two witnesses in another state by whom he can prove payment. *Clark v. Mullen*, 16 Neb. 481 (20 N. W. 642).

11. (1889.) Under the provisions of section 960 of the code a party desiring a continuance of a cause for a period not exceeding thirty days is entitled to such continuance if he "prove by his own oath or otherwise that he cannot, for want of material evidence which he expects to procure, safely proceed to trial." *Belcher v. Skinner*, 28 Neb. 91 (44 N. W. 78).

12. (1894.) Suit was brought and service had on defendant in August, 1890. March 27, 1891, defendant applied for a continuance, on the ground of the absence from the state of a witness whose testimony was material for the defendant. The witness did not reside within the jurisdiction of the court when the suit was brought, and defendant had made no effort to procure the witness' deposition. *Held*, That the overruling of the application for a continuance by the district court was correct. *Kansas City, W. & N. W. R. Co. v. Conlee*, 43 Neb. 121 (61 N. W. 111).

13. (1895.) It is proper to refuse an application to withdraw a juror and continue the case for the purpose of enabling a party to procure a witness, when the adverse party admits the only fact to be proved, except what is cumulative. *Smith v. First Nat. Bank of Chadron*, 45 Neb. 444 (63 N. W. 796).

14. (1896.) An instruction by which the court only professed to describe, and in fact did accurately describe, to the jury the admissions of fact of a party as the same appeared of record, cannot be assailed as erroneous on the alleged ground that the adverse party had a right, in the first place, to an admission of greater scope or conclusiveness than that described as a condition upon which a continuance would be denied

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such adverse party. *Burris v. Court*, 48 Neb. 179 (66 N. W. 1131).

15. (1897.) The overruling of an application for continuance of a cause, based on the absence of a witness, is without prejudice when the person whose presence was desired was in court during the trial, placed on the witness stand, and was examined by the parties. *Hartford Fire Ins. Co. v. Corey*, 53 Neb. 209 (73 N. W. 674).

16. (1898.) There was no prejudicial error in denying an application for a continuance in order to secure the testimony of witnesses who afterwards appeared and testified at the trial. *Life Insurance Clearing Co. v. Altschuler*, 55 Neb. 341 (75 N. W. 862).

17. (1898.) An application for a continuance grounded on the absence of a material witness is properly denied where the party making the application has not been diligent in attempting to procure the testimony or compulsory attendance of such witness. *Life Insurance Clearing Co. v. Altschuler*, 55 Neb. 341 (75 N. W. 862).

18. (1898.) Where it appears that the evidence of an absent witness, if given on the trial, could not possibly change the result, an order refusing a continuance to obtain his testimony, if erroneous, would not be prejudicially so. *Life Insurance Clearing Co. v. Altschuler*, 55 Neb. 341 (75 N. W. 862).

19. (1902.) A motion for a continuance in order to obtain the testimony of an absent witness is addressed to the sound legal discretion of the trial court, and it is not error to overrule it where it does not appear that the party asking for the continuance has, without his fault, been deprived of material evidence. *McDermott v. Manley*, 65 Neb. 194 (90 N. W. 1119).

——— Surprise at trial.

20. (1884.) Where the injury is alleged in the petition to have occurred in December, and the testimony showed that it occurred in the previous September, it is not error to overrule a motion for a continuance, it not appearing that the change of time affected the defense. *City of Omaha v. Cane*, 15 Neb. 657 (20 N. W. 101).

21. (1894.) Where the pleadings notify the party seeking the continuance of the character of the evidence which his adversary will offer, and where no reason is shown for his not being prepared to meet such evidence, except his reliance upon an issue of law arising upon the trial, which is determined against him, it is not error for the trial court to refuse permission to withdraw a juror and continue the case. *Violet v. Rose*, 39 Neb. 660 (58 N. W. 216).

22. (1894.) Leave to withdraw a juror and continue the case is discretionary with trial court, and refusal thereof is not error when asked only upon the ground that the applicant expected certain evidence, admitted under the pleadings, to be ruled out. *Violet v. Rose*, 39 Neb. 660 (58 N. W. 216).

23. (1902.) When the issues in an action are regularly made up, the cause stands for trial; and a party thereto will not be granted, as a matter of right, a postponement solely on the ground that the issues as made by the pleadings were formed sooner than he anticipated they would be. *Palmer v. Caywood*, 64 Neb. 372 (89 N. W. 1034).

23*a*. (1907.) In the absence of any showing on the part of defendants that they were unprepared to meet, or were surprised by, the allegations in an amendment to the petition allowed at the close of the trial, the decision of the district court refusing a continuance on account of the granting of such amendment will not be reviewed. *Bliss v. Beck*, 80 Neb. 290 (114 N. W. 162).

24. (1903.) The propriety of allowing the plaintiff after he has rested his case without proving a material fact in issue, to withdraw a juror and continue the case in order to obtain further testimony, is a matter resting in the sound discretion of the court. *Harker v. Burbank*, 68 Neb. 85 (93 N. W. 949).

——— Absence of evidence.

25. (1886.) Where material testimony is suppressed, without which the party in whose favor it was taken cannot safely proceed to trial, the court, upon the application of such party and upon such terms as may be just, should grant a continuance. *Spielman v. Flynn*, 19 Neb. 342 (27 N. W. 224).

26. (1896.) The action of the trial court in denying an application for the continuance of a hearing on a motion to dissolve an attachment examined and affirmed. *Dayton Spice Mills Co. v. Sloan*, 49 Neb. 622 (68 N. W. 1040).

27. (1901.) When due diligence is not shown to have been exercised, or when the materiality of the proposed evidence does

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not appear, or when the proposed evidence may be procured from witnesses within the jurisdiction of the court, it is not error to overrule an application for a continuance for the purpose of securing the same character of testimony from witnesses residing in other states. *Kerr v. State*, 63 Neb. 115 (88 N. W. 240).

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——— Pending review of interlocutory order.

28. (1899.) A trial of the merits of a case should not be delayed on account of an attempt to review on error an interlocutory order. *Doolittle v. American Nat. Bank*, 58 Neb. 454 (78 N. W. 926).

Time for application.

29. (1903.) Where, by the rules of the trial court, it is provided that applications for continuances must be filed on or before the first day of the term, and where it appears that such application is not filed until the cause is called for trial, and in the application itself it is not shown that the applicant has used reasonable diligence to procure counsel, and obtain the testimony of witnesses whose evidence he alleges is necessary to enable him to proceed to trial, it is no abuse of discretion to overrule the application. *Miles v. Ballantine*, 4 Unof. 171 (93 N. W. 708).

Affidavits for continuance.

——— In general.

30. (1876.) A party who charges that an election for the relocation of the county seat of M. county was carried in favor of M. by fraudulent means, must state the facts on which he bases his charge; and an affidavit for a continuance of an application for a peremptory writ of mandamus to compel the removal of the county records and offices to M., the place declared by the county commissioners to be the county seat, is not sufficient where it merely states that the affiant is informed and believes that a greater number of fraudulent votes were cast in one of the precincts of said county in favor of M. than the entire majority in favor of that place, and that certain votes were cast in favor of B. that were not counted. *State, ex rel. Barnes, v. Thatch*, 5 Neb. 94.

31. (1883.) The statement of facts in an affidavit for a continuance should be specific of acts done, or of excuses for not doing them, and given with such particularity that an indictment for perjury would lie in case of its being false. *Ingalls v. Nobles*, 14 Neb. 272 (15 N. W. 351).

32. (1889.) The oath for continuance, if in the form of an affidavit, may be substantially in the words of the statute, and it is unnecessary to state the purport of the testimony which the moving party supposes he can procure. *Belcher v. Skinner*, 28 Neb. 91 (44 N. W. 78).

33. (1907.) Where a case is set down for trial on a day certain, an application for a continuance over the term, supported by an affidavit showing the inability of the defendant to be in attendance on that day, but failing to show that he could not be in attendance at some subsequent day of the same term, is properly overruled. *Good v. Bonacum*, 78 Neb. 792 (111 N. W. 796).

——— Absence of witness.

34. (1871.) The affidavit for the continuance of a cause, to procure the evidence of a co-defendant, is fatally defective, if it does not state the testimony which the affiant expects will be given by the absent party. *Jameson v. Butler*, 1 Neb. 115.

35. (1884.) Application for continuance on ground of absence of witness examined, and found to be insufficient showing of diligence. *Peavy v. Hovey*, 16 Neb. 416 (20 N. W. 272).

36. (1889.) An affidavit for a continuance on account of absent witnesses which fails to show that either their personal attendance or testimony will probably be obtained, if time be granted, is insufficient, where it does not appear that the same facts cannot be proven by other witnesses within the jurisdiction of the court. *Rowland v. Shephard*, 27 Neb. 494 (43 N. W. 344).

37. (1890.) In an action to recover for personal injuries sustained by a servant while operating a press for defendant, an affidavit, supporting a motion for a continuance, stating that such continuance is necessary to obtain a necessary witness, who was plaintiff's foreman at the time of the accident, and by him defendant expects to prove contributory negligence by plaintiff; and that diligent search has been made for such witness, is sufficient and a continuance should have been granted even though the cause had been continued for other reasos at a previous term. *Beatrice Sewer Pipe Co. v. Erwin*, 30 Neb. 86 (46 N. W. 279).

38. (1891.) Where a motion for a continuance of a cause, made in the district

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court by a defendant on account of the absence of a co-defendant as a witness, is supported by affidavit which sets out specifically what facts the witness would testify to and that there was no other person by whom the facts could be proven, and it appearing that the testimony is material under the issues, that diligence has been used to obtain it in time for the trial, and that such testimony can be procured by the next succeeding term of court, *held*, that the continuance should be granted. *Johnson v. Mills*, 31 Neb. 524 (48 N. W. 266).

39. (1891.) Affidavits of parties to actions for the continuance of the trial for the production of the testimony of absent and distant witnesses, must allege facts and circumstances to be given in evidence from which legal conclusions, constituting a cause of action or defense, may be drawn. *Farmers & Merchants Bank v. Berchard*, 32 Neb. 785 (49 N. W. 762).

40. (1892.) A motion for continuance based upon an affidavit that a witness was absent and his whereabouts unknown; that he possessed important papers and that it would be unsafe to proceed to trial without him, but failed to state what papers he possessed, or what was to be proven by him, or any reason for the failure to take his deposition, was properly overruled. *German Ins. Co. v. Penrod*, 35 Neb. 273 (53 N. W. 74).

41. (1893.) A fourth application for continuance, based on the absence of the same witness as were the previous ones, was properly refused, where the affidavit did not show that either the personal attendance of such witness, or his evidence would probably be obtained if the cause was continued. *Barton v. McKay*, 36 Neb. 632 (54 N. W. 968).

42. (1894.) An order denying a continuance was properly sustained where applicant failed to show unavoidable absence of an important witness or that his testimony could subsequently be obtained. *Home Fire Ins. Co. v. Johnson*, 43 Neb. 71 (61 N. W. 84).

43. (1896.) A motion and affidavit based upon the absence of a witness are insufficient, where they fail to show that either the attendance of the witness or his testimony would be obtained after the granting of a continuance. *McClelland v. Scroggin*, 48 Neb. 141 (66 N. W. 1123).

44. (1896.) An admission that absent witnesses would testify as alleged in an affidavit for a continuance, *held* not an admission that the testimony was true. *Burris v. Court*, 48 Neb. 179 (66 N. W. 1131).

45. (1898.) An application for a continuance which failed to disclose the names of absent parties whose testimony was desired, and the nature of their testimony, *held* properly to have been denied. *Life Insurance Clearing Co. v. Altschuler*, 53 Neb. 481 (73 N. W. 942).

46. (1901.) A mere unsworn certificate of a physician that defendant is prostrated from the effects of la grippe and rheumatism; not able to be out, and that any exposure would be dangerous, together with affidavits of the party and his son that he is unable to sit up and has to be assisted from his bed from such causes, is not such a showing as indicates abuse of discretion in overruling a motion to continue for that cause a foreclosure suit already pending more than two years, especially when no reason appears why defendant's place cannot be fully supplied. *Black v. Webber*, 1 Unof. 468 (96 N. W. 606).

47. (1902.) An affidavit for a continuance, on the ground of the absence of a witness, which leaves the materiality of such witness in doubt is fatally defective. *Lomax v. Holbine*, 65 Neb. 270 (90 N. W. 1122).

48. (1903.) Where the affidavit in support of a motion for a continuance does not set out the facts and circumstances to which an absent witness will testify, and especially where it is not shown that there are no other available witnesses by whom the facts known to the absent witness can be proved, the continuance of the case should be denied. *Diedrichs v. Diedrichs*, 68 Neb. 534 (94 N. W. 536).

49. (1907.) Where the necessity for the continuance by reason of defendant's inability to be present is placed on the ground that the defendant is a material witness in his own behalf as to the facts relied upon as a defense, the affidavit is defective if it fails to show that he would testify to such facts if present at the trial. *Good v. Bonacum*, 78 Neb. 792 (111 N. W. 796).

——— Admissibility in evidence.

49*a*. (1894.) Where a stipulation is made by the parties whereby it is agreed that an affidavit for continuance on the ground of the absence of a material witness may be read to the jury as the evidence

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of such absent witness, if the application for continuance be overruled, the facts which the affidavit alleged the absent witness would testify to are not incompetent, irrelevant, immaterial or improper evidence, because such facts are stated in the form of a conclusion. *Blaine v. Boyer*, 42 Neb. 709 (60 N. W. 865).

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——— Absence of evidence.

50. (1887.) Where an affidavit in support of a motion for a continuance on account of the absence of a document necessary to be used in the cause as evidence is filed, it should affirmatively appear thereby, not only that the party seeking the continuance has been diligent in trying to procure such document, but that it is at least probable that the evidence can be had in case the adjournment should be granted. *Singer Mfg. Co. v. McAllister Bros.*, 22 Neb. 359 (35 N. W. 181).

——— Loss of depositions.

51. (1890.) To entitle a party to either a continuance of a cause or a new trial on account of the loss before the trial of a deposition taken in the case, he must under oath set out the testimony contained in the lost deposition. It is no sufficient to state that it fully supports the allegations of the answer. *Felton v. Moffet*, 29 Neb. 582 (45 N. W. 930).

Counter-affidavits and other evidence.

52. (1889.) The docket of the county judge contained a recital that a motion for a continuance was overruled "as not appearing sufficient to the court, after examination, a settlement made between plaintiff and defendant and signed by H. D. Rowland." There was nothing of record to show that the settlement referred to was submitted to the court; whether it was in writing or rested on parol, nor that any evidence was offered by either party except the affidavit for a continuance, and which of itself was insufficient. *Held*, That the district court did not err in refusing to reverse the judgment of the county judge upon the ground that other evidence was heard contradicting the affidavit filed in support of the motion. *Rowland v. Shephard*, 27 Neb. 494 (43 N. W. 344).

53. (1893.) Where counter-affidavits are used, and the application for a continuance is denied, the judgment will not be reversed for that reason, where the showing of the party making the application, when considered alone, is insufficient to entitle him to a continuance. *Barton v. McKay*, 36 Neb. 632 (54 N. W. 968).

54. (1893.) Permitting counter-affidavits to be used on the hearing of a motion for a continuance is improper. *Barton v. McKay*, 36 Neb. 632 (54 N. W. 968).

Continuance to Sunday or holiday.

55. (1888.) Where cause is continued to a day on which the court is prohibited from transacting business, as Sunday, or a legal holiday, the continuance will extend to the first day thereafter on which it can legally transact business. *State, ex rel. Carter, v. King*, 23 Neb. 540 (37 N. W. 310).

56. (1898.) A continuance of a cause to a legal Sunday operates as a continuance to the first day thereafter when the court may legally sit. *State, ex rel. Carter, v. King*, 23 Neb. 540 (37 N. W. 310).

Time of continuance.

57. (1902.) The return day of the summons was September 5. It was returned not served because the defendant was a non-resident of the state, and not found within the county. On October 16 defendant entered his voluntary appearance in the case, waiving issuance and service of summons. *Held*, That the date of such appearance was equivalent to the return day of the summons; that a continuance for less than ninety days from October 16, but more than ninety days from September 5, without defendant's consent, did not work a discontinuance of the suit. *Reed v. Mott*, 2 Unof. 450 (89 N. W. 277).

Discretion of court.

58. A motion for a continuance is addressed to the sound legal discretion of a court, and its decision thereon will not be reversed unless there has been an abuse of such discretion. (1889) *Singer Mfg. Co. v. McAllister Bros.*, 22 Neb. 359 (35 N. W. 181); (1894) *Clark v. Carey*, 41 Neb. 780 (60 N. W. 78); (1894) *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb. 281 (58 N. W. 695); (1895) *Stratton v. Dole*, 45 Neb. 472 (63 N. W. 875); (1896) *Burris v. Court*, 48 Neb. 179 (66 N. W. 1131); (1896) *Storz v. Finklestein*, 48 Neb. 27 (66 N. W. 1020); (1901) *Kerr v. State*, 63 Neb. 115 (88 N. W. 240); (1903) *Miles v. Ballantine*, 4 Unof. 171 (93 N. W. 708); (1906) *City of Lincoln v. Lincoln Street R. Co.*, 75 Neb. 523 (106 N. W. 317).

59. (1883.) Granting of continuance is

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largely a matter of discretion with the court, and will not be interfered with unless clearly abused. *Ingalls v. Nobles*, 14 Neb. 272 (15 N. W. 351).

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60. (1876.) An application for a continuance is addressed to the sound discretion of the court, and its action will not be reversed, unless there has been such an abuse of discretion as has operated to the prejudice of the party in the final determination of the case. *Billings v. McCoy Bros.*, 5 Neb. 187.

61. (1891.) An application for the postponement of a trial to a later day in the term, or for the continuance of a cause, is addressed to the sound legal discretion of the court, and the ruling thereon will not be disturbed, in the absence of a showing that there has been an abuse of discretion. *McDonald v. McAllister*, 32 Neb. 514 (49 N. W. 377).

62. (1894.) Allowance of continuance is discretionary with trial court. *Home Fire Ins Co. v. Murray*, 40 Neb. 597 (59 N. W. 102).

63. (1894.) The ruling of a district court on a motion for a continuance will not be disturbed unless it is manifest the court abused its discretion, and the litigant, himself guiltless of negligence or laches, was thereby deprived of an opportunity to make his case or defense. *Kansas City, W. & N. W. R. Co. v. Conlee*, 43 Neb. 212 (61 N. W. 111).

64. (1895.) Motions for change of venue and for continuance are addressed to the sound discretion of the trial court, and unless it appears that there has been an abuse of such discretion, its rulings thereon will not be disturbed. *Stoppert v. Nierle*, 45 Neb. 105 (63 N. W. 382).

65. (1896.) The ruling of a district court on a motion for a continuance will not be disturbed unless it is manifest the court abused its discretion and the litigant —himself guiltless of negligence or laches —was thereby deprived of an opportunity to make his case or defense. *Keens v. Robertson*, 46 Neb. 837 (65 N. W. 897).

Objections and review.

Ruling on motions for, as ground for reversal, see *Appeal and Error*, §§ 1909-1911.

——— Necessity of exceptions.

66. (1891.) To predicate error upon an order denying a continuance it must be excepted to at the trial. *Coad v. Home Cattle Co.*, 32 Neb. 761 (49 N. W. 757; 29 Am. St. Rep. 465).

67. (1898.) To review the denial of a continuance it is necessary to take an exception to the ruling in the trial court. *Staples v. Arlington State Bank*, 54 Neb. 760 (74 N. W. 1066).

——— Sufficiency of record.

68. (1899.) An assignment of error that the court erred in denying a motion for a continuance is without merit where the record does not disclose that the motion was ever presented to the court for decision, or that there was any action or refusal to act thereon. *Nelson v. Farmland Security Co.*, 58 Neb. 604 (79 N. W. 161).

69. (1901.) To obtain a review of the action of a trial court on an application to continue, the affidavits on which it was heard must be made a part of the bill of exceptions. *Donahue v. Potter & George Co.*, 63 Neb. 128 (88 N. W. 171).

70. (1901.) Affidavits on an application for a continuance not made a part of the bill of exceptions and found only in the transcript of the record are not properly presented. *Kerr v. State*, 63 Neb. 115 (88 N. W. 240).

71. (1902.) Affidavits for continuance must be embodied in the bill of exceptions if the right to a continuance is to be examined on its merits upon review. *Kinney v. Bittinger*, 3 Unof. 817 (92 N. W. 1005).

——— Curing error.

72. (1891.) When a motion for the adjournment of a cause for a specified time is overruled, and the trial does not take place until the period asked for has elapsed, the error, if any, in not granting the motion in the first instance, is cured. *Baldwin v. Rhea*, 33 Neb. 319 (50 N. W. 1).

73. (1896.) Prejudicial error did not result from denying a continuance, where the application was based on the absence of a witness who appeared at the trial and testified. *Imhoff v. Richards*, 48 Neb. 590 (67 N. W. 483).

Costs.

74. (1879.) Under the act of February 25, 1875, the court may require the party moving for a continuance to pay a sum not exceeding $10 as costs. *Smith v. Silvis*, 8 Neb. 164.

75. (1890.) The awarding of costs on the granting of a continuance is discretionary with the trial court. *Coombs v. Brenklander*, 29 Neb. 586 (45 N. W. 929).

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CONTRACTS.

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ANALYSIS.

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I. REQUISITES AND VALIDITY.

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A. Nature and Essentials in General.

What law governs.

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1. (1871.) The validity of a contract is to be determined by the law of the state in which it is made. The fact that a contract made in one state is evidenced by a note dated in another and secured by a mortgage upon land located in such other state, does not avoid the application of the rule. The note is but an incident to the agreement. *Sands v. Smith*, 1 Neb. 108.

2. (1874.) Unless a contract is by its terms to be performed in another state, it must be governed by the laws of the place where it is made. *Kittle v. De Lamater*, 3 Neb. 325.

3. (1890.) A contract by which plaintiff in Illinois agrees to sell beer to defendant exclusively in a certain territory in Nebraska, and under which plaintiff ships from Illinois car load lots of beer consigned to defendant in Nebraska, is a contract made and concluded in Illinois, and hence its validity is to be determined by the laws of that state. *Wagner v. Breed*, 29 Neb. 720 (46 N. W. 286).

4. (1899.) A contract made in Nebraska is a Nebraska contract, and will be governed by the laws of this state, notwithstanding it contains a stipulation that it is understood to be made with reference to and under the laws of another state. *Building & Loan Ass'n of Dakota v. Bilan*, 59 Neb. 458 (81 N. W. 308).

5. (1901.) A contract executed in this state by a foreign building and loan association on property in this state is a Nebraska contract, and the construction and validity is to be governed by laws of this state. *People's Building, Loan & Savings Ass'n v. Parish*, 1 Unof. 505 (96 N. W. 243); (1902) *People's Building, Loan & Savings Ass'n v. Shaffer*, 63 Neb. 573 (88 N. W. 669).

6. (1903.) A contract, void for illegality in its inception, is not validated by being sued upon in a foreign jurisdiction. *Corn Exchange Nat. Bank v. Jansen*, 70 Neb. 579 (97 N. W. 814).

Implied contracts.

7. (1902.) One who furnishes labor and materials for the creation of a public work, in good faith, but in the absence of a contract such as is required by statute, is entitled to recover their reasonable value, in the absence of a statute expressly or by necessary implication denying such right. *Cass County v. Sarpy County*, 66 Neb. 476 (97 N. W. 352).

8. (1903.) Wherever one person has money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay it to the latter and the obligation may be enforced by assumpsit. *Estate of Devries v. Hawkins*, 70 Neb. 656 (97 N. W. 792).

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Existence and condition of subject matter.

9. (1893.) One who sells his business and good-will to another, agreeing not to do business at the same point, and afterwards violates such agreement, is liable in damages. *Nelson v. Hiatt*, 38 Neb. 478 (56 N. W. 1029).

Certainty.

10. (1887.) That is certain which may be rendered certain. *Wiley v. Shars*, 21 Neb. 712 (33 N. W. 418).

11. (1903.) Appellee purchased certain lands from the United States at a price much above their appraised value, paying one-fourth of the purchase price in cash. Before any further payments had been made he sold part of the lands to appellants who, in addition to a cash payment, agreed to assume and pay to the government the unpaid three-fourths of the original purchase price. Prior to this sale appellee and other purchasers of like lands were pressing a claim to have the government remit from the purchase price of their lands all sums in excess of the appraised value thereof, and as a part of the contract of sale from appellee to appellants it was agreed that if the government should make this rebate appellee was to receive one-half thereof or of any amount of which rebate should be granted. *Held*, That the contract was not void for uncertainty in time of payment. *Gumaer v. Day*, 4 Unof. 320 (93 N. W. 933).

Mutuality.

12. (1896.) Reciprocal promises as the basis of a valid agreement must be equally obligatory upon the parties, so that each may have an action thereon; otherwise such agreement is *nudum pactum*. *State, ex rel. Leidigh, v. Holcombe*, 46 Neb. 612 (56 N. W. 873).

13. (1896.) One party to a contract may obligate himself for a definite or an indefinite period, not depending on his own acts, and the other party may at the same time have the option of terminating it at his will. A contract upon sufficient consideration is not void for that reason. *Carter White Lead Co. v. Kinlin*, 47 Neb. 409 (66 N. W. 536).

14. (1904.) Want of mutuality is no defense, even in an action for specific performance, where the party not bound thereby has performed all of the conditions of the contract and brought himself clearly within its terms. *Dickson v. Stewart*, 71 Neb. 424 (98 N. W. 1085; 1115 Am. St. Rep. 596).

Contract made on Sunday.

15. (1877.) Neither at common law nor under out statute is a contract entered into on Sunday void for that reason. *Horacek v. Keebler*, 5 Neb. 355.

Persons who can question validity of contract.

16. (1894.) Strangers to a contract cannot set up as a defense to an independent action that the contract is void as being champerty. *Chamberlain v. Grimes*, 42 Neb. 701 (60 N. W. 948).

17. (1902.) The plea of *ultra vires* cannot be interposed by a stranger to the contract, who cannot show a violation of a duty owing to himself. *State Ins. Co. v. Farmers Mutual Ins. Co.*, 65 Neb. 34 (90 N. W. 997).

B. Parties, Proposals and Acceptance.

Contract by unauthorized person.

18. (1901.) A contract made in this state, with a resident thereof, by a foreign building and loan association, which has failed to first procure a certificate of approval and authorization from the proper officers for transacting business in this state, is void and unenforceable, though the parties to such contract may have stipulated therein that it should be governed by the laws of the state where the offending association is resident. *Henni v. Fidelity Building & Loan Ass'n*, 61 Neb. 744 (86 N. W. 475; 87 Am. St. Rep. 519).

Offer and acceptance.

19. (1898.) To establish an express contract there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof. *Melick v. Kelley*, 53 Neb. 509 (73 N. W. 945).

20. (1898.) That a binding contract may result from an offer and acceptance, it is essential that the minds of the parties meet at every point, and that nothing be left open for future arrangement. *Krum v. Chamberlain*, 57 Neb. 220 (77 N. W. 665).

21. (1900.) A contract to be of any binding force must be assented to by all the parties to it. *Fulton v. Ryan*, 60 Neb. 9 (82 N. W. 105).

22. (1901.) A contract, running to a corporation to be formed and providing for a conveyance of land to it on certain conditions, must be taken as an offer whose acceptance, within a reasonable time by forming the corporation and performing the conditions, would constitute a valid agree-

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ment. *Omaha Loan & Trust Co. v. Goodman*, 62 Neb. 197 (86 N. W. 1082).

23. (1906.) To establish as a contract a proposition made by letter, proof of its acceptance is necessary. *Sennett v. Melville*, 76 Neb. 690 (107 N. W. 991).

Acceptance varying from offer.

24. (1899.) Since a concurrence of minds is essential to a contract, a written instrument signed by one party with the intention that the other shall later sign it, which is changed in any manner altering its legal effect, and by that other signed in its altered condition, does not become binding on the former, unless he learn of and ratify the change; and this although the alteration be made by a stranger. *McGavock v. Morton*, 57 Neb. 385 (77 N. W. 785).

C. Formal Requisites.

Several instruments.

25. (1904.) A contract in writing may be created by letters between the parties, and may be sufficient though the same papers are not signed by both. *Bradley & Co. v. Bower*, 5 Unof. 542 (99 N. W. 490).

Delivery.

26. (1899.) An instrument is not delivered until it has passed beyond the dominion, control and authority of the maker, and is no longer capable of being recalled. *Paxton v. State*, 59 Neb. 460 (81 N. W. 383; 80 Am. St. Rep. 689).

Seals.

27. (1885.) The strict rule of the common law in regard to contracts under seal made by an agent for the sale or leasing of real estate is not in force in this state—private seals being abolished. *Wheeler v. Walden*, 17 Neb. 122 (22 N. W. 346).

D. Consideration.

Usurious contracts, see *Usury*.

Consideration for modification of contract, see *post*, §§ 242, 243.

Necessity.

28. (1881.) A sufficient consideration is essential to the enforcement of an unexecuted agreement to waive prompt payment according to the conditions of a written contract for the sale of land, where time is essential. *Reynolds v. Burlington & M. R. R. Co.*, 11 Neb. 186 (7 N. W. 737).

29. (1881.) Plaintiff purchased lands at tax sale, and afterwards received deeds therefor. Defendant purchased the lands at sheriff's sale, and afterwards promised orally to pay an agent of plaintiff the principal and ten per cent. interest for the amount paid at the tax sale. Plaintiff surrendered nothing, and nothing was done under the agreement. *Held*, That it could not be enforced. *Boyce v. Berger*, 11 Neb. 399 (9 N. W. 545).

30. (1881.) It is the consideration that gives vitality to a contract, and without it the contract cannot be enforced. *Kansas Mfg. Co. v. Gandy*, 11 Neb. 448 (9 N. W. 569; 38 Am. Rep. 370).

31. (1894.) Where a construction company having contracted to build a line of railroad had completed its work according to contract, an agreement by its president, without authority, to accept payment at less than the contract price, was without consideration and did not release the other contracting party from full payment. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374 (59 N. W. 838).

32. (1906.) An agreement without benefit, advantage or detriment to either party is without consideration and not enforceable. *First Nat. Bank of Plattsmouth v. Estate of Lehnhoff*, 77 Neb. 307 (112 N. W. 563).

Awarding of contract or franchise.

33. (1877.) The corporate franchise is a valuable privilege and is a sufficient consideration for the duties which the law imposes. *City of Omaha v. Olmstead*, 5 Neb. 446.

34. (1894.) The awarding of a contract for the erection of a public building is a sufficient consideration for a promise by such contractor to pay for all labor and material furnished him in the performance of such contract. *Lyman v. City of Lincoln*, 38 Neb. 794 (57 N. W. 531); (1894) *Doll v. Crume*, 41 Neb. 655 (59 N. W. 806); (1896) *Kaufmann v. Cooper*, 46 Neb. 644 (65 N. W. 796).

35. (1894.) A provision that contractors for the erection of a building for a city shall file with board of public works receipts of claims from laborers and materialmen is a promise that the latter shall be paid by such contractors, for which promise the awarding of the contract is a sufficient consideration. *Lyman v. City of Lincoln*, 38 Neb. 794 (57 N. W. 531).

Performance of legal obligation.

36. (1887.) Where a party sold stock to be paid for by weight, and said stock was

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weighed on the scales of the buyer, which on the next day were found to have been out of order, and to have favored the buyer, the seller was entitled to have the stock weighed correctly, and a promise by him to pay the buyer a bonus to weigh the stock correctly was without consideration. *Billings v. Filley*, 21 Neb. 511 (32 N. W. 567).

37. (1894.) Neither the promise to do nor the actual doing of that which the promisor is by law or subsisting contract bound to do is a sufficient consideration to support a promise in his favor. *Esterly Harvesting Machine Co. v. Pringle*, 41 Neb. 265 (59 N. W. 804); (1902) *Allen v. Plasmyere*, 3 Unof. 187 (90 N. W. 1125).

38. (1906.) The doing of that which the creditor of a corporation is required by law to do before he could maintain an action against the stockholders of the corporation is not a sufficient consideration to support a promise. *First Nat. Bank of Plattsmouth v. Estate of Lehnhoff*, 77 Neb. 303 (109 N. W. 164).

Mutual promises.

39. (1873.) An agreement by several property owners to convey their respective properties, to such one of their number as should be afterwards designated by a majority of them, being without consideration, is void. *Dawson v. Merrille*, 3 Neb. 458.

40. (1889.) An agreement to furnish medical treatment and care to horses and mules of the subcontractors of a railroad contract is a sufficient consideration for an agreement by the chief contractor to pay for such service, though the promisor has no ownership in the horses or mules. *Lewis v. Owen*, 26 Neb. 156 (42 N. W. 285).

41. (1891.) Mutual promises are sufficient consideration to make a valid contract. *Pryor v. Hunter*, 31 Neb. 678 (48 N. W. 736); (1894) *Morrow v. Jones*, 41 Neb. 867 (6 N. W. 369); (1902) *Lamb v. Wilson*, 3 Unof. 505 (97 N. W. 325).

42. (1896.) Where a party agreed, in consideration of real property being placed in the hands of his agent, that the rents and profits therefrom arising were to be collected and paid out as stipulated to certain holders of liens on such property, among whom was the aforesaid party to said agreement, such agreement will be enforced according to its terms, though thereby the otherwise existing rights of said party are modified or impaired. *Rogers v. Central Loan & Trust Co.*, 49 Neb. 676 (68 N. W. 1048).

43. (1906.) Mutual promises, not for a common object or purpose and not mutually advantageous or detrimental, are without consideration and not enforceable. *First Nat. Bank of Plattsmouth v. Estate of Lehnhoff*, 77 Neb. 307 (112 N. W. 563).

44. (1906.) A promise made in consideration of an agreement to refrain from resisting the probate of a will is not without consideration and will be enforced. *Grochowski v. Grochowski*, 77 Neb. 506 (109 N. W. 742).

Services.

45. (1882.) Where, after an assignment for creditors, plaintiff told the assignee that, if the latter would furnish him information as to the creditors, and aid in buying up the claim, he would accept the assigned estate in full payment of the claim so purchased, the aid so rendered being valuable, is sufficient to sustain the contract to accept payment. *Wilson v. Moore*, 13 Neb. 240 (13 N. W. 217).

Detriment to promisee.

46. (1886.) A valuable consideration is one that is either a benefit to the party promising or some trouble or prejudice to the party to whom the promise is made. Any damage, or suspension, or forbearance of a right will be sufficient to sustain the promise. *Homan v. Steele*, 18 Neb. 652 (26 N. W. 472).

47. (1899.) The consideration of a contract need not move to promisor, a disadvantage to promisee being sufficient, though promiscr derives no benefit therefrom. *Faulkner v. Gilbert*, 57 Neb. 544 (77 N. W. 1072).

48. (1904.) The consideration sufficient to suport a promise may be a detriment suffered by the promisee in reliance upon the promise, as well as a benefit accruing to the promisor. *Henry v. Dussell*, 71 Neb. 691 (99 N. W. 484).

49. (1906.) A valuable consideration is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. Any damage, or suspension, or forbearance of a right, will be sufficient to sustain the promise. *First Nat. Bank of Plattsmouth v. Estate of Lehnhoff*, 77 Neb. 303 (109 N. W. 164).

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Performance on faith of promise.

50. (1889.) The promise to pay for goods to be furnished to aonther, having been made prior to the delivery of any of the property sold, and such sale and delivery having been made upon the faith of the agreement of the promisor, it was sustained by sufficient consideration and the promisor was liable thereon. *Lindsey v. Heaton*, 27 Neb. 662 (43 N. W. 420).

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51. (1907.) Where by reason of an agreement made by the president of a bank with the proposed purchaser of its stock that the bank will accept certain notes and mortgages held by him, amounting to the face value of said stock, in payment therefor, and that if such purchase is made he will hold the purchaser harmless and indemnify him against any action of the bank to recover any further or other amount either on his indorsement of said notes or otherwise, in payment for said stock, the bank stock is actually purchased and paid for, according to its terms, such purchase is a sufficient consideration to support the agreement. *Patrick v. Barker*, 78 Neb. 823 (112 N. W. 358).

Past consideration.

Pre-existing debt as consideration for chattel mortgage, see *Chattel Mortgages*, §§ 23-31.

52. (1896.) A past consideration is sufficient to support a promise when the consideration was performed in pursuance of a previous request. *Stuht v. Sweesy*, 48 Neb. 767 (67 N. W. 748).

Forbearance.

53. (1889.) The prevention of filing liens for services rendered in grading the railway was a sufficient consideration between employees of such subcontractor in grading the railway road-bed, and the contractor, who had agreed to save the railway company harmless from such liens. *Carlile & Co. v. Dauchy*, 26 Neb. 337 (41 N. W. 1119).

54. (1889.) Where the main contractor for the construction of railroad, finding a subcontractor has underestimated the cost of his work, takes the latter's pay-roll and pays the subcontractor's employees out of his monthly allowance, the withholding of filing their lien for wages against the railroad company is a sufficient consideration for the agreement of the main contractor to pay such employees. *Carlile & Co. v. Dauchy*, 26 Neb. 337 (41 N. W. 1119).

55. (1892.) Where one who stands in relation to an insolvent debtor as surety or creditor, and has in his hands certain property of the debtor, which he desires to retain or have applied on his claim or obligation, a promise made by him to another creditor, that if he will not institute legal proceedings against the common debtor he will pay the debt, if accepted, will constitute a valid contract and a recovery may be had thereon. *Mathews v. Seaver*, 34 Neb. 592 (52 N. W. 283).

56. (1896.) In order to sustain a contract which has for its consideration the release of a claim for damages against the promisor it is not necessary that the claim should be one which on litigation would have proved valid. *Carter White Lead Co. v. Kinlin*, 47 Neb. 409 (66 N. W. 536).

57. (1904.) The abandonment of a prosecution for statutory rape and consent, by the girl's father, to her marriage to the accused is a sufficient consideration for a contract by the accused's mother to provide a certain sum to the father of the girl for her maintenance. *Henry v. Dussell*, 71 Neb. 691 (99 N. W. 484).

58. (1906.) The dismissal, by a child, of proceedings instituted by her for the appointment of a guardian for her mother on the ground of the incompetency of the latter is not a valid consideration for a promise made by the mother to such child. *Simmons v. Kelsey*, 76 Neb. 124 (107 N. W. 122).

59. (1906.) Where opposition to the probate of a will is made by a party in good faith, a withdrawal of such opposition is a valid consideration for a promise on the part of one interested in sustaining the will. *Grochowski v. Grochowski*, 77 Neb. 510 (112 N. W. 335).

Release from obligation.

60. (1894.) The present acceptance by a railroad company from a construction company of unfinished work is a sufficient consideration for a stipulated deduction by the latter, made as a compromise between the parties, from the contract price of finished work. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374 (59 N. W. 838).

One consideration for several promises.

61. (1899.) One consideration is sufficient to support all the stipulations of a contract, where such was the intention of

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the parties. *Boughn v. Smith*, 58 Neb. 590 (79 N. W. 160).

Recitals as to consideration.

62. (1902.) The recital of a consideration is not always conclusive. *Davis v. Thomas*, 66 Neb. 26 (92 N. W. 187)

E. Validity of Assent.

Mental condition.

63. (1901.) The insanity of the obligor at the time the contract was made is a good defense to an action thereon. *Boyd v. Mulvihill*, 61 Neb. 878 (86 N. W. 922).

64. (1902.) The acts and contracts of a person of weak understanding will be set aside by a court of equity, when the nature of the acts or contracts justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented or overcome by cunning, artifice or undue influence. *Meyer v. Fishburn*, 65 Neb. 626 (91 N. W. 534).

65. (1903.) In absence of fraud, or undue influence, mere imbecility or weakness of mind will not avoid a contract or deed. *Tichy v. Simicek*, 4 Unof. 597 (95 N. W. 629).

66. (1906.) In order to make a valid contract the minds of the parties must meet; and if one mind is so weak, unsound or diseased that the party is incapable of understanding the nature and quality of the act to be performed, or its consequences, he is incompetent to make a valid contract, whether such state of his mind be the result of sickness, accident or voluntary intoxication. *Hauber v. Leibold*, 76 Neb. 706 (107 N. W. 1042).

Intoxication.

Ground for rescinding contract, see *post*, § 265.

67. (1906.) Intoxication. at the time a party enters into a contract, to the extent of rendering him mentally unfit for business transactions, renders such contract void. *Hauber v. Leibold*, 76 Neb. 706 (107 N. W. 1042).

67*a*. (1877.) In order to set aside a contract on the ground of drunkenness it is not sufficient that the party was under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, where a party is utterly deprived of his reason and understanding. *Johnson v. Phifer*, 6 Neb. 401.

68. (1907.) To avoid a contract on the ground of drunkenness, it is not sufficient that the party was under undue excitement from liquor. It must arise to that degree which may be called excessive drunkenness, where a party is so far deprived of his reason and understanding as to render him incapable of understanding the character and consequence of his act. *Case Threshing Machine Co. v. Meyers*, 78 Neb. 685 (111 N. W. 602).

Ignorance of facts.

69. (1901.) Where persons are dealing with each other upon equal terms, and no confidential relation exists between them, neither is bound to disclose superior information he may have respecting the transaction. *Jones v. Stewart*, 62 Neb. 207 (87 N. W. 12).

70. (1902.) All men are presumed to read and understand the terms of contracts entered into by them, and in the absence of fraud, deception or other undue means in procuring their execution, they will not be permitted to escape a liability clearly expressed by the language of the contract. *Cruzen v. Pottle*, 3 Unof. 453 (91 N. W. 858).

Mistake.

71. (1895.) A mistake of law excuses no one. *Boyes v. Summers*, 46 Neb. 308 (64 N. W. 1066).

72. (1901.) Poor judgment, or unfortunate trades, in the absence of fraud or deception, form no basis for relief by the court. *Jones v. Stewart*, 62 Neb. 207 (87 N. W. 12).

Duress and undue influence.

Ground for rescission of contract, see *post*, § 266.

Sufficiency of plea of duress, see *post*, § 403.

73. (1884.) A contract made under duress is voidable, not void. *Mundy v. Whittemore*, 15 Neb. 647 (19 N. W. 694).

74. (1886.) Where coercion is not sufficient to amount to duress, but a social or domestic force is exerted on a party which controls the free action of his will, and prevents voluntary action in the making of a contract or execution of deed for real estate, equity may relieve against the same on the ground of undue influence. *Munson v. Carter*, 19 Neb. 293 (27 N. W. 208).

75. (1889.) It is those contracts only which are made under fear of unlawful im-

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prisonment, and not those made under fear of imprisonment which would be legally justifiable, that can be avoided for duress. *Sanford v. Sornberger*, 26 Neb. 295 (41 N. W. 1102).

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76. (1889.) Duress which will avoid a contract is either by unlawful restraint or imprisonment; or, if lawful, it must be accompanied by circumstances of unnecessary pain, privation, or danger, or when the arrest, though made under legal authority, is for an unlawful purpose. *Sanford v. Sornberger*, 26 Neb. 295 (41 N. W. 1102).

77. (1895.) When money is paid or concessions exacted through necessity in order to obtain property illegally withheld, where its detention is accompanied by immediate hardship or irreparable injury, such transaction may be avoided on the ground of compulsion, although perhaps not amounting to a technical duress. *Fitzgerald v. Fitzgerald & Mallory Co.*, 44 Neb. 463 (62 N. W. 899).

78. (1895.) To set aside a contract for duress it must be shown first that the will of one of the parties was overcome, and that he was thus subjected to the power of another, and that the means used to induce him to act were of such a kind as would overcome the mind and will of an ordinary person. *Hargreaves v. Korcek*, 44 Neb. 660 (62 N. W. 1086).

79. (1898.) It is those contracts made under fear of unlawful arrest, and not those executed under threat of lawful imprisonment, which can be avoided on the ground of duress. *McCormick Harvesting Machine Co. v. Miller*, 54 Neb. 644 (74 N. W. 1061).

80. (1902.) An instruction, "Duress may be defined as an unlawful restraint, intimidation or compulsion of another to such an extent and degree as to induce such other person to do or perform some act, which he is not legally bound to do, contrary to his will and inclination," correctly states the law. *First Nat. Bank of David City v. Sargeant*, 65 Neb. 594 (91 N. W. 595; 59 L. R. A. 296).

81. (1906.) Where a contract, whereby children of a woman against whom the former had instituted insanity proceedings, is procured whereby the mother released all of her property to the children in consideration of a dismissal of the insanity proceedings, evidence shows the same was procured by duress. *Simmons v. Kelsey*, 76 Neb. 124 (107 N. W. 122).

Misrepresentations.

82. (1903.) Where one has made representations of fact shown to be false upon which the other party has relied to his damage, the intent or good faith of the party making the representations is immaterial in an action by the injured party to recoup his damages, or in an action by the former where the latter pleads the fraud of the plaintiff as a defense. *Bauer v. Taylor*, 4 Unof. 710 (98 N. W. 29).

Fraud.

Ground for rescission of contract, see *post*, §§ 267-278.

83. (1877.) Fraud cannot be predicated on a promise not performed. To be available there must be a false assertion in regard to some *existing* matter by which a party is induced to part with his money or property. *Perkins v. Lougee*, 6 Neb. 220.

84. (1879.) A contract obtained by fraud is not void; it is merely voidable; and the rights of intervening innocent parties will be protected. *Aultman & Taylor Co. v. Steinan*, 8 Neb. 109.

85. (1882.) Obtaining signature to contract by fraud is a good defense *Cole v. Williams*, 12 Neb. 440 (11 N. W. 875).

86. (1882.) Where one verbally contracts for the erection of lightning rods, and requests the agent procuring the contract to sign an alleged order for the work, he himself not having his glasses with him, and the agent does not read all of the contract therein, the other is not guilty of such negligence as would prevent a defense of fraud to the contract he in fact signed. *Cole v. Williams*, 12 Neb. 440 (11 N. W. 875). [Overruled. *Ward v. Spelts*, 39 Neb. 809.]

87. (1894.) The doctrine that the carelessness or negligence of a party in signing a writing estops him from afterwards disputing the contents of such writing, is not applicable in a suit thereon between the original parties thereto where the defense is that such writing, by reason of fraud, does not embrace the contract actually made. *Ward v. Spelts*, 39 Neb. 809 (58 N. W. 426).

88. (1897.) The doctrine that the negligence of a party in signing a writing estops him from afterwards urging that it does not contain the true agreement of the parties is not applicable in a suit between the original parties thereto or their privies, where the party seeking enforcement practiced fraud or deception in order to induce

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the other to sign without reading *Woodbridge v. De Witt*, 51 Neb. 98 (70 N. W. 506).

89. (1899.) Fraud, to constitute a cause of action, counter-claim or defense, must have been fruitful of injury or damage to the party who seeks to avail himself of the plea. *Carrington v. Omaha Life Ass'n*, 59 Neb. 116 (80 N. W. 491).

90. (1901.) In an action upon a contract, where the defense is that fraud was employed in securing the signature of one of the parties, the doctrine that the carelessness or negligence of the party in the signing of the contract estops him from disputing its contents is not applicable. *Spelts & Klosterman v. Ward*, 2 Unof. 177 (96 N. W. 56).

90*a*. (1908.) Where it appears that a plaintiff, who brings a suit in equity to enforce a specific performance of a contract, has obtained such contract by sharp and unscrupulous practices, by overreaching, by concealment of important facts, even though not actually fraudulent, by trickery, or by any other unconscionable means, he will be denied affirmative relief. *Blondel v. Bolander*, 80 Neb. 531 (114 N. W. 574).

Confidential relations.

91. (1905.) One occupying confidential relations toward another is held to the exercise of scrupulous good faith, and will not be permitted to make use of knowledge or opportunities to his own advantage and the injury of the party with whom he is dealing, from which the latter is in good conscience entitled to profit. *Morrison v. Hunter*, 74 Neb. 559 (105 N. W. 88).

F. Legality of Object and Consideration.

Gaming contracts, see *Gaming*, §§ 1-36.

Usurious contracts, see *Usury*.

Validity of contract by carrier's limiting liability for loss of goods, see *Carriers*, §§ 102-104.

Validity of contract for unlawful sale of liquor on commission, see *Factors*, § 2.

Validity of contract to marry, see *Marriage*, §§ 15-18.

Contract creating monopolies, see *Monopolies*, §§ 9-11.

Contravention of statute.

92. (1878.) Whenever a claim is bottomed on an immoral or illegal transaction, no right whatever can be founded upon such contract which the law will sanction or the courts maintain. *Rudolf v. Winters*, 7 Neb. 125.

93, 94. (1895.) No action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law. *Storz & Iler v. Finklestein*, 46 Neb. 577 (65 N. W. 195, 30 L. R. A. 644); (1902) *Schoenhofen Brewing Co. v. Whipple*, 2 Unof. 704 (89 N. W. 751).

95. (1897.) Courts will refuse to enforce contracts in contravention of statutes or good morals. *Wilson v. Parrish*, 52 Neb. 6 (71 N. W. 1010).

96. (1897.) A contract providing for the sale of intoxicating liquors without a license is void. *Hall v. Hart*, 52 Neb. 4 (71 N. W. 1009).

97. (1897). An action cannot, in this state, be maintained for the price of intoxicating liquors sold in violation of statute. *Wilson v. Parrish*. 52 Neb. 6 (71 N. W. 1010).

98. (1898.) A provision in a bond given by a person contracting with the state for the erection of a public building is valid which imposes on the contractor the duty of paying for material furnished and used in the erection of such building. *Rohman v. Gaiser*, 53 Neb. 474 (73 N. W. 923).

99. (1900.) Courts will not enforce contracts which are shown to be illegal. *Jorgensen v. Kingsley*, 60 Neb. 44 (82 N. W. 104).

100. (1902.) A court of equity will not enforce a contract made in contravention of a statute. *Buetgenbach v. Gerbig*, 2 Unof. 889 (90 N. W. 654).

Intent of parties.

101. (1901.) A party who has entered into a contract lawful on its face in good faith and for an honest purpose, is not precluded from relief because the other party may have intended to make fraudulent use of it as to a third person. *Fox v. State, ex rel. Powers*, 63 Neb. 185 (88 N. W. 176).

102. (1903.) The validity of a contract assailed for illegality is not determined by its formal incidents, but by the nature of the transaction and the intent of the parties. *Corn Exchange Nat. Bank v. Jansen*, 70 Neb. 579 (97 N. W. 814).

Public policy in general.

103. (1872.) The court will not lend its aid to the enforcement of a contract which is against public policy. *Dawson v. Merrille*, 2 Neb. 119.

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104. (1873.) An agreement by several property owners to convey land to one of their number, as a donation for the procuring of the location of the capital is against public policy, and void. *Dawson v. Merrille*, 3 Neb. 458.

105. (1882.) The mere fact, that depot grounds were donated, will not render a contract for the location of the depot void. *Harris v. Roberts*, 12 Neb. 631 (12 N. W. 89; 42 Am. Rep. 779).

106. (1893.) Courts will refuse to enforce contracts which are manifestly contrary to public policy or sound morals. *Wilde v. Wilde*, 37 Neb. 891 (56 N. W. 724); (1897) *Rocco v. Frapoli*, 50 Neb. 665 (70 N. W. 236).

107, 108. (1896.) The legislative power to subserve the public welfare by regulations in the interest of health and safety is inherent in the sovereignty of the state and cannot be bartered away by contract or otherwise. *Chicago, B. & Q. R. Co. v. State, ex rel. City of Omaha*, 47 Neb. 549 (66 N. W. 624; 53 Am. St. Rep. 557; 41 L. R. A. 481).

109. (1898.) A note reading, "Six months after date, if elected county commissioner, I promise to pay," etc., is a contract of wager on the result of an election, and on grounds of public policy will be declared void. *Specht v. Beindorf*, 56 Neb. 553 (76 N. W. 1059; 42 L. R. A. 429).

110. (1900.) Contracts which contravene the established policy of this state cannot be enforced by action in its courts. *Commonwealth Mutual Fire Ins. Co. v. Hayden Bros.*, 60 Neb. 636 (83 N. W. 922; 83 Am. St. Rep. 545. [Rehearing. 61 Neb. 454.]

111. (1901.) Our courts, as an exercise of comity, will not enforce a contract resulting from the transaction of business within this state violating the public policy thereof. *Henni v. Fidelity Building & Loan Ass'n*, 61 Neb. 744 (86 N. W. 475; 87 Am. St. Rep. 519).

112. (1903.) Courts should only declare contracts void as against public policy when expressly or impliedly forbidden by the paramount law, or by some principle of the common law, or by the provisions of the statute. *Langdon v. Conlin*, 67 Neb. 243 (93 N. W. 389; 108 Am. St. Rep. 643; 60 L. R. A. 429).

113. (1906.) A contract whereby one interested in defeating the probate of a will agrees to interpose no objection thereto is not void as against public policy, unless made collusively and in fraud of other parties interested in the estate. *Grochowski v. Grochowski*, 77 Neb. 510 (112 N. W. 325).

114. (1906.) A promise made in consideration of an agreement to refrain from resisting the probate of a will is not void as against public policy where no persons or interests other than the persons and interests of the contracting parties are prejudicially affected thereby. *Grochowski v. Grochowski*, 77 Neb. 506 (109 N. W. 742).

115. (1906.) A clause of a contract of a corporation of *quasi* public character, which, if enforced, would prevent its serving the public on such terms is illegal and void. *Sammons v. Kearney Power & Irrigation Co.*, 77 Neb. 580 (110 N. W. 308).

Contracts impossible of performance.

116. (1902.) Contracts in which a corporation, in consideration of stated payments made to it, makes promises, which are the main inducement to such contracts, and are impossible to perform, are unlawful, being against public policy. *State, ex rel. Prout, v. Nebraska Home Co.*, 66 Neb. 349 (92 N. W. 763; 103 Am. St. Rep. 706; 60 L. R. A. 448).

117. (1902.) Contracts of a corporation, in consideration of stated payments to it, by which it professes to assist the holders of its contracts in the purchase of homes and in payment of the same, where under its scheme some of the contributors can obtain no assistance for more than 70 years, are unlawful, as against public policy. *State, ex rel. Prout, v. Nebraska Home Co.*, 66 Neb. 349 (92 N. W. 763; 103 Am. St. Rep. 706; 60 L. R. A. 448).

Restraint of trade.

118. (1900.) Contracts which impose unreasonable restraints upon the exercise of any business, trade or profession contravene sound public policy. *Wittenberg v. Mollyneaux*, 60 Neb. 583 (83 N. W. 842).

119. (1900.) A contract of purchase, the main purpose of which is to secure a monopoly, is contrary to public policy and will not be enforced. *Wittenberg v. Mollyneaux*, 60 Neb. 583 (83 N. W. 842).

120. (1901.) Agreements in restraint of trade should be construed with reference to the object sought to be attained by them, and will not be given a construction which, though covered by the words of the agreement, cannot be supposed reasonably, in

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view of the circumstances of the parties and the context of the instrument, to have been contemplated by them. *Herpolsheimer v. Funke*, 1 Unof. 304 (95 N. W. 687).

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121. (1905.) A contract in restraint of trade which is not limited either in time or space is against public policy and void. *Roberts v. Lemont*, 73 Neb. 365 (102 N. W. 770).

122. (1905.) In determining the validity of a contract in restraint of trade, the test is whether the restraint is only such as is necessary to afford a fair protection to the interests of the party in whose favor it is given, and not so much as to interfere with the interest of the public. *Roberts v. Lemont*, 73 Neb. 365 (102 N. W. 770).

——— **Partial restraint.**

123. (1894.) Where real estate, consisting of certain lots and buildings thereon, is sold, and in the granting portion of the deed conveying the same a clause is inserted stating that the property is not to be used for hotel purposes for two years, *held*, that such restriction as to use of the property, being a limited one, was valid and not an unreasonable restrain of trade in view of the facts developed by the pleadings (the case having been decided upon the pleadings alone), and that such agreement was not within or covered by the prohibitions of provisions of chapter 91*a*, entitled "Trusts," Compiled Statutes, 1893. *Mollyneaux v. Wittenberg*, 39 Neb. 547 (58 N. W. 205).

124. (1899.) The contract in suit, one of the class known as contracts "in restraint of trade," being limited as to time and territory, and its stipulations reasonable, *held* valid and enforceable by injunction. *Downing v. Lewis*, 59 Neb. 38 (80 N. W. 261).

125. (1900.) Partial restraints upon the exercise of any business, trade or profession are not unreasonable when they are ancillary to an actual purchase of property, made in good faith, and are apparently necessary to afford fair protection to the purchaser. *Wittenberg v. Mollyneaux*, 60 Neb. 583 (83 N. W. 842).

126. (1900.) A covenant in a deed for the exchange of hotel property by which the grantee in one deed agrees that for a period named he will not use the property acquired by him for hotel purposes, is not void as being contrary to public policy. *Wittenberg v. Mollyneaux*, 60 Neb. 583 (83 N. W. 842).

127. (1901.) The owners of a building in which they were conducting a department store leased a portion of the building to a firm engaged in the sale of queensware, glassware and kindred articles, and in the lease covenanted "not to sell" articles of that character during the term of the lease. *Held*, That in view of the circumstances and context, this was not an agreement in general restraint of trade, but was intended to prohibit the lessors, in the conduct of their department store, from competing with the lessees in the same building, and hence was valid and enforceable. *Herpolsheimer v. Funke*, 1 Unof. 304 (95 N. W. 687).

128. (1901.) An agreement prohibiting one of the parties from engaging in a competitive business for a reasonable time and within a limited area not larger than reasonably necessary for the protection of the other, is valid and enforceable. *Herpolsheimer v. Funke*, 1 Unof. 304 (95 N. W. 687).

Ousting jurisdiction.

129. (1901.) It is the settled law of this state that a provision in a contract requiring arbitration, whether of disputes arising under the contract generally or only of the amount of any loss or damages sustained by the parties thereto, will not be enforced; nor will refusal to arbitrate be available in an action growing out of the contract. *Schrandt v. Young*, 62 Neb. 254 (86 N. W. 1085).

130. (1902.) An agreement by which parties thereto stipulate in advance not to enforce, by a resort to a court of justice, a substantial right which may subsequently be involved in dispute between them, but to submit such right to the decision of a private tribunal, although other questions involved may be reserved for adjudication by the courts, cannot be enforced. *Hartford Fire Ins. Co. v. Hon*, 66 Neb. 555 (92 N. W. 746; 60 L. R. A. 436).

131. (1902.) An agreement between parties to a contract that neither shall maintain a suit thereon after breach, all differences to be settled by arbitration—is without binding force, as tending to oust the courts of their jurisdiction. *Hartford Fire Ins. Co. v. Hon*, 66 Neb. 555 (92 N. W. 746; 60 L. R. A. 436).

——— **Limiting time for action.**

132. (1898.) A provision in a contract limiting the time for bringing suit thereon

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to a period different from that fixed by statute is against public policy and not enforceable. *Miller v. State Ins. Co.*, 54 Neb. 121 (74 N. W. 416; 69 Am. St. Rep. 709).

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Prevention of competition in bids.

133. (1892.) An agreement entered into by parties for the purpose of preventing competition in the letting of public contracts is void; and a like rule prevails where the necessary tendency or effect of the contract would be to stifle competition. To have this effect, however, it must appear that the intent, effect, or necessary tendency of the contract was to prevent or stifle competition. Otherwise, the contract will be sustained. *Whalen v. Brennan*, 34 Neb. 129 (51 N. W. 759).

134. (1898.) Contract between two persons for one of them to bid at a judicial sale for the benefit of both may be upheld where the intent or effect was not to chill bids or to prevent competition. *Olson v. Lamb*, 56 Neb. 104 (76 N. W. 433; 71 Am. St. Rep. 670).

135. (1900.) A contract whereby one agrees not to bid at a chattel mortgage sale is contrary to public policy, and a note given in pursuance of such contract is unenforceable. *McClelland v. Citizens Bank*, 60 Neb. 90 (82 N. W. 319).

Derogation of marriage relation.

136. (1893.) A contract intended to facilitate the procuring of a divorce at the suit of either of the parties thereto is void. *Wilde v. Wilde*, 37 Neb. 891 (56 N. W. 724); (1905) *Davis v. Hinman*, 73 Neb. 850 (103 N. W. 668).

Influencing legislation.

137. (1899.) A contract by which a person agrees to draft a bill, have it introduced in a legislature, explain it, and make arguments in its favor before legislative committees, and do all things needful and proper to secure its passage, is vicious, illegal and void, as against public policy; and the claimant can not recover, either on an implied contract or a *quantum meruit* for the services performed. *Richardson v. Scott's Bluff County*, 59 Neb. 400 (81 N. W. 309; 80 Am. St. Rep. 682; 48 L. R. A. 294). [Overruled. *Stroemer v. Van Orsdel*, 74 Neb. 132, 143.]

138. (1905.) A contract between an attorney and client for services to be rendered by the former is not necessarily invalid because a part of the services to be rendered is the procurement of legislative action, nor because such contract provides for a contingent fee, and will be enforced unless it appears that it contemplates the use of unlawful or improper means, or that such means were employed in pursuance thereof to attain the object for which the contract was made. *Stroemer v. Van Orsdel*, 74 Neb. 132 (103 N. W. 1053).

Affecting appointment to office.

139. (1901.) A contract between an appointive officer of a city, whose salary is fixed by statute or ordinance and a city council, by which such appointive city officer agrees to perform the duties of his office for a sum less than that prescribed by law, is against public policy and absolutely void. *Gallaher v. City of Lincoln*, 63 Neb. 339 (88 N. W. 505).

Compounding offenses.

140. (1898.) A contract, the consideration of which, in whole or in part, is the compounding of a felony or the stifling of a criminal prosecution, is contrary to public policy, illegal, and void. *McCormick Harvesting Machine Co. v. Miller*, 54 Neb. 644 (74 N. W. 1061).

141. (1902.) If the consideration for the giving of a note is the suppression of a criminal prosecution, the transaction is illegal and void, and no recovery can be had thereon. It is not material in such a case that no criminal prosecution was actually commenced. A promise not to institute a prosecution is as illegal a consideration as the dismissal of a prosecution already instituted. *Smith Premier Typewriter Co. v. Mayhew*, 65 Neb. 65 (90 N. W. 939).

142. (1904.) Where a plaintiff claims that a certificate of deposit in the sum of $300 was indorsed and delivered for him to a county attorney under an agreement that, in consideration thereof, he would dismiss a criminal prosecution against plaintiff and release him from jail, a court will not aid him to regain possession of the property. Such a contract or agreement is illegal, against good morals and public policy, and the court will leave the parties in the same position in which it finds them. *Johnson v. Owen*, 72 Neb. 477 (100 N. W. 945).

Inducing litigation.

Champerty, see *Champerty and Maintenance.*

143. (1903.) A contract between an at-

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torney at law and one who is not an attorney, by which the latter agrees to procure the employment of the former by third persons for the prosecution of suits in courts of record, and also to assist in looking after and procuring witnesses whose testimony is to be used in the cases, in consideration of a share of the fees which the attorney shall receive for his services, is against public policy and void. *Langdon v. Conlin*, 67 Neb. 243 (93 N. W. 389; 108 Am. St. Rep. 643; 60 L. R. A. 429).

Obstructing justice.

144. (1885.) An agreement whereby an attorney agrees to furnish another certain claims against a bankrupt merchant, and to procure his appointment as assignee in bankruptcy in consideration of which the other was to furnish his professional skill necessary to the successful prosecution of said claims in bankruptcy, and a division of all fees, both as attorney and assignee, is not void as against public policy as an attempt to impede justice. *Redick v. Woolworth*, 17 Neb. 260 (22 N. W. 693; 52 Am. St. Rep. 410).

Ratification.

145. (1898.) The payment of money on an agreement to compound a felony cannot be considered as a ratification, since the contract was illegal and void and incapable of ratification. *McCormick Harvesting Machine Co. v. Miller*, 54 Neb. 644 (74 N. W. 1061).

146. (1906.) When a party who claimed he had been fraudulently induced to enter into a contract by reason of the concealment of material facts afterwards employs counsel, and after full investigation ratifies and indorses the contract and accepts benefits under it, he is bound by such ratification. *Kertson v. Kertson*, 77 Neb. 688 (110 N. W. 750).

Effect of partial illegality.

147. (1881.) When a contract to convey land to be acquired under the United States homestead law provided that payment should be made in part by breaking the land, and that the breaking should be paid for in cash if the land was not conveyed, the illegality of the agreement to convey will not defeat a recovery for the price of the breaking. *Simmons v. Yuram*, 11 Neb. 516 (9 N. W. 690).

148. (1894.) An indivisible promise founded upon two considerations, one of which is legal and the other illegal, cannot be enforced. *Luce v. Foster*, 42 Neb. 813 (60 N. W. 1027).

Relief of parties.

149. (1877.) An action cannot be maintained for the consideration of a contract upon an alleged performance by the plaintiff, if such contract is against public policy. *Clarke v. Omaha & S. W. R. Co.*, 5 Neb. 314.

150. (1877.) If a contract against public policy is fully executed the court will not disturb it, but leave the parties to abide the consequences; if it is not executed the court will not lend its aid to carry it into effect. *Clarke v. Omaha & S. W. R. Co.*, 5 Neb. 314.

151. (1878.) The test in cases where the contract is founded on an illegal transaction is, whether the party requires the aid of the illegal transaction to establish his claim; and if he cannot proceed without showing that he has broken the law, the court cannot assist him whatever may be his demand. *Rudolf v. Winters*, 7 Neb. 125.

152. (1882.) Where acts are merely prohibited by statute, and the parties are not *in pari delicto*, the party upon whom no penalty is imposed may, upon non-performance, maintain an action against his co-contractor to recover the amount advanced on the contract. *Bateman v. Robinson*, 12 Neb. 508 (11 N. W. 736).

153. (1884.) No court of law or equity will lend its assistance in any way towards carrying out an illegal contract; therefore, such contract cannot be enforced by one party against the other; either directly, by asking the court to carry it into effect, or indirectly, by claiming damages or compensation for a breach of it. *Gould & Kennard v. Kendall & Smith*, 15 Neb. 549 (19 N. W. 483).

154. (1885.) No court of law or equity will lend its assistance in any way towards carrying out an illegal contract; therefore such contract cannot be enforced by one party against the other, either directly, by asking the court to carry it into effect, or indirectly, by claiming damages or compensation for a breach of it. *Hobble v Zaepffel*, 17 Neb. 536 (23 N. W. 514).

155. (1900.) When an illegal contract has been executed and the parties thereto are *in pari delicto*, no action lies to recover back money paid under it, or for restitution

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of property delivered in pursuance of its terms. This rule applies to the parties themselves and to all others claiming through or under them. *Brower v. Fass*, 60 Neb. 590 (83 N. W. 832).

156. (1902.) A party *in pari delicto* cannot make his illegal act a basis of recovery; but where the stronger mind takes posession of the weaker, or where through ignorance and without any intent to violate the law, one is led by fraud and misrepresentation to the performance of an act against public policy, the courts will not deny him relief against those whose fraud persuaded him to the act, and who seek to profit therefrom. *Klein v. Pederson*, 65 Neb. 452 (91 N. W. 281).

157. (1905.) Where an illegal contract has been executed, and the parties thereto are *in pari delicto*, no action lies to recover back money paid under it or for restitution of property delivered in pursuance of its terms. *Davis v. Hinman*, 73 Neb. 850 (103 N. W. 668).

II. CONSTRUCTION AND OPERATION.

Construction as question for court or jury, see *post*, §§ 493-504.

Prison labor contracts, see *Convicts*, §§ 5-7.

Admissibility in evidence of customs to interpret, see *Customs and Usages*, §§ 9-12.

Penalty or liquidated damages for nonperformance, see *Damages*, §§ 68-90.

Rights under contract dealing in liquors in violation of law, see *Intoxicating Liquors*, §§ 472-485.

Within statute of frauds, see *Frauds, Statute of.*

Contract of employment of physician and surgeon, see *Physicians and Surgeons.*

Contract for sale of goods, see *Sales.*

Construction of subscription contract, see *Subscription*, § 3.

A. General Rules of Construction.

In general.

158. (1885.) In construing contracts, the presumption of greater or less strength, according to the language used or circumstances of the case, is in favor of the comprehensive over the restricted, the general over the particular, the common over the unusual sense. *Shuman v. Willets*, 17 Neb. 478 (23 N. W. 358).

159. (1895.) A contract of donation must be strictly construed in favor of the donor. *Gerner v. Church*, 43 Neb. 690 (62 N. W. 51).

160. (1899.) While a court may construe and enforce contracts duly entered into, it is not the province of the judiciary to make contracts for parties. *Te Poel v. Shutt*, 57 Neb. 592 (78 N. W. 288).

161. (1899.) It is not the province of a court of equity to make contracts, but to construe and enforce them. *Building & Loan Ass'n of Dakota v. Walker*, 59 Neb. 456 (81 N. W. 308).

162. (1904.) Where a written contract is relied upon by both parties to an action it will be literally construed and enforced by the courts. *McCormick Harvesting Machine Co. v. Brown*, 5 Unof. 356 (98 N. W. 697).

What law governs.

163. (1874.) Unless a contract is by its terms to be performed in another state, it must be governed by the laws of the place where it is made. *Kittle v. De Lamater*, 3 Neb. 325.

164. (1889.) The homestead law in force when a contract was entered into is the law applicable to such contract. *Gallagher v. Smiley*, 28 Neb. 189 (44 N. W. 187; 26 Am. St. Rep. 319).

165. (1895.) The rule that the law of the place where a contract is made becomes a part of the contract applies to a city ordinance. *Gerner v. Church*, 43 Neb. 690 (62 N. W. 51).

166. (1900.) A contract is to be construed by the laws of the state in which it is made. *Antes v. State Ins. Co.*, 61 Neb. 55 (84 N. W. 412).

Construction in favor of validity.

167. (1885.) In construing a contract, that construction which makes the contract legal and operative will be preferred to one which would have the opposite effect. *Shuman v. Willets*, 17 Neb. 478 (23 N. W. 358).

168. (1893.) Where a contract is capable of two constructions, the one making it valid and the other void, the law will adopt the construction that upholds the contract. *Morrisey v. Broomal*, 37 Neb. 766 (56 N. W. 383); (1903) *Horton v. Rohlff*, 69 Neb. 95 (95 N. W. 36).

Meaning of words.

169. (1876.) In the interpretation of contracts, words must not be forced from their proper signification to one entirely different. *Mills v. Miller*, 4 Neb. 441.

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170. (1879.) Use of the word "as" in the clause "that said defendant refused and neglected to cut plaintiff's wheat *as* defendant had agreed and contracted," commented upon and proper signification given. *Kelley v. Peterson*, 9 Neb. 76 (2 N. W. 346).

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Giving effect to all provisions.

171. (1878.) As a general rule, the covenants of a contract will be considered and held as dependent conditions to be performed by the respective parties, unless it very clearly appears, from the nature of the covenants, they intended them to be independent; and the common intention of the parties must be collected from the entire instrument; and therefore one clause or condition of the contract must be interpreted by the others, whether they precede or follow it. *Hamilton v. Thrall*, 7 Neb. 210.

172. (1899.) A contract should be construed if possible so as to give effect to all of its provisions. *Lawton v. Fonner*, 59 Neb. 214 (80 N. W. 808).

173. (1902.) The intention of the parties is to be gathered from the entire contract, and not from any clause contained therein. *Royal Neighbors of America v. Wallace*, 64 Neb. 330 (89 N. W. 758).

174. (1902.) In the interpretation of a written ambiguous contract, that construction will be preferred which gives effect to all the parts of the instrument rather than one which renders a portion redundant and useless. *McGavock v. Omaha Nat. Bank*, 64 Neb. 440 (90 N. W. 230).

175. (1902.) A construction of a written contract, which requires the rejection of certain words, is unwarranted where the rejection of such words would defeat the intention of the parties. *Ricketts v. Buckstaff*, 64 Neb. 851 (90 N. W. 915).

176. (1903.) A construction that will completely emasculate a clause of a contract will not be adopted, if any other reasonable construction is admissible. *State, ex rel. Davis, v. Mortensen*, 69 Neb. 376 (95 N. W. 831).

Surrounding circumstances.

177. (1884.) Contracts should be construed in the light of surrounding circumstances and the condition of the parties at the time of making them. *Singer Mfg. Co. v. Doggett*, 16 Neb. 609 (21 N. W. 468).

178. (1898.) Acts of the parties and other circumstances may be considered in interpreting an ambiguous contract in writing. *Lctenser v. Misner*, 56 Neb. 340 (76 N. W. 897).

179. (1900.) A contract will generally be construed solely by reference to its own language and terms; but where the language is ambiguous, other evidence may be considered, not for the purpose of contradiction, but to explain the ambiguity. *State, ex rel. Seth Thomas Clock Co., v. County Commissioners of Cass County*, 60 Neb. 566 (83 N. W. 733).

180. (1905.) In the determination of the rights of parties to a contract, the contract should be construed in the light of surrounding circumstances and the condition of the parties at the time of making it. *Fiscus v. Wilson*, 74 Neb. 444 (104 N. W. 856).

Custom or usage.

180*a*. (1894.) Parties to contracts are bound thereby and evidence of customs and usages cannot be received as a substitute. *American Building & Loan Ass'n v. Mordock*, 39 Neb. 413 (58 N. W. 107).

181. (1897.) The business usage of a particular individual is not admissible to interpret a contract between that individual and another in the absence of proof of knowledge by the latter of such usage. *Gamble v. Stauber Mfg. Co.*, 50 Neb. 463 (69 N. W. 960).

182. (1897.) Custom or usage in trade or business may be shown for the purpose of interpreting a contract or controlling its execution, although not for the purpose of changing its intrinsic character, provided it be known to the party sought to be charged, or is so well settled and so uniformly acted upon as to warrant the presumption that it was known to both contracting parties and that they contracted with reference to it. *McKee v. Wild*, 52 Neb. 9 (91 N. W. 958).

Intention of parties.

183. (1874.) In the construction of a contract, the acts to be performed under it and the manner of performance may be considered; and such a construction should be adopted as will give effect to the provisions which carry out the evident intent of the contract; and the whole contract should be considered in determining the meaning of any or all of its parts. *People, ex rel. Gere, v. Gosper*, 3 Neb. 285.

184. (1883.) If words are used in a doubtful sense as to their meaning or ap-

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plication, courts should give them the meaning intended and understood by the parties. *Harbach v. Miller*, 14 Neb. 9 (14 N. W. 545).

185. (1894.) When terms of a contract are intended in different senses by the parties, courts will, under section 341, code, adopt one party's understanding when it formed the inducement for him to enter into the contract, and the other party is aware of it. *Schroeder v. Nielson*, 39 Neb. 335 (57 N. W. 993).

186. (1896.) In construing a contract, for the purpose of determining whether the statements made therein were intended by the parties thereto to be warranties or representations, the court will take into consideration the situation of the parties, the subject matter of the contract, and the language employed, and will consider a statement made to be a warranty only when it clearly appears that such was the intention of the contracting parties; that the mind of each party consciously intended and consented that such should be the interpretation of his statements. *Kettenbach v. Omaha Life Ass'n*, 49 Neb. 842 (69 N. W. 135).

187. (1901.) Where a building and loan association, through its agent, by representations inconsistent with a written contract, induces one, who is ignorant, and wholly unable to read or write the English language, to enter into such contract; and it appears that such party would not have entered into the contract had he known or possessed the means of knowing that the contract which he signed was not the contract to which he had agreed orally; and it further appears that the agent knew at the time that such pary relied upon his oral explanation of the terms of the contract, and was thereby induced to enter into the same; the court will give to such contract the construction understood and agreed to by the person so induced to sign. *People's Building, Loan & Savings Ass'n v. Klauber*, 1 Unof. 676 (95 N. W. 1072).

188. (1903.) In an action for damages for a breach of contract between a school district, in a metropolitan city, and an architect, for his services for the period of one year, the contract will be construed according to the plain import of its language, viewed in the light of the circumstances and the apparent understanding of the parties at the time it was made. *School District of Omaha v. McDonald*, 68 Neb. 610 (94 N. W. 829).

189. (1906.) A contract will ordinarily be construed as it was understood and construed by the contracting parties. *School District v. Davis*, 76 Neb. 612 (107 N. W. 842).

190. (1906.) A contract should be construed to give effect to the intention of the contracting parties, keeping in mind the situation of the parties, the property which is the subject matter of the contract, and the use to which it is being applied. *Grothe v. Lane*, 77 Neb. 605 (110 N. W. 305).

190*a*. (1907.) Contract of assignment examined, and *held*, under the evidence, to fall within the provisions of section 341 of the code, which provides that "when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." *Barnes v. Sim*, 80 Neb. 213 (117 N. W. 881).

Construction by parties.

191. (1882.) Where both parties to a contract, with a full knowledge of its terms, by their action under it have given it the same construction, it is a safe rule to adopt that construction, where there is a possible doubt as to its meaning, in estimating damages under it. *School District No. 8 v. Estes*, 13 Neb. 52 (13 N. W. 16); (1894) *Paxton & Gallagher v. Smith & Co.*, 41 Neb. 56 (59 N. W. 690); (1900) *State, ex rel. Seth Thomas Clock Co., v. County Commissioners of Cass County*, 60 Neb. 566 (83 N. W. 733); (1905) *Fiscus v. Wilson*, 74 Neb. 444 (104 N. W. 856).

192. (1890.) Where a contract for the construction of a canal at a certain sum per cubic yard of earth is silent as to whether the measurement is to include both excavation and embankment, the contractor by accepting each month a payment on account based on an estimate made by the engineer in charge obtained by computing the amount of excavation only is concluded by such construction of the contract. *Price v. Kearney Canal & W. S. Co.*, 29 Neb. 33 (45 N. W. 252).

193. (1895.) In an action on a contract, where both parties in the district court adopt a particular construction, neither will be permitted to urge a different one in the reviewing court. *Woodward v. Baird*, 43 Neb. 310 (61 N. W. 612).

194. (1896.) Where a contract is ambiguous, a practical construction placed

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upon it by the parties thereto should prevail over any mere technical interpretation. *Davis v. Ravenna Creamery Co.*, 48 Neb. 471 (67 N. W. 436).

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195. (1897.) A practical construction placed upon an ambiguous contract by the parties will generally be adopted by the courts. *Hale v. Sheehan*, 52 Neb. 184 (71 N. W. 1019); (1899) *Lawton v. Fonner*, 59 Neb. 214 (80 N. W. 808); (1903) *Williams v. Auten*, 68 Neb. 26 (93 N. W. 943).

Written and printed portions.

196. (1889.) Where an instrument consists partly of written and partly of printed form, the former controls the latter, where the two are inconsistent. Civil code, sec. 340. *Union P. R. Co. v. Graddy*, 25 Neb. 849 (41 N. W. 809).

197. (1896.) In case a contract is partly written and partly of printed form, the writing controls in case of inconsistency of provisions. *Davis v. Ravenna Creamery Co.*, 48 Neb. 471 (67 N. W. 436).

Construing instruments together.

Construction of note and mortgage as one contract, see *Bills and Notes*, §§ 104-106.

198. (1874.) A contract to print and publish a map containing a lottery scheme, and the execution of a note in payment thereof, constitutes but one transaction, and should be construed as one entire contract. *Kittle v. De Lamater*, 3 Neb. 325.

199. (1886.) Where one partner sells his interest in the firm to the other, if he would take a certain interest in rooms over the store at one hundred dollars per year, the sale of the partnership interest and the leasehold constituted but one contract. *Connor v. Hingtgen*, 19 Neb. 472 (27 N. W. 443).

200. (1896.) Where a part consideration for a promise was performed in pursuance of a previous request, the previous request, the performance of the consideration, and the subsequent promise constitute a single contract, and where it would otherwise be within the statute of frauds, the performance by one party, although preceding the promise, may be sufficient to take the case out of the statute. *Stuht v. Sweesy*, 48 Neb. 767 (67 N. W. 748).

B. Parties.

Rights and liabilities of parties to contracts under assignment, see *Assignments*, §§ 24-30.

Joint and several contracts.

201. (1871.) An apportionment between several joint obligors does not render their contract one of severalty. *Neligh v. Bradford*, 1 Neb. 451.

202. (1903.) Contract for the conveyance of real estate between a vendee and three vendors, each owners of separate tracts of land, construed, and *held* to be severable and independent as to each vendor. *Watkins v. Youll*, 70 Neb. 81 (96 N. W. 1042).

Rights acquired by third persons.

203. (1877.) If a cause of action is exclusively based upon the full performance of the terms and conditions of a prior agreement between other parties, the primary inquiry is, whether such agreement was made a contract between the parties to the action, and if so, whether it was fully executed. *Clarke v. Omaha & S. W. R. Co.*, 5 Neb. 314.

204. (1894.) A party seeking to avail himself of the terms of a contract between other parties must do so subject to all its conditions and restrictions. *Simms v. Summers*, 39 Neb. 781 (58 N. W. 431).

205. (1897.) Contract permitting the owner of buildings to retain,—for the purpose of insuring payment to subcontractors and of insuring completion of the buildings,—15 per cent. of the amounts due the contractor, *held* not to render the owner primarily liable to a subcontractor for sums thus retained, nor to constitute the owner a trustee. *School District of Beatrice v. Thomas*, 51 Neb. 740 (71 N. W. 731).

206. (1897.) A subcontractor, between whom and the employer of the contractor there is no privity of contract, cannot, as a matter of right,—merely because employed by the contractor to perform a portion of the labor contracted for,—if not paid by the contractor, demand payment of the employer, and, on refusal, maintain suit against the employer therefor. *School District of Beatrice v. Thomas*, 51 Neb. 740 (71 N. W. 731).

206*a*. (1899.) The circumstances under which the contract by which the telegraph company agreed to transmit to the other party to the contract the news reports of the Associated Press examined, and *held* not to show the contract to be elemental of the consideration of the agreement by the Associated Press to furnish the news reports to the party to the first mentioned contract other than the telegraph company.

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Western Union Telegraph Co. v. Call Publishing Co., 58 Neb. 192 (78 N. W. 519).

——— Agreement for benefit of third person.

207. (1886.) Where one makes a promise to another for the benefit of the third person, such third person can maintain an action upon the promise, though the consideration does not move directly from him. *Shamp v. Meyer*, 20 Neb. 223 (29 N. W. 379); (1893) *Barnett v. Pratt*, 37 Neb. 349 (55 N. W. 1050); (1891) *Kaufman v. United States Nat. Bank*, 31 Neb. 661 (48 N. W. 738); (1891) *Hale v. Ripp*, 32 Neb. 259 (49 N. W. 218); (1894) *Doll v. Crume*, 41 Neb. 655 (59 N. W. 806); (1896) *Kaufman v. Cooper*, 46 Neb. 644 (65 N. W. 796); (1897) *Meyer v. Shamp*, 51 Neb. 424 (71 N. W. 57); (1898) *Morrill v. Skinner*, 57 Neb. 164 (77 N. W. 375).

208. (1898.) One not a party to a contract may maintain an action thereon when such contract was made for his benefit or the benefit of a class to which he belongs. *Rohman v. Gaiser*, 53 Neb. 474 (73 N. W. 923).

209. (1898.) Where one makes a promise to another for the benefit of a third person, the latter may defend the contract against an attack for fraud. *Goos v. Goos*, 57 Neb. 294 (77 N. W. 687).

Liabilities of third persons.

210. (1876.) Where the owner of premises, upon which with other property, judgment liens are held, enters into an agreement whereby the liens were to be discharged, and the owner was to buy in an outstanding title in favor of himself and the judgment creditor's son, the defendant herein, as tenants in common, the defendant cannot be compelled to contribute anything in the purchase of the outstanding title. *Mills v. Miller*, 4 Neb. 441.

C. Subject-Matter.

Construction of particular contracts.

211. (1874.) Under a contract for public printing, wherein it was provided that superior royal paper, forty pounds to the ream, and folded four times, should be used, paper twenty-four by thirty-eight inches in size, weighing forty pounds to the ream, must be used and should contain sixteen leaves and thirty-two pages of printed matter to the sheet, printed on both sides. *People, ex rel. Gere, v. Gosper*, 3 Neb. 285.

212. (1888.) A promise by a party to "see you paid for your trouble," is not an absolute promise to pay, but a guaranty that payment shall be made. *Sedgwick v. Bliss*, 23 Neb. 617 (37 N. W. 483).

213. (1894.) Where the contract of a construction company contemplated only the building of a specified line of railroad, the expenses incidental to preliminary surveys made by the construction company with a view to the location of other lines where municipal donations could readily and freely be secured, in large part, for the benefit of said construction company, are not properly recoverable by said construction company as against the railroad company for which the work of construction was being done, even though some of the officers of the said railroad company, by their conversation, in a measure, countenanced the making of said surveys for the purposes above stated. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374 (59 N. W. 838).

214. (1895.) The reservation of the right in a building contract by the owner, of an option to make payments by assuming lumber bills, of necessity excluded the inference therefrom that the proprietor assumed payment of lumber bills, of the existence of which he had no knowledge. *O'Rourke v. Burke*, 44 Neb. 821 (63 N. W. 17).

215. (1896.) A contract which provides for the sinking of a tubular well to be not more than of a certain depth and to furnish a flow of a certain quantity of water per hour, *held* to be an agreement under which the defendant was to sink the well until the prescribed flow of two thousand gallons of water per hour was obtained, not to extend, however, beyond a depth of five hundred feet, at any ascertained or fixed compensation for such further extension, and not in any event to extend beyond a depth at which the employer should give the defendant notice to quit work. *Omaha Consolidated Vinegar Co. v. Burns*, 49 Neb. 229 (68 N. W. 492).

216. (1898.) Under a contract, "Publishers Lincoln Daily Call, Lincoln, Neb.: I hereby authorize you to insert my advertisement in the Lincoln Daily Call, to occupy the space of five thousand (5,000) lines local reading matter, said advertisement to run one year, commencing January 10, 1891, for which I agree to pay the sum due for the lines used on the first day of each month until the expiration, at the rate of 2½

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cents per line," there was no obligation to pay for 5,000 lines, but only for such portion thereof as was furnished by the contracting party and printed by the publishing company. *Call Publishing Co. v. Edson*, 55 Neb. 394 (75 N. W. 837).

217. (1902.) A note for $1,593 and a memorandum on the back thereof to the effect that when the sureties "quit paying on this note or any renewal of it, it is to be cut down to $1,050" construed to mean that the sureties were to be released when the excess of $1,050 had been paid. *Mockett v. Boston Improvement Co.*, 2 Unof. 500 (89 N. W. 283).

218. (1906.) Under a contract whereby defendant purchased the joint interest of one, who with another has bought certain book rights of plaintiff, and agreed to pay off certain indebtedness, he was *held* not to have assumed the unknown obligations of the seller to plaintiff. *Gammel Book Co. v. Paine*, 75 Neb. 683 (106 N. W. 777).

219. (1906.) Under a contract by a school district and an architect whereby the latter was employed to draw all plans for buildings contemplated within one year, at a fixed compensation, such architect is entitled to compensation for plans for a building, prepared within the year, even though the building was not then constructed. *School District v. Davis*, 76 Neb. 612 (107 N. W. 842).

Warrantics.

220. (1888.) When a person undertakes any employment, trust, or duty, he thereby in contemplation of law impliedly contracts with those who employed him to perform that which he has undertaken with integrity, diligence, and skill; and if he fails to do so it is a breach of contract. *Hart v. Barnes*, 24 Neb. 782 (40 N. W. 322).

221. (1901.) One who undertakes for a consideration to do work requiring special skill, impliedly represents that he possesses, and will exercise, such reasonable degree of skill as the nature of the service may require; and if he is to furnish his own tools, implements or machinery, there is an implied representation as to their fitness for the use to which they are to be put. *Van Nortwick v. Holbine*, 62 Neb. 147 (86 N. W. 1057).

D. Time.

Effect of delay in performance, see *post*, § 313.

Time of performance in general.

222. (1886.) When the day of performance of contracts, other than instruments upon which days of grace are allowed, falls on Sunday, that day is not counted, and compliance with the stipulation of the contract on the next day (Monday) is deemed in law a performance. *Post v. Garrow*, 18 Neb. 682 (26 N. W. 580).

223. (1896.) The term "due" is employed to express distinct ideas. In some connections it is held to mean a debt immediately payable. In others it signifies a state of indebtedness merely, without reference to the time of payment; but does not include contingent liabilities which may ripen into absolute indebtedness upon the future performance of contract obligations. *Ryan v. Douglas County*, 47 Neb. 9 (66 N. W. 30).

224. (1897). A contract of carriage which contains no specified time for performance, implies, as one of its terms, performance within a reasonable time, and an action may be maintained on the contract for unreasonable delay in performance. *Denman v. Chicago, B. & Q. R. Co.*, 52 Neb. 140 (71 N. W. 967).

224*a*. (1908.) The words "as soon as possible" in a contract for the manufacture of certain specified goods mean "with all reasonable diligence" or "without unreasonable delay." *Childs & Co. v. Omaha Paraphernalia House*, 80 Neb. 673 (114 N. W. 941).

Time as of essence of contract.

225. (1888.) The words "This contract is to be construed strictly as to payments" *held* not to make time of the essence of the contract. *Langan v. Thummel*, 24 Neb. 265 (38 N. W. 782).

226. (1900.) In equity, time will be regarded as of the essence of a contract when it clearly and affirmatively appears that the parties intended that time should be essential. *Jewett v. Black*, 60 Neb. 173 (82 N. W. 385).

Duration of contract.

227. (1880.) Under a contract whereby one of the parties was to put up ice and sell the same, unless the other should terminate the contract on the ground of the other's disposition and neglect of the business, a termination of the contract cannot be had merely because the one thought the other had become dissipated unless he was also neglectful of the business. *Krigbaum v. Vindquest*, 10 Neb. 435 (6 N. W 631).

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228. (1890.) A contract appointing defendant as sales agent for plaintiff "during the season of 1888" in consideration of which defendant purchased 15,000 pounds of binding twine at a price fixed, with a proviso "above prices guaranteed during the season of 1888, and any reduction on this grade of twine will be met by us," is a continuing contract for 1888, so that plaintiff is liable for failure to furnish the entire 15,000 pounds. *McCormick Harvesting Co. v. Jensen*, 29 Neb. 102 (45 N. W. 160).

228*a*. (1908.) Where the county board has a yearly contract for the construction of all bridges in the county, it may not make another to take effect before the expiration of the first; but it may, if the occasion for building a bridge arises during the life of the yearly contract, require it to be done thereunder, even though the same cannot be completed within the term thereof. *Whedon v. Lancaster County*, 80 Neb. 682 (114 N. W. 1102).

Option to terminate.

229. (1891.) A contract by which plaintiff was to move to defendant's farm and keep house for him and board him "during the following winter," is not terminable at any time at the option of either party. *Bryant v. Barton*, 32 Neb. 613 (49 N. W. 331).

230. (1893.) Ordinarily where the right to terminate a contract on notice is reserved in the instrument itself, without fraud or mistake, and with the actual knowledge and consent of all the parties thereto, such reservation is valid, and the exercise thereof will be enforced by the courts, if not contrary to equity and good conscience. *Morrissey v. Broomal*, 37 Neb. 766 (56 N. W. 383).

E. Conditions.

In general.

231. (1905.) A provision in a contract placing certain cattle in another's care, giving him power to sell all by a certain time for not less than a certain sum per head, that requires each to submit all offers to buy to the other, is not a limitation upon the otherwise unlimited power of the one to sell at the other's discretion. *First Nat. Bank of Omaha v. Dye*, 73 Neb. 300 (102 N. W. 614).

III. MODIFICATION AND MERGER.

Merger of oral contract of insurance in subsequent policy, see *Insurance*, §§ 97, 98.

Reformation of contract, see *Reformation of Instruments*.

Of contract for sale of goods, see *Sales*, III.

Of contract for sale of land, see *Vendor and Purchaser*, III.

Contracts subject to modification.

232. (1882.) A contract between two corporations, having been entered into whereby one agrees to loan a large sum of money to the other, to concentrate its debts, in consideration of certain bonds and a control of the business, the officers of the advancing company, in their individual capacity with consent of an agent of the other company, cannot change or modify the original contract. *Romig v. West Point Butter Co.*, 12 Neb. 567 (11 N. W. 884).

Provisions in contract for modification.

233. (1890.) Where a building contract provides that the owner and architect may make changes they deem necessary at any time during the building, the extra cost to be apportioned on them, the construction of a stairway from the kitchen not originally provided for and the use of a different kind of hardware falls within such clause and within the authority so given. *Dorsey v. McGee*, 30 Neb. 657 (46 N. W. 1018).

Parol modification of prior written contract.

Parol evidence to vary terms of contract, see *post*, §§ 456-472.

234. (1886.) It is competent to prove by parol a change or modification in the terms of a written contract made by the parties to such contract at a time subsequent to the execution thereof. And the consideration for the contract may be a sufficient consideration for such change or modification. *Morrissey v. Schindler*, 18 Neb. 672 (26 N. W. 476).

235. (1887.) After a contract has been reduced to writing, it is competent for the parties, at any time before breach of it, by a new contract, not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it; which is to be proved partly by the written agreement and partly by the subsequent verbal terms, engrafted upon what will be thus left of the written agreement. *Delaney v. Linder*, 22 Neb. 274 (34 N. W. 630).

236. (1888.) A provision in a building

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contract, that "no new work of any description done on the premises, nor any work of any kind whatsoever, shall be considered as extra unless expressly contracted for in writing before its commencement," will not preclude the parties from afterwards waiving the same, and making changes in the original contract by parol. *Erskine v. Johnson*, 23 Neb. 261 (36 N. W. 510).

237. (1890.) A provision in a building tract that "no new work of any description done on the premises, nor work of any kind whatsoever, shall be considered as extras unless a separate estimate in writing for the same before it is commenced shall have been submitted by the contractor to the superintendent and proprietor and their signatures obtained thereto," may be subsequently waived by the parties by parol. *McLeod v. Genius*, 31 Neb. 1 (47 N. W. 473).

238. (1890.) The owner of a building is liable for work and materials furnished by the contractor in its construction not called for by the original written contract, where the owner, or his authorized agent, by a subsequent oral agreement, promised to pay therefor, or knew that the contractor would charge for the same as extras, and assented thereto or permitted the same without objection. *McLeod v. Genius*, 31 Neb. 1 (47 N. W. 473).

238*a*. (1894.) A written contract for the construction of a line of railroad only does not preclude the introduction of parol evidence of a subsequent contract for supply of cattle yards, telegraph line, and other extras necessary to equipment and operation of the road, and not within the terms of the written contract. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374 (59 N. W. 838).

239. (1902.) While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement, and such subsequent agreement requires no consideration. *Bowman v. Wright*, 65 Neb. 661 (91 N. W. 580).

240. (1902.) There is a clear distinction between parol modification of an executory written agreement before breach and before the time for performance has arrived, and an attempt to satisfy a liquidated and accrued indebtedness by payment and acceptance of a less sum. *Bowman v. Wright*, 65 Neb. 661 (91 N. W. 580).

241. (1904.) It is a well settled principle that a written contract not required by the statute of frauds to be in writing may be subsequently changed by oral agreement, and such subsequent agreement need not rest upon any new consideration. *Strahl v. Western Grocer Co.*, 5 Unof. 482 (98 N. W. 1043).

Consideration for modification.

242. (1895.) The mutual waiver of the rights of the parties to a contract of sale of nursery stock is sufficient consideration for a cancelation of the contract, to release the parties from their obligations thereunder. *Bryant v. Thesing*, 46 Neb. 244 (64 N. W. 967).

242*a*. (1894.) The present acceptance by a railroad company from a construction company of unfinished work is a sufficient consideration for a stipulated deduction by the latter, made as a compromise between the parties, from the contract price of finished work. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374 (59 N. W. 838).

242*b*. (1894.) Where a construction company having contracted to build a line of railroad had completed its work according to contract, an agreement by its president, without authority to accept payment at less than the contract price, was without consideration and did not release the other contracting party from full payment. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374 (59 N. W. 838).

243. (1902.) Where the contract is one required to be in writing by the statute of frauds, there must be consideration for a parol modification by waiving some of its requirements, or else such new agreement must be executed. In such case, if the terms of the new agreement have been fully carried out, the original obligation is discharged, though there was no additional consideration. *Bowman v. Wright*, 65 Neb. 661 (91 N. W. 580).

Merger in subsequent contract.

244. (1882.) A written contract of warranty of a machine cannot be varied by proof of oral agreements made before the writing was executed. *Sycamore Marsh Harvester Co. v. Sturm*, 13 Neb. 210 (13 N. W. 202).

245. (1887.) When a contract has been reduced to writing, verbal evidence of what passed between the parties either before the written instrument was made or during the time of its preparation, so as to add to or subtract from or in any manner

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to vary or qualify the written contract, is not admissible. *Delaney v. Linder*, 22 Neb. 274 (34 N. W. 630).

246. (1894.) All verbal negotiations or understandings of parties had prior to the execution of the written contract are merged in the written agreement. *Clarke v. Kelsey*, 41 Neb. 766 (60 N. W. 138); (1902) *Martens v. Pittock*, 3 Unof. 770 (92 N. W. 1038).

247. (1895.) A new contract with reference to the subject-matter of a former one does not supersede the former and destroy its obligations, except in so far as the new one is inconsistent therewith, when it is evident from an inspection of the contracts and from an examination of the circumstances that the parties did not intend the new contract to supersede the old, but intended it as supplementary thereto. *Uhlig v. Barnum*, 43 Neb. 584 (62 N. W. 749).

248. (1897.) The contractor abandoned the work and his contract. His bondsmen took charge and management of the completion of the buildings and fulfillment of the contract, and an additional contract was entered into between them, the subcontractor, and the owner. *Held*, This latter contract became of force and binding on all parties, including the owner; also that it provided for payment of all subsequent estimates of amounts due on the buildings for work by a subcontractor to be made directly to him, and this to apply to the whole sum of any and all such estimates, inclusive of the 15 per cent. which was to be retained by the owner under the original contract and by the original contractor under the contract of the subcontractor. *School District of Beatrice v. Thomas*, 51 Neb. 740 (71 N. W. 731).

249. (1905.) Before one contract is merged in another and superseded thereby, the last contract must be between the same parties as the first, and must embrace the same subject matter, and must have been so intended by the parties. *Walsh v. Lunney*, 75 Neb. 337 (106 N. W. 447).

249*a*. (1908.) Where a plaintiff, who, after having entered into a valid contract, has by means of sharp, unconscionable and fraudulent practices, and by a threat to repudiate the contract at a critical period during its execution, secured a change thereof greatly to his own advantage, brings a suit in equity for a specific performance of the contract as changed, he may not, after the court has determined the contract as so changed invalid for such misconduct, still prosecute such suit for the specific performance of the contract as originally made. *Blondel v. Bolander*, 80 Neb. 531 (114 N. W. 574).

Contemporaneous parol agreement.

250. (1878.) When the parties have reduced their contract to writing, the law presumes that all previous and contemporaneous negotiations and conversations leading to the contract are merged in it, and cannot be varied by parol testimony. *Hamilton v. Thrall*, 7 Neb. 210.

251. (1883.) One C., a depositor, purchased sight drafts at a bank to pay for cattle that he expected to purchase in Colorado. At the same time he made a parol agreement with the bank that if he did not purchase cattle he might return the drafts to the bank and receive credit for the amount thereof with interest. *Held*, That the parol agreement was valid, and did not contradict the written agreement, as it merely showed the purpose for which the drafts were procured and delivered. *Collingwood v. Merchants Bank*, 15 Neb. 118 (17 N. W. 359).

252. (1895.) Parol evidence is not admissible to establish a contemporaneous oral agreement not to negotiate a negotiable instrument. *Waddle v. Owen*, 43 Neb. 489 (61 N. W. 731).

253. (1896.) Parol evidence of prior or contemporaneous conditions modifying a written proposition afterwards submitted and acted upon cannot be received in evidence to vary the terms of the writing. *Commercial State Bank of Neligh v. Antelope County*, 48 Neb. 496 (67 N. W. 465).

254. (1899.) A written contract cannot be varied, modified, or contradicted by parol evidence of a prior or contemporaneous agreement between the parties. *Te Poel v. Shutt*, 57 Neb. 592 (78 N. W. 288).

255. (1901.) The terms of a promissory note cannot be contradicted, altered or varied by evidence of a prior or contemporaneous parol agreement. *Garneau v. Cohn*, 61 Neb. 500 (85 N. W. 531).

256. (1902.) Parol evidence tending to establish a separate oral agreement between the parties to a written contract, as to matters upon which such contract is silent, and not against its terms, is admissible. *Huffman v. Ellis*, 64 Neb. 623 (90 N. W. 552).

257. (1903.) Evidence of a contemporaneous oral agreement is inadmissible to con-

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tradict or vary the terms of a written contract. *Peterson v. Ferbrache*, 4 Unof. 249 (93 N. W. 1011).

258. (1903.) Where a contract to sell machinery and put it in place is in writing and free from ambiguity, evidence as to a prior or contemporaneous parol warranty is inadmissible. *Kummer v. Dubuque Turbine & Roller Mills Co.*, 4 Unof. 347 (93 N. W. 938).

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IV. RESCISSION AND ABANDONMENT.

Of marriage contract, see *Breach of Marriage Promise*, § 2.

Right of common carrier to rescind, see *Carriers*, § 125.

Necessity of notice of repudiation of wagering contract, see *Gaming*, § 16.

Avoidance of insurance policy, see *Insurance*, §§ 160-198.

Forfeiture of rights under insurance policy, see *Insurance*, §§ 199-267.

Rescission of contract for sale of goods, see *Sales*, III.

Contract for sale of land, see *Vendor and Purchaser*, III.

Option to rescind.

Option to terminate contract, see *ante*, §§ 229, 230.

259. (1879.) Generally a contract cannot be rescinded unless by consent of all the parties to it, except in cases of fraud. And a declaration by one party that he rescinds the contract, followed by a refusal on his part further to perform it, not acquiesced in by the other party, does not amount to a rescission, but only a breach. *Nebraska City v. Gas Co.*, 9 Neb. 339 (2 N. W. 870).

260. (1890.) A party to an executory contract has the right to rescind the contract, and terminate it wholly, without the consent of the other party, who is in no fault; the first party becoming liable to the other in any damages he may have sustained, or any compensation he may have earned, by reason of the rescission. *Hale v. Hess*, 30 Neb. 42 (46 N. W. 261).

261. (1904.) Either party to an executory contract may abandon or renounce his contract at any time before performance is due, on the usual terms of compensation to the other for damages which the law recognizes and allows,—subject to the jurisdiction of equity and decree of specific performance in proper cases. *Hixson Map Co. v. Nebraska Post Co.*, 5 Unof. 388 (98 N. W. 872).

Abandonment of contract.

262. (1896.) An abandonment of a contract may be effected by acts of one of the parties thereto, which are inconsistent with its existence and acquiesced in by the other party. *Hall v. Eccles*, 46 Neb. 880 (65 N. W. 1058).

263. (1901.) 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. *Culley v. Taylor*, 62 Neb. 651 (87 N. W. 334).

264. (1906.) A contract will be treated as abandoned, where the acts of one party, inconsistent with its existence, are acquiesced in by the other. *Herpolsheimer v. Christopher*, 76 Neb. 352 (107 N. W. 382).

Grounds for rescission.

——— Incapacity.

265. (1877.) In order to set aside a contract on the ground of drunkenness it is not sufficient that the party was under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, where a party is utterly deprived of his reason and understanding. *Johnson v. Phifer*, 6 Neb. 401.

——— Duress.

266. (1895.) To set aside a contract for duress it must be shown first that the will of one of the parties was overcome, and that he was thus subjected to the power of another, and that the means used to induce him to act were of such a kind as would overcome the mind and will of an ordinary person. *Hargreaves v. Korcek*, 44 Neb. 660 (62 N. W. 1086).

——— Fraud and misrepresentations.

267. A contract procured by fraud will be rescinded at the suit of the party defrauded. But in such action the particular and precise circumstances which constitute the alleged fraud must be set forth in the petition. *Arnold v. Baker*, 6 Neb. 134.

268. (1877.) In morals the failure to perform a promise may be without excuse

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or justification; but in law false representation to authorize the rescission of a contract must be made in regard to existing facts. *Perkins v. Lougee*, 6 Neb. 220.

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269. (1877.) A court of equity will relieve a party against contracts made by him while temporarily insane from the use of intoxicating liquor, where such contracts have been procured by the fraud or imposition of the other party. *Johnson v. Phifer*, 6 Neb. 401.

270. (1896.) The jurisdiction of equity to relieve against mutual mistakes is, in general, confined to cases where, because of such mistake, the minds of the parties never met, and there was therefore no contract, and to cases where the contract made was not correctly expressed by the instrument evidencing it. Relief cannot be given because of misapprehensions in regard to a collateral matter, as in regard to a fact incidentally affecting the value of the subject-matter of the contract, there being no deception or wrongful concealment. *Moore v. Scott*, 47 Neb. 346 (66 N. W. 441).

271. (1896.) False representations as the basis of an action, whether for damages or for rescission of a contract, are such only as in some manner actually mislead the complaining party to his damage. *American Building & Loan Ass'n v. Bear*, 48 Neb. 455 (67 N. W. 500).

272. (1896.) Actionable fraud must relate to matters material to the transaction involved. Mere collateral inducement, although fraudulently made, of itself affords no ground for the rescission of a contract, or for the recovery of damage against the offending party. *American Building & Loan Ass'n v. Bear*, 48 Neb. 455 (67 N. W. 500).

273. (1901.) 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. *Perry v. Rogers*, 62 Neb. 898 (87 N. W. 1063).

274. (1903.) The rule, that the carelessness of negligence of a person in signing a written contract estops him from afterwards asserting that the writing does not truly express the agreement of the parties, does not apply in an action for relief on the ground that the contract was obtained by fraud or entered into by mutual mistake. *Story v. Gammell*, 68 Neb. 709 (94 N. W. 982).

Breach by other party.

Excuse for nonperformance, see *post*, § 321.

275. (1886.) In an action on a contract whereby one party agreed to take and herd the other's cattle, and agreed not to take more than two hundred head of cattle into his herd, an instruction that if more than two hundred cattle were taken into the herd the defendant had the right to remove his cattle, and would not be liable for breach of his contract should be given. *Skinner v. Majors*, 19 Neb. 453 (27 N. W. 431).

276. (1889.) The failure or refusal of one party to a contract to perform his part thereof does not justify the other party in making such performance a condition of his own performance of his own part of a separate and independent contract with the same person. *Filley v. Walker*, 28 Neb. 506 (44 N. W. 737).

277. (1894.) A party who has required payment of sums of money which by a rescission of the contract will be rendered useless to the other contracting party cannot rescind such contract for the mere nonperformance of some conditions thereof, unless such right of rescission is reserved by the express terms of the contract itself. *Swobe v. New Omaha Electric Light Co.*, 39 Neb. 586 (58 N. W. 181).

278. (1896.) Not every breach of a contract by one party thereto will authorize the other to treat it as rescinded. The failure to perform an independent stipulation collateral to the main consideration, not amounting to a condition precedent, and not such as to prevent the performance by the party so in default, of the principal undertaking, although attended by some loss or inconvenience to the other party, does not absolve the latter from liability, or authorize him to treat the contract as abandoned. *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434 (67 N. W. 495).

Waiver of right to rescind.

279. (1882.) If a party become entitled to rescind or terminate a contract, or claim a forfeiture by reason of the default of another, he must do it within a reasonable

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time. *Catlin v. Wright*, 13 Neb. 558 (14 N. W. 530).

280. (1896.) One who is deceived by means of the fraudulent representations of another may elect to rescind the contract and reclaim the property parted with, or to affirm the agreement and pursue his ordinary remedy by an action thereon. Such remedies are, however, not concurrent but inconsistent, and by electing to pursue one with a knowledge of the facts he waives his right to the other. *First Nat. Bank of Chadron v. McKinney*, 47 Neb. 149 (66 N. W. 280); (1896) *Pollock v. Smith*, 49 Neb. 864 (69 N. W. 312).

281. (1896.) The right to rescind a contract on the ground of fraud must be promptly exercised upon the discovery of the ground therefor. The continued use or employment of property will, in such case, be construed as an election to affirm the contract under which it was received. *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434 (67 N. W. 493); (1896) *Pollock v. Smith*, 49 Neb. 864 (69 N. W. 312).

282. (1896.) Where time is made the essence of a contract and a forfeiture is provided in case of default, the acceptance of part of overdue payments on the contract is a waiver of the right to declare a forfeiture as to all defaults in payments then existing. *White v. Atlas Lumber Co.*, 49 Neb. 82 (65 N. W. 359).

283. (1907.) To avoid a contract on the ground of excessive intoxication, one must rescind the contract within a reasonable time after recovering his senses, or, if he has received no money or property as a consideration therefor, he must, within a reasonable time, disclaim liability thereon. *Case Threshing Machine Co. v. Meyers*, 78 Neb. 685 (111 N. W. 602).

Conditions precedent to rescission.

284. (1882.) Where an agreement is made whereby a corporation in consideration of certain bonds, which are to be delivered as securities, agrees to loan another corporation thirty-five thousand dollars for the purpose of permitting the latter to concentrate its debts, after the bonds have been issued and delivered to an agent to deliver to the advancing company or its president to be held in trust, such advancing company, through its president, cannot rescind the contract on the ground of fraud and concealment of facts without placing the other *in statu quo*. *Romig v. West Point Butter Co.*, 12 Neb. 567 (11 N. W. 884).

285. (1891.) The general rule is that a party who seeks to rescind a contract entered into on fraudulent representation, must return or offer to return the property acquired by such contract within a reasonable time, so as to place the property and the adverse party substantially in the same condition as at the time the property was received. There are some exceptions to this rule, however. *Symns & Co. v. Benner*, 31 Neb. 593 (48 N. W. 472).

286. (1891.) A party to a contract is not entitled to a rescission when he is unwilling to perform his part of the agreement. *Pryor v. Hunter*, 31 Neb. 678 (48 N. W. 736).

287. (1893.) Where plaintiff and defendant are induced to give their separate notes to another for the purpose of securing leases on school lands as an investment, and such third party absconds, and when the notes, that have been indorsed, fall due, defendant paid both notes, taking as security certain stock in a cheese company from plaintiff, in an action by plaintiff to compel reassignment of the stock, there being no evidence of fraud, and plaintiff refusing an offer to redeem for the amount of the secured claim, a judgment for defendant affirmed. *Rathman v. Peycke*, 37 Neb. 384 (55 N. W. 1070).

288. (1896.) One who seeks to rescind a contract on the ground of fraud must, within a reasonable time, offer to return the property or consideration therefor received by him, provided it be of any value. Property, the loss of which would in any way result in disadvantage or inconvenience to the adverse party, must, in such case, be returned although it possesses no intrinsic or market value. *Building & Loan Ass'n of Dakota v. Cameron*, 48 Neb. 124 (66 N. W. 1109).

289. (1899.) One is not entitled to a rescission of a contract who is unwilling to perform his part of the agreement. *Te Poel v. Shutt*, 57 Neb. 592 (78 N. W. 288).

290. (1902.) It is a general rule that a party who seeks to rescind a contract entered into fraudulently or under undue influence, must return or offer to return the property acquired by such contract within a reasonable time, and so place the adverse party *in statu quo*. An exception to that part of the rule requiring a return of the

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property arises where the party guilty of the fraud and undue influence, and as a part of the general wrongful design, has by advice or interference, induced the other party to part with his property. In such a case, a tender of the value of the property received is sufficient. *Meyer v. Fishburn*, 65 Neb. 626 (91 N. W. 534).

Partial rescission.

291. (1896.) A contract cannot be rescinded in part on account of fraud, and ratified in part. *Baum Iron Co. v. Burg*, 47 Neb. 21 (66 N. W. 8).

292. (1898.) A contract rescinded for fraud is rescinded *in toto*, and an adjustment of matters growing therefrom must proceed on both sides independent of the contract. *Olson v. Lamb*, 56 Neb. 104 (76 N. W. 433; 71 Am. St. Rep. 670).

293. (1900.) A contract cannot be rescinded in part, and a part remain executed. *Alfree Mfg. Co. v. Grape*, 59 Neb. 777 (82 N. W. 11).

294. (1905.) Persons claiming under a contract must accept it in its entirety, and will not be permitted to avail themselves of those terms which are favorable and reject those which are onerous. *Beer v. Wisner*, 74 Neb. 437 (104 N. W. 757).

Effect of rescission.

295. (1898.) One rescinding a contract on the ground of fraud cannot recover damages sustained by reason of the fraud. *Smith v. Myers*, 56 Neb. 503 (76 N. W. 1084).

Actions for rescission.

296. (1877.) In an action to rescind a contract on the ground of fraud, the particular and precise circumstances which constitute the alleged fraud, and the facts upon which the plaintiff bases his claim for relief, must be stated in the petition. *Arnold v. Baker*, 6 Neb. 134.

297. (1877.) The allegation in a petition for the rescinding of a contract for a mining claim that the "defendant was not at any time the lawful owner of said claim, or any interest therein, according to the mining laws of said mining district," is not such a statement of facts as will authorize the court to rescind the contract. *Arnold v. Baker*, 6 Neb. 134.

298. (1897.) Where rescission of a contract is sought on the ground of deceit, the party injured must allege and prove that he relied upon the false representations of the other party. *Griswold v. Hazels*, 52 Neb. 64 (71 N. W. 972).

299. (1899.) To entitle a party to be relieved from his contract on the ground that he was induced to make it by false representation of the other contracting party, he must plead and prove that the representation was made, that it was false, that he believed it, and acted upon it. *Murphy v. Illinois Trust & Savings Bank*, 57 Neb. 519 (77 N. W. 1102).

300. (1900.) A pleading for rescission of a contract for a breach in its conditions must allege the ground upon which a right to rescind is based—an offer to rescind without unnecessary delay by a tender of the property received, with a request for a return of the consideration. The offer to return the property must be continuous, and kept good by a proper averment to that effect. *Alfree Mfg. Co. v. Grape*, 59 Neb. 777 (82 N. W. 11).

301. (1902.) Whether the offer to rescind has been made within a reasonable time, is a mixed question of law and of fact depending upon the peculiar facts and circumstances of each case. *Meyer v. Fishburn*, 65 Neb. 626 (91 N. W. 534).

V. PERFORMANCE OR BREACH.

Actions for breach, see *post*, VI.

Recovery on *quantum meruit* of employment contract, see *Master and Servant*, §§ 24-29.

Effect of performance of invalid parol contract, see *Frauds, Statute of*, §§ 161-169*a*.

Measure of damages for breach, see *Damages*, VI, C.

Penalty for breach, see *Damages*, § 37.

Breach as ground for rescission, see *ante*, §§ 275-278.

Ratification by cities, see *Municipal Corporations*, §§ 284-286.

Duty to perform.

302. (1905.) While public policy forbids the enforcement of an illegal or immoral contract, it is equally insistent on the enforcement of contracts which are lawful and contravene none. *Stroemer v. Van Orsdel*, 74 Neb. 132 (103 N. W. 1053).

Sufficiency of performance in general.

303. (1895.) A contract to put into a hotel a hot air furnace, and that all work should be done in a workmanlike manner, required that the furnace should be so constructed as not to expose the building to

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danger from fire when the furnace was used by a person of ordinary prudence in the usual manner. *Uhlig v. Barnum*, 43 Neb. 584 (62 N. W. 549).

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304. (1898.) The mere setting aside of a decree under section 82 of the code, does not comply or fulfill the terms of an agreement to secure the deed issued after confirmation, and in completion of a sale ordered by the judgment to be vacated, and the property and its title to be settled and fixed in a party to the agreement. *Security Abstract Title Co. v. Longacre*, 56 Neb. 469 (76 N. W. 1073).

Election as to manner of performance.

305. (1902.) Where an agreement gives one of the parties thereto the option to erect and maintain a structure of a certain description, or to pay a specified amount of money in lieu thereof, and the party exercises his election by building the structure, such election is final, and he can not relieve himself from maintaining the structure by tendering payment of the money. *Gloe v. Chicago, R. I. & P. R. Co.*, 65 Neb. 680 (91 N. W. 547).

Satisfaction of party, or agent.

306. (1902.) If a contract of sale is expressly made subject to the approval of the purchaser, or of someone for him, and such approval involves either judgment in matters of taste or personal opinion, the person whose approval is required is made the sole arbiter, and his decision is conclusive, provided he really passes upon the question and reaches a conclusion honestly, whether his conclusion is right or wrong. *Thurman v. City of Omaha*, 64 Neb. 490 (90 N W. 253).

307. (1902.) Where a party stipulates that his contract of purchase shall be subject to the opinion of his attorney as to the title to or legal status of the thing to be purchased, the plain purpose being to make his act dependent upon the personal opinion of his legal adviser, the sole requirement is that such legal adviser in fact pass upon the subject and give his honest opinion, and the merits of an honest opinion actually given are not subject to review. *Thurman v. City of Omaha*, 64 Neb. 490 (90 N. W. 253).

308. (1902.) The cases in which the courts insist that the opinion or decision subject to which a purchase is made, must be reasonable and well founded, as well as honest, are those in which the contract is for performance of labor in lines not necessarily involving personal taste and opinion, so that any competent person could arrive at a satisfactory determination. *Thurman v. City of Omaha*, 64 Neb. 490 (90 N. W. 253).

Approval or decision of architect or engineer.

309. (1875.) Where a building contract provides that the work shall be done under the direction and supervision of an architect "to be testified by a certificate or writing under his hand," such architect is thereby constituted sole arbiter between the parties, and by his certificate, stating "balance due in full of contract price," the owner of the building is bound, no fraud being alleged or proven. In such a case evidence offered to show the character and quality of the materials furnished, and a subsequent certificate stating that the architect could not without detriment to his reputation "sign a certificate for the work being done in accordance with the plans and specifications," is admissible. *Mercer v. Harris*, 4 Neb. 77.

310. (1877.) Where a building contract provides that the work shall be done to the satisfaction of the architect, such architect is the sole arbiter between the parties; but if the owner avers that such agreement was procured by collusion and conspiracy between the builder and architect to cheat and defraud him, evidence tending to show such conspiracy is admissible. *School District v. Randall*, 5 Neb. 408.

311. (1890.) Where a contract for the construction of a canal provided for monthly payments of 80 per cent of contract price on amounts estimated by the engineer of the canal company to have been completed, the company is bound by the estimate of the engineer and cannot afterwards claim that work on which he had made his estimate and for which the 80 per cent payment had been made, was in fact not completed. *Price v. Kearney Canal & W. S. Co.*, 29 Neb. 33 (45 N. W. 252).

312. (1892.) A provision in a building contract, that the value of changes made in the building is to be estimated by the architect and shall be final, is conclusive on the parties if the agreement is carried out in good faith. *Anderson v. Imhoff*, 34 Neb. 335 (51 N. W. 854).

Delay in performance.

313. (1877.) Where a day certain is fixed within which the consideration is to

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be paid, performance or a tender thereof must be made within the time, or the seller will not be bound. *Horacek v. Keebler*, 5 Neb. 355.

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Excuses for delay in performance.

314. (1888.) Where a party entered into a contract with a contractor for the erection of a dwelling-house for a son-in-law of the former, the work to be completed by a day named, and there was testimony tending to show that such party had assured the contractor while the work was being performed that "no damages if it is not done according to the time specified," and there was no proof that the son-in-law wished to occupy the dwelling before the time of its completion, *held*, that a jury was justified in returning no damages for the delay. *Erskine v. Johnson*, 23 Neb. 261 (36 N. W. 510).

315. (1888.) Where a contract is entered into between an owner and contractor for the erection of a dwelling-house according to certain plans and specifications prepared by an architect named, the work to be under the supervision and control of such architect and performed to his satisfaction, and it is found that a mistake has been made in the plans and specifications, by reason of which changes are necessary at an increased expense, and are made by the direction of such architect in order to enable the contractor to complete his contract, the owner will be liable to such contractor for the extra cost, although probably as between the owner and the architect the latter will be liable. *Erskine v. Johnson*, 23 Neb. 261 (36 N. W. 510).

316. (1890.) A building contract provided for the completion of the building by a specified date, "provided there be no interference from labor strikes." It was *held*, that the fact that the mechanics quit work upon the building on account of the contractor failing to pay them their wages as agreed, did not release the contractor from completing the building by the time agreed upon. *McLeod v. Genius*, 31 Neb. 1 (47 N. W. 473).

Excuses for non-performance.

317. (1883.) Where a contractor agrees to erect a building in a certain manner, he must comply with his agreement; and no plea of lack of skill of himself or any of his workmen or subcontractors will constitute a defense for a failure to comply with the contract. *Sherman v. Bates*, 15 Neb. 18 (16 N. W. 831).

318. (1890.) Where a contractor agrees with the owner of a building to place therein pipes, radiators, etc., the owner to furnish the boiler, and the latter is unfit for the use intended, the defect cannot be charged to the contractor, who is entitled to recover for the labor and material where the same conform to the contract. *Knutzen v. Hansen*, 28 Neb. 591 (44 N. W. 1065).

319. (1892.) No exceptions were taken to the instructions nor any ruling of the court on the trial, and it being admitted that the defendants below had failed to comply with their contract to lay out and open a public road, the building of a railway on the proposed route will not relieve them from the payment of damages for the failure to perform. *Kingsley v. Butterfield*, 35 Neb. 228 (52 N. W. 1101).

320. (1895.) Where a contractor partially erected a building and received payments as the work progressed, owners who agreed to keep the building insured to the extent of their interest are not, after a loss by fire, released from that agreement on the ground they could not procure a responsible company to write insurance to the extent of their interest. *Gallagher v. St. Patrick's Church*, 45 Neb. 535 (63 N. W. 864).

——— Breach or non-performance by other party.

321. (1899.) Where stipulations of parties are dependent, and to be performed concurrently, mutual readiness to perform is an essential prerequisite to performance. *Frenzer v. Dufrene*, 58 Neb. 432 (78 N. W. 719).

Discharge by impossibility of performance.

Act of God as releasing carrier from liability for loss of live stock, see *Carriers*, §§ 139-141.

Floods and high water as defense for failure to perform contract, see *Carriers*, § 82.

322. (1901.) A party is not released from his obligation to A because B has, by injunction or otherwise, prevented him from performing that obligation. *State v. Chicago, R. I. & P. R. Co.*, 61 Neb. 545 (85 N. W. 556).

323. (1904.) The parties to a contract, which is legal and possible of performance when made, will be discharged, if it afterwards becomes impossible by act of God or is made illegal by ordinance of the state.

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School District No. 16 v. Howard, 5 Unof. 340 (98 N. W. 666).

324. (1904.) The general rule is that where the law interposes to prevent the performance of a contract, but such prohibition is for an indefinite or limited time, performance of the contract will be suspended while the law is in force but the parties will not be discharged from its performance. Whether this rule applies to a contract for personal service not determined. *School District No. 16 v. Howard*, 5 Unof. 340 (98 N. W. 666).

325. (1906.) Death or disability, which renders the performance of a contract of attorney and client impossible, annuls the contract. *Corson v. Lewis*, 77 Neb. 446 (109 N. W. 735).

Declaration of intention not to perform.

326. (1894.) A mere declaration by a party to a contract, before performance is due, that he does not intend to comply with the terms of his agreement, will not constitute a breach so as to authorize the other party to maintain an action for damages before the time fixed for performance has elapsed. *Carstens v. McDonald*, 38 Neb. 858 (57 N. W. 757).

327. (1898.) An action for a breach of executory contract cannot be maintained upon a mere declaration by the other party, before performance is due, that he does not intend to comply with the terms of his agreement. *King v. Waterman*, 55 Neb. 324 (75 N. W. 830).

328. (1904.) A mere declaration by a party to a contract, before performance thereunder is due, that he does not intend to carry out the terms thereof, will not constitute a breach so as to authorize the other to at once maintain an action; for the party, at any time before the period fixed for performance, has the right to recant and comply with his agreement; but if he fails to withdraw his declaration before the time comes for performance, it will excuse that default of the other party. *Hixson Map Co. v. Nebraska Post Co.*, 5 Unof. 388 (98 N. W. 872).

Substantial performance.

329. (1886.) Where, in an action on a contract to dig a well, the testimony shows a substantial compliance with the terms of the contract as to the quantity of water to be produced, a verdict for the contract price will not be disturbed. *Woodworth v. Hammond*, 19 Neb. 215 (27 N. W. 106).

330. (1891.) In an action upon a contract to exterminate the prairie dogs upon a certain tract of land, there having been a substantial compliance with the terms of the contract, the plaintiff was entitled to recover. *Craig v. Weitner*, 33 Neb. 484 (50 N. W. 442).

Waiver of defects and objections.

331. (1873.) Where under a contract whereby defendants were to furnish certain machinery and material for the erection of a dam, but failed to so do within the contract time, plaintiff accepts the delivery of material after the time for the delivery had expired, and completes the dam, he cannot recover back money advanced, there being no rescission of the contract. *Holmes v. Wilhite*, 3 Neb. 147.

332. (1876.) Waiver is an intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and an intention to relinquish it. *Livesey v. Omaha Hotel Co.*, 5 Neb. 50.

333. (1877.) Where a party has knowledge of the inferior character of seed before he sows the same, the party furnishing the seed is not liable for damages resulting to either the crop or land in consequence of the use of such inferior seed. *Oliver v. Hawley*, 5 Neb. 439.

334. (1886.) Where a contract to dig a well that should produce a certain quantity of water, and the party doing the work measured the water, which was not in strict compliance with the contract, a failure of the other party to make such measurement is a waiver of that part of the contract. *Woodworth v. Hammond*, 19 Neb. 215 (27 N. W. 106).

335. (1895.) Where the owner of the building knew that the furnace put in by defendant was so constructed as to imperil the building and continued to use the furnace without having it repaired in such a manner as to obviate the danger, he could not recover from the person constructing the furnace the value of the property destroyed by a resulting fire. *Uhlig v. Barnum*, 43 Neb. 584 (62 N. W. 549).

336. (1895.) Where the owner of a building permitted the contractor to continue work thereon after the contract time for completing it had expired, he thereby recognized the contract as still in force, and hence the obligation on his part to keep the building insured, as required by the contract, still continued. *Gallagher v.*

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St. Patrick's Church, 45 Neb. 535 (63 N. W. 864).

337. (1901.) Where one agrees to buy of another all that part of a crop to be raised which reaches a certain standard as to quality, and he accepts a part of the crop, he may refuse the remainder if it falls below such standard, even though a part of those accepted fell below it and he had full knowledge thereof. *Norfolk Beet Sugar Co. v. Berger*, 1 Unof. 151 (95 N. W. 336).

Partial performance.

Sufficiency of pleading to sustain recovery on *quantum meruit*, see *post*, §§ 427, 428.

338. (1880.) Where a contract is entire and indivisible and payment is to be made after full performance, no action can be maintained on part performance. *McMillan v. Malloy*, 10 Neb. 228 (4 N. W. 1004; 35 Am. St. Rep. 471).

339. (1880.) Where a contract is susceptible of division and its entirety has been destroyed by part performance, from which the other party has derived a benefit, the law raises an implied promise to pay to the extent of the benefit received; and an action may be maintained thereon after the time has expired for the completion of the contract. *McMillan v. Malloy*, 10 Neb. 228 (4 N. W. 1004; 35 Am. Rep. 471).

340. (1880.) Where a person contracts to thresh the whole of another's crop of grain at a certain price per bushel, but, after threshing about one-third, refused to further carry out his contract, the part performance being beneficial to the employer, the employee may recover for the value of his labor less the damage done the other by reason of the breach of the contract. *McMillan v. Malloy*, 10 Neb. 228 (4 N. W. 1004; 35 Am. Rep. 471).

341. (1894.) An employee is entitled to compensation for services rendered in part performance of a contract and profits to be made where his offer to complete has been rejected by his employer. *Roberts v. Drehmer*, 41 Neb. 306 (69 N. W. 911).

342. (1894.) Where a contractor agrees with the owner of real estate to furnish the material and labor and erect for him an improvement thereon and the owner rightfully terminates the same by virtue of some provision authorizing him to do so upon the happening of certain contingencies, then the contractor is entitled to recover from the owner the actual benefit he has received from the contractor's partial performance. *Von Dorn v. Mengedoht*, 41 Neb. 525 (59 N. W. 800).

343. (1896. (Where one contracts to sink a tubular well of a certain size until a certain flow of water per hour is had, the contractor to furnish all the pipes and fittings, at a stipulated price per foot, but not to exceed 500 feet in depth, and the right to stop the work is reserved, and a notice to stop work is given, the contractor may recover for the number of feet completed as to dimensions, casing, etc., in accordance with the contract. *Omaha Consolidated Vinegar Co. v. Burns*, 49 Neb. 229 (68 N. W. 492).

344. (1896.) Under a contract to sink a tubular well to furnish a certain flow of water per hour, it not being provided that such a flow of water be obtained as a condition precedent to defendant's right to compensation for labor and material furnished, the contract is enforceable, notwithstanding a failure to produce the required quantity of water. *Omaha Consolidated Vinegar Co. v. Burns*, 49 Neb. 229 (68 N. W. 492).

345. (1899.) Where in a contract there are several undertakings, each supported by a distinct consideration, the contract is generally severable, and suit may be brought on one undertaking without showing plaintiff's compliance with the whole contract. *Burwell v. Wilson*, 57 Neb. 396 (77 N. W. 762).

346. (1906.) A contract for potatoes in car-load lots at an agreed price per bushel for all that may be loaded during the week, under which the seller has loaded and shipped four car-loads, is entire in the sense that either party had the right to a full performance. *Peycke v. Shinn*, 76 Neb. 364 (107 N. W. 386).

347. (1906.) If the party to an entire contract for personal services, who is to render the service, becomes, by reason of physical disability, through no fault of his own, unable to perform the same, the contract is discharged, but he may recover the reasonable value of his services rendered upon a *quantum meruit*. *Corson v. Lewis*, 77 Neb. 449 (114 N. W. 281).

Offer of performance.

348. (1899.) The doctrine of tender, as understood in cases where the relation of debtor and creditor exists, is not applicable to mutual and concurrent promises. In this

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class of cases a party who has signified his readiness and willingness to perform has done all that he is required to do, until the other party is also ready and willing to perform his part of the agreement. *Frenzer v. Dufrene*, 58 Neb. 432 (78 N. W. 719).

349. (1904.) The law does not require vain things and a formal tender, either of money or property, is never required where it appears that if made it would have been futile. *Lapham v. Bossemeyer Bros.*, 5 Unof. 343 (98 N. W. 699).

350. (1906.) When no other place is specified in a contract for a tender, the law will presume that the tender should be made at the place of the contract; but an unconditional refusal to accept the tender at any place waives the necessity for a technical tender at the place of the contract. *Hefner v. Robert*, 76 Neb. 192 (107 N. W. 258).

Rights and liabilities on breach.

351. (1890.) When a contractor omits to furnish materials called for by his contract, he is liable therefor in damages to the owner. *McLeod v. Genius*, 31 Neb. 1 (47 N. W. 473).

——— Mutual breach.

352. (1881.) In an action to recover damages for breach of contract by the defendant, if the plaintiff himself is in inexcusable default, he cannot recover. *Reynolds v. Burlington & M. R. R. Co.*, 11 Neb. 186 (7 N. W. 737).

353. (1894.) One who refuses to perform the conditions imposed upon him by the terms of a contract cannot recover for a breach thereof by the other party. *Chicago, B. & Q. R. Co. v. Cochran*, 42 Neb. 531 (60 N. W. 894); (1897) *Hale v. Sheehan*, 52 Neb. 184 (71 N. W. 1019).

354. (1895.) In a suit to recover money paid by plaintiffs to a contractor as work progressed on a church building destroyed by fire before completion, the sureties on the contractor's bond are not liable, where the owners of the building violated a provision of the contract requiring them to keep the property insured to the extent of their interest, although the fire was caused by the contractor's negligence. *Gallagher v. St. Patrick's Church*, 45 Neb. 535 (63 N. W. 864).

355. (1905.) Law will not aid a party to recover damages for the breach of a contract, where the failure to comply with the contract was his own. *Apking v. Hoefer*, 74 Neb. 325 (104 N. W. 177).

Restraining performance or breach.

356. (1898.) An agreement in partial restraint of trade, which is not within the inhibition of the statute, is valid and may in a proper case be enforced by injunction. *Downing v. Lewis*, 56 Neb. 386 (76 N. W. 900).

357. (1900.) An injunction will not lie to enjoin the breach of a contract where the party complaining has a plain and adequate remedy at law. *Wabaska Electric Co. v. City of Wymore*, 60 Neb. 199 (82 N. W. 626).

358. (1903.) A court of equity will not enjoin the further execution of a contract and enjoin the prosecution of any claim for compensation for work and material already furnished in good faith under it, except on condition of the payment of a fair value for the work and material so furnished. *Clark v. County of Lancaster*, 69 Neb. 717 (96 N. W. 593).

359. (1903.) Where defendant was proceeding under color of a lawful contract, the institution of an action to enjoin further proceedings under it, and the ordering of a temporary injunction on condition of the furnishing of a bond, which is not given, do not necessarily deprive the subsequent proceedings of defendant under the contract of their good faith and color of lawfulness. *Clark v. County of Lancaster*, 69 Neb. 717 (96 N. W. 593).

360. (1905.) A valid agreement in restraint of trade must be established by clear and satisfactory proof to warrant a court in restraining its breach by injunction. *Roberts v. Lemont*, 73 Neb. 365 (102 N. W. 770).

360*a*. (1907.) The breach of an oral contract by one of the parties will not be restrained, where the terms of the contract are in doubt, or so indefinite and uncertain that a court would not decree specific performance thereof. *Platte County Independent Telephone Co. v. Leigh Independent Telephone Co.*, 80 Neb. 46 (116 N. W. 511).

VI. ACTIONS FOR BREACH.

Actions for rescission, see *ante*, §§ 296-301.

Parol evidence to vary terms of contract, see *Evidence*, §§ 396-487.

Restraining breach, see *Injunction*, II, B.

Performance or breach, see *ante*, V.

What law governs.

361. (1903.) The evidence by which a contract shall be proved is no part of the

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contract itself, and is governed, therefore, by the *lex fori* and not by the *lex loci contractus*. *Marvel v. Marvel*, 70 Neb 498 (97 N. W. 640; 113 Am. St. Rep. 792).

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Right of action.

Right of action on illegal contract, see *ante*, §§ 149-157.

Right of action or defense by person not a party to contract, see *ante*, §§ 203-209.

362. (1906.) To entitle one to recover in an action in damages for the breach of a contract, he must show that the wrong done and the injury sustained bear toward each other the relation of cause and effect. The damages which one has sustained to entitle him to recover must be the natural and proximate consequence of the wrongful act complained of. *Bahr v. Manke*, 77 Neb. 552 (110 N. W. 300).

Accrual of right of action.

Declaration of intention not to perform as giving right of action, see *ante*, §§326-328.

363. (1877.) If a condition or promise is to perform some act for the plaintiff's benefit, the neglect to perform the act is a breach of the contract, and will give an immediate right of action. *Gregory v. Hartley*, 6 Neb. 356.

364. (1892.) One who has hauled lumber for a person who had contracted to furnish such lumber to the government, may bring suit for his compensation as soon as the hauling is completed, and in the absence of an agreement to that effect need not wait until the contractor has received his pay for the lumber. *Fransen v. Eller*, 34 Neb. 664 (52 N. W. 284).

365. (1895.) H. agreed to furnish to G. a designated herd of cattle on the 1st day of May, to be cared for and herded by the latter during the ensuing season at a stipulated rate per head. On May 13, H. having refused to furnish said cattle or any of them, an action for damage was brought by G. on the said contract. *Held*, That the action was not premature. *Hamilton v. Goff*, 45 Neb. 339 (63 N. W. 807).

366. (1903.) A contract by the lender of money to use the money to pay off an existing note and mortgage and to save the borrower harmless, is an undertaking to indemnify the borrower against such note and mortgage and no cause of action accrues until the borrower has been damnified by reason of the note and mortgage against which he was indemnified. *O'Connor v. Ætna Life Ins. Co.*, 67 Neb. 129 (99 N. W. 845).

367. (1903.) By a contract to pay off and discharge a note and mortgage by the lender of money borrowed for that purpose, there is an absolute undertaking to pay the debt and upon a failure thereof a cause of action at once accrues in favor of the borrower or his legal representatives. *O'Connor v. Ætna Life Ins. Co.*, 67 Neb. 129 (99 N. W. 845).

368. (1906.) An express repudiation and denial of a contract to divide the profits of a land purchase by the party having the title will give rise to a cause of action at law for damages. *Rice v. Parrott*, 76 Neb. 501 (107 N. W. 840).

Limitation of action.

369. (1899.) An action to recover on an implied assumpsit is barred at the expiration of four years after the cause of action arose. *Markey v. School District No. 18*, 58 Neb. 479 (78 N. W. 932).

Defenses.

370. (1891.) A party who refuses to perform a contract for a stated reason, cannot, after suit commenced, be heard to adopt a different reason. *Ballou v. Sherwood*, 32 Neb. 666 (49 N. W. 790; 50 N. W. 1131).

371. (1895.) If parties to a contract agree that if a dispute arises between them that such dispute shall be submitted to arbitration, refusal to arbitrate or no arbitration is not a defense to an action brought on such contract by one of the parties thereto, as to the effect of such agreement is to oust the courts of their jurisdiction, and is contrary to public policy and therefore void. *National Masonic Accident Ass'n v. Burr*, 44 Neb. 256 (62 N. W. 466).

372. (1895.) A cause of action arising upon contract may properly be pleaded by way of set-off in an action for damages. *Jones v. Driscoll*, 46 Neb. 575 (65 N. W. 194).

373. (1897.) A defendant cannot object that the description by which the contract sued upon was entered into by plaintiff is not a sufficiently full description of such plaintiff and of the capacity in which he brings his action. *Eiseley v. Taggart*, 52 Neb. 658 (72 N. W. 1039).

Parties.

374. (1898.) In a suit on a joint contract, all who are jointly liable should be

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joined as defendants, and if service of summons cannot be had upon all, the action may proceed against those served. *Perkins County v. Miller*, 55 Neb. 141 (75 N. W. 577).

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375. (1905.) If a defendant admits by answer or demurrer that he entered into a contract with plaintiffs by an associate name in which the suit is brought, such admission, without further explanation, is equivalent to an admission that the plaintiffs have sufficient capacity to bind and to be bound by the instrument, and to enforce the same in the contract name. *Miller v. Loverene & Browne Co.*, 74 Neb. 557 (105 N. W. 84).

Joinder of causes of action.

376. (1899.) Two causes of action on two separate contracts cannot be united in one petition unless each cause of action affects all parties made defendants. *Barry v. Wachosky*, 57 Neb. 534 (77 N. W. 1080).

376*a*. (1907.) A petition which seeks a recovery for several breaches of one contract states but one cause of action, and is not subject to a motion to separately state and number. *Haurigan v. Chicago & N. W. R. Co.*, 80 Neb. 132 (113 N. W. 983).

Petition.

Requisite and sufficiency of pleading damage, see *Damages*, §§ 118-124.

Necessity of pleading statute under which city executed, see *Municipal Corporations*. § 287.

377. (1886.) Where in an action on a written contract a copy of the contract is attached and referred to in the petition, a statement of the terms of the contract in the body of the petition will not be stricken out, on motion, as redundant nor as irrelevant matter. *Post v. Garrow*, 18 Neb. 682 (26 N. W. 580).

378. (1886.) Where the conditions of a contract have been altered by the consent of the parties, the contract as modified should be set out in the petition, and then an allegation of performance may be made. Such modified contract should not be set up in the reply if inconsistent with the allegations of the petition. *Evarts v. Smucker*, 19 Neb. 41 (26 N. W. 596).

379. (1891.) Where a motion to require a copy of a contract to be attached to a petition is sustained, but the order is not complied with until after the time fixed by the court, defendant should be notified when the copy is filed. *Taylor v. Trumbull*, 32 Neb. 508 (49 N. W. 375).

380. (1891.) In an action for breach of contract, the petition sets up the terms of the contract, avers performance on the part of the plaintiffs of the conditions to be performed on their part, and alleges non-performance by the defendant of the stipulations on his part to be kept and performed. *Held*, Sufficient as against a demurrer. *Bryan v. Barton*, 32 Neb. 613 (49 N. W. 331).

381. (1894.) In pleading a contract which need not by common law be in writing, but where a writing is required by a positive statute, it is not necessary to plead that the contract was written, a least where no objection is made by motion to the certainty of the pleading. *York Park Building Ass'n v. Barnes*, 39 Neb. 834 (58 N. W. 440).

382. (1894.) A petition describing in ordinary and concise language the contract sued on and alleging compliance therewith is sufficient after trial of issues framed without question as to the sufficiency of the description. *Darst v. Perfect* 42 Neb. 574 (60 N. W. 928).

383. (1897.) A breach of the contract on which an action is based must be pleaded in the petition. *Hudelson v. First Nat. Bank of Tobias*, 51 Neb. 557 (71 N. W. 304).

384. (1900.) Petition examined, and *held* to state a cause of action for damages for breach of contract for non-performance and failure to comply with its terms, and *held* that it does not contain essential averments necessary in order to construe it as a petition for a rescission of the contract and recovery of the consideration paid *Alfree Mfg. Co. v. Grape*, 59 Neb. 777 (82 N. W. 11).

385. (1902.) A pleading should state the ultimate fact alleged to exist, and not the evidence by which that fact may be proved. It is proper therefore to allege in a petition that a contract was entered into by the defendant, although the proof may be that he made the contract through the medium or instrumentality of an agent. *Blotcky v. Miller*, 3 Unof. 344 (91 N. W. 523).

386. (1903.) When it does not clearly appear on the fact of the petition that the contract declared on is void because of illegality, it is error to sustain an objection to the introduction of plaintiff's evidence on

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that ground. *Horton v. Rohlff*, 69 Neb. 95 (95 N. W. 36).

387. (1904.) Petition examined, and *held* sufficient to withstand a demurrer except for the fact that the letters alleged to constitute the contract are not shown or alleged to have been signed. *Bradley & Co. v. Bower*, 5 Unof. 542 (99 N. W. 490).

388. (1906.) In an action to recover the contract price of a book that under the contract plaintiff agreed to prepare and reserve for defendant, it is not necessary to allege acceptance of the order and preparation of such book. *Harris v. Paine*, 76 Neb. 523 (107 N. W. 748).

389. (1906.) A petition alleging the making of a verbal building contract and partial performance thereof by the plaintiff, and claiming damages on account of defendant's failure to perform the same, is not subject to demurrer because it fails to allege the time within which the contract was to be performed. *Stansbury v. Storer*, 77 Neb. 67 (108 N. W. 162).

——— **Allegation as to performance of happening of conditions precedent.**

390. (1876.) In an action upon a contract containing a condition precedent, the plaintiff must aver performance to show a cause of action against the defendant *Livesey v. Omaha Hotel Co.*, 5 Neb. 50.

391. (1876.) To maintain an action upon a contract without performance, the plaintiff must aver all the facts necessary to show a waiver of the condition precedent and fix the defendant's liability without such performance. *Livesey v. Omaha Hotel Co.*, 5 Neb. 50.

392. (1876.) In an action upon contract the plaintiff must aver performance of all the conditions precedent in the contract to be performed on his part, in order to constitute a cause of action against the defendant, unless he states in his petition all the necessary averments which will take the case out of the general rule, and fix the defendant's liability without such full performance on his part. *Estabrook v. Omaha Hotel Co.*, 5 Neb. 76; (1876) *Boehme v. Omaha Hotel Co.*, 5 Neb. 80.

393. (1898.) Where the promise of a party to pay the debt of another is expressly contingent upon the happening of a certain event, the happening of such event must be alleged and proved to render the promisor liable. *Husenetter v. Gullikson*, 55 Neb. 32 (75 N. W. 41).

394. (1899.) In suing on a contract consisting of reciprocal promises, to be concurrently performed, the plaintiff must allege either performance an his part or a tender of performance before suit brought. *Burwell v. Wilson*, 57 Neb. 396 (77 N. W. 762); (1904) *Lapham v. Bossemeyer Bros.*, 5 Unof. 343 (98 N. W. 699).

395. (1902.) A petition, based on a contract which fails to allege performance on the part of the plaintiff, or facts showing a valid excuse for non-performance, is fatally defective. *Deering & Co. v. Claypool*, 2 Unof. 520 (89 N. W. 373).

——— **Sufficiency in actions on particular contracts.**

396. (1879.) A petition alleging that defendant contracted to cut plaintiff's crop of wheat at an agreed price per acre; and when the grain was ripe plaintiff notified defendant of the fact, but the defendant "refused to cut plaintiff's wheat as he had agreed and contracted, whereby said wheat was damaged and wasted," state a good cause of action, and a general demurrer was properly overruled. *Kelley v. Peterson*, 9 Neb. 76 (2 N. W. 346).

397. (1881.) In an action for the price of breaking under a contract for the conveyance of real estate when title should be acquired under the United States homestead law, and providing for part payment in breaking prairie at $2.50 per acre, the breaking to be paid for in cash if the land was not conveyed, the petition must state the failure to convey. *Simmons v. Yurann*, 11 Neb. 516 (9 N. W. 690).

398. (1888.) A petition, on account for labor performed in the construction of a building under a certain contract, which alleges the execution of a contract, the performance of the labor thereunder by the plaintiff, the acceptance of the work by defendant, and the amount due thereon, with the usual prayer for judgment, *held* to state a cause of action, when assailed by demurrer. *Davenport v. Jenning*, 25 Neb. 87 (40 N. W. 952).

399. (1893.) A petition that alleges plaintiff to have been in the employe of defendant's assignor and that there was owing him a sum certain as wages, and a purchase of the business, a livery stable, by defendant who agreed to pay plaintiff; that this agreement was omitted from an instrument in the form of a receipt, states a cause of action against the defendant. *Barnett v. Pratt*, 37 Neb. 349 (55 N. W. 1056).

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400. (1894.) In an action for the breach of a contract not to use certain premises for hotel purposes for a specified period of time, the petition examined and held error to sustain a motion for a judgment on the pleadings for defendant. *Mollyneaux v. Wittenberg*, 39 Neb. 547 (58 N. W. 205).

401. (1897.) Averments that plaintiff, "replying upon said representations of the defendant" on a certain day entered into an agreement in writing for the sale of real estate, and relying upon said representations plaintiff conveyed the property in pursuance to said contract, states a cause of action for deceit. *Griswold v. Hazels*. 52 Neb. 64 (71 N. W. 972).

402. (1902.) On action brought to compel specific performance of a contract to maintain a structure of a certain description, the defendant, on the trial, tendered to the plaintiff payment of the money, which the defendant might, in the first instance, have paid in lieu of the work to be done. *Held*, That this was an admission that the contract had been made as claimed by the plaintiff, and defendant could not thereafter complain that the plaintiff's petition was defective or his evidence insufficient to establish the contract. *Gloe v. Chicago, R. I. & P. R. Co.*, 65 Neb. 680 (91 N. W. 547).

Answer.

403. (1903.) The plea of duress as a defense to an action upon a contract is sufficient if it shows that, by reason of threats or other unlawful means, the defendant was deprived of his free will and understanding, and that the contract sued upon was not his free and voluntary act. *Nebraska Mutual Bond Ass'n v. Klee*, 70 Neb. 383 (97 N. W. 476).

404. (1902.) Where both parties allege a contract voidable at the pleasure of the postmaster general, and avoided by him, a counter-claim of damages on account of such avoidance which fails to state that it was caused by the default of the other party presents no ground of recovery. *Stillings v. Van Alstine*, 2 Unof. 684 (89 N. W. 756).

405. (1903.) An anaswer which sets forth a contemporaneous agreement varying the terms of a writen contract which is the subject of the suit, but from which it does not appear, either expressly or by necessary intendment, that such agreement was oral, is not obnoxious to a general demurrer. *Tablet & Ticket Co. v. Le Feber*, 4 Unof. 105 (93 N. W. 414).

406. (1903.) Fraud must be specifically alleged and the fraudulent motive charged in the answer; otherwise the answer will be insufficient to lay the basis for the introduction of testimony. *Bauer v. Taylor*, 4 Unof. 701 (96 N. W. 268). [Modified on rehearing. 4 Unof. 710.]

Reply.

407. (1892.) In an action on a building contract, for extra material furnished and work performed by the contractor, the answer was, that there was a stipulation in the contract that the same was to be estimated by the architect and such estimate had been made and the amount thereof tendered. The reply was, in substance, that the architect by collusion and fraud had refused to make proper estimates, etc. *Held*, That a motion to make the reply definite and certain, was properly overruled. *Anderson v. Imhoff*, 34 Neb. 335 (51 N. W. 854).

Issues, proof and variance.

408. (1888.) Under the code of civil procedure a written contract is admissible in evidence under a general allegation that the party contracted, without indicating how. *Hamilton v. Lau*, 24 Neb. 59 (37 N. W. 688).

409. (1894.) A party whose cause of action is founded upon a written contract is limited as to his rights by the terms of such contract, and a recovery contrary thereto cannot be sustained. *Patterson v. Murphy*, 41 Neb. 818 (60 N. W. 1).

410. (1900.) Evidence tending to show that forfeiture was waived will not be considered where the question of waiver is not raised by the pleadings. *Jewett v. Black*, 60 Neb. 173 (82 N. W. 385).

411. (1901.) In an action to recover damages for negligence in threshing grain, an averment that the thresher represented 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*, 62 Neb. 147 (86 N. W. 1057).

412. (1901.) An allegation of a contract with a party is supported by proof that the contract was made with his authorized agent. *Hare v. Winterer*, 1 Unof. 854 (96 N. W. 179).

413. (1901.) There is no variance between an allegation on a verbal contract and an unsigned memorandum of such contract alleged to have been made by the

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party charged at the time the contract was entered into, because such unsigned memorandum is not a written contract. *Brown v. Silver*, 2 Unof. 164 (96 N. W. 281).

414. (1902.) When, in an action for damages for the alleged breach of a contract, the petition misrecites the agreement in an important particular, but the answer gives a true recital thereof, which is accepted by the plaintiff as correct, and the action proceeds to trial and judgment in all respects as an action upon the contract set out in the answer, so that it is apparanent that the defendant has not been misled, the variance between the petition and the proof should, under section 138 of the code, be treated as immaterial. *Chicago House-Wrecking Co. v. Stewart Lumber Co.*, 66 Neb. 835 (92 N. W. 1009).

415. (1902.) Where a written agreement alleged to have superseded prior verbal negotiations, is pleaded in a reply as a matter of defense to the allegations contained in the answer, evidence of fraud or mistake in procuring such agreement will be received without further pleading. *Martens v. Pittock*, 3 Unof. 770 (92 N. W. 1038).

——— Defenses which must be specially pleaded.

416. (1872.) The fraud need not be specially pleaded in order to admit proof of it. *Franklin v. Kelley*, 2 Neb. 79.

417. (1884.) If, in an action upon a contract, fair and legal on its face, it is claimed by the defendant that the contract is void as being illegal and against public policy, such illegality must be pleaded or it will be disregarded by the court in which such action is pending. *Atchison & N. R. Co. v. Miller*, 16 Neb. 661 (21 N. W. 451).

418. (1892.) The unlawful purpose which it is claimed renders the contract illegal and void must be pleaded, and unless so pleaded, should not be submitted to the jury. *Hellman v. Oliver*, 35 Neb. 334 (53 N. W. 145).

419. (1893.) Where there is nothing on the face of a contract to suggest that it is founded upon an unlawful consideration the illegality thereof must, as a rule, be pleaded when relied upon as a defense. But if on the trial it is appearent from evidence material to the issues that the cause of action or defense rests upon an agreement *contra bonos mores* the court will of its own motion refuse to enforce such immoral agreement, even should both parties assent to its enforcement. *Wilde v. Wilde*, 37 Neb. 891 (56 N. W. 724).

420. (1896.) When suit is brought upon a contract, a general denial puts the making of the contract in issue, and the burden devolves upon the plaintiff of establishing it substantially as alleged. *Rawlings v. Young Men's Christian Ass'n*, 48 Neb. 216 (66 N. W. 1124).

421. (1909.) An affirmative defense to an action upon a contract should be pleaded. *Denney v. Stout*, 59 Neb. 731 (82 N. W. 18).

422. (1901.) In an action for the value of materials sold under a verbal contract the defendant may, under a general denial, prove that the contract on which the cause of action is based was made with, and the material sold to, a third party. *Wiedeman v. Hedges*, 63 Neb. 103 (88 N. W. 170).

423. (1903.) Where the defense relied on is the illegality of the contract used on it is necessary to plead and prove such defense. *Horton v. Rohlff*, 69 Neb. 95 (95 N. W. 36).

424. (1905.) Where a party to a contract inserts a provision exempting him from fulfilling because of a condition which may afterwards arise, he must, when sued for a breach of the contract, plead in defense the existence of the condition in order to have the advantage thereof. *Omaha Feed Co. v. Rushforth*, 75 Neb. 340 (106 N. W. 25).

425. (1906.) In an action for damages on account of an alleged breach of contract, evidence is admissible under a general denial to show that, in fact, no contract existed. *Olsen v. Collins*, 75 Neb. 749 (106 N. W. 784).

426. (1906.) In an action on an express contract the defendant may show under a general denial that the contract differed in terms from that pleaded, or that no contract was in fact made. *Sorenson v. Townsend*, 77 Neb. 499 (109 N. W. 749).

——— Recovery on quantum meruit.

Right of recovery on partial performance see *ante*, §§ 338-347.

427. (1893.) An action on a *quantum meruit* cannot be sustained by proof of a contract to pay an agreed price for the services, since a party is not allowed to allege in his petition one cause of action and prove another upon the trial. *Imhoff v. House*, 36 Neb. 28 (53 N. W. 1032).

428. (1893.) A party cannot recover

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upon a *quantum meruit* where he pleads and relies on the trial, solely upon a special contract. *Powder River Live Stock Co. v. Lamb*, 38 Neb. 339 (56 N. W. 1019); (1895) *Mayer v. Ver Bryck*, 46 Neb. 221 (64 N. W. 691); (1897) *Dorrington v. Powell*, 52 Neb. 440 (72 N. W. 587).

Presumptions.

429. (1894.) Our statute having abolished private seals it abolished at the same time their incidents, and an instrument in the form of a bond must be now deemed a simple contract not conclusively importing a consideration. *Luce v. Foster*, 42 Neb. 818 (60 N. W. 1027).

430. (1903.) It will not be presumed that the parties to a contract intended to provide for the doing of an illegal act, or one which would render their agreement void. *Horton v. Rohlff*, 69 Neb. 95 (95 N. W. 36).

431. (1904.) In the absence of fraud or imposition, persons of mature years and ordinary intelligence and education are presumed to have read the contracts executed by them, or to have otherwise made themselves acquainted with their contents. *Bradley & Co. v. Basta*, 71 Neb. 169 (98 N. W. 697).

432. (1905.) The possession of a written contract is *prima facie* evidence of its delivery, but the presumption of delivery arising from such possession may be explained or rebutted by oral evidence. *Dodd v. Kemnitz*, 74 Neb. 634 (104 N. W. 1069).

433. (1907.) In the absence of proof to the contrary, the constitution and laws in force in this state will be presumed to have been in force at the place of the making of of the contract which is in issue. *Cook v. Chicago, R. I. & P. R. Co.*, 78 Neb. 64 (110 N. W. 718).

Burden of proof.

434. (1881.) The burden is on defendant, sued for work and labor, to prove the allegation in his answer that such services were to be performed. *Ewarth v. Nier*, 11 Neb. 441 (9 N. W. 569).

435. (1885.) In a cross-action to require the execution of a mortgage, the agreement to execute it must be clearly proved. *Pereau v. Frederick*, 17 Neb. 117 (22 N. W. 235).

436. (1889.) In an action to recover on a contract to dig a well the answer consisting of a general denial, and also setting up that plaintiff had warranted a certain quantity of water and in case of failure nothing should be paid for the work done, the burden of proving such warranty was on the defendant. *Johnson v. Bowman*, 26 Neb. 745 (42 N. W. 754).

437. (1890.) Where a contract for the construction of a canal provided for monthly payments of 80 per cent. on estimates of work done, the balance being retained to insure a completition of the contract, the canal company could not off set its counter-claim for completing unfinished work against the reserved 20 per cent. earned by the contractor without establishing the amount and value of the work both completed and incomplete by the contractor as well as that finished by the company according to the terms of the contract. *Price v. Kearney Canal & W. S. Co.*, 29 Neb. 33 (45 N. W. 252).

438. (1895.) One who predicates his right to relief upon the alleged performance by him of all the terms of a written contract must show a substantial compliance with each requirement thereof, where there has been neither a waiver nor acceptance of benefits thereunder by the other contracting party. *Omaha Consolidated Vinegar Co. v. Burns*, 44 Neb. 21 (62 N. W. 301). [Overruled on rehearing. 49 Neb. 229.]

439. (1897.) The burden of proving fraud or misrepresentation in the making of a contract is upon the party alleging it. *Woods v. Hart*, 50 Neb. 497 (70 N W. 53).

440. (1901.) Where one is dealing with an unlettered man, who can neither read nor write, and makes his mark to the instrument he executes, and there is testimony tending to show that he did not understand the contents of such paper, or that his signature was obtained by fraud, it is incumbent on the former to show by a preponderance of the evidence that the latter fully understood the object and import of the writing which he executed. *Spelts & Klosterman v. Ward*, 2 Unof. 177 (96 N. W. 56).

Admissibility of evidence.

Admissibility in evidence, see *Evidence*, §§ 319-326.

Admissibility in evidence of custom to interpret, see *Customs and Usage*, §§ 9-12.

441. (1875.) Where a building contract provides that the work shall be done under the direction and supervision of an architect "to be testified by a certificate or writing under his hand," such architect is

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thereby constituted sole arbiter between the parties, and by his certificate, stating "balance due in full of contract price," the owner of the building is bound, no fraud being alleged or proven. In such a case evidence offered to show the character and quality of the materials furnished, and a subsequent certificate stating that the architect could not without detriment to his reputation "sign a certificate for the work being done in accordance with the plans and specifications," is admissible. *Mercer v. Harris*, 4 Neb. 77.

442. (1876.) A paper offered in evidence to establish a tripartite contract, being signed by one party only, is inadmissible. *Wilcox v. Saunders*, 4 Neb. 569.

443. (1888.) Only as between the parties to the instrument, must an agreement stand as written, as to all others extrinsic evidence is admissible to show the real agreement. *Rosewater v. Hoffman*, 24 Neb. 222 (38 N. W. 857).

444. (1890.) Evidence of dealing of the parties, tending to show the contsruction which they had placed upon the contract, is admissible. *Esterly Harvesting Machine Co. v. Veeder*, 29 Neb. 664 (45 N. W. 1103).

445. (1890.) In an action for the removal of earth at twenty cents per cubic yard, one S. testified that he had cross-sectioned the work before the grading was done, and in substance that the measurements were accurate. A Mr. H. then testified that he and S. had made estimates from the data furnished by S., and from such data a certain number of cubic yards of earth had been removed. *Held*, That the evidence of H. was properly received. *Clarke v. Williams*, 29 Neb. 691 (46 N. W. 82).

446. (1890.) Where the engineers of the city have cross-sectioned certain grading to be done for the city, made estimates thereof and filed the same in the engineer's department, such estimates are admissible as *prima facie* evidence of the correctness of such estimates. *Clarke v. Williams*, 29 Neb. 691 (46 N. W. 82).

447. (1892.) Where a building is not erected within the time limited by the contract through the contractor's default or neglect, the owner is entitled to recover damages. In the trial of such a case it is not error for the owner to prove that the building had been leased for a stipulated sum, and that the tenant was to take possession as soon as the work was completed, when it is shown that the reasonable rental value exceeded the amount of rent reserved by the lease. *Consaul v. Sheldon*, 35 Neb. 247 (52 N. W. 1104).

448. (1893.) Where the parties to a verbal contract call in as witness a third person, and then carry on a part of their conversation in a foreign language, with which the witness is unfamiliar, such witness' evidence of the terms of the contract made is admissible, it appearing that both parties at the time knew his ignorance of such lanaguage, and it not appearing that any part of the agreement was made in that language. *Roberson v. Reiter*, 38 Neb. 198 (56 N. W. 877).

449. (1897.) Under a *quantum meruit* count for services rendered under a contract, the contract is admissible to prove the value of the services. The stated rates of compensation, if any, are competent evidence tending to show the reasonable value. *Hibbard v. Wilson*, 51 Neb. 436 (71 N. W. 65).

450. (1898.) In an action by a contractor to recover for repairs made to a building the rejection of an unrecorded lease, as showing a liability only against a tenant, *held* not error. *Herzke v. Blake*, 54 Neb. 465 (74 N. W. 959).

451. (1900.) In the trial of an action on a contract, where the answer is a general denial, it is not error to exclude evidence which has no tendency to disprove the averments of the petition. *Denney v. Stout*, 59 Neb. 731 (82 N. W. 18).

452. (1901.) Where the answer admits the execution of the contract sued on it is prejudicial error to receive evidence that such contract did not exist at the time the answer admits its execution. *Faulkner v. Gilbert*, 61 Neb. 602 (85 N. W. 843).

453. (1903.) A witness cannot be interrogated on his cross-examination as to the length of time it took him to perform another contract, different from and independent of the one which is the basis of the action. *School District of Omaha v. McDonald*, 68 Neb. 610 (94 N. W. 829).

454. (1903.) Where a written contract made the basis of an action is impeached by proper pleadings on the ground that it was procured by the fraud of the plaintiff, evidence is admissible in support of the fraudulent representations alleged. *Bauer v. Taylor*, 4 Unof. 701 (96 N. W. 268).

455. (1903.) The particular place where witness put an executed contract after set-

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tlement with regard to it is immaterial where all the essential facts as to it and its custody are in evidence and undisputed. *Arabian Horse Co. v. Bivens*, 4 Unof 823 (96 N. W. 621).

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——— Parol evidence.

Evidence of contemporaneous parol agreement, see *ante*, §§ 250-258.

Evidence of parol agreement made prior to written contract, see *ante*, §§ 244-249.

456. (1873.) Parol evidence is admissible to supply an omission in a written contract, which, in case of a disagreement between the parties, would otherwise be ambiguous and wholly inexplicable. *Goodrich v. McClary*, 3 Neb. 123.

457. (1895.) It is competent for a party when sued upon a written contract to show by parol that he was induced to execute the contract by the fraud or material false representation of the party seeking to enforce it. *Gerner v. Church*, 43 Neb. 690 (62 N. W. 52).

458. (1895.) In an action on a written contract agreeing to donate a certain sum if an opera house of a certain size should be built, parol evidence that the donee agreed orally that the building should be of certain material, tends to contradict, rather than explain, the written contract, and hence is no admissible. *Gerner v. Clark*, 43 Neb. 690 (62 N. W. 52).

459. (1896.) It is not competent to change or vary the terms of a written contract by parol evidence. *Stoner v. Keith County*, 48 Neb. 279 (67 N. W. 311).

460. (1898.) Where negotiating parties reduce their agreement to writing, and sign and deliver the same, the writing, in absence of fraud, mistake, or ambiguity, constitutes the best and only competent evidence of the contract originally made. *Sylvester v. Carpenter Paper Co.*, 55 Neb. 621 (75 N. W. 1092).

461. (1898.) A written contract, the meaning of which is certain and patent from its terms, may not be varied by direct explanation or interpretation in oral testimony. *Latenser v. Misner*, 56 Neb. 340 (76 N. W. 897).

462. (1902.) Doctrine as to inadmissibility of oral evidence to vary a contract has no application as between a party to it and a stranger where there appears no estoppel against showing the truth. *Crockett v. Miller*, 2 Unof. 292 (96 N. W. 491).

463. (1902.) A written building contract provided that the work was to be done according to certain plans and specifications to the satisfaction of one of the parties "in design, workmanship, and finish." The plans and specifications contained no details as to certain materials required, and nothing was specified as to where they were to be obtained. *Held*, That parol evidence was admissible to show that at the time the contract was made such party insisted that said materials must be obtained in the east, because he considered the eastern designs, workmanship and finish superior, and to show that a subsequent purchase of such materials in the east was in pursuance of the understanding when the contract was made and to comply with the requirements he was empowered to make by its express terms. *Creedon v. Patrick*, 3 Unof. 459 (91 N. W. 872).

464. (1903.) Oral testimony may be introduced for the purpose of explaining an ambiguity in a written instrument. *Fidelity Mutual Fire Ins. Co. v. Murphy*, 4 Unof. 578 (95 N. W. 702).

465. (1903.) Where the controversy is between a party to a written contract and one who is neither a party nor a privy to it, the rule excluding parol evidence tending to vary, modify or contradict the writing does not apply. *First Nat. Bank of Wayne v. Tolerton & Stetson Co.*, 5 Unof. 43 (97 N. W. 248).

466. (1904.) Parol evidence cannot be received for the purpose of changing, modifying or explaining a clear, plain and unambiguous written agreement. *Agnew v. Montgomery*, 72 Neb. 9 (99 N. W. 820).

467. (1904.) If a written agreement is incomplete upon its face, parol evidence not in conflict therewith is admissible to supply its deficiencies. *Bell v. Wiltson*, 5 Unof. 486 (98 N. W. 1049).

468. (1905.) Where a contract of sale has been consummated by writing, the presumption is that the writing contains the whole contract, and, in the absence of fraud, mistake or ambiguity of expression in the contract itself, parol evidence is inadmissible to change or vary its terms. *Apking v. Hoefer*, 74 Neb. 325 (104 N. W. 177).

469. (1905.) The admission of oral evidence to explain the possession of and to prove that the delivery of a written contract was conditional, and that such delivery was not to become effective until the happening

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of some other event, is not a violation of the rule which would prohibit the introduction of oral evidence to contradict or vary the terms of the contract. *Dodd v. Kemnitz*, 74 Neb. 634 (104 N. W. 1069).

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470. (1906.) If a written memorandum confirmatory of a previous oral agreement does not purport to recite the whole of the later, oral testimony is admissible to supply omitted covenants not inconsistent with the writing. *De Laval Separator Co. v. Jelinek*, 77 Neb. 192 (109 N. W. 169).

471. (1907.) The defense of fraud and want of consideration may be shown by parol, not to contradict or vary, but to destroy the legal and binding effect of a written contract. *Minneapolis Threshing Machine Co. v. Otis*, 78 Neb. 233 (110 N. W. 550).

472. (1907.) In the absence of ambiguity, and of fraud, accident or mistake, parol evidence is not admissible to assist in the interpretation of a written contract. *Wheeler v. Moore*, 78 Neb. 484 (111 N. W. 120).

Weight and sufficiency of evidence.

473. (1886.) Under the peculiar facts and circumstances of the case at bar, *held*, that the evidence which tended to prove plaintiff's claim for extra compensation for performing the work set out in the petition tended also to disprove and controvert defendants' counterclaim for damages alleged to have been sustained by them by reason of said work not having been performed in accordance with the terms of the original contract. *Morrissey v. Schindler*, 18 Neb. 672 (26 N. W. 476).

474. (1891.) Evidence examined, and *held* not sufficient to show that the plaintiff signed the contract under duress. *Pryor v. Hunter*, 31 Neb. 678 (48 N. W. 736).

475. (1892.) Where the defendant, in effecting a settlement of his claim against plaintiff, agrees to pay off a judgment against the plaintiff, evidence showing that a sum of money had been turned over to defendant, though denied by defendant, is sufficient to sustain a verdict for plaintiff in an action to recover such payment. *Brecher v. Treitschke*, 33 Neb. 699 (50 N. W. 1041).

476. (1892.) In action to recover compensation for hauling lumber evidence *held* to sustain finding for plaintiff. *Fransen v. Eller*, 34 Neb. 664 (52 N. W. 284).

477. (1894.) Proof of a defective compliance with the laws of congress as to acquiring right of way, without proof that the railway company had been evicted or required to yield possession, will not entitle it to recover damages against the party whose duty it was to procure the right of way. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374 (59 N. W. 838).

478. (1894.) One cold air box took fire and there was evidence tending to show that this was because the valves attached to a furnace put into the building by defendant were so arranged that air forced into the other box drove the hot air back into the one which ignited. The evidence tended to show that in so arranging the valves the owner followed the instructions given by those who sold the furnace and placed it in the building. *Held*, That the jury was justified in finding the owner had used the furnace in a reasonably prudent manner. *Uhlig v. Barnum*, 43 Neb. 584 (62 N. W. 549).

479. (1896.) Evidence tending to show that plaintiff made a proposition to defendant to raise the latter's store building, and, also, showing that there was no acceptance of the same, sustains a verdict for defendant in an action by plaintiff for damages for a breach of such contract by defendant. *Kreamer v. Irwin*, 46 Neb. 827 (65 N. W. 885).

480. (1896.) Defendant *held* not liable on a conditional agreement to pay plaintiff a certain sum upon completion of a contract with others. *Barsby v. Warren*, 47 Neb. 275 (66 N. W. 409).

481. (1898.) In an action by a mortgagor of several houses against the mortgagee for a balance alleged to be due on the contract, evidence *held* to sustain a verdict for plaintiff as against a defense that defendant was to retain the sum of $75 on each property until each purchaser thereof shall have paid off a certain part of the mortgage. *Continental Building & Loan Ass'n v. Aulgur*, 54 Neb. 115 (74 N. W. 405).

482. (1902.) Evidence examined, and *held* sufficient to sustain finding that the note in suit was given in consideration of plaintiff's promise not to prosecute one of the defendants for embezzlement. *Smith Premier Typewriter Co. v. Mayhew*, 65 Neb. 65 (90 N. W. 939).

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483. (1902.) Testimony of a subscribing witness to an instrument that he recognizes his signature thereto and is acquainted with the parties, and, from that and his uniform practice not to witness any paper unless actually executed before him, he is satisfied and will testify that it was so executed, there being no showing to the contrary, is sufficient evidence of its execution. *Cheston v. Wilson*, 2 Unof. 674 (89 N. W. 764).

484. (1902.) Evidence and contract examined, and *held* that the construction given to the contract and the meaning ascribed to the word "proceeds" therein by the trial court, are reasonable and should be approved. *Wheeler & Wilson Mfg. Co. v. Winnett*, 3 Unof. 293 (91 N. W. 514).

485. (1904.) Evidence showing defendant signed the contract in suit, wherein she agreed to pay plaintiff a certain sum of money in consideration of his abandoning a prosecution of defendant's son for statutory rape, and consented to the marriage of his daughter to defendant's son, it appearing that the two were minors and had sustained an illicit relation with each other, sustains a judgment for plaintiff. *Henry v. Dussell*, 71 Neb. 691 (99 N. W. 484).

486. (1904.) In an action to recover on a contract whereby plaintiff was to cut standing timber on a tract of land belonging to defendant and deliver the same to defendant's saw mill in consideration of which the defendant agreed to convey the land so cleared to plaintiff, evidence of a settlement of plaintiff's claim after an abandonment of the work *held* not to sustain a verdict for plaintiff. *Strong v. Eggert*, 71 Neb. 813 (99 N. W. 647).

487. (1906.) Where one son of a testator appeared for the purpose of contesting the will, and an agreement between him and another brother is executed whereby the former withdraws such contest in consideration that the latter divide whatever of the property remains after the terms of the will have been fulfilled, evidence *held* sufficient to sustain a decree for plaintiff in an action for his portion under such agreement. *Grochowski v. Grochowski*, 77 Neb. 510 (112 N. W 335).

487*a*. (1908.) Evidence *held* to sustain finding that articles manufactured by plaintiff under an order to furnish them "as soon as possible" had been furnished in sufficient time to comply with the contract. *Childs & Co. v. Omaha Paraphernalia House*, 80 Neb. 673 (114 N. W. 941).

Questions for court or jury.

488. (1876.) If a condition precedent in the contract has not been fully performed on the part of the plaintiff, the question whether the defendant has or has not waived his legal rights and by his acts become estopped from denying his ability under the contract is one of fact, which is alone within the province of the jury. *Estabrook v. Omaha Hotel Co.*, 5 Neb. 76.

489. (1876.) If waiver of the condition precedent by defendant is pleaded, then the question whether the defendant has or has not waived his legal rights and by his own acts become estopped from denying his liability under the contract is a question of fact, which is alone within the province of the jury. *Boehme v. Omaha Hotel Co.*, 5 Neb. 80.

490. (1888.) Questions of fraud are for the jury to determine, in the light of the circumstances surrounding the transaction complained of, as shown by the testimony. *Riley v. Melquist*, 23 Neb. 474 (36 N. W. 657).

491. (1891.) The existence of the contract sued on is a question of fact. *School District v. Foster*, 31 Neb. 501 (48 N. W. 267).

492. (1892.) Where the architect whose estimate as to the value of changes, was to be final and conclusive, is charged in the pleadings with fraud, partiality, or other improper cause, whereby one of the parties has been defrauded, and there is testimony in support of such charges, the question is one for the jury to determine. *Anderson v. Imhoff*, 34 Neb. 335 (51 N. W. 854).

——— **Construction of contract.**

493. (1888.) While it is the province of the courts to construe contracts, yet where the meaning of a contract is obscure and depends upon facts *aliunde* in connection with the written language, the question of construction may be one of fact for the jury. *Coquellard v. Hovey*, 23 Neb. 622 (37 N. W. 479; 8 Am. St. Rep. 134).

494. (1894.) When a contract is to be construed by its terms alone, without the aid of extrinsic facts, it is the duty of the court to interpret it, and not for the jury. *Simms v. Summers*, 39 Neb. 781 (58 N. W. 43); (1897) *Rosenthal v. Ogden*, 50 Neb. 218 (69 N. W. 779); (1897) *Meyer v. Shamp*, 51 Neb. 424 (71 N. W. 57); (1902) *Dillon v. Watson*, 3 Unof. 530 (92 N. W. 156); (1898) *Ricketts v. Rogers*, 53 Neb. 477 (73

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N. W. 946; (1898) *Western Mfg. Co. v. Rogers*, 54 Neb. 456 (74 N. W. 849); (1901) *McCormick Harvesting Machine Co. v. Davis*, 61 Neb. 406 (85 N. W. 390).

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495. (1897.) If a written contract is to be construed with reference to its terms alone, it is the duty of the court to interpret it; but if the construction or application must depend upon other and extrinsic facts, the contract, in connection with these questions of fact, should be submitted to the jury, under proper instructions. *Rosenthal v. Ogden*, 50 Neb. 218 (69 N. W. 779); (1897) *Meyer v. Shamp*, 51 Neb. 424 (71 N. W. 57); (1902) *Dillon v. Watson*, 3 Unof. 530 (92 N. W. 156).

496. (1898.) Where, after a contract for sale of land was made, it was discovered that the vendor had no title to a small portion thereof, and, after a dispute, the contract was consummated, except that $250 of the purchase price was retained by the vendee, a written statement given to the vendor, "Mr. F. J. Rogers has left in my hands two hundred and fifty dollars to cover damages for a strip of land 130 feet wide and 1,000 feet long. * * * The condition of this contract is this. If Mr. F. J. Rogers makes A. D. Ricketts a good warranty deed for said strip of land, then the said Ricketts is to refund the $250 to Rogers," presents no reason for committing its interpretation to a jury. *Ricketts v. Rogers*, 53 Neb. 477 (73 N. W. 946).

497. (1898.) Where a written contract is the basis of an action and neither party asks for a reformation thereof, it is the duty of the court to ascertain its meaning and enforce it accordingly. *Clark v. Hall*, 54 Neb. 479 (74 N. W. 856).

498. (1898.) Where the answer to a petition for the recovery of damages for a breach of contract presents an equitable counter-claim which is traversed by a reply, the issues of fact thus arising are triable to the court without a jury. *Hotaling v. Tecumseh Nat. Bank*, 55 Neb. 5 (75 N. W. 242).

499. (1900.) Contradictory evidence as to the construction of an ambiguous contract, should be submitted to the jury. *McCord-Brady Co. v. Moneyhan*, 59 Neb. 593 (81 N. W. 608).

500. (1901.) When an action is predicated upon a written contract it is the duty of the court to construe the contract, but if the jury is fully instructed upon the issues generally, and no proper instruction construing the contract is requested, such failure to instruct is not reversible error. *McCormick Harvesting Machine Co v. Carpenter*, 1 Unof. 273 (95 N. W. 617).

501. (1902.) An instruction which submits the construction of a contract to a jury is erroneous. *Hinman v. Austin Mfg. Co.*, 65 Neb. 187 (90 N. W. 934).

502. (1903.) Where a written contract requires extrinsic evidence to explain its terms, the interpretation to be given in view of such evidence is a question of fact. *Haskell v. Read*, 68 Neb. 107 (93 N. W. 997).

503. (1903.) In an action for breach of a contract where no evidence is introduced in support of the only defense properly pleaded, it is the duty of the court to construe the contract, and determine the measure of damages, and direct the jury to return a verdict accordingly. *School District of Omaha v. McDonald*, 68 Neb. 610 (94 N. W. 829).

504. (1904.) When the evidence as to the alleged breach of contract is all contained in letters which had passed between the parties, and there is no conflict as to what the letters show, it is for the court to determine the legal effect of such evidence and to so instruct the jury. *Hixson Map Co. v. Nebraska Post Co.*, 5 Unof. 388 (98 N. W. 872).

Direction of verdict.

505. (1897.) In an action to recover damages against defendant for a breach of his contract to notify plaintiff where a certain tract of land would be sold on foreclosure of a first mortgage, plaintiff holding a second mortgage thereon, the only evidence being an unattested copy of a sheriff's return of the sale and the satisfying of the first lien only, such being incompetent, a direction of a verdict for defendant was proper. *Westerman v. Sheppard*, 52 Neb. 124 (71 N. W. 950).

506. (1902.) Where a breach of contract is established, the injured party is entitled, at least, to nominal damages, but his adversary cannot complain of an instruction which authorizes the jury to find in his favor if it is found that the breach has resulted in no damage *Jones v. Wattles*, 66 Neb. 533 (92 N. W. 765).

507. (1904.) Where, in an action on a contract, the defendant pleads illegality of consideration and duress, upon a return of a finding as to the two defenses pleaded adverse to the defendant, it is proper for

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the court to instruct the jury to find for the plaintiff, if, under the pleadings and the evidence, facts sufficient to show that the contract is upon a valid consideration appear uncontradicted. *Henry v. Dussell*, 71 Neb. 691 (99 N. W. 484.)

508. (1904.) When the assignment of a written contract, by a third person, to the plaintiff in an action, bears upon its back the general indorsement of such third person; and the undisputed evidence shows that the contract was delivered to plaintiff under such indorsement, and that the plaintiff is the owner thereof; and plaintiff actually has possession of such contract and produces it upon the trial, it is the duty of the court to instruct the jury, as a matter of law, that plaintiff is entitled to maintain the action, if a right of action in other respects exists. *Hixson Map Co. v. Nebraska Post Co.*, 5 Unof. 388 (98 N. W. 872).

Instructions.

509. (1886.) Where there is evidence tending to prove a rescission of a contract an instruction stating the supposed facts of the case, and telling the jury that if they believed such facts from the evidence they should find for the defendant, is erroneous where the question of rescission is ignored in the instructions. *McPherson v. Wiswell*, 19 Neb. 117 (26 N. W. 916).

510. (1887.) In an action to recover for services as carpenter in erecting a building the instructions set out in the opinion, held to be correct. *Driscoll v. Troughton*, 22 Neb. 260 (34 N. W. 497).

511. (1889.) In an action to recover the contract price for digging a well, defended on the ground of a breach of a warranty as to the quantity of water to be procured, an instruction that if there was a warranty and breach thereof, but that if the plaintiff did not expressly agree that in case the well did not yield the quantity of water named in the answer, he would charge nothing therefor, and if the jury found the well was of any value the plaintiff's recovery should be the contract price less the amount it would cost to complete the well, was not erroneous as inapplicable to the evidence. *Johnson v. Bowman*, 26 Neb. 745 (42 N. W. 754).

512. (1893.) In a suit for balance due on account of pasturing cattle, the defendant pleaded settlement, counter-claim for damages sustained by loss of and injury to cattle on account of plaintiff's negligence. The instructions of the court to the jury on the subject of the defenses of settlement and counter-claim approved and set out at length in the opinion. *Loomer v. Thomas*, 38 Neb. 277 (56 N. W. 973).

513. (1899.) The existence of an alleged memorandum of agreement being one of the facts in issue, it was proper to instruct the jury that it might first determine whether the agreement ever in fact had an existence, and if not to drop it from further consideration. *Summers v. Simms*, 58 Neb. 579 (79 N. W. 155).

514. (1900.) An instruction to the effect that a waiver of provisions contained in a written instrument must be proved by evidence which is clear and unequivocal, is erroneous. *McCord-Brady Co. v. Moneyhan*, 59 Neb. 593 (81 N. W. 608).

515. (1900.) Instructions set out in the opinion *held* erroneous as giving action a double aspect, one for damages for breach of contract, and the other for a rescission thereof and the recovery of the purchase price. *Alfree Mfg. Co. v. Grape*, 59 Neb. 777 (82 N. W. 11).

516. (1902.) When evidence tends to show only a joint liability of parties sued jointly on a contract, it is error to instruct jury that finding may be against one or all. *Sutherland v. Holliday*, 65 Neb. 9 (90 N. W. 937).

517. (1902.) When, in an action for damages for an alleged breach of a contract, a party requests of the court alternatively two inconsistent instructions with respect to the interpretation of the agreement, and an example of what would constitute a breach thereof, and the court accepts and gives one of such requests and refuses the other, such party cannot complain that the court erred in making the refusal. By such conduct the party has said to the court, in effect, that he will be satisfied with either of such requests and will abide by the choice which the court shall make of them. *Chicago House-Wrecking Co. v. Stewart Lumber Co.*, 66 Neb. 835 (92 N. W. 1009).

518. (1903.) Instructions as to the law of duress held proper. *Nebraska Mutual Bond Ass'n v. Klee*, 70 Neb. 383 (97 N. W. 476).

519. (1904.) Where plaintiff's claim is for services under an alleged contract of a certain date, and the evidence tends to show an offer to engage services at a fixed price at that time on defendant's part, and im-

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mediately afterwards a beginning of such services on plaintiff's part, with defendant's knowledge and with no retraction of the proposition, it is error to instruct the jury, in substance, that there can be no recovery unless an express agreement on both sides was reached at the time alleged. *Pettis v. Green River Asphalt Co.*, 71 Neb. 513 (99 N. W. 235).

520. (1904.) If the issue of illegality of consideration and that of duress are properly submitted to the jury, upon which their verdict is adverse to defendant, it is not error to defendant that the court, instead of directing the jury to find for the plaintiff upon the issue of consideration, instructs the jury incorrectly as to what constitutes a valid consideration for the contract. *Henry v. Dussell*, 71 Neb. 691 (99 N. W. 484).

521. (1905.) In an action on a building contract, the issue being that by reason of interference by the owner the plaintiff was unable to complete the contract within the specified time, an instruction that amounted to a direction of a verdict on the evidence, after instructing that if the jury found such interference caused the delay to find for plaintiff, is erroneous. *Havens v. Robertson*, 75 Neb. 205 (106 N. W. 335).

Right to open and close.

522. (1894.) The plaintiff alleged the payment to a third person of specific sums of money for the benefit and at the request of the defendant. The answer made no denial of the allegations of the petition, but pleaded insanity as a defense. *Held*, That under this state of the issues the defendant was required to first introduce testimony and was entitled to the opening and closing of the case. *Rea v. Bishop*, 41 Neb. 202 (59 N. W. 555).

Damages.

Adequacy of recovery for breach, see *Damages*, § 108.

Duty to reduce loss on breach, see *Damages*, §§ 25-30.

523. (1894.) Where a breach, by defendant, of an actually existing contract between plaintiff and defendant is proven, plaintiff is entitled to at least nominal damages. *Mollyneaux v. Wittenberg*, 39 Neb. 547 (58 N. W. 205).

524. (1895.) It is the duty of a party suffering damages from breach of a contract to exert himself to lighten damages, and he cannot recover damages which would have been avoided had he performed such duty. *Uhlig v. Barnum*, 43 Neb. 584 (62 N. W. 549).

525. (1895.) Where the time for completing a continuing contract has not expired the plaintiff, in an action for a breach thereof, can only recover the damages sustained before the suit was instituted. *Terry v. Beatrice Starch Co.*, 43 Neb. 866 (62 N. W. 255).

526. (1899.) The time of a stipulation was fixed by its terms at two years. In this action, commenced prior to the expiration of the full time, there could be no recovery of damages for breaches of the agreement which occurred subsequent to the institution of the suit. *Wittenberg v. Mollyneaux*, 59 Neb. 203 (80 N. W. 824).

527. (1901.) If the measure of damages fixed in the contract to be paid for its breach, will more than compensate the innocent party, the court will regard such sum as a penalty. *Lee v. Carroll Normal School Co.*, 1 Unof. 681 (96 N. W. 65).

528. (1901.) When parties to a contract stipulate that in case of a violation thereof the party making default shall pay to the other a stipulated sum as liquidated damages, the courts will take the sum so fixed as the innocent party's measure of damages, only, when it appears that to do so will no more than compensate his loss. *Lee v. Carroll Normal School Co.*, 1 Unof. 681 (96 N. W. 65).

529. (1902.) The general rule is that the injured party is entitled to recover such damages as naturally and reasonably result from a breach of a contract or as may reasonably be supposed to have been in contemplation of the parties as a result of such breach when the contract was made. *Punteney-Mitchell Mfg. Co. v. Northwall Co.*, 66 Neb. 5 (91 N. W. 863).

530. (1904.) In an action for breach of a contract to perform services, plaintiff can recover the excess he is obliged to pay to another for the services, only from the date of the breach to the date when the action was commenced, and not to the date when the contract would have expired. *Brown v. Cowles*, 72 Neb. 896 (101 N. W. 1020).

531. (1904.) The rule is elementary that in an action for damages for breach of contract such damages only may be recovered as are the probable, direct and proximate consequences of the wrong complained of, and such as may fairly be supposed to have

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been within the contemplation of the parties at the time of the making of the contract as a probable result of the breach of the same. *Brown v. Cowles*, 72 Neb. 896 (101 N. W. 1020).

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532. (1906.) No recovery can be had on an agreement to loan money on real estate to enable plaintiff to take up a certain mortgage when it is not shown that he suffered a loss by not being able to borrow of another. *Bahr v. Manke*, 77 Neb. 552 (110 N. W. 300).

——— **Items.**

533. (1871.) When the owners of a mill in the course of erection are not ready for the installation of the machinery when the contracted time came, they cannot, in an action for breach of contract, show what their mill would have earned from the time the machinery was to have been in, had it then been ready. *Holmes v. Boydston*, 1 Neb. 346.

534. (1883.) Where a contract calls for the completion of a stone flume by a certain date, it being the intention to erect a mill thereon, and such flume is not completed until several months after the time fixed and the mill was never built, the loss of the use of the mill, being too remote and uncertain, no recoupment can be had therefor in an action for the contract price for building the flume. *Bridges v. Lanham*, 14 Neb. 369 (15 N. W. 704; 45 Am. St. Rep. 121).

535. (1894.) Where a contractor agrees with the owner of real estate to furnish the material and labor and erect for him an improvement thereon, and such contractor voluntarily abandons the work before completion, the owner may charge the contractor with the necessary costs of completing the improvement as the contractor agreed to complete it, the amount of all payments made to the contractor on the contract, the amount of all valid liens on the real estate for labor and material furnished the contractor and used by him in such improvement, and the amount of actual damages the owner has sustained by reason of the contractor's default. The difference between the total of these items and the contract price is the measure of damages of both the owner and contractor. *Von Dorn v. Mengedoht*, 41 Neb. 525 (59 N. W. 800).

536. (1898.) A party injured by breach of contract may recover for gains prevented, provided they are within the established rules permitting consequential damages, and provided they can be proved to a reasonable degree of certainty. *Wittenberg v. Mollyneaux*, 55 Neb. 429 (75 N. W 835).

537. (1902.) In an action brought by plaintiff to recover damages for a breach of contract, whereby he was to receive as compensation for caring for a flock of sheep, one-half of the increase and one-half of the wool clip, *held*, that plaintiff was entitled to recover for such profits or advantages, the direct and immediate fruits of his contract as were lost by such breach of contract on the part of the defendant. *Schrandt v. Young*, 2 Unof. 546 (89 N. W. 607).

——— **Measure of damages.**

538. (1871.) The value of services cannot be shown by proof of what was paid therefor, but only by proof of what they are worth. *Holmes v. Boydston*, 1 Neb. 346.

539. (1871.) Damages for breach of a contract for machinery, sustained by reason of furnishing imperfect articles, cannot be shown by proof of what the party to whom the same were furnished actually paid for replacing them with such as the contract required. *Holmes v. Boydston*, 1 Neb. 346.

540. (1879.) Where one causes a loss to a crop of wheat by breach of his contract to cut the same when ripe, the measure of damages is the value of the crop. *Kelley v. Peterson*, 9 Neb. 76 (2 N. W. 346).

541. (1879.) A party may recover as damages for the breach of a contract to cut grain; the value of the entire crop, if it is shown the damage amounted to so much, and they are the proximate result of the breach. *Kelley v. Peterson*, 9 Neb. 76 (2 N. W. 346).

542. (1889.) When a contract has been established, the measure of recovery in such case is the price agreed upon in the contract less the damages sustained by the employer by the breach of the same. *McMillan v. Malloy*, 10 Neb. 228 (4 N. W. 1004; 35 Am. Rep. 471).

543. (1884.) When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.

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Aultman & Co. v. Stout, 15 Neb. 586 (19 N. W. 464).

544. (1887.) Where A, being indebted to B, fraudulently procured C to execute to B a mortgage for $2,650, with statements that B would furnish that amount, the proceeds to be applied to the payment of a mortgage of $1,200 already on the land and a $900 note held by A, with remainder in cash, and instead A procured only $1,000 from B and applied the $1,650 to the payment of his indebtedness, the measure of C's damages in an action against A would be the $1,650 and legal interest thereon, notwithstanding the fact that by the increased mortgage liens on C's land he was unable to borrow sufficient to discharge them, and by subsequent foreclosure proceedings the land was sold and C's title destroyed. *Forbes v. Thomas*, 22 Neb. 541 (35 N. W. 411).

545. (1890.) Where one contracts to furnish a heating apparatus in complete working order, to a specified degree of temperature, for a newly erected building, and the owner of the building rescinds the contract and refuses to allow the furnace to be placed in the building, the measure of damage recoverable by the seller is the amount of the profits that would have been realized under the contract. *Hale v. Hess*, 30 Neb. 42 (46 N. W. 261).

546. (1893.) In a suit for violation of a contract the courts will not, for the measure of damages, apply a rule which would give plaintiff a greater compensation for a breach of the contract than he could receive had it been performed. *Bates v. Diamond Crystal Salt Co.*, 36 Neb. 900 (55 N. W. 258).

547. (1894.) Where there has been a partial performance of a contract and an offer to perform the balance the measure of damages is compensation for the part performed, and the profits to be made under the contract. *Roberts v. Drehmer*, 41 Neb. 306 (59 N. W. 911).

548. (1894.) The measure of plaintiff's recovery for partial performance of a building contract, is found by ascertaining the reasonable worth of such partial performance appropriated or received by the owner, and deducting therefrom payments made to the contractor and the actual damages, if any, the owner has sustained by the contractor's default. *Von Dorn v. Mengedoht*, 41 Neb. 525 (59 N. W. 800).

549. (1894.) Where a contractor agrees with the owner of real estate, to furnish the material and labor, and erect for him an improvement thereon, and the owner wrongfully terminates the same or the contractor's employment thereunder before the completion of the work, the contractor's measure of damages is the reasonable value of his partial performance increased by all actual damages sustained by him by reason of the owner's unjustifiable termination of the contract. *Von Dorn v. Mengedoht*, 41 Neb. 525 (59 N. W. 800).

550. (1894.) In an action by an agent against a manufacturer for breach of a contract granting the former the exclusive right to sell manufactured articles in a specified territory, the measure of damages is the profit which he shows he was prevented from realizing. *Russell v. Horn, Brannen & Forsyth Mfg. Co.*, 41 Neb. 567 (59 N. W. 901).

551. (1896.) In a suit against a party for wrongfully terminating work under a contract, plaintiff's measure of damages is the profit he would have made by completing it. *Kreamer v. Irwin*, 46 Neb. 827 (65 N. W. 885).

552. (1896.) The general rule is that the party injured by breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach. *Western Union Telegraph Co. v. Wilhelm*, 48 Neb. 910 (67 N. W. 870).

553. (1897.) In a suit on a *quantum meruit* for services performed, the reasonable value of the services furnishes the measure of recovery. *Hibbard v. Wilson*, 51 Neb. 436 (71 N. W. 65).

554. (1897.) In an action on a *quantum meruit*, the only competent evidence of the reasonable value of services performed was the contract price. The plaintiff in the action offered other proof of the value of the services, which, on objection of defendant, was excluded. *Held*, That the contract price was the proper measure of damages. *Hibbard v. Wilson*, 51 Neb. 436 (71 N. W. 65).

555. (1897.) There is, in principle, as well as on authority, a wide distinction between contracts for personal service and for the doing of specific acts. In the former case, unless the plaintiff, who has been discharged without sufficient cause, is able to secure other employment, the contract price furnishes the exact measure of his damage.

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In the latter class of cases the measure of damage upon the violation of the agreement by the employer is that asserted by the district court, viz., the plaintiff's probable profit; in other words, the difference, if any, in his favor between the contract price and the sum it would have cost to complete the work. *Jewett v. Wilmot*, 51 Neb. 700 (71 N. W. 775).

556. (1897.) Where one party to an express contract is wrongfully prevented by the other party from completing, he may sue upon the contract for a breach thereof, and the measure of his damages will be the value of the part performed as measured by the contract price plus the profits, if any, which would have accrued to him had he completed the contract according to its terms; or he may ignore the contract and declare upon a *quantum meruit* or *quantum valebat*, in which case the measure of his damage will be the fair and reasonable value of what he has done. *Thompson v. Gaffey*, 52 Neb. 317 (72 N. W. 314).

557. (1901.) 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. *Culley v. Taylor*, 62 Neb. 651 (87 N. W. 334).

558. (1901.) The measure of damages for the breach of a contract to complete a building within the contract time is the loss of the possession of the building as a thing of use. *Lee v. Carroll Normal School Co.*, 1 Unof. 681 (96 N. W. 65).

559. (1901.) Under a contract by a merchant and his creditors whereby the latter were to assume the management of the business in order to pay off their debts and also were to keep the stock of goods supplied with new goods, in an action for a breach of such contract by an alleged sale of the goods at public auction in violation of the contract a refusal to instruct that the measure of the damages was the difference in amount for which the price for which they would have sold for at private sale, erroneous. *Paxton & Gallagher v. Vaddonker*, 1 Unof. 776 (96 N. W. 378).

560. (1903.) When the contract is entire, is one for personal services only and the breach of it is total, the measure of damages is what the plaintiff would have earned, less what it would have cost him to perform it according to its terms. *School District of Omaha v. McDonald*, 68 Neb. 610 (94 N. W. 829).

Verdict.

561. (1886.) In an action to recover for labor and skill in the erection of certain buildings under a written contract, and for certain extras and expenses claimed under an alleged modification of said contract, a verdict, "We, the jury, * * * do find for the plaintiff and assess his damages," etc., is correct in form, since the action is not one of debt, but for damages for breach of the contract. *Morrissey v. Schindler*, 18 Neb. 672 (26 N. W. 476).

562. (1889.) Where none of the witnesses, in an action for damages for non-performance of a contract, placed the value of the profits which would have arisen therefrom at less than $239, a verdict for $90 was set aside as not based on the evidence. *Hancock v. Stout*, 28 Neb. 301 (44 N. W. 446).

Judgment.

563. (1874.) The plaintiff asserted a claim for an allowance for waste attending public printing, and the defendant admitted that an allowance was due but not to the extent claimed; *held*, that it was error for the court to reject all claim for allowance. It should have found, upon this claim, for the plaintiff, at least to the extent admitted by the pleadings. *People, ex rel. Gere, v. Gosper*, 3 Neb. 285).

Appeal and error.

564. (1891.) There being no material error in an action for the breach of a contract securing advancement of money, a judgment for the plaintiff will not be disturbed. *Payne v. Jones*, 33 Neb. 260 (50 N. W. 8).

565. (1898.) Where the trial court erroneously disposed of a case on the theory that a contract involved did not express the agreement of the parties and was, therefore, unenforceable, the supreme court may eliminate from the findings below the errors resulting from the failure to construe and enforce the contract, and order the judgment below to be modified accordingly. *Clark v. Hall*, 54 Neb. 479 (74 N. W. 856).

566. (1902.) When a petition misrecites a contract sued on, but it is properly set out in the answer, and the action is tried upon the contract so set out, if the court has given to the jury the correct rule of damages

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for the alleged breach of the contract set forth in the answer, it is not error prejudicial to the defendant if he afterwards instructs them what is the measure of damages for a breach of a contract substantially such as is set out in the petition, if the measure so given is also equally applicable to the like breach of the contract as recited in the answer. *Chicago House-Wrecking Co. v. Stewart Lumber Co.*, 66 Neb. 835 (92 N. W. 1009).

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CONTRADICTION.

Of expert witnesses, see *Evidence*, §§ 618, 619.

Of witness in general, see *Witnesses*, IV, E.

CONTRIBUTION.

CROSS-REFERENCES.

For repair of bridges, see *Bridges*, §§ 39-58.

By adjoining county for bridges, see *Bridges*, §§ 21-30.

Of cost of building fence, see *Fences*, § 2.

Between liquor dealers for loss by action, see *Intoxicating Liquors*, §§ 362-364.

Between copartners, see *Partnership*, §§ 78-82.

Between sureties, see *Principal and Surety*, §§ 208-213.

By joint tenant on purchase of incumbrances, see *Tenancy in Common*, § 15.

Joint tort feasors.

1. (1892.) In determining whether one joint wrong-doer is entitled to contribution from another the test is, whether the former knew, at the time of the commission of the act for which he has been compelled to respond, that such act was wrongful. *Johnson v. Torpy*, 35 Neb. 604 (53 N. W. 575; 37 Am. St. Rep. 447).

2. (1895.) In an action for contribution by one joint wrong-doer against another the test of recovery is whether the plaintiff, at the time of the commission of the act for which he has been compelled to respond, knew that such act was wrongful. *Torpy v. Johnson*, 43 Neb. 882 (62 N. W. 253).

3. (1903.) When a joint and several judgment for trespass is satisfied by one of the parties, contribution will be enforced, where it appears that the parties acted in good faith and without any intention of committing a trespass. The basis of contribution in such cases is the ratio the claims of the several attaching creditors bear to each other. *First Nat. Bank of Pawnee v. Avery Planter Co.*, 69 Neb. 329 (95 N. W. 622; 111 Am. St. Rep. 541).

3*a*. (1908.) One who sues for contribution on the ground that he has satisfied a judgment for a trespass committed against a third party must show that the defendant joined in committing the trespass and was liable therefor equally with the plaintiff. *Schappel v. First Nat. Bank*, 80 Neb. 708 (115 N. W. 317).

Stockholders of corporations.

4. (1898.) An agreement by stockholders of a corporation to indemnify one for the personal assumption or payment of a corporate debt, or to contribute, may be enforced. *Gorder v. Connor*, 56 Neb 781 (77 N. W. 383).

5. (1898.) A voluntary assumption of the debt of a corporation, or a voluntary payment of its debt, or the two in combination, will not alone confer on a stockholder of the corporation the right to contribution from the other members. *Gorder v. Connor*, 56 Neb. 781 (77 N. W. 383).

6. (1898.) As between the stock subscribers and the creditors of a corporation, each stock subscriber is liable to the extent of his unpaid stock subscription As between themselves, each stock subscriber is liable for his proportionate share of the corporate debts, and one stock subscriber who has been compelled to pay more than his proportionate share may sue his co-subscribers for contribution. *Van Pelt v. Gardner*, 54 Neb. 701 (75 N. W. 874).

7. (1898.) A subscriber to corporate stock who has paid off a deficiency judgment against the corporation is not estopped from maintaining a suit for contribution against his co-subscribers by the fact that he participated in a distribution made of the assets of the corporation by the stockholders, the debt discharged by him not being provided for in such distribution. *Bennison v. McConnell*, 56 Neb. 46 (76 N. W. 412).

8. (1898.) Where a subscriber discharges a debt of an incolvent corporation for which all the stock subscribers thereof

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are liable, he may maintain an action for contribution against his co-subscribers. *Bennison v. McConnell*, 56 Neb. 46 (76 N. W. 412).

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9. (1903.) Where trustees of an insolvent corporation have, with knowledge of the pendency of an action against it, divided among shareholders nearly all its available assets, one of the trustees, who is also treasurer and who paid out the money divided, cannot recover contribution from another director, because of payment of a judgment against him, as trustee, for so converting the company's assets. *Sharp v. Call*, 69 Neb. 72 (95 N. W. 16).

10. (1904.) Where a stockholder of a state bank advances his own funds to pay the debts of the bank in pursuance of an agreement of the stockholders that each should contribute in proportion to the number of shares of stock held by him, the advancing stockholder may maintain an action against the other stockholders for an accounting and contribution, without having first exhausted the assets of the bank. *Davidson v. Gretna State Bank*, 59 Neb. 63 (80 N. W. 256).

CONTRIBUTORY NEGLIGENCE.

As against carriers, see *Carriers*, §§ 301-347.

In actions against cities, see *Municipal Corporations*, §§ 785-794.

See *Negligence*, III.

In actions against railroads, see *Railroads*, §§ 239-248; 309-315; 350-352.

In actions against street railroads, see *Street Railroads*, 33-35.

CONVENTIONS.

Nominating conventions, see *Elections*. §§ 38-58.

CONVERSION.

CROSS-REFERENCES.

See, also, *Trover and Conversion*.

Effect of conversion of homesteads, see *Homesteads*, §§ 48-56.

Effect of conversion of personalty on title.

1. (1894.) Where one wilfully, as a trespasser, takes the property of another and alters it in substance or form by his own labor, the manufactured article belongs to the owner of the original material. *Carpenter v. Lingenfelter*, 42 Neb. 728 (60 N. W. 1022; 32 L. R. A. 221).

Conversion by direction of will.

2. (1902.) Will examined, construed, and *held* that it worked an equitable conversion of the testator's real estate into money at the time of his death. *Chick v. Ives*, 2 Unof. 879 (90 N. W. 751.)

3. (1902.) Where the provisions of a will are of such a character as to amount to a positive direction to convert the testator's real estate into money or personalty, or where by a fair construction of the will such intention of the testator is clearly shown by implication, a court of equity will decree that an equitable conversion of the real estate of the testator into money took place at the time of his death. *Chick v. Ives*, 2 Unof. 879 (90 N. W. 751).

CONVEYANCES.

See *Deeds; Mortgages; Vendor and Purchaser*.

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Conditional delivery, see *Escrow*.

By executor or administrator, see *Executors and Administrators*, VI.

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Of homestead, see *Homesteads*, II.

Conveyances under judicial order, see *Judicial Sales*, §§ 484-540.

Conveyances pending suit, see *Lis Pendens*, §§ 17-26.

By trustee, see *Trusts*, IV.

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CONVICTS.

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ANALYSIS.

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Power of lessee of convict labor, § 8.
Contract to feed convicts, § 9.
Agent to manage convict labor and machinery, §§ 10-11.
Application of proceeds from convict labor, § 12.
Action on labor contract, § 13.

CROSS-REFERENCES.

Conviction of, see *Criminal Law.*

Regulation of prisons, see *Prisons.*

Pardon of convicts, see *Pardons.*

Disqualification of convicted person to hold office, see *Officers*, § 14.

Right to vote, see *Elections*, § 34.

Statutory provisions.

1. (1896.) Section 5, chapter 66, Session Laws, 1895, providing for the leasing of convict labor, is not within the title of the act, and is, therefore, in conflict with the provisions of section 11, article III of the constitution, requiring the subjects of acts to be clearly expressed in their titles. *State, ex rel. Leidigh, v. Holcomb*, 46 Neb. 612 (65 N. W. 873).

2. (1896.) The power conferred upon the board of public lands and buildings by section 17, Session Laws 1877, page 194, to lease the convict labor of the state for a period not exceeding ten years is not a continuing power, but was exhausted by a single user. *State, ex rel. Leidigh, v. Holcomb*, 46 Neb. 612 (65 N. W. 873).

Right to lease convict labor.

3. (1896.) The board of public lands and buildings is by section 19, article V of the constitution, and the act of February 13, 1877 (Session Laws 1877, p. 188), invested with the genaral management and control of all of the public institutions of the state, except those for educational purposes, and may, in its discretion, lease the convict labor, penitentiary grounds, shops, and machinery therein, together with any property connected with or incident thereto. *State, ex rel. Leidigh, v. Holcomb*, 46 Neb. 612 (65 N. W. 873).

4. (1903.) The board of public lands and buildings is vested with the general management and control of the penitentiary and may, at its direction, let out by contract the labor of any or all the convicts. *State, ex rel. Davis, v. Mortensen*, 69 Neb. 376 (95 N. W. 831).

Validity and rights of labor contracts.

5. (1903.) A contract for convict labor, made between the warden of the penitentiary and a manufacturer would, if valid, impose no active duties upon the board of public lands and buildings, and hence cannot be enforced by mandamus against such board. *State, ex rel. Davis, v. Mortensen*, 69 Neb. 376 (95 N. W. 831).

6. (1903.) A written contract for the hiring of convict labor, drawn under the provisions of section 16, chapter 86, Compiled Statutes, is not valid unless executed by the warden of the penitentiary, and approved by the governor and the board of public lands and buildings. *State, ex rel. Davis, v. Mortensen*, 69 Neb. 376 (95 N. W. 831).

7. (1903.) The state, like an individual or private corporation, may refuse to keep its engagements; and the board of public lands and buildings, as a governmental agency having full authority in all matters relating to the management of the penitentiary, is vested with power to determine whether a contract for the leasing of convict labor shall be kept or broken. The action of the members of the board in the matter is the action of the state; their determination is its determination. *State, ex rel. Davis, v. Mortensen*, 69 Neb. 376 (95 N. W. 831).

Power of lessee of convict labor.

8. (1896.) The contractor or lessee, of convict labor, cannot, even with the assent of the board of public lands and buildings, usurp any of the functions of the warden as the keeper of the prison, although he may, and doubtless should, be

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accorded such privileges, consistent with the rules prescribed for the government of the prison and the health and safe-keeping of the convicts, as are necessary to carry into execution his agreement with the state. *State, ex rel. Leidigh, v. Holcomb*, 46 Neb. 612 (65 N. W. 873).

Contract to feed convicts.

9. (1896.) It is within the power of the board of public lands and buildings to provide by contract for the feeding and clothing of the convicts in the penitentiary as one of the considerations for the leasing of their labor, and such a contract is a sufficient justification for a proceeding to compel the state board to furnish provisions and supplies. *State, ex rel. Leidigh, v. Holcomb*, 46 Neb. 612 (65 N. W. 873).

Agent to manage convict labor, and machinery.

10. (1896.) An agreement whereby the state board of public lands and buildings gives control of all convict labor, and the machinery in the penitentiary, to another, who is to account for the earnings of the convicts and to retain not less than $3,000 per year for services is a mere appointment of such person as an agent of the state to lease the convict labor to third persons and to disburse the funds appropriated for the support of the penitentiary. *State, ex rel. Leidigh, v. Holcomb*, 46 Neb. 612 (65 N. W. 873).

11. (1896.) In absence of statutory restriction it is within the power of the board of public lands and buildings to appoint an agent to lease or manage the convict labor and the shops and machinery within the penitentiary. *State, ex rel. Leidigh, v. Holcomb*, 46 Neb. 612 (65 N. W. 873).

Application of proceeds from convict labor.

12. (1877.) Proceeds of "convict labor" uncollected for the year 1876 may properly be applied in payment of outstanding indebtedness for support of convicts incurred during that year. *Opinion of the Judges*, 5 Neb. 566.

Actions on labor contract.

13. (1903.) A contract with the board of public lands and buildings for the leasing of convict labor is in substance a contract with the state; and an action against the members of the board to compel specific performance of such a contract is in substance an action against the state. *State ex rel. Davis, v. Mortensen*, 69 Neb. 376 (95 N. W. 831).

COPYRIGHTS.

CROSS-REFERENCES.

See, also, *Literary Property.*

Infringement on right to trade-marks or trade-names, see *Trade-Marks and Trade-Names*, §§ 4-15.

1. (1906.) The word "copyright" is generally used to mean the "exclusive right of multiplying copies of a work already published." This right can only be preserved by complying with the act of congress for that purpose. The word has sometimes also been used to denote the right which an author has in his literary work to keep it for his own private use, to publish it, or to refrain from publishing it, at his pleasure. This right exists at common law. It does not depend upon any statute. It can only exist as long as the work is kept private. If it is published without complying with the copyright act the right is abandoned. *State v. State Journal Co.*, 77 Neb. 752 (110 N. W. 763).

2. (1906.) Manuscript of the state law reports intrusted to a publishing company to enable it to perform its contract to publish such reports for the state is not copyrighted, and is already given to the public. Any citizen has full right to print and sell the same on his own account. *State v. State Journal Co.*, 77 Neb. 752 (110 N. W. 763).

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CORONER.

ANALYSIS.

Inquest, when, §§ 1, 1a.
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Fees, §§ 3-3c.
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CROSS-REFERENCE.

Authority to serve process or summons, see *Process*, §§ 62-68.

Inquest, when.

1. (1893.) A coroner can lawfully hold an inquest upon the dead bodies of only such persons as are supposed to have died by unlawful means. *Lancaster County v. Holyoke*, 37 Neb. 328 (55 N. W. 950; 21 L. R. A. 394).

1a. (1907.) Jurisdiction to hold an inquest is conferred upon a coroner by his finding and custody in his county of the body of a person who has apparently come to his death by violent, mysterious or unknown means, and such jurisdiction is not defeated by the mere fact that the violence was inflicted or the death occurred in another county. *Moore v. Box Butte County*, 78 Neb. 561 (111 N. W. 469).

Definition of viewing.

2. (1893.) The word "viewing" as found in section 7, chapter 28, Compiled Statutes, means something more than looking, seeing, beholding; it means inspection and investigation by a coroner and a jury. *Lancaster County v. Holyoke*, 37 Neb. 328 (55 N. W. 950; 21 L. R. A. 394).

Fees.

3. (1893.) A coroner, without impaneling a jury is not entitled to any fees for inspection and examination of a person found dead in his county. *Lancaster County v. Holyoke*, 37 Neb. 328 (55 N. W. 950; 21 L. R. A. 394).

3a. (1907.) An undertaker who, acting in good faith pursuant to a direction by a coroner, causes the decent burial of a dead body found and being in the county, upon which the latter had held an inquest, will not be denied reasonable compensation for his services and expenses for the sole reason that it may afterwards be shown that the inquest was unnecessary. *Darling v. Box Butte County*, 78 Neb. 564 (111 N. W. 470).

3b. (1907.) Whether, in any case, the circumstances are such as to require an inquest into the cause of the death of a person whose body is found within the county is a matter left very largely to the discretion of the coroner, and he will not be denied compensation for his services in holding such an inquest in the absence of a showing that he has acted in bad faith. *Moore v. Box Butte County*, 78 Neb. 561 (111 N. W. 469).

3c. (1907.) Jurors and witnesses have no discretion justifying their disobedience to a summons by a coroner to attend upon an inquest held by him, and cannot be denied their fees, solely because it may afterwards appear to have been unnecessary. *Moore v. Box Butte County*, 78 Neb. 561 (111 N. W. 469).

Action on bond.

4. (1898.) In an action on the bond of a coroner the introduction of evidence of a copy of such bond is not erroneous, where the execution, delivery, and approval are admitted by the answer. *Maul v. Drexel*, 55 Neb. 446 (76 N. W. 163).

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CORPORATIONS.

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ANALYSIS.

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I. INCORPORATION AND ORGANIZATION.

What are corporations.

1. (1894.) A *de jure* corporation is one whose right to exercise a corporate function would prove invulnerable if assailed by the state in *quo warranto* proceedings. *Capps & McCreary v. Hastings Prospecting Co.*, 40 Neb. 470 (58 N. W. 956; 42 Am. St. Rep. 677; 24 L. R. A. 259).

Kinds and classes of corporations.

2. (1892.) Private corporations distinguished from public. *Overton Bridge Co. v. Means*, 33 Neb. 857 (51 N. W. 240; 29 Am. St. Rep. 514).

3. (1903.) The character of a corporation is determined from its articles of incorporation and the statute authorizing its formation. *McLeod v. Lincoln Medical College*, 69 Neb. 550 (96 N. W. 265).

——— Corporation for pecuniary benefit.

4. (1903.) The fact that an educational institution may acquire and convey property necessary to the accomplishment of its object, and may charge tuition for instruction, does not render it an incorporation for the pecuniary benefit of its members. *McLeod v. Lincoln Medical College*, 69 Neb. 550 (96 N. W. 265).

——— Manufacturing corporation.

5. (1903.) A corporation organized to "plant, harvest, store, purchase, manufacture, market, sell and deal in chicory" *held* a manufacturing corporation within the purview of section 37, chapter 16, Compiled Statutes. *Bolton v. Nebraska Chicory Co.*, 69 Neb. 681 (96 N. W. 148).

Instalment investment companies.

6. (1894.) A corporation which has for its object the purchase of land and the construction of houses thereon (the funds being realized from the capital stock paid in by subscribers in instalments), and finally the allotment of the lots and houses among the stockholders in satisfaction of their stock, is one organized for the purpose of carrying on a lawful business and authorized by the general incorporation law. *York Park Building Ass'n v. Barnes*, 39 Neb. 834 (58 N. W. 440).

7. (1904.) Compiled Statutes, chapter 16, sections 216-227, defining and regulating instalment investment companies, is not in violation of article III, or of section 1 of article VI, of the constitution, nor does it give the state banking board such arbitrary powers as to be unconstitutional for that reason. *State, ex rel. Prout, v. Northwestern Trust Co.*, 72 Neb. 497 (101 N. W. 14).

8. (1904.) If the organization of a corporation and its plan of doing business involve receiving from each of its members a stated sum at stated intervals until a specified amount is received from such members, and investing this money in property for the benefit of its members, it is an instalment investment company within the meaning of chapter 29, laws of 1903. (Comp. Stat., ch. 16, secs. 216-227.) *State, ex rel. Prout, v. Northwestern Trust Co.*, 72 Neb. 497 (101 N. W. 14).

Homestead associations.

9. (1898.) Section 2 of an act passed February 18, 1873, entitled "Homestead Associations," being section 146, chapter 16, Compiled Statutes 1897, was repealed by the adoption of section 4, article XI, constitution 1875, under "Miscellaneous Corporations." *Van Pelt v. Gardner*, 54 Neb. 701 (75 N. W. 874).

General laws.

10. (1876.) The general incorporation statute and the articles of a corporation are

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considered in the nature of a grant from the state, and, taken together, constitute its charter. *Livesey v. Omaha Hotel Co.*, 5 Neb. 50.

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11. (1876.) Sections 126 and 132 of the general incorporation act were not intended to nullify the settled rule of law in regard to the qualifications of a corporation, to enable it to commence business. *Livesey v. Omaha Hotel Co.*, 5 Neb. 50.

12. (1879.) Where the charter—which is the general law in most cases in this state—contains provisions or conditions for the protection of the public against the evils of corrupt and irresponsible organizations, which are not inconsistent with the organic law of the state, they enter into and become a part of the charter, and must be complied with. *Smith v. Steele*, 8 Neb. 115.

13. (1891.) In a condemnation proceeding by a railroad for a right of way, the proof showing that certificate of organization of the railroad in the state of Nebraska, and the articles of incorporation filed and recorded in the office of a county clerk and the secretary of state, and later articles of consolidation, with another company were filed, *held* to be a corporation under the laws of this state. *Trester v. Missouri P. R. Co.*, 33 Neb. 171 (49 N. W. 1110).

14. (1895.) In this state the legislature does not by a special act charter a corporation, but all corporations are formed under general laws, and these laws and the articles of incorporation adopted in pursuance of and in conformity with such laws constitute the charter of a corporation in this state. *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279 (62 N. W. 480).

——Construction in general.

15. (1901.) The charter or grant of franchise rights to a corporation is to be construed strictly, and a claim of exemption can not be sustained which is not in express terms granted or clearly implied from the terms of the grant. *Lincoln Street R. Co. v. City of Lincoln*, 61 Neb. 109 (84 N. W. 802).

——Filing articles of incorporation.

16. (1876.) In this state, the filing of articles of incorporation, with the county clerk, is a condition precedent to the existence of any corporate franchise. The law and the articles so filed, taken together, are considered in the nature of a grant from the state, and constitute the charter of the company. *Abbott v. Omaha Smelting Co.*, 4 Neb. 416.

17. (1894.) The Hastings Prospecting Company was organized for the purpose of boring for gas. Its articles of association fixed its principal place of business in Adams county, Nebraska. It did not file its articles of incorporation in the office of the county clerk of said Adams county. *Held*, That by such default it failed to become a corporation *de jure*. *Abbott v. Omaha Smelting & Refining Co.*, 4 Neb. 416, followed. *Capps & McCreary v. Hastings Prospecting Co.*, 40 Neb. 470 (58 N. W. 956; 42 Am. St. Rep. 677; 24 L. R. A. 259).

18. (1900.) The record of the articles of incorporation of a corporate body in office of county clerk, or a certified copy thereof, is primary proof of the right of the association to transact business. *Equitable Building & Loan Ass'n v. Bidwell*, 60 Neb. 169 (82 N. W. 384).

19. (1900.) Under section 126, chapter 16, Compiled Statutes, 1895, a corporation, previous to the commencement of any business, except its own organization, must file its articles of incorporation for record in the office of the county clerk in the county or counties in which the business is to be transacted. *Equitable Building & Loan Ass'n v. Bidwell*, 60 Neb. 169 (82 N. W. 384).

Special charters.

20. (1901.) Under the constitution and laws of this state, special charters to corporations, with the exceptions mentioned, are prohibited. Corporations receive their franchises only by general law, and are subject to all the legal rules and statutes as to the reserve power of the lawmaking body of alteration and amendment; the laws of the state and the articles of incorporation are considered in the nature of a grant and constitute the charter of the company. *Lincoln Street R. Co. v. City of Lincoln*, 61 Neb. 109 (84 N. W. 802).

Fraudulent incorporation.

21. (1902.) The question of whether or not the incorporation of Hubbard Bros. Company was fraudulent, *held*, to depend upon whether or not the $5,000 indebtedness of Hubbard Bros., a partnership, to Enoch Hubbard, whose payment was the main object of incorporating, was *bona fide*. *McNerney v. Hubbard*, 3 Unof. 108 (93 N. W. 1123).

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Incorporation of partnership.

22. (1906.) Where a corporation is organized by the members of an existing partnership and a third person, who contributes the funds necessary to properly finance the new enterprise, and receives therefor his agreed proportionate share of its capital stock, the partners contributing thereto the stock in trade, bills receivable and real estate of the firm, for which they receive their proportionate share of such capital stock, in the absence of fraud, the new corporation cannot be said to be a mere continuation of the old firm. *Baker Furniture Co. v. Hall*, 76 Neb. 93 (111 N. W. 129).

23. (1906.) A corporation organized for the sole purpose of continuing the business of a partnership firm, which takes over to itself the ownership and control of the assets thereof, thereby assumes the debts of such firm to the extent of the property so received. *Baker Furniture Co. v. Hall*, 76 Neb. 88 (107 N. W. 117).

24. (1906.) To render a newly organized corporation liable for the debts of an established corporation or firm to whose business and property it has succeeded, it should, in the absence of a special agreement to assume such liabilities, affirmatively appear from the pleadings and proof that the transaction in question is fraudulent as to creditors, or that the circumstances attending the creation of the new and its succession to the business and property of the old corporation or partnership are of such character as to warrant the finding that it is a mere continuation of the old firm or corporation. *Baker Furniture Co. v. Hall*, 76 Neb. 93 (111 N. W. 129).

25. (1906.) If the new corporation takes all of the property of the old corporation or partnership, and pays for same entirely in its stock issued to the stockholders of the old corporation or members of the former partnership, the creditors of the former partnership or corporation may enforce their claims in equity against the interests of the former partners or stockholders, and a court of equity will seize such property rights in the hands of fraudulent grantees, as in other cases of fraudulent transfer of property, but an innocent purchaser in good faith, without notice, will be protected. A stockholder in the new corporation may be an innocent purchaser. *Baker Furniture Co. v. Hall*, 76 Neb. 93 (111 N. W. 129).

De facto corporations.

26. (1893.) Where there was a substantial compliance with the law requiring the articles of incorporation to be filed and published, mere defects, even if they existed, did not render the articles void, and it was *held* that the company was a *de facto* corporation. *Porter v. Sherman County Banking Co.*, 36 Neb. 271 (54 N. W. 424).

27. (1894.) An organization which attempts in good faith to incorporate a body under lawful authority and exercises corporate functions is a corporatinn *de facto*, and the legal existence thereof cannot ordinarily be attacked collaterally. *Haas v. Bank of Commerce*, 41 Neb. 754 (60 N. W. 85).

28. (1899.) An unincorporated bank, exclusively owned by one person, is not a corporation *de facto*, though the business be conducted by a president and cashier. *Longfellow v. Barnard*, 59 Neb. 455 (81 N. W 307).

29. (1904.) Where the law authorizes a corporation and there has been an attempt in good faith to organize, and the requirements of the statute have been colorably complied with and corporate functions thereafter exercised, there exists a corporation *de facto*, which cannot ordinarily be called in question collaterally. *Lusk v. Riggs*, 70 Neb. 718 (102 N. W. 88).

Collateral attack.

30. (1878.) Though a corporation may be so defective as to render the franchise wholly invalid in a proceeding against it by the state, still its corporate existence, when acting under color of a franchise, cannot be questioned in a suit where it would arise collaterally. *Lincoln Building & Savings Ass'n v. Graham*, 7 Neb. 173.

31. (1895.) Where parties in good faith organized as a corporation and substantially complied with the conditions prescribed as precedent to the commencement of business by the law governing the formation of corporations, such as the adoption of articles of incorporation and filing the same with the county clerk of the county in which the business was to be conducted, and have entered upon the discharge of corporate functions and so continued for a considerable length of time, although if challenged by the state in a proper proceeding it might be declared illegal, such organization was not vulnerable to a collateral attack by a person who contracted with it in its corporate capacity and

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thus acknowledged and recognized its corporate existence, the object of such attack being to recover upon the contract, against the stockholders of the corporation individually, or to render them liable thereon as members of an unincorporated association or partnership. *Kleckner v. Turk*, 45 Neb. 176 (63 N. W. 469).

32. (1896.) Where a corporation has had a *de facto* existence for a considerable time, its corporate character cannot be collaterally assailed by persons contracting with it in such capacity, relying upon its corporate credit, in order to hold stockholders thereof individually liable on account of the failure to observe the statutory requirements essential to constitute it a technical *de jure* corporation. *Hogue v. Capital Nat. Bank*, 47 Neb. 929 (66 N. W. 1036).

33. (1901.) The legality of the organization of a *de facto* corporation cannot be called in question in a collateral proceeding. *Otoe County Fair & Driving Park Ass'n v. Doman*, 1 Unof. 179 (95 N. W. 327).

34. (1904.) Where a collection of persons claim to have organized themselves into a corporation, the invalidity of their organization may be shown, even when questioned collaterally, by evidence that no articles of incorporation were filed as required by statute. *Lusk v. Riggs*, 70 Neb. 713 (97 N. W. 1033). [Overruled. 70 Neb. 718.]

II. CORPORATE EXISTENCE AND FRANCHISE.

Estoppel to deny corporate existence.

35. (1891.) The maker of a note, payable to a bank, cannot, in an action on the note, raise the question of the incorporation of the bank. *Exchange Nat. Bank v. Capps*, 32 Neb. 242 (49 N. W. 223; 29 Am. St. Rep. 433).

36. (1894.) Persons subscribing for the stock of an association, then acting as and assuming to be a corporation, are estopped in a suit on such subscription from questioning the legal existence of such corporation. *Capps & McCreary v. Hasting Prospecting Co.*, 40 Neb. 470 (58 N. W. 956; 42 Am. St. Rep. 677; 24 L. R. A. 259).

37. (1894.) A subscription of stock to preliminary articles of association, not purporting to be a contract with an existing corporation, does not estop the subscriber from afterwards denying the legal existence of the corporation in a suit by the alleged corporation upon the subscription. *Capps & McCreary v. Hastings Prospecting Co.*, 40 Neb. 470 (58 N. W. 956; 42 Am. St. Rep. 677; 24 L. R. A. 259).

38. (1896.) When a party contracts with, sues, and obtains judgment against an imperfectly organized corporation, he is estopped from denying its corporate existence, and is precluded from recovering from its members individually, as if they were partners, upon the same indebtedness. *Nebraska Nat. Bank of York v. Ferguson*, 49 Neb. 109 (68 N. W. 370; 59 Am. St. Rep. 522).

39. (1896.) Where one enters into a contract with a body acting as a corporation, he is estopped from denying its corporate existence when sued on the contract. *Livingston Loan & Building Ass'n v. Drummond*, 49 Neb. 200 (68 N. W. 375).

40. (1900.) One who has entered into a contract with a body assuming to act as a corporation, is not permitted, when sued on such contract, to question the capacity of such body to contract or to sue. *Equitable Building & Loan Ass'n v. Bidwell*, 60 Neb. 169 (82 N. W. 384).

41. (1901.) Where one had dealt with a company in its corporate name, he cannot set up as a defense to an action to reform a deed the plaintiff's want of legal existence. *Otoe County Fair & Driving Park Ass'n v. Doman*, 1 Unof. 179 (95 N. W. 327).

42. (1901.) One who has entered into a contract with a body of men acting as a corporation cannot, when sued on such contract, be heard to plead the want of legal organization of such corporation. *Crete Building & Loan Ass'n v. Patz*, 1 Unof. 768 (95 N. W. 793).

43. (1906.) When the required number of individuals attempt in good faith to organize a corporation, and for that purpose sign articles of incorporation which contain substantially the provisions required by statute, and file the same with the county clerk of the proper county and proceed to do business as a corporation in the name adopted by the articles, one who transacts business with such company in its corporate name will not be allowed to deny its existence as a corporation *de facto*. *Lincoln Butter Co. v. Edwards-Bradford Lumber Co.*, 76 Neb. 477 (107 N. W. 797).

44. (1906.) If, in an action against the company in its corporate name, plaintiff attaches its property upon a claim arising

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from business transacted with the corporation, he will not be allowed to deny that the business of the company was conducted by it in its corporate capacity. *Lincoln Butter Co. v. Edwards-Bradford Lumber Co.*, 76 Neb. 477 (107 N. W. 797).

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Evidence of corporate existence.

45. (1876.) Where one of an association of persons, charged as partners, seeks relief from liability on the ground that such association is a corporation, legally organized, and doing a corporate business, the burden of proof rests on him to show the existence of such corporation. Failing to establish it, he cannot avoid liability on the ground that he does not appear as a subscriber to the capital stock of such association. *Abbott v. Omaha Smelting Co.*, 4 Neb. 416.

46. (1876.) To establish the existence of a corporation *de facto* a charter or some law under which the assumed powers are claimed to be conferred, and uses of the franchise thereby obtained, must be shown. *Abbott v. Omaha Smelting Co.*, 4 Neb. 416.

47. (1903.) It is sufficient for a corporation which seeks to defend upon the ground of a franchise to show that it is actually possessed of the franchise. Whether such franchise was acquired or is held rightfully, is to be determined only in a direct proceeding to oust the corporation or in a proceeding to which some one who claims a better title is a party. *Bronson v. Albion Telephone Co.*, 67 Neb. 111 (93 N. W. 201; 60 L. R. A. 609).

III. CORPORATE SEAL.

Right to use seal.

48. (1895.) Municipal and private corporations may, in absence of limitations express or implied, as an incident to their general corporate powers, adopt and use a common seal. *Board of Directors of Alfalfa Irrigation District v. Collins*, 46 Neb. 411 (64 N. W. 1086).

IV. CAPITAL STOCK AND DIVIDENDS.

Corporation stock as subject to garnishment, see *Garnishment*, §§ 16-18.

A. Subscription to Stock.

Liability of subscriber to stock of building and loan associations, see *Building and Loan Associations*, §§ 10, 11.

Estoppel of subscriber to deny corporate existence, see *ante*, §§ 36, 37.

Liability of creditors on unpaid subscriptions, see *post*, §§ 169-174.

Power of corporation to hold stock in other company, see *post*, §§ 266-268.

Contract of subscription.

49. (1894.) The plaintiffs in error were sued on a writing signed by them, as follows: "For the purpose of organizing a corporation * * * to bore for gas, we, the undersigned, agree to subscribe and pay for the amount of stock set opposite our names * * * within thirty days from the organization of said corporation." *Held*, That by this writing the plaintiffs in error promised to take and pay for stock of a corporation *de jure*, not of a corporation *de facto*, thereafter to be organized. *Capps & McCreary v. Hastings Prospecting Co.*, 40 Neb. 470 (58 N. W. 956; 42 Am. St. Rep. 677; 24 L. R. A. 259).

50. (1895.) A contract in writing whereby one agrees to purchase certain stock in a then forming corporation *held* to be a subscription to the capital stock of the corporation. *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279 (62 N. W. 480).

51. (1907.) Section 39, chapter 16, Compiled Statutes 1905, authorizing the opening of books for stock subscriptions, does not limit the right of individuals to subscribe for stock by special agreement for that purpose made either before or after the filing of the articles of incorporation. *Nebraska Chicory Co. v. Lednicky*, 79 Neb. 587 (113 N. W. 245).

52. (1907.) A contract to subscribe to the stock of a forming corporation is based upon a sufficient consideration. There is a mutuality of promise in the act of the particular subscriber in subscribing with others which obliges him to make good his promise to the corporation after it comes into existence. *Nebraska Chicory Co. v. Lednicky*, 79 Neb. 587 (113 N. W. 245).

53. (1907.) A subscription by a number of persons to the stock of a corporation, to be thereafter formed by them, constitutes a contract between the subscribers themselves to become stockholders when the corporation is formed, upon the conditions expressed in the agreement, and, as such, it is binding and irrevocable from the date of the subscription. *Nebraska Chicory Co. v. Lednicky*, 79 Neb. 587 (113 N. W. 245).

54. (1907.) A subscription to corporate shares, made before the corporation comes into existence, but accepted by the corpora-

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tion after coming into existence, either expressly by issuing the share certificates, or impliedly by recognizing the subscriber as a shareholder, makes him a shareholder, and the corporation may maintain an action upon the subscription against the signers. *Nebraska Chicory Co. v. Lednicky*, 79 Neb. 587 (113 N. W. 245).

55. (1902.) A claim upon a stock subscription payable on call of the directors does not accrue within the meaning of section 262, chapter 23, Compiled Statutes, until a call is made and that only for the amount of the call. *Estate of Fitzgerald v. Union Savings Bank*, 65 Neb. 97 (90 N. W. 994).

56. (1907.) Any agreement by which a person shows an intention to become a stockholder in a corporation is sufficient as a contract of subscription, as against both himself and the corporation. *Nebraska Chicory Co. v. Lednicky*, 79 Neb. 587 (113 N. W. 245).

Conditional subscriptions.

57. (1876.) Where a subscription is made to the capital stock of an insurance company, upon the condition that the same is not payable until a certain specified amount has been subscribed, such condition is a condition precedent, performance of which is essential before the company can enforce the payment of a note given for such subscription; nor will it avail the company that the condition is complied with after suit brought, but before the trial; the right to recover must exist at the time the action is commenced. *McCann v. American Central Ins. Co.*, 4 Neb. 256.

Withdrawal or cancelation.

58. (1896.) Mismanagement of the affairs of the corporation by its officers or agents does not warrant the withdrawal of stockholders or the repudiation of the obligations assumed by them. *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434 (67 N. W. 493).

59. (1896.) A stockholder who acted as a director of the corporation for three years and had notice of its business methods and financial condition, cannot, in a suit against it, recover the money he paid for his stock on the ground that his subscription was procured by fraud of defendant's agents. *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434 (67 N. W. 493).

Release or discharge.

60. (1896.) The mismanagement of the affairs of a corporation will not release a stockholder from his obligation to pay for the stock subscribed. *Hards v. Platte Valley Improvement Co.*, 46 Neb. 709 (65 N. W. 781).

Payment.

61. (1894.) An agreement made between promoters of a corporation and a subscriber to its stock, that such subscriber is to have the stock for the sake of the influence of his name, and that he will not be required to pay his subscription therefor, is void, and the corporation may enforce payment of such subscription, notwithstanding such agreement. *York Park Building Ass'n v. Barnes*, 39 Neb. 834 (58 N. W. 440).

62. (1895.) Subscriptions for stock of a corporation may be paid in money or in property such as is within the power of a corporation to acquire and hold, or in labor for the corporation in the proper furtherance of its purposes and business. *Gilkie & Anson Co. v. Dawson Town & Gas Co.*, 46 Neb. 333 (64 N. W. 1097).

63. (1895.) Where payment of subscriptions for stock is made in property or labor, it must be of such value as to be the money's worth; if property, of the value of the amount of the par value of the stock; and if labor, it must be reasonably of the face value of the stock. *Gilkie & Anson Co. v. Dawson Town & Gas Co.*, 46 Neb. 333 (64 N. W. 1097).

64. (1895.) When property is conveyed to a corporation in payment of subscriptions for stock, it may be at a valuation agreed upon between the parties to the transaction, provided the valuation is one made in good faith or in the fair exercise of judgment and discretion honestly directed. *Gilkie & Anson Co. v. Dawson Town & Gas Co.*, 46 Neb. 333 (64 N. W. 1097).

65. (1895.) Where the property conveyed in payment for stock is knowingly and advisedly overvalued, it is but a formal and illusory compliance with the requirements of the law and fair dealing in this regard and is not sufficient, and the transaction may be impeached by a creditor of the corporation as a fraud, and the liability of the subscriber for stock, to the amount of the difference between the fair and true value of the property at the time it was conveyed and the fictitious value at which it was received, be enforced against such subscriber as an unpaid portion of his subscription to the stock and appropriated, in a proper action, to the satisfaction of the debts of the corporation.

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Gilkie & Anson Co. v. Dawson Town & Gas Co., 46 Neb. 333 (64 N. W. 1097).

66. (1895.) In an action against a corporation to impeach a transfer of stock to stockholders for property of a fictitious value, and hold the stockholders liable for the unpaid stock on judgment debts, an amended petition setting out additional defendant stockholders and the transfer of stock for overvalued property is sufficient in its statements of the fraudulent character of the transactions. *Gilkie & Anson Co. v. Dawson Town & Gas Co.*, 46 Neb. 333 (64 N. W. 1097).

67. (1895.) The books of a corporation are its private books, as to third persons, and such persons are not chargeable with notice of what is contained therein, nor with the duty of examining them for the purpose of ascertaining the condition of the capital stock in respect to whether fully paid in or not and at what valuation, before granting credit to the corporation, to the extent that a failure to do so will bar the right to a proper action to impeach the transfer of stock to a party in consideration of the conveyance of corporate property, which may be shown in the books, and prove its fraudulent character. *Gilkie & Anson Co. v. Dawson Town & Gas Co.*, 46 Neb. 333 (64 N. W. 1097).

68. (1898.) A purchaser of stock from one who fully paid for it in property cannot be held liable to creditors of the corporation solely on the theory that the property thus received in payment was accepted at too high a valuation. *Troup v. Horbach*, 53 Neb. 795 (74 N. W. 326).

69. (1898.) Owners of property have a right, in disposing of it, to place such valuation thereon as they see fit; and if, with such property at an overvaluation, they pay for capital stock issued to them by a corporation, the excess above the real value of the property cannot subsequently be treated by creditors of the corporation as never having been paid, in the absence of fraud, misrepresentation, suppression of the truth, and the violation of the obligations of law or morality, express or implied. *Troup v. Horbach*, 53 Neb. 795 (74 N. W. 326).

70. (1898.) In an action to hold liable to creditors of a corporation certain of its stockholders because, as found by the court, the property conveyed by such stockholders in payment for their stock was greatly overvalued, a judgment against the stockholders was improperly rendered in view of the further finding that defendants acted in good faith. *Penfield v. Dawson Town & Gas Co.*, 57 Neb. 231 (77 N. W. 672).

Forfeiture of stock.

71. (1876.) A corporation has no authority to declare a forfeiture of, and sell the shares of, its capital stock for the nonpayment of assessments levied thereon, unless specially authorized so to do by its charter. *Williams v. Lowe*, 4 Neb. 382.

Actions on assessments or subscriptions.

Creditor's right to enforce liability for unpaid subscription, see *post*, §§ 151-220.

72. (1876.) When the subscription contract or charter of a corporation specifically fixes the capital stock at a certain amount, divided into shares of a certain amount each, the capital so fixed must be fully subscribed before an action will lie against a subscriber to recover assessments, unless there is a waiver of such condition precedent. *Livesey v. Omaha Hotel Co.*, 5 Neb. 50; (1897) *Macfarland v. West Side Improvement Ass'n*, 53 Neb. 417 (73 N. W. 736).

73. (1891.) A banking organization in Franklin county proposed to move to Grand Island and organize there with a capital stock of $125,000, and erect a business house of a certain description on a lot designated, provided that R. and other persons would subscribe $30,000 to the capital stock. $35,000 were, in fact, subscribed by R. and others. In an action by the bank against R., the facts were stated, together with the contract of R. and others, and it was alleged that the bank had duly performed all the conditions on its part to be performed. *Held*, That the petition stated a cause of action against R. *Security State Bank v. Raine*, 31 Neb. 517 (48 N. W. 262).

74. (1892.) When there is testimony in the record which tends to show that the defendant waived the conditions of the contract in respect to the amount of stock to be subscribed before entering upon the main purpose of the corporation, viz., the construction of a public hall, this should have been submitted to the jury. *Hards v. Platte Valley Improvement Co.*, 35 Neb. 263 (53 N. W. 73).

75. (1892.) In an action on the subscription to corporation stock, evidence *held* to sustain a finding for plaintiff. *Hays v. Franklin County Lumber Co.*, 35 Neb. 511 (53 N. W. 381).

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76. (1894.) One to whom stock is issued, who pays assessments thereon, acts as an officer and takes part in management of corporation, is estopped to deny his subscription. *York Park Building Ass'n v. Barnes*, 39 Neb. 834 (58 N. W. 440).

77. (1896.) In an action by a corporation against a stockholder, who defends on the ground of a misrepresentation as to the number of subscribers to stock already obtained, evidence that shows there are more subscribers than required by the representation, and no evidence that any were not *bona fide* purchasers, justifies a direction of the verdict for plaintiff. *Hards v. Platte Valley Improvement Co.*, 46 Neb. 709 (65 N. W. 781).

78. (1896.) Where a defendant in a suit on a subscription files a counter-claim alleging that he was induced to subscribe through a promise that capital stock to the amount subscribed would be isued to him, he must aver payment or tender before he can claim anything by reason of plaintiff's failure to issue the stock. *Nebraska Exposition Ass'n v. Townley*, 46 Neb. 893 (65 N. W. 1062).

79. (1897.) One who acts as treasurer of a corporation, receives payment of assessments from other subscribers, himself pays certain assessments and disburses the funds of the corporation in carrying out its main objects, is estopped to set up that the stock has not all been subscribed, although at the time of such act he was ignorant of the deficiency. *Macfarland v. West Side Improvement Ass'n*, 53 Neb. 417 (73 N. W. 736).

80. (1897.) One elected treasurer of a corporation, who with the consent of its promoters permits an agent to perform all the active duties of the office, but in the name of the treasurer, is responsible for the consequences of the agent's acts as if they were his own. and is charged with notice of all facts learned by the agent by reason of his performance of such duties. *Macfarland v. West Side Improvement Ass'n*, 53 Neb. 417 (73 N. W. 736).

81. (1898.) When the directory of a corporation, before it is put into the hands of a receiver, makes a call or assessment on the stock subscribers for all or a part of their unpaid stock subscriptions, such calls become at once corporate property or assets of the corporation and may be sued for and collected by a receiver subsequently appointed as any other asset of the corporation. *Wyman v. Williams*, 53 Neb. 670 (74 N. W. 48).

82. (1898.) In an action on subscription to the stock of a banking corporation evidence showing the same was obtained by fraud in fraudulently representing that a certain other had subscribed sustains a verdict for defendant. *Gretna State Bank v. Grabow*, 54 Neb. 547 (74 N. W. 956).

83. (1898.) Where, in a suit by a corporation against a subscriber to its stock to recover his unpaid subscription, the defense is that the entire capital stock was not subscribed, a reply which avers that the defendant waived the non-payment of the entire stock is good as against a demurrer. Such a plea is not a conclusion of law, but the averment of an ultimate fact, included in which are all the ingredients which constitute waiver. *Macfarland v. West Side Improvement Ass'n*, 56 Neb. 277 (76 N. W. 584).

84. (1898.) In an action by a corporation against subscribers to its stock to recover unpaid subscription, where the defense is that the entire capital stock was not subscribed and a reply that defendants waived such non-payment under such a plea the acts and omissions of the defendant which tend to show or from which may be inferred, an intention on his part to waive subscription of the entire capital stock are competent and relevant. *Macfarland v. West Side Improvement Ass'n*, 56 Neb. 277 (76 N. W. 584).

85. (1902.) If made in good faith for the purpose of the corporation, stockholders when sued upon their subscription, cannot question the necessity of or occasion for a call. The necessity or advisability of making it rests entirely with the directors or officers of the corporation to whom the power has been entrusted. *Estate of Fitzgerald v. Union Savings Bank*, 65 Neb. 97 (90 N. W. 994).

——— Conditions precedent.

86. (1876.) When the subscription contract or charter of a corporation specifically fixes the capital stock at a certain amount, divided into shares of a certain amount each, the capital so fixed must be fully subscribed before an action will lie against a subscriber to recover assessments. *Livesey v. Omaha Hotel Co.*, 5 Neb. 50.

87. (1884.) Where articles of incorporation fix the amount of the capital stock,

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the entire amount must be subscribed before a stockholder is liable to assessment for the accomplishment of the main object of the corporation unless the articles otherwise provide, or there is a waiver of the conditions. *Hale v. Sanborn & Follett*, 16 Neb. 1 (20 N. W. 97).

88. (1892.) Unless otherwise provided, the whole amount of capital fixed by a subscription contract must be fully secured by a *bona fide* subscription before an action will lie upon the personal contract of a subscriber to recover an assesment on the several shares. *Hards v. Platte Valley Improvement Co.*, 35 Neb. 263 (53 N. W. 73).

89. (1895.) The fact that all the stock authorized by the articles of incorporation of a manufacturing company formed under sections 37, 38, and 39, chapter 16, Compiled Statutes 1893, entitled "Corporations," has not been subscribed, is not a defense to a subscriber for part of such stock when sued on his contract of subscription, if ten per cent. of the stock of such manufacturing corporation has been subscribed. *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279 (62 N. W. 480).

90. (1895.) The fact that all of the stock authorized by the articles of a corporation has not been subscribed is not a fense to an action on a contract of subscription of stock. *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279 (62 N. W. 480).

91. (1897.) The capital stock of a corporation must be fully subscribed before an action will lie against a subscriber to recover assessments thereon, unless by law or charter provision the corporation is permitted to proceed with its main design with a less subscription. A subscriber may, however, by his conduct, either waive or estop himself from setting up such a defense. *Macfarland v. West Side Improvement Ass'n*, 53 Neb. 417 (73 N. W. 736).

92. (1898. A suit by the receiver of a corporation against subscribers to its stock to recover their unpaid stock subscriptions will not lie until the amount justly due from the corporation has been ascertained and the corporate property exhausted. *Wyman v. Williams*, 53 Neb. 670 (74 N. W. 48).

Liability of corporation on subscription.

93. (1896.) Under a subscription contract with builders for the construction of a factory for operation by a company to be incorporated by the subscribers whose liability was several, it was *held* that the corporation was not liable on the contract, and that the builders could not enforce a mechanic's lien for the amount of the unpaid subscriptions. *Davis v. Ravenna Creamery Co.*, 48 Neb. 471 (67 N. W. 436).

B. Issue of Certificate.

Fraudulent issue.

94. (1892.) A fraudulent issue of stock in corporation to one of the directors, by the secretary, to give his control thereof, is illegal and will be enjoined. *Humboldt Driving Park Ass'n v. Stevens*, 34 Neb. 528 (52 N. W. 568; 33 Am. St. Rep. 654).

Waiver of right to allege invalidity.

95. (1897.) Stock in a bank was issued to A, who pledged it as collateral security to a loan procured from another bank. The bank issuing the stock accepted a surrender of the certificate and issued a new one in its place to the cashier of the bank. *Held*, That it thereby waived any right it might have had to rescind its contract with the original holder and cancel the stock on the ground of fraud in its procurement. *Tecumseh Nat. Bank v. Russell*, 50 Neb. 277 (69 N. W. 763).

Ratification of unauthorized issue.

96. (1878.) O., the president of a bank, informed one R. that they were about to reorganize the bank, and that, if he would act as director thereof, and his firm would give the bank all their business as they had done before, and use their influence in its behalf, they would give him ten shares of the stock. R. accepted the proposition and was elected and served as a director, and the firm of which he was a member continued to do business with the bank. *Held*, That the agreement was a sufficient consideration to entitle R. to the ten shares of stock; and that the president professing to act for the bank in the transaction, and the bank receiving the benefits derived from the contract, thereby ratified his action. *Rich v. State Nat. Bank*, 7 Neb. 201 (29 Am. Rep. 382).

C. Transfer of Shares.

Effect on right to dividend, see *post*, § 120.

In general.

97. (1876.) Stock of a corporation, being the separate property of the individual, is, in a legal sense, personal property; it may be sold by the owner of it; it may be conveyed by will, and it may descend from an intestate to the administrator. *Williams v. Lowe*, 4 Neb. 382.

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Requisites of contract.

98. (1902.) A contract for the purchase of certain shares of stock in a corporation and for the repurchase of the same upon the happening of a certain event, where it has been fully performed by one of the parties thereto, is not within the statute of frauds. *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370 (91 N. W. 376).

99. (1907.) Where by reason of an agreement made by the president of a bank with a proposed purchaser of its stock that the bank will accept certain notes and mortgages held by him, amounting to the face value of said stock, in payment therefor, and that if such purchase is made he will hold the purchaser harmless and indemnify him against any action of the bank to recover any further or other amount either on his indorsement of said notes or otherwise, in payment for said stock, the bank stock is actually purchased and paid for, according to its terms, such purchase is a sufficient consideration to support the agreement. *Patrick v. Barker*, 78 Neb. 823 (112 N. W. 358).

Regulation by corporation.

100. (1907.) Section 124, chapter 16, Compiled Statutes 1905, is not only definitive of the general powers of a corporation, but is also expressive of certain corporate qualities or properties, or consequences which follow the act of incorporation. The fifth clause of that section, which purports to give a corporation the power "to render the interest of the stockholders transferable," was not intended to make the transferability of stock dependent on some affirmative act of the corporation authorizing its transfer, but to impress the stock with that quality as a consequence of the act of incorporation. *Miller v. Farmers Milling & Elevator Co.*, 78 Neb. 441 (110 N. W. 995).

101. (1907.) The regulation of stock transfers is a legitimate subject of corporate legislation, in the form of by-laws, to enable the corporation to know who are stockholders, to whom dividends are payable, who are entitled to vote, and, where the company has a lien on the stock for debts due to it from the stockholders, to enable it to prevent a transfer in derogation of its rights. *Miller v. Farmers Milling & Elevator Co.*, 78 Neb. 441 (110 N. W. 995).

102. (1907.) Corporate legislation in the form of by-laws regulating stock transfers will not be enforced beyond what is reasonably necessary to serve such purposes, where its enforcement would operate as an infringement on the property rights of others, or as an unreasonable restraint upon the transfer of property in the stock of the corporation. *Miller v. Farmers Milling & Elevator Co.*, 78 Neb. 441 (110 N. W. 995).

103. (1907.) A by-law of a corporation organized under the laws of this state which limits the number of shares which a person may hold, or forbids a transfer of stock by a stockholder to a non-stockholder without the consent of the directors, is void as an unreasonable restriction upon the transfer of property. *Miller v. Farmers Milling & Elevator Co.*, 78 Neb. 441 (110 N. W. 995).

Title and rights of purchaser.

104. (1897.) One claiming stock by purchase from a cashier who wrongfully used the funds of his bank to buy the stock, *held*, under evidence set out in opinion, not an innocent purchaser for value. *Tecumseh Nat. Bank v. Russell*, 50 Neb. 277 (69 N. W. 763).

105. (1903.) If the debtor has sold or pledged corporate stock owned by him, in good faith before the levy on such stock by garnishment, the right of such *bona fide* purchasers will not be affected by the levy, even though, by the books of the corporation, the stock appears to be the property of the debtor and is so regarded by the corporation. *Farmers & Merchants Nat. Bank v. Mosher*, 68 Neb. 724 (100 N. W. 133).

Fraud.

106. (1894.) Where an officer of a corporation knows the secretary's report is false and induces one who relies upon it to make a purchase of corporate stock on the faith of the report, the purchaser may have the contract canceled. *Foley v. Holtry*, 43 Neb. 133 (61 N. W. 120).

107. (1899.) Assuming it to be the right of a stockholder to examine the books of the company, it is not, as a matter of law, his duty to do so, after becoming a stockholder, to ascertain whether or not he has been defrauded in the purchase, he not being aware of any fact leading to a suspicion. *Gerner v. Mosher*, 58 Neb. 135 (78 N. W. 384; 46 L. R. A. 244).

Sale by corporation.

108. (1902.) A corporation, when not prohibited by its articles or by statute, may buy and sell its own stock and hold, reissue

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or retire the same, provided such act is done in entire good faith and in no manner injures the rights of its creditors or its stockholders. *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370 (91 N. W. 376).

109. (1903.) The general manager of a corporation in effectuating a sale of the entire capital stock of his company, acts as the agent of all stockholders, and he cannot receive and retain a secret compensation from the vendee for effectuating the contract of sale. *Barber v. Martin*, 67 Neb 445 (93 N. W. 722).

110. (1903.) In an action by a stockholder against the manager of an insurance company, charging the manager, as agent, with fraudulently concealing from plaintiff the actual consideration received for plaintiff's stock, sold by him as agent, evidence of representations made to other stockholders similarly situated is admissible when such representations are so related in character and point of time as to furnish a basis for a reasonable inference as to the main issue. *Barber v. Martin*, 67 Neb. 445 (93 N. W. 722).

111. (1903.) Where the evidence shows conclusively that all the negotiations for the purchase of the capital stock of an insurance company contemplated all the stock, it is not error to exclude, on cross-examination, the statement of a witness, who was the vendee, as to what he would have given per share for less than all the stock. *Barber v. Martin*, 67 Neb. 445 (93 N. W. 722).

Guaranty of resale.

112. (1897.) One who purchased stock in a corporation under a guaranty that it could be resold for $3,000 within a year, *held* not required to submit to the guarantor for acceptance or rejection all offers received during that time. *Lobeck v. Duke*, 50 Neb. 568 (70 N. W. 36).

113. (1897.) Where defendant sold stock in a corporation to plaintiff, and guaranteed that it could be sold within a year for $3.000, and there was evidence tending to show exchanges of property for other stock in the same corporation during the year, it was proper to instruct the jury that the agreement contemplated a sale for money, and that D. was not required to make any efforts to exchange it for other property. *Lobeck v. Duke*, 50 Neb. 568 (70 N. W. 36).

114. (1902.) A contract with a corporation by which it sells certain of its shares of stock and agrees to repurchase the same upon the happening of a certain specified event is not *ultra vires;* and for a breach thereof the purchaser may recover of the corporation the amount agreed upon as the price of such repurchase. *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370 (91 N. W. 376).

Registration of transfer on corporate books.

115. 1891.) Although an assignment of bank stock as collateral was not entered upon the books of the corporation, as required, yet where the officers of the corporation had actual notice of such assignment, the bank is liable to the assignee for dividends, payment to the assignor being no defense. *Central Nebraska Nat. Bank v. Wilder*, 32 Neb. 454 (49 N. W. 369).

116. (1905.) When under its by-laws or under a statute it is necessary that the transfer of the stock be made on its books, and the corporation wrongfully refuses to make the transfer, such refusal is a conversion of the stock. *Herrick v. Humphrey Hardware Co.*, 73 Neb. 809 (103 N. W. 685).

Action for purchase price.

117. (1898.) To maintain an action at law for the purchase price of corporation stock plaintiff, ordinarily, must plead and prove a delivery or tender of such stock before the bringing of his suit. *Bartlett v Scott*, 55 Neb. 477 (75 N. W. 1102).

Judicial sales.

118. (1876.) A sale of shares of stocks in a ferry company under a decree *pro confesso* to subject them to the payment of an assessment thereon where the charter of the company gave it no authority so to do, is void. *Williams v. Lowe*, 4 Neb. 382.

Enjoining transfer.

119. (1901.) The transfer of shares of stock of a corporation may be enjoined at the suit of the owner when a bank of another state has wrongfully received the certificates of stock in pledge from one not the owner thereof, and not authorized to so pledge the same, and in attempting to have the stock transferred to the bank as the owner thereof upon the books of the corporation. *Reynolds v. Touzalin Improvement Co.*, 62 Neb. 236 (87 N. W. 24).

D. Dividends and New Stock.

Allowance of unpaid dividends on foreclosure by building and loan association, see *Building and Loan Associations*, §§ 48-53.

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Effect of pledge or sale of stock.

120. (1901.) The vendee or pledgee of shares of stock in a corporation is entitled to all dividends which are declared on the stock after the sale or pledge, regardless whether the transfer has been made upon the books of the corporation. *Farmers & Merchants Bank v. Mosher*, 63 Neb. 130 (88 N. W. 522).

Effect of garnishment of corporation.

121. (1903.) A stockholder's interest in a corporation, and in all of its property and rights, is represented by his stock. A levy upon the stock of a debtor by garnishment of the corporation pursuant to the statute will impound dividends upon the stock declared while the proceedings are pending. *Farmers & Merchants Nat. Bank v. Mosher*, 68 Neb. 724 (100 N. W. 133).

Assignment of dividends.

122. (1895.) Dividends declared by a corporation upon shares of its stock belong to the parties in whose names the shares of stock are registered in the books of the corporation at the time the dividends are declared, but such dividends may be made the subject of a valid contract in like manner and to the same extent as other personal property. *Cook v. Monroe*, 45 Neb. 349 (63 N. W. 800).

Preference in purchase of new stock.

123. (1892.) A corporation can issue its stock only by direction of the corporation, and unless there are stipulations in its charter to the contrary, its stockholders are entitled *pro rata* to a preference in the purchase of the new stock. *Humboldt Driving Park Ass'n v. Stevens*, 34 Neb. 528 (52 N. W. 568; 33 Am. St. Rep. 654).

V. MEMBERS AND STOCKHOLDERS.

Right of stockholders of railroad to repudiate sale of property, see *Railroads*, § 155.

Power of corporation to hold stock in another company, see *post*, §§ 266-268.

Representation of corporation by stockholders, see *post*, §§ 274, 275.

A. Rights and Liabilities to Corporations.

Corporate property.

124. (1903.) Stockholders, as such, have no title to the corporate property which they may convey or incumber in their own name; but this is only another way of saying that the corporation must act through its proper agents, and in the prescribed way. *Home Fire Ins. Co. v. Barber*, 67 Neb. 644 (93 N. W. 1024; 108 Am. St. Rep. 716; 60 L. R. A. 927).

——— Garnishment of corporation.

125. (1901.) The real and not the apparent interest of a stockholder in the property of the corporation represented by shares of stock registered in his name, may be reached by garnishee process served on the corporation. *Farmers & Merchants Nat. Bank v. Mosher*, 63 Neb. 130 (88 N. W. 552).

126. (1901.) The real actual rights and interests of a stockholder, will be reached by the garnishment upon the corporation without regard to the appearent interest of the owner. *Farmers & Merchants Nat. Bank v. Mosher*, 63 Neb. 130 (88 N. W. 552).

Dues and assessments.

127. (1898.) The charter of the Omaha Law Library association examined, and *held* to confer authority on the board of directors of the corporation to enact a by-law imposing on annual due on each of its stockholders. *Omaha Law Library Ass'n v. Connell*, 55 Neb. 396 (75 N. W. 837).

128. (1898.) The by-laws of the Omaha Law Library Association examined, and *held* not to attempt an assessment of the stock of the corporation. *Omaha Law Library Ass'n v. Connell*, 55 Neb. 396 (75 N. W. 837).

129. (1898.) An assessment, as that term is understood in corporation law, is a levy made upon the stock of the corporation requiring the stockholder to pay in proportion to the amount of stock owned by him. *Omaha Law Library Ass'n v. Connell*, 55 Neb. 396 (75 N. W. 837).

130. (1899.) In absence of statutory authority or power given by articles of incorporation there can be no assessment against paid-up stock. *Enterprise Ditch Co. v. Moffitt*, 58 Neb. 642 (79 N. W. 560; 76 Am. St. Rep. 122; 45 L. R. A. 647*n*).

131. (1899.) The fully paid-up stock of a corporation is the personal property of the owner. and the articles of incorporation and laws of the state are elemental of the contract existing between the corporation and the owner of stock, and may not be so amended by legislative enactment as to make the paid-up stock subject to an assessment or general or specific assessments, and forfeitable, or subject to summary sale by the corporation, for the non-payment of

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such assessment. *Enterprise Ditch Co. v. Moffitt*, 58 Neb. 642 (79 N. W. 560; 76 Am. St. Rep. 122; 45 L. R. A. 647*n*).

132. (1906.) Where corporate stock is fully paid up, an assessment levied thereon, as provided for by the articles of incorporation and stock certificate, and levied by a board of which the objecting stockholder was a member, is valid and enforceable. *Mirage Irrigation Co. v. Sturgeon*, 77 Neb. 175 (108 N. W. 977).

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Rights of corporation as creditor of stockholder.

133. (1905.) A corporation has no lien upon the shares of its stockholders for debts due from them to the company, unless such lien is provided for by statute or by the charter or by-laws of the corporation. *Herrick v. Humphrey Hardware Co.*, 73 Neb. 809 (103 N. W. 685).

133*a*. (1907.) Where a stockholder in a bank which is in process of liquidation, who is indebted to the bank, refuses to pay his indebtedness and litigates the question, thereby preventing the distribution of funds on hand, and the litigation is determined adversely to him, he should be charged with interest upon the amount of his indebtedness, as found by the court, down to the time of the entry of judgment, regardless of the fact of the existence of such funds. *Gund v. Ballard*, 80 Neb. 385 (114 N. W. 420).

B. Meetings.

Election of officers, see *post*, §§ 221-224.

Calling meeting.

134. (1903.) Whether less than a majority of the shares of stock in a corporation having a fixed capital stock, divided into a definite number of shares, may hold a valid meeting and bind the corporation, in the absence of any rule upon the subject, left undecided. *Haskell v. Read*, 68 Neb. 115 (96 N. W. 1007).

135. (1903.) Whatever may be the rule in case of stated meetings, or those regularly called or convened, a minority of the shares, after failure of the stated meeting for election of officers, cannot call a new meeting on their own authority and hold a valid election. *Haskell v. Read*, 68 Neb. 115 (96 N. W. 1007).

Right to vote.

136. (1898.) *Prima facie*, at least, the right to vote stock does not exist until it has been registered in the name of the person seeking to vote it. *Reynolds v. Bridenthal*, 57 Neb. 280 (77 N. W. 658).

137. (1903.) As a general rule the right to vote pledged shares of stock remains in the pledgor until foreclosure. *Haskell v. Read*, 68 Neb. 107 (93 N. W. 997).

138. (1903.) It is not necessary that a stockholder shall have paid for his stock in full to enable him to vote all his shares at an election. *Haskell v. Read*, 68 Neb. 107 (93 N. W. 997).

139. (1903.) Whatever might be the rule as to a *bona fide* purchaser of or subscriber for an overissue of shares of stock, one who procures the overissue without consideration, by false representations, will not be heard to assert that a stockholder who voted therefor, relying on such representations, is estopped to question the validity of the shares. *Haskell v. Read*, 68 Neb. 107 (93 N. W. 997).

140. (1903.) A stockholder may maintain a suit to enjoin the holder of shares issued in excess of the amount authorized by the articles of incorporation, and without consideration, from voting such shares in prejudice of his rights, and to procure cancelation thereof. *Haskell v. Read*, 68 Neb. 107 (93 N. W. 997).

141. (1903.) The officers of a corporation, in conducting an election, will not look behind the books of the corporation which show who are registered as stockholders; but a court of equity may do so, and may enjoin a pledgee from voting the shares pledged in prejudice of the rights of the pledgor. *Haskell v Read*, 68 Neb. 107 (93 N. W. 997).

C. Suing or Defending on Behalf of Corporation.

Right in general.

142. (1900.) A corporation holds its property in trust for its shareholders who, like other beneficial owners, may insist that it shall be properly managed and preserved from waste. *State, ex rel. Bugbee, v. Holmes*, 60 Neb. 39 (82 N. W. 109).

143. (1900.) Where the officers of a corporation fail and refuse to protect and conserve the corporate property, the shareholders may intervene in pending suits for the purpose of protecting their own interests. *State, ex rel. Bugbee, v. Holmes*, 60 Neb. 39 (82 N. W. 109).

Action to set aside conveyance by corporation.

144. (1881.) A stockholder in a corporation has a remedy in chancery against individuals, in whatever character they pro-

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fess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law. Such an action lies to set aside conveyances made by officers of the company to defendants in fraud of the stockholders. *Wilcox v. Bickel*, 11 Neb. 154 (8 N. W. 436).

145. (1903.) The minority stockholders can maintain an action in their own names to set aside an illegal transfer of all property and good will of the corporation, when such transfer is made by the board of directors of the corporation pursuant to instructions of the majority of the stockholders. *McLeod v. Lincoln Medical College*, 69 Neb. 555 (98 N. W. 672).

Conditions precedent.

146. (1894.) Any stockholder of a corporation, whose officers have abused their trust in the interest of another corporation, may without previous demand upon the directors to bring suit, maintain in his own name, in behalf of his corporation, an action for redress and for an accounting between the two corporation, impleading both as defendants. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374 (59 N. W. 838).

147. (1894.) Where the directors of a corporation having the authority to direct its litigation are themselves guilty of the wrong complained of, a court of equity will interfere at the instance of the stockholders without a demand and refusal upon the part of the directors to bring the suit, for it would be against the plainest principles of justice to permit the perpetrators of the wrong to conduct a litigation against themselves. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374 (59 N. W. 838).

Estoppel.

148. (1894.) Acquiescence by a stockholder will not bar a recovery in a suit brought by him, in behalf of a corporation, to recover for wrongs committed by its officers in the interest of another corporation. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374 (59 N. W. 838). [Overruled. 44 Neb. 463; 67 Neb. 644.]

Pleading.

149. (1881.) In a suit by stockholders to set aside an alleged fraudulent conveyance of the company's property by its officers to defendant, were it not for the alleged disorganized condition of the said corporation, it would be necessary for the petition to state that the plaintiff had first applied to the officers or managing directors of the company and demanded that proper proceedings be taken in the name of the corporation for the protection of the property, but the allegations of the petition to the effect that all of the officers of the company have absconded and their whereabouts unknown, etc., constitute a sufficient showing that it was impossible for the plaintiff to make such demand. *Wilcox v. Bickel*, 11 Neb. 154 (8 N. W. 436).

Burden of proof.

150. (1894.) In an action on behalf of a corporation to recover the discount at which certain bonds held by said corporation had been by its board of directors ostensibly authorized to be sold to the stockholders of said corporation, resulting, however, in such sale only to the individual directors who voted to authorize it. and to parties in privity with them in wrongfully making such sale, *held*, that the burden of proof strongly devolved upon the purchasers of said bonds at the discount authorized to show affirmatively that the price paid was the fair value of such bonds; and the proofs, as well as the finding of the trial court, having been adverse to such showing, *held further*, that the discount was properly recoverable. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374 (59 N. W. 838).

D. Liability for Corporate Dates and Acts.

Nature and grounds in general.

151. (1898.) Within the common-law rule there was no individual liability of stockholders in a corporation for its debts. Our constitution states and also limits the liability of a stockholder in a corporation for its debts. *Gorder v. Conner*, 56 Neb. 781 (77 N. W. 383).

Constitutional and statutory provisions.

152. (1896.) The provisions of section 7, article XI, of the constitution of Nebraska, designated "Corporations," that "every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities ac-

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cruing while he remains such stockholder," are enforceable without special supplementary statutory enactments. *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353 (68 N. W. 520).

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Contracts and securities for payment of corporate liabilities.

153. (1895.) An agreement by the creditors of an insolvent bank with the stockholders and officers thereof to discount their claims against the bank ten per cent, to throw off all interest after a certain date, and to extend the time of payment of the claims for a definite period, is a sufficient consideration for a bond given to a trustee of such creditors by such stockholders and officers to secure the payment of the indebtedness of the bank. *Mullen v. Morris*, 43 Neb. 596 (62 N. W. 74).

154. (1902.) Where the creditors of a bank agree to an extension of time of the payment of their claims on the condition, among others, that certain of the stockholders of the bank shall secure the payment of such claims by the execution of a trust deed to real estate, the grantors in such deeds cannot, by an agreement among themselves and without the consent of the creditors, determine the order in which the trust property shall be sold, or compel the creditors to exhaust the property of one before that of another is resorted to. *Michigan Trust Co. v. City of Red Cloud*, 3 Unof. 722 (92 N. W. 900).

Failure to publish list of indebtedness.

Judgment and execution against corporation as condition precedent, see *post*, §§ 182-191.

155. (1878.) Where the president and a majority of the board of directors of a corporation fail to make and publish the notice required by the statute, of all the existing debts of the corporation, the stockholders will be jointly and severally liable for all debts contracted by such corporation, while the officers are thus in default. *Smith v. Steele*, 8 Neb. 115.

156. (1881.) Debts mentioned in sections 136 and 139, page 200, General Statutes, Comp. Stats., sec. 136, are debts arising upon contracts, express or implied, and not damages for torts. *Doolittle v. Marsh*, 11 Neb. 243 (9 N. W. 54).

157. (1882.) The liability of a stockholder for debts contracted by the corporation, while it was in default of publication of the annual notice required by law, as to the amount of its debts, is purely statutory, and cannot and should not be extended beyond the strict letter of the statute, as primarily a stockholder is only liable for the amount remaining unpaid upon his stock. *Cady v. Smith*, 12 Neb. 628 (12 N. W. 95).

158. (1893.) The stockholders are not liable under the provisions of sections 136 and 139, chapter 11, General Statutes, for a debt which was not incurred while the officers of the bank were in default in publishing notice of the condition of the bank. *Porter v. Sherman County Banking Co.*, 36 Neb. 271 (54 N. W. 424); (1893) *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548 (54 N. W. 830).

159. (1895.) Sections 136 and 139, chapter 11, General Statutes 1873, imposing a liability on stockholders for omission to do certain acts, were repealed by act of April 6, 1891. *Kleckner v. Turk*, 45 Neb. 176 (63 N. W. 469).

160. (1895.) Corporators will not be heard to allege failure to become a *de jure* corporation in order to escape individual liability for neglecting to comply wth statutory requirements. *Kleckner v. Turk*, 45 Neb. 176 (63 N. W. 469).

161. (1895.) The act of the legislature approved April 6. 1891, entitled "An act to amend section 136 and section 139 of chapter 16, Compiled Statutes 1889, and to repeal said original sections," is not unconstitutional on the ground that the subject matter of the portion of the act, which makes its provisions operative as to actions pending or accrued, is not expressed in or not sufficiently stated in the title. *Kleckner v. Turk*, 45 Neb. 176 (63 N. W. 469).

162. (1895.) Section 139, chapter 11, General Statutes 1872, making stockholders individually liable for corporate debts where there has been a failure to give notice and other requisites of organizaton, is penal. *Kleckner v. Turk*, 45 Neb. 176 (63 N. W. 469).

——— Effect of repeal of statute.

163. (1894.) Where the law commands corporations to do certain acts, as to publish annually a notice of their indebtedness, and declares that all the stockholders of such a corporation shall be liable for all the debts of the corporation, if it fails to comply with the requirements of the statute, then such a law is designed as a punishment of the

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stockholders, and is penal, and not contractual, and hence its repeal pending an action against stockholders abates the action. *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175 (59 N. W. 683; 27 L. R. A. 854).

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164. (1896.) The liability imposed by section 139, chapter 16, Compiled Statutes, as originally enacted, was penal in its character, and rights of action thereunder not reduced to judgment, abated with the repeal of said section without a saving clause. *Hogue v. Capital Nat. Bank of Lincoln*, 47 Neb. 929 (66 N. W. 1036).

Defective organization.

165. (1894.) Where a statute provides that until certain things are done by persons forming a corporation, such as the filing of its articles of association in the office of a public officer, the stockholders in such corporation shall be liable for the debts thereof, such a statute is only declaratory of the common law. *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175 (59 N. W. 683; 27 L. R. A. 854).

166. (1894.) Until the requirements of a statute providing that certain things are to be done by persons desiring to form a corporation, have been complied with, a *de jure* corporation does not exist, and the stockholders thereof are jointly and severally liable for the debts contracted by such voluntary unincorporated association of persons; and such a statute and the rights of creditors acquired thereunder are contractual in their nature. *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175 (59 N. W. 683; 27 L. R. A. 854).

167. (1894.) Where persons attempt in good faith to incorporate themselves into a valid corporation, and such a corporation actually enters upon the discharge of corporate functions and so continues for a considerable time unchallenged by the state, persons who contract with such a corporation cannot hold the stockholders thereof liable on such contract because it transpires that by some mistake or oversight the corporation had never become a technical *de jure* corporation. *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175 (59 N. W. 683; 27 L. R. A. 854).

168. (1896.) Promissory notes purporting to be executed by a corporation construed to be the obligations of the corporation, and not of the members thereof. *Nebraska Nat. Bank of York v. Ferguson*, 49 Neb. 109 (68 N. W. 370; 59 Am. St. Rep. 522).

Liability for unpaid subscriptions.

169. (1893.) Under section 4, article XI, of the constitution of Nebraska the original subscribers for stock of a corporation or joint stock association are liable to the creditors of such corporation or association for the amount unpaid on said subscription, and such liability shall follow the stock without releasing such subscriber. *Commercial Nat. Bank of Omaha v. Gibson*, 37 Neb. 750 (56 N. W. 616).

170. (1895.) The capital, including unpaid subscriptions for stock of a corporation, is a trust fund for the payment of its creditors. *Gilkie & Anson Co. v. Dawson Town Gas Co.*, 46 Neb. 333 (64 N. W. 1097).

——— Right of creditor to enforce liability.

171. (1898.) One creditor of a corporation cannot maintain an action in his own name and for his own benefit against the debtor stock subscribers of a corporation; but, to subject unpaid stock subscriptions to the payment of corporate debts, all debtor stock subscribers and all creditors of the corporation should be made parties, and a receiver appointed. *Van Pelt v. Gardner*, 54 Neb. 701 (75 N. W. 874).

172. (1901.) The liability of a stockholder for the unpaid subscription, whether it is due to the corporation or not, does not run direct to the creditor, but his obligation is through the corporation. *Bohrer v. Adair*, 61 Neb. 824 (86 N. W. 495).

173. (1901.) In this state an action at law cannot be maintained by a creditor of an insolvent corporation against a stockholder in such corporation for his unpaid subscription; such action can only be maintained by a bill in equity for the benefit of all the creditors of such corporation and against all the stockholders thereof whose subscriptions are unpaid. *Reed v. Burg*, 2 Unof. 117 (96 N. W. 414).

——— Release of subscriber by corporation.

174. (1898.) A provision in the charter of a corporation organized under the laws of this state which provides that the private property of a stockholder shall not be liable for the debts of the corporation is void, in so far as it attempts to exempt the stockholder from liability—for his unpaid stock subscription—for the payment of corporate debts. *Van Pelt v. Gardner*, 54 Neb. 701 (75 N. W. 874).

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Persons liable.

175. (1903.) After acquiring the stock of another corporation, a savings bank becomes subject to any liability thereon the same as other stockholders. *Hill v. Shilling*, 69 Neb. 152 (95 N. W. 24).

Extent of liability.

176. (1893.) W. and T. were conducting a private bank at L., and on November 1, 1887, organized a corporation with an alleged capital of $50,000, of which they retained a controlling interest. They turned over the deposits and assets of the private bank to the new corporation, and notes were taken from a number of the stockholders for the amount of their stock. *Held*, That the stockholders were liable for the unpaid stock held by each, and for a sum equal to the shares so held by each for all liabilities of the bank accruing while he was a stockholder. *Porter v. Sherman County Banking Co.*, 36 Neb. 271 (54 N. W. 424).

177. (1894.) When the law prescribes what the liability of a shareholder shall be, for instance, that such shareholder shall be liable to the creditors of the corporation for double the amount of his stock, or for a sum equal to the amount of his stock, or for the amount remaining unpaid on his subscription to the stock of such company, the law is then speaking of and fixing the liability of a stockholder in a corporation *de jure*, as, without an express statute, a stockholder in such a corporation would not be liable for any debt whatsoever of such corporation. *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175 (59 N. W. 683; 27 L. R. A. 854).

178. (1894.) Persons who organize themselves into a *de jure* corporation, when a statute is in force fixing the liability of stockholders for debts of the corporation, incorporate it into, and it becomes a part of, their charter, and they impliedly agree and assent that their liability for the debts of the corporation shall be as fixed by such a law. *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175 (59 N. W. 683; 27 L. R. A. 854).

179. (1898.) Section 4, article XI, of the constitution (Miscellaneous Corporations), by fixing the liability of stockholders, limits such liability, and it is not within the power of the legislature to extend it. *Van Pelt v. Gardner*, 54 Neb. 701 (75 N. W. 874).

180. (1898.) The liability of a stock subscriber, for corporate debts, except he be a stock subscriber of a banking corporation, is limited to the amount of his unpaid stock subscription. *Van Pelt v. Gardner*, 54 Neb. 701 (75 N. W. 874); (1898) *Gorder v. Conner*, 56 Neb. 781 (77 N. W. 383).

Set-off against suit by stockholder.

181. (1898.) In an action by a stockholder of an insolvent corporation to enjoin an execution sale of real estate which had been purchased by him from the members of a firm against whom the defendant had recovered the judgment on which the execution was issued, the answer charged that all the stockholders of such corporation were liable for the payment of the debt which was the basis of the judgment, and asked that they be brought in and required to pay the same. *Held*, Not to constitute a counter-claim within the meaning of section 99 of the code of civil procedure. *Wehn v. Fall*, 55 Neb. 547 (76 N. W. 13; 70 Am. St. Rep. 397).

Necessity of judgment and execution against corporation.

182. (1893.) The constitutional requirements, that the exact amount justly due shall be first ascertained, and that the corporate property shall have been exhausted before enforcing individual liability for unpaid subscription for stock, are sufficiently met by the rendition of a judgment and the return of an execution *nulla bona* against the corporation whose stockholders are sought to be held liable to its creditors. *Commercial Nat. Bank of Omaha v. Gibson*, 37 Neb. 750 (56 N. W. 616); (1898) *Van Pelt v. Gardner*, 54 Neb. 701 (75 N. W. 874).

183. (1894.) The creditors of a *de jure* corporation have no right of action against the stockholders thereof until they have reduced their claims against the corporation to judgment, and until execution issued upon such judgment has been returned, wholly or in part, unsatisfied. *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175 (59 N. W. 683; 27 L. R. A. 854).

184. (1894.) The word "ascertained," in section 4, article XI, of the constitution, means "judicially ascertained;" and to "judicially ascertain" the amount due from a corporation to a creditor thereof means to have the finding and judgment or decree of a court as to such amount, and such a creditor's cause of action does not accrue until

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the return unsatisfied in whole or in part of an execution issued on a judgment rendered in his favor against the corporation for the corporate debt. *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175 (59 N. W. 683; 27 L. R. A. 854); (1898) *German Nat. Bank v. Farmers & Merchants Bank*, 54 Neb. 593 (74 N. W. 1086).

185. (1895.) An action to enforce the statutory liability of a stockholder arising from a corporation's failure to publish an annual notice of its indebtedness as required by law, cannot be maintained until after a judgment has been rendered against such corporation by which has been judicially ascertained the amount owing by it. Following *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175. *Ball v. Wicks*, 45 Neb. 367 (63 N. W. 806).

186. (1895.) In all cases of claims against corporations and joint stock associations the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the individual subscribers thereof shall be individually liable to the extent of their unpaid subscriptions, and the liability for the unpaid subscriptions shall follow the stock. *Gilkie & Anson Co. v. Dawson Town Gas Co.*, 46 Neb. 333 (64 N. W. 1097).

187. (1896.) The constitutional requirement (const., art. XI, sec. 4, under "Miscellaneous Corporations") that the indebtedness of a corporation shall be ascertained and the corporate assets exhausted before the enforcement of individual liability of stockholders, applies to banking corporations. *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353 (68 N. W. 520).

188. (1897.) Section 4, article XI, of the constitution, under miscellaneous corporations, makes the liability of subscribers for unpaid subscriptions a secondary liability to be enforced only after the amount of the debts has been judicially ascertained and the corporate property exhausted. *State v. German Savings Bank*, 50 Neb. 734 (70 N. W. 221).

189. (1897.) A proceeding by the receiver of an insolvent bank to collect unpaid subscriptions to its capital stock is one on behalf of creditors of the corporation, and is a "case of claims" against it within the meaning of section 4, article XI, of the constitution requiring the amount due to be ascertained and the corporate property first exhausted. *State v. German Savings Bank*, 50 Neb. 734 (70 N. W. 221).

190. (1898.) Until the legal remedy has been exhausted a creditor of an insolvent and dissolved corporation cannot obtain satisfaction of his claim by suit against a stockholder who has in any way come into possession of corporate assets. *Wehn v. Fall*, 55 Neb. 547 (76 N. W. 13; 70 Am. St. Rep. 397).

191. (1902.) It is not necessary that a receiver of an insolvent bank procure executions against himself and a return of *nulla bona* on all claims against the bank before commencing action to enforce stockholder's liability. *Brinkworth v. Hazlett*, 64 Neb. 592 (90 N. W. 537).

——— **Waiver or estoppel affecting necessity.**

192. (1897.) The members of a board of directors of an insolvent corporation who took part in a meeting of said board at which, by a unanimous vote, an assessment upon the unpaid subscriptions of such directors was declared necessary to discharge the debts of the corportaion and accordingly there were made such assessments, are in no situation to question their liability for the amount of such assessments because of the fact that no judgment had been rendered against the corporation, and its want of assets established by the return, *nulla bona*, of an execution against it. *Wyman v. Williams*, 52 Neb. 833 (73 N. W. 285).

Conclusiveness of judgment against corporation.

193. (1900.) A stockholder is bound by a decree of a court of equity against a corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company. *Commonwealth Mutual Fire Ins Co. v. Hayden Bros.*, 60 Neb. 636 (83 N. W. 922; 83 Am. St. Rep. 545). [Rehearing. 61 Neb. 454.]

Judgment against stockholder in suit against corporation.

194. (1901.) A court having jurisdiction of an insolvent corporation for the purpose of winding up its affairs has no authority to render a personal judgment against one of its stockholders who is not a party to the action by service of process or voluntary appearance. Neither has the court in such case authority to adjudicate the fact of membership in the corporation.

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Commonwealth Mutual Fire Ins Co. v. Hayden Bros., 61 Neb. 454 (85 N. W. 443); (1907) *Howell v. Malmgren*, 79 Neb. 16 (112 N. W. 313).

195 (1900.) The theory upon which a stockholder is held to be concluded by a judgment rendered against him in a suit brought to enforce a corporate obligation is that, although not personally served with process, he is before the court as an integral part of the corporation and that the corporation represents him. *Commonwealth Mutual Fire Ins. Co. v. Hayden Bros.*, 60 Neb. 636 (83 N. W. 922; 83 Am. St. Rep. 545).

196. (1901.) In an action for winding up the affairs of an insolvent corporation an assessment upon stockholders is conclusive only to the extent that it ascertains the amount of corporate assets and liabilities and declares the necessity for making the assessment. *Commonwealth Mutual Fire Ins. Co. v. Hayden Bros.*, 61 Neb. 454 (85 N. W. 443).

Actions to enforce liability.

——— Parties.

197. (1896.) The special individual liability of a stockholder in a banking corporation or institution, superadded to his ordinary liabilty by secton 7, article XI, of the constitution, is for the creation of a trust fund for the benefit of all creditors of the banking corporation or institution in which stock is held, and an action to render available such liabilty must be prosecuted by one credtor of such corporation or institution for the benefit of all other creditors, or by the receiver of such corporation or institution when there is a receiver. *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353 (68 N. W. 520).

198. (1898.) The corporation is not a necessary party to a suit by creditors against stockholders for unpaid stock subscription. *Van Pelt v. Gardner*, 54 Neb. 701 (75 N. W. 874).

199. (1899.) An action for the enforcement of the individual liability of the stockholders of a banking corporation must be prosecuted by one creditor for the benefit of all, or by the receiver of the corporation. *Brown v. Brink*, 57 Neb. 606 (78 N. W. 280).

200. (1899.) In a suit by a receiver to enforce individual liability of stockholders a creditor cannot intervene unless plaintiff abuses his trust or acts in bad faith. *Brown v. Brink*, 57 Neb. 606 (78 N. W. 280).

201. (1902.) When a bill in equity is filed by the creditors of an insolvent corporation for the purpose of subjecting the unpaid subscriptions of the capital stock of such corporation to the payment of the corporate debts, it is necessary that each one of the delinquent subscribers to such capital stock be made a party defendant; and unless all are made parties defendant, or some good and sufficient reason appears upon the face of the petition, such as death, insolvency, or inability to reach with the process of the court the delinquent subscribers not joined as defendants, the petition is bad because of a non-joinder of parties defendant. *Fremont Package Mfg. Co. v. Storey*, 2 Unof. 325 (96 N. W. 416).

202. (1904.) A single creditor cannot maintain an action at law against a part of the stockholders of an insolvent corporation for a violation of the provisions of section 136, chapter 16, Compiled Statutes. Such action should be brought in equity, by the receiver if there be one, or by a creditor on his own behalf, and for all the other creditors similarily situated, against all of the stockholders of the corporation. *Emanuel v. Barnard*, 71 Neb. 756 (99 N. W. 666).

——— Defenses.

203. (1897.) A judgment rescinding a purchase of corporate stock on the ground of fraudulent representations of the seller, is a bar to a subsequent action by a creditor of the corporation against the buyer to enforce his liability as a stockholder. *Creighton v. Keith*, 50 Neb. 810 (70 N. W. 406).

204. (1900.) It is no defense to a stockholder in an insolvent national bank, who is sued by the receiver on his individual liability upon an assessment ordered by the comptroller of the currency, to say that the recever has unlawfully disposed of such claim, and that the creditors of such bank will not receive of the proceeds thereof as much as they are entitled to have. *Schaberg v. McDonald*, 60 Neb. 493 (83 N. W. 737).

205. (1902.) In an action by the receiver of an insolvent bank, to enforce a stockholder's liability, misconduct of the receiver and his possession of unreported assets is no defense. *Brinkworth v. Hazlett*, 64 Neb. 592 (90 N. W. 537).

206. (1904.) The overruling of objections to the discharge of a receiver of a corporation, on the ground that the double

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liability of stockholders had not been enforced, is not a bar to an action to enforce such liability. *Hamilton Nat. Bank v. American Loan & Trust Co.*, 72 Neb. 81 (100 N. W. 202).

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——— Limitation of action.

207. (1890.) An action against stockholders of a corporation under section 136, chapter 16, Compiled Statutes, for failing to publish the amount of its indebtedness, is *quasi*-penal only, and not barred in one year as a penal action, the limitation being the same as in other contracts. *Howell Bros. v. Roberts*, 29 Neb. 483 (45 N. W. 923). [Disapproved. *Globe Publishing Co. v. State Bank*, 41 Neb. 175.]

208. (1890.) Section 136, chapter 16, Compiled Statutes, which makes stockholders in a corporation liable for debts contracted by the corporation while its officers are in default in publishing an annual notice stating "the amount of all of its existing debts," is *quasi*-penal, only, but is not a penalty, the evident purpose being to secure the rights of creditors, and an action to recover such debts is not barred by the statute of limitations in one year. *Coy v. Jones*, 30 Neb. 798 (47 N. W. 208; 10 L. R. A. 658). [Overruled. *Globe Publishing Co. v. State Bank*, 41 Neb. 175.]

209. (1898.) A cause of action against stockholders of a corporation, by a creditor, to subject their unpaid stock subscriptions to the payment of his debt, accrues when the exact amount justly due the creditors from the corporation has been ascertained and the corporate property exhausted, and is barred in four years thereafter. *Van Pelt v. Gardner*, 54 Neb. 701 (75 N. W. 874).

——— Weight and sufficiency of evidence.

210. (1902.) Where evidence is merely conflicting, finding of the trial court that a party was owner of certain shares in the bank on which liability is sought to be enforced, at the time of insolvency will not be disturbed. *Brinkworth v. Hazlett*, 64 Neb. 592 (90 N. W. 537).

——— Judgment.

211. (1898.) The decree should not be a joint one against all subscribers for the amount of the corporate debts, but a several judgment against each subscriber for the amount of his unpaid subscription. *Van Pelt v. Gardner*, 54 Neb. 701 (75 N. W. 874).

212. (1898.) The decree should provide for an execution against each subscriber for his proportionate share of the corporate debts, interest, and costs, and, if any execution should not be collected in full, then for the issuance, upon order of the court, of additional executions from time to time against each solvent subscriber for his proportionate share of the corporate debt remaining unpaid. *Van Pelt v. Gardner*, 54 Neb. 701 (75 N. W. 874).

——— Execution and enforcement of judgment.

213. (1880.) A homestead cannot be subjected to the payment of a stockholder's liability for the debt of a corporation of which the homesteader is a stockholder. *Smith v. Schmitz*, 10 Neb. 600 (7 N. W. 329).

——— Review.

214. (1897.) In an action by a receiver of a bank against one who had held some of its unpaid stock, and his transferee thereof for the amount of an assessment thereon, in which it was sought to obtain judgment against one defendant if certain allegations of fraud against him should be sustained by the proofs to be adduced, and if not so sustained then against the other defendant, the cause must be tried on appeal as one for alternative relief; and the evidence not being found sufficient to charge the original holder of the stock on the theory proceeded on against him in the district court, he cannot be held liable in the supreme court on a different theory. *Morrill v. Crawford*, 51 Neb. 284 (70 N. W. 954).

Contribution among stockholders.

215. (1898.) Where a stock subscriber discharges a debt of an insolvent corporation for which all the stock subscribers thereof are liable, he may maintain an action for contribution against his co-subscribers. *Bennison v. McConnell*, 56 Neb. 46 (76 N. W. 412).

216. (1898.) A subscriber to corporate stock who has paid off a deficiency judgment against the corporation is not estopped from maintaining a suit for contribution against his co-subscribers by the fact that he participated in a distribution made of the assets of the corporation by the stockholders, the debt discharged by him not being provided for in such distribution. *Bennison v. McConnell*, 56 Neb. 46 (76 N. W. 412).

217. (1898.) An agreement by stock-

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holders of a corporation to indemnify one for the personal assumption or payment of a corporate debt, or to contribute, may be enforced. *Gorder v. Connor*, 56 Neb. 781 (77 N. W. 383).

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218. (1898.) A voluntary assumption of the debt of a corporation, or a voluntary payment of its debt, or the two in combination, will not alone confer on a stockholder of the corporation the right to contribution from the other members. *Gorder v. Conner*, 56 Neb. 781 (77 N. W. 383).

219. (1898.) As between the stock subscribers and the creditors of a corporation, each stock subscriber is liable to the extent of his unpaid stock subscripton. As between themselves, each stock subscriber is liable for his proportionate share of the corporate debts, and one stock subscriber who has been compelled to pay more than his proportionate share may sue his co-subscribers for contribution. *Van Pelt v. Gardner*, 54 Neb. 701 (75 N. W. 874).

220. (1904.) Where a stockholder of a state bank advances his own funds to pay the debts of the bank in pursuance of an agreement of the stockholders that each should contribute in proportion to the number of shares of stock held by him, the advancing stockholder may maintain an action against the other stockholders for an accounting and contribution, without having first exhausted the assets of the bank. *Davidson v. Gretna State Bank*, 59 Neb. 63 (80 N. W. 256).

VI. OFFICERS AND AGENTS.

By-bidding by officer of loan association, see *Building and Loan Associations*, § 8.

Representation of corporation by officers and agents, see *post*, §§ 272-325.

A. Election and Qualifications.

Right of stockholder to vote, see *ante*, §§ 136-141.

Number of votes necessary for election.

221. (1903.) Where a corporation has a fixed capital stock, divided into a definite number of shares, a majority of all the shares is necessary to a valid election in the absence of some rule to the contrary. *Haskell v. Read*, 68 Neb. 107 (93 N. W. 997). [Withdrawn on rehearing. 68 Neb. 115.]

Effect of illegal election.

222. (1898.) A stockholder may obtain an injunction to restrain persons claiming to have been elected directors from acting as such, when the election was illegal and void. *Reynolds v. Bridenthal*, 57 Neb. 280 (77 N. W. 658).

Action to test validity of election.

223. (1903.) It seems that in this state a stockholder may maintain a suit in equity to try the validity of an election of officers and directors of a private corporation, and determine whether persons claiming to be such are entitled to act in that capacity. *Haskell v. Read*, 68 Neb. 107 (93 N. W. 997).

224. (1903.) Whether or not a stockholder may maintain a suit to try the validity of an election of corporate officers, the court may inquire into the validity of the election and pass upon the title to corporate officers when necessary to do complete justice in a suit of which it has jurisdiction on other grounds. *Haskell v. Read*, 68 Neb. 107 (93 N. W. 997).

B. Authority and Functions.

Right of officer to set off claim due corporation, see *Set-off and Counter-claim*, § 39.

Right of officer to sign petition for paving or street improvement, see *Municipal Corporations*, §§ 334-338.

Right to vote.

225. (1899.) The sale of corporate property and the disposition of the proceeds thereof, being distinct acts, a director may be qualified to vote upon a proposition to ratify the sale, although disqualified from voting upon a question affecting the application of the purchase-money. *German Nat. Bank of Hastings v. First Nat. Bank of Hastings*, 59 Neb. 7 (80 N. W. 48).

Resolutions.

226. (1902.) A resolution which authorizes the officers of a corporation to convey away or incumber all of its property by a trust agreement and a deed to trustees must at least be adopted by a majority of the board of directors duly assembled at a regular or called meeting of which due notice must have first been given. A resolution of that kind adopted at a called meeting of which the proper notice had not been given, and at which only one director was actually present, who voted for himself and for another absent director by proxy, is not the act of the corporation and is void. *First Nat. Bank of Omaha v. East Omaha Box Co.*, 2 Unof. 820 (90 N. W. 223).

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C. Rights, Duties and Liabilities as to Corporation and Its Members.

Compensation.

227. (1903.) Where a general manager of a corporation after the expiration of a contract which fixed his salary at $5,000 per annum continues, without any new agreement, and draws salary at the rate of $3,000 per annum, no action having been taken with reference to the salary, cannot recover the $2,000 difference, as if under the old contract. *Home Fire Ins. Co. v. Barber*, 67 Neb. 644 (93 N. W. 1024; 108 Am. St. Rep. 716; 60 L. R. A. 927).

228. (1903.) Where service of an officer under a contract of employment for a fixed period continues after such period has expired, it is presumed to be under the same contract; but this presumption must yield to evidence showing a change of terms. *Home Fire Ins. Co. v. Barber*, 67 Neb. 644 (93 N. W. 1024; 108 Am. St. Rep. 716; 60 L. R. A. 927).

Duty imposed by statute.

229. (1879.) One or more of the stockholders of a corporation may compel its officers, by mandamus, to make and publish the statement required by the statute. *Smith v. Steele*, 8 Neb. 115.

230. (1900.) Where the officers of a *quasi*-public corporation are required immediately to perform a certain act for the benefit of the corporation, the duty will, ordinarily, be regarded as a continuing one. *Baltes v. Farmers Irrigation District*, 60 Neb. 310 (83 N. W. 83).

231. (1900.) A statute which directs officers of a *quasi*-public corporation such as an irrigation district to immediately issue bonds which have been voted, and which also provides that they "may sell the bonds resolution declare its intention to sll a spec from time to time" and "before making any sale the board shall, at a meeting, by resolution declare its intention to sell a specified amount of the bonds," imposes upon such officers a duty which continues until such provision is complied with. *Baltes v. Farmers Irrigation District*, 60 Neb. 310 (83 N. W. 83).

Contracts and dealings with corporation.

232. (1893.) The relation of the directors to stockholders of a corporation is of a fiduciary character and their contracts and dealings with the corporation with respect to the corporate property will be carefully scrutinized by the courts. Such contracts are not, however, necessarily void. Where it is clear that the transaction is in good faith on the part of the director and beneficial to the corporation which has with the sanction of the stockholders received and appropriated the consideration without offering to make restitution, it may be upheld when assailed even in a court of equity. *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548 (54 N. W. 830).

233. (1893.) Evidence examined and *held* to sustain the finding that the indebtedness of the defendant company to the plaintiffs, directors thereof, was contracted with the knowledge and approval of the interveners, who were stockholders, and that the execution of certain mortgages to secure such indebtedness was sanctioned by such stockholders. *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548 (54 N. W. 830).

234. (1895.) Directors of a solvent corporation may convey property of the company to themselves in payment of debts due to them. *Tillson v. Downing*, 45 Neb. 549 (63 N. W. 836).

235. (1899.) Directors of a corporation each made a loan of money to it with the understanding that in payment or enforcement of the debts thereby created no one should have or obtain preference over another. It was subsequently ordered, all being present and acting, that negotiable promissory notes be executed and delivered to the parties evidencing the debts which originated in the loan transactions. *Held*, That the latter adjustment was under such circumstances and attendant facts as evinced the intention to annul and abrogate the agreement which accompanied the loans. *Nebraska Nat. Bank v. Clark*, 58 Neb. 183 (78 N. W. 527).

236. (1901.) The purchase of property of a corporation by one of its directors is voidable at the option of the corporation. *Miller v. Brown*, 1 Unof. 754 (95 N. W. 797).

Acquiring adverse title or interest.

237. (1893.) An officer of a corporation for pecuniary profit, who in good faith purchases at judicial sale the property of the corporation, will be protected in such purchase, provided he shows affirmatively that he has, as indicated, paid the full value of the property of which he so became the purchaser. *Horbach v. Marsh*, 37 Neb. 22 (55 N. W. 286).

238. (1893.) A stockholder of a corpora-

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tion who seeks as such to impress with an express trust the property of such corporation regularly sold at judicial sale to an officer of such corporation should commence proceedings within a reasonable time after such sale, and must, when such proceedings are unreasonably delayed, establish by a preponderance of the evidence the facts upon which such trust is based. *Horbach v. Marsh*, 37 Neb. 22 (55 N. W. 286).

239. (1894.) Question whether the president of a loan company, who claimed to have advanced money to purchase a leasehold interest in land acted for himself or for the benefit of the company, found in favor of the latter. *Nebraska Mortgage Loan Co. v. Van Kloster*, 42 Neb. 746 (60 N. W. 1016).

240. (1895.) Where the president of a loan company consented that securities in the nature of trust deeds should be made to himself, described as trustee, he thereby gained no right to use such designation to the injury of the company of which he was president and which was in fact the beneficiary named or contemplated in such trust deeds. *Tulleys v. Keller*, 45 Neb. 220 (63 N. W. 388).

241. (1905.) Where the president of a bank who was a creditor of a firm who were also debtors of the bank, secured an assignment of all of the debtors property in his individual name, and obligated himself to pay the indebtedness to the bank by signing a note in its favor with the debtor, he is primarily liable to the bank for the amount of the bank. *Gund v. Ballard*, 73 Neb. 547 (103 N. W. 309).

242. (1905.) Where a person occupies a fiduciary relation to a bank and its stockholders, and engages in litigation in which his individual interests are in conflict with those he represents in a fiduciary capacity, actual fraud is not essential in order to avoid the proceedings thus had and entered into. *Gund v. Ballard*, 73 Neb. 547 (103 N. W. 309).

Liability for negligent or unauthorized acts.

243. (1887.) As between the corporation and himself, a president of a bank ordinarily has no authority to sell the property of the corporation of which he is such officer. Before he can legally do so he must have authority by the charter, the direction of the board of directors, managing committee, or by usage. And where the property of a bank is sold by a president without authority and the bank suffers loss thereby, he may be held to respond in damages to the extent of such loss. *First Nat. Bank v. Lucas*, 21 Neb. 280 (31 N. W. 805).

244. (1887.) Where the president of a bank without authority disposes of the property of the bank, and the bank is damaged thereby, and for the purpose of making good the loss, either temporarily or permanently, transfers to the bank promissory notes held by him in an amount equal to the loss sustained; and where afterwards he disposes of his interest in the bank and induces others to purchase a controlling interest in the stock upon the representation that he has no demand against the bank, he cannot afterwards recover of the bank the amount of the notes transferred to it for the purpose of making up the deficiency caused by the loss resulting from the sale of the bank's property. *First Nat. Bank v. Lucas*, 21 Neb. 280 (31 N. W. 805).

245. (1903.) Subsequent stockholders have no standing, as a general rule, to attack prior mismanagement of the corporation. *Home Fire Ins Co. v. Barber*, 67 Neb. 644 (93 N. W. 1024; 108 Am. St. Rep. 716; 60 L. R. A. 927).

246. (1903.) A subsequent stockholder ought not to be allowed to sue unless the mismanagement or its effects continue and are injurious to him, or it affects him specially and peculiarly in some other manner. *Home Fire Ins. Co. v. Barber*, 67 Neb. 644 (93 N. W. 1024; 108 Am. St. Rep. 716; 60 L. R. A. 927).

247. (1903.) Stockholders who have acquired their shares and their interest in the corporation from the alleged wrongdoers and through the prior mismanagement, have no standing to complain thereof. *Home Fire Ins. Co. v. Barber*, 67 Neb. 644 (93 N. W. 1024; 108 Am. St. Rep. 716; 60 L. R. A. 927).

248. (1903.) Where an officer of a bank gives a bond conditioned that he will "honestly, faithfully, and efficiently" perform his duties, he and his sureties are liable for loss resulting from his negligence, even though the directors may not have used due diligence. *Fiala v. Ainsworth*, 68 Neb. 308 (94 N. W. 153).

Individual profits.

249. (1903.) The officers and directors of a corporation and the shareholders thereof sustain to each other the relation of trus-

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tees and *cestuis que trustent*, and public policy forbids those who have accepted such positions of trust to take secret profits antagonistic to their duties as trustees. *Barber v. Martin*, 67 Neb. 445 (93 N. W. 722).

250. (1903.) Where the manager of an insurance company who, during negotiations to sell stockholders stock in the corporation, advised the latter that he had received a certain cash offer for the same when in fact no such offer had been received, but the stock was later sold at a much higher figure, such manager acted as agent for the shareholder and is liable for an accounting for the real amount received. *Barber v. Martin*, 67 Neb. 445 (93 N. W. 722).

Actions between shareholders and officers.

251. (1906.) The stockholders bear the same relation substantially to the corporate officers that the *cestui que trust* bears to the trustee, and has for the protection of his interest in the corporation the same remedies that are provided for the beneficiary in a trust estate. *Hards v. Platte Valley Improvement Co.*, 46 Neb. 709 (65 N. W. 781).

252. (1903.) In an action by a stockholder in an insurance company against the manager thereof, who acted as agent in the sale of plaintiff's stock, for the difference between the amount actually received and that accounted for to plaintiff, letters leading up to negotiations for the sale of the stock are admissible in evidence. *Barber v. Martin*, 67 Neb. 445 (93 N. W. 722).

253. (1903.) Where a manager of an insurance company offered to make a sale of a shareholder's stock, and the shareholder expressly authorized a sale for a stated sum within a limited period, and there is evidence that both parties regarded the contract of agency to sell the stock as a continuing one, the limitation of time being only upon the power to sell at the sum stated, it was not error to admit in evidence the letter of the manager offering to make the sale, and the reply of the shareholder authorizing a sale within a limited period at a stated sum, as tending to show the existence of a contract of agency at a later period. *Barber v. Martin*, 67 Neb. 445 (93 N. W. 722).

D. Liabilities for Corporate Debts and Acts.

Order authorizing receiver to enforce liability, see *post*, § 441.

Note or contract of corporation executed by officers.

254. (1902.) Where one acting as the agent of a corporation makes a contract on its behalf, which is binding upon it, his acts in that behalf create no individual or personal liability against him. *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370 (91 N. W. 376).

255. (1903.) A note signed "Globe Loan & Trust Co., H. O. Devries, Presdt., W. B. Taylor, Secy.," on its face shows no personal liability on the part of Devries or Taylor. *English & Scottish American Mortgage & Investment Co. v. Globe Loan & Trust Co.*, 70 Neb. 435 (97 N. W. 612).

Mismanagement of corporate affairs.

256. (1903.) An officer or agent of a corporation is not liable personally to third persons for mere failure to perform some duty which the corporation may have owed them. *Penney v. Bryant*, 70 Neb. 127 (96 N. W. 1033).

Misappropriation of corporate assets.

257. (1902.) It was error, in a creditors' bill, on a judgment against a corporation, to discharge the president of the corporation and the managing officer from an accounting for the assets which the evidence clearly showed he had received. *Benedict v. T. L. V. Land & Cattle Co.*, 66 Neb. 236 (92 N. W. 210).

Actions to enforce liability.

258. (1893.) The evidence in an action for services rendered was insufficient to support a verdict against officers of a company, individually, where the testimony showed that the contract was made with and the work performed for the company. *Imhoff v. House*, 36 Neb. 28 (53 N. W. 1032).

Contribution among officers.

259. (1903.) Where trustees of an insolvent corporation have, with knowledge of the pendency of an action against it, divided among shareholders nearly all its available assets; one of the trustees, who is also treasurer and who paid out the money divided, cannot recover contribution from another director, because of payment of a judgment against him, as trustee, for so converting the company's assets. *Sharp v. Call*, 69 Neb. 72 (95 N. W. 16).

VII. CORPORATE POWERS AND LIABILITIES.

Capacity to act as administrator, see *Executors and Administrators*, §§ 28-30.

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A. Extent and Exercise of Powers in General.

Scope of powers in general.

260. (1890.) Corporations can be organized under the laws of this state for a lawful purpose only. Unlawful acts of a corporation are not limited to those which are *mala prohibita* and *malum in se*, but include powers which the corporation is not authorized to exercise, and contracts which they are not empowered to make. *State v. Nebraska Distilling Co.*, 29 Neb. 700 (46 N. W. 155).

261. (1905.) The powers of a corporation in effecting its objects are as broad and comprehensive as those of an individual, when not expressly prohibited. *Herrick v. Humphrey Hardware Co.*, 73 Neb. 809 (103 N. W. 685).

Construction of statutes or charter.

262. (1876.) Sections 124 and 137 of the general incorporation act were intended only to define and grant the general powers which may be exercised by a corporation when legally organized. *Livesey v. Omaha Hotel Co.*, 5 Neb. 50.

263. (1888.) The powers of a corporation organized under legislative statutes are such, and such only, as the statutes confer. The charter of a corporation is the measure of its powers, and the enumeration of those powers implies the exclusion of all others. *State, ex rel. Leese, v. Atchison & N. R. Co.*, 24 Neb. 143 (38 N. W. 43; 8 Am. St. Rep. 164).

264. (1903.) The power of a corporation to make valid contracts is measured by its charter; and the scope of the authority of its officers and agents acting for it is limited, and a person dealing with such corporation is chargeable with notice of such limitations. *Sturdevant Bros. & Co. v. Farmers & Merchants Bank of Rushville*, 69 Neb. 220 (95 N. W. 819).

265. (1905.) When the exercise of corporate power has been regulated by statute, the corporation cannot, by its by-laws or resolutions, change the mode of the exercise of this power. *Lange v. Royal Highlanders*, 75 Neb. 188 (106 N. W. 124; 10 L. R. A. [n. s.] 666).

Purchasing and holding stock in other corporations.

266. (1893.) A banking corporation, organized under the laws of this state, has no power to become a stockholder in an insurance company. *Bank of Commerce v. Hart*, 37 Neb. 197 (55 N. W. 631; 40 Am. St. Rep. 479; 20 L. R. A. 780).

267. (1903.) Unless authorized by statute, a corporation has no power to subscribe to the capital stock of another corporation, and such a subscription is not binding. *Nebraska Shirt Co. v. Horton*, 3 Unof. 888 (93 N. W. 225).

268. (1903.) Where no money or property of any kind has been acquired or held by virtue of a subscription by one corporation to the capital stock of another, mere inaction and neglect to repudiate it will not estop the subscribing corporation when sued upon such a subscription. *Nebraska Shirt Co. v. Horton*, 3 Unof. 888 (93 N. W. 225).

Compromises.

269. (1896.) A corporation has power to compromise a doubtful claim against it, although such doubt arises in regard to the power of the corporation to enter into the contract creating the claim. *Farmers Mut. Ins. Co. v. Meese*, 49 Neb. 861 (69 N. W. 113).

Confession of judgment.

270. (1898.) The statute conferring power upon any person to confess judgment applies to such corporations whe such judgment has been rendered as described in the case at bar. *Solomon v. Schneider*, 56 Neb. 680 (77 N. W. 65).

Persons entitled to question corporate powers.

271. (1898.) Where a corporation borrows money and executes a mortgage on its real estate to secure the payment thereof, a third person cannot assail the transaction on the ground of *ultra vires*, or that the corporation exceeded its power. *Beels v. North Nebraska Fair & Driving Park Ass'n*, 54 Neb. 226 (74 N. W. 581).

B. Representation of Corporation by Officers and Agents.

Knowledge of officer as affecting *bona fides* of purchase of note, see *Bills and Notes*, § 235.

Service of process in officer, see *post*, §§ 358-366.

Limitation by statutory regulation.

272. (1900.) A person dealing with the officers or agents of a public corporation is required to act with reference to the authority, limitations and restrictions imposed

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upon such officers by the legislation authorizing the organization and government of such corporation. *Lincoln & Dawson County Irrigation District v. McNeal*, 60 Neb. 613 (83 N. W. 847).

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Restriction of authority by by-laws.

273. (1895.) One dealing with the agent of a business corporation, in a matter relating to its business operations and not involving its corporate functions, is not charged with notice of its by-laws. Therefore, the apparent authority of such agent cannot be extended or restricted by such by-laws in the absence of actual notice thereof. *Johnson v. Milwaukee Investment Co.*, 46 Neb. 480 (64 N. W. 1100).

Representation by stockholders.

274. (1871.) A corporation whose governing power is vested in a board of directors is not bound by the act of its stockholders. *Columbus Co. v. Hurford*, 1 Neb. 146.

275. (1898.) Where money is borrowed by stockholders of a corporation for its benefit, and actually used in its business, the corporation is legally liable for the repayment of such money. *Stough v. Fonca Mill Co.*, 54 Neb. 500 (74 N. W. 868).

Scope of authority in general.

276. (1894.) Agents of corporations have no implied authority to give away corporate property or create corporate obligations gratuitously. *Robertson v. Buffalo County Nat. Bank*, 40 Neb. 235 (58 N. W. 715).

277. (1895.) A treasurer and bookkeeper of a corporation, where the articles of incorporation require every officer of the company to be a stockholder, may verify the claim for a mechanic's lien. *Chapman v. Brewer*, 43 Neb. 890 (62 N. W. 320; 47 Am. St. Rep. 779).

278. (1903.) The president or secretary of a corporation, either singly or jointly, cannot bind the corporate property by signing the corporate name to a petition asking for a street improvement without being specially authorized. *Morse v. City of Omaha*, 67 Neb. 426 (93 N. W. 734).

Liability for acts of officers and agents in general.

279. (1894.) A corporation is not chargeable with the knowledge nor bound by the acts of one of its officers in a matter in which he acts in behalf of his own interests, and deals with the corporation as a private individual, and in no way represents it in the transaction. *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123 (58 N. W. 734).

280. (1894.) One who deals with the officers or agents of a corporation is bound to know their powers, and the extent of their authority, and the corporation is only bound by their acts, and contracts which are within the scope of their authority. *Robertson v. Buffalo County Nat. Bank*, 40 Neb. 235 (58 N. W. 715).

281. (1895.) Directors of a railroad company have no authority to sell at a discount below value its corporate bonds earned by a construction company in building a railroad, and the railroad company is not liable to minority stockholders of the construction company for the loss occasioned by such a sale where the directors have a controlling interest in both companies. *Fitzgerald v. Fitzgerald & Mallory Co.*, 44 Neb. 463 (62 N. W. 899).

282. (1902.) The acts of a bank officer, outside the usual scope of his authority, in a matter to which it is no party and of which it is not chargeable with notice, do not bind the bank. *Jones v. First Nat. Bank of Lincoln*, 3 Unof. 73 (90 N. W. 912).

283. (1902.) As a general rule, acts done by an officer of a bank away from its place of business, and not authorized or ratified, are not binding upon it. *Jones v. First Nat. Bank of Lincoln*, 3 Unof. 73 (90 N. W. 912).

284. (1902.) A bank is not chargeable with notice of the fraudulent act of its employee, outside the scope of his authority and in furtherance of his own personal designs, solely because he is an employee. *Jones v. First Nat. Bank of Lincoln*, 3 Unof. 73 (90 N. W. 912).

Conduct of corporate business.

285. (1878.) As a rule, the officers of a bank are held out to the public as having authority to act according to the usage and course of business of such institutions, and their acts, within the scope of their authority, bind the bank in favor of persons having no knowledge to the contrary. *Rich v. State Nat. Bank*, 7 Neb. 201 (29 Am. Rep. 382).

286 (1878.) Like other agents, the president of a bank must act within the scope of his authority, in order to bind his principal, unless his acts have been ratified. *Kennedy v. Otoe County Nat. Bank*, 7 Neb. 59.

287. (1882.) Indorsement of a note by

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officers of a corporation to whom it is made payable, taken in connection with the allegation by the indorsee that there was due from the defendant to the plaintiffs the sum of $250, is sufficient to show a cause of action in favor of the indorsee. *Sanborn v. Hale*, 12 Neb. 318 (11 N. W. 302).

Contracts in general.

288. (1878.) No officer of a bank can bind it by a promise to pay a debt which the corporation does not owe and was not liable to pay. *Rich v. State Nat. Bank*, 7 Neb. 201 (29 Am. Rep. 382).

289. (1884.) A stockholder in a corporation surrendered his stock to the corporation secretary and procured from him a "due bill" or promise to pay a certain sum in printing, etc. There is no proof that the secretary had any authority to execute or deliver the writing. *Held*, That neither the corporation nor the other stockholders were liable to such stockholder in an action on such instrument. *Gregory v. Lamb*, 16 Neb. 205 (20 N. W. 248).

290. (1893.) One who is shown to be the general manager of a corporation engaged in the business of feeding and raising cattle is presumably empowered to buy feed for them. *Powder River Live Stock Co. v. Lamb*, 38 Neb. 339 (56 N. W. 1019).

291. (1900.) The manager of a business corporation has no implied authority to furnish medical aid and assistance to a servant of the corporation who has been injured outside the line of his duties. *Chase v. Swift & Co.*, 60 Neb. 696 (84 N. W. 86; 83 Am. St. Rep. 552).

292. (1902.) The directors of a corporation, by the mere act of employing another to give a fireworks exhibition for and on behalf of such corporation on its own grounds, are not made personally liable for the negligent acts of the person thus employed to give such exhibition. *Bianki v. Greater American Exposition*, 3 Unof. 656 (92 N. W. 615).

293. (1907.) Any general officer of a corporation may summon medical attendants to care for an employee who has received serious injuries while engaged in dangerous work for the company, and such injury occurred at a place distant from such employee's home, and the corporation is bound for the reasonable value of such medical services. *Salter v. Nebraska Telephone Co.*, 79 Neb. 373 (112 N. W. 600).

293*a*. (1907.) Emergency services, unless expressly limited at the time of procuring them, ought to extend to a sufficient time for the party employed to communicate with the the company, and, if it declines to be further responsible, for notice to the proper poor authorities, if the injured party is entitled to public care. *Salter v. Nebraska Telephone Co.*, 79 Neb. 373 (112 N. W. 600).

294. (1907.) In case of serious injury to an employee of a corporation, receiving immediate medical care, if no general officer of the company is present, the highest officer or person highest in authority then present may bind the company for medical services as the emergency may demand. *Salter v. Nebraska Telephone Co.*, 79 Neb. 373 (112 N. W. 600).

Disposal of corporate property.

295. (1871.) A deed executed in the name of the president of a corporation, purporting to convey its lands, is inoperative. *Zoller v. Ide*, 1 Neb. 439.

296. (1893.) Where a deed or mortgage purporting to have been executed by a corporation is signed and acknowledged in its behalf by the president and secretary thereof, with the corporate seal attached, the presumption is that it was executed by authority of such corporation and the burden of proof is upon one who denies such authority. *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548 (54 N. W. 830).

297. (1901.) The signature of one of the general officers of a corporation to the assignment of a mortgage which is attested by the corporate seal of the company, is *prima facie* evidence that the assignment was executed by authority of the company and the burden of proving want of authority is upon the party seeking to attack such assignment. *Wilson v. Neu*, 1 Unof. 42 (95 N. W. 502).

297*a*. (1908.) Under the facts set forth in the opinion, *held*, that one C. was the last acting manager of a dissolved corporation, and was therefore sole trustee and competent to sell and convey the real estate of the corporation. *Heenan & Finlen v. Parmele*, 80 Neb. 514 (118 N. W. 324).

Wrongful acts.

298. (1879.) A corporation is liable the same as a natural person for the tortious acts of its servants or agents in the course of their employment. But to make a corporation liable for such acts they must be committed in the course of the agent's em-

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ployment, or connected with the transaction of the business of the corporation. *Miller v. Burlington & M. R. R. Co.*, 8 Neb. 219.

299. (1879.) When an injury is committed by an employee of a corporation wilfully, and of his own malice, and not in the course of his employment, the corporation is not bound by his acts. *Miller v. Burlington & M. R. R. Co.*, 8 Neb. 219.

300. (1894.) A corporation is liable civilly for all damages occasioned by the torts of its officers or agents committed within the scope of their employment as such. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374 (59 N. W. 838).

301. (1895.) The term "scope of authority," as used in the law defining the liability of corporations for the tortious acts of their officers and agents, is not susceptible of a precise definition, but is limited to acts in some way incident to the employment and duties of such agents and having some relation to the obvious purpose of their appointment. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463 (62 N. W. 899)

302. (1895.) The fact that bonds of a railroad due a construction company on a construction contract may have been withheld for a considerable time after they were earned by the construction company, to the damage of the latter in the loss of promised subsidies and prospective profits, although actionable in the proper proceeding, will not render the railroad company liable for loss by reason of the negligent or corrupt action of the directors of the last named company in disposing of said bonds for less than their value. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463 (62 N. W. 899).

Representation of different corporations by same person.

303. (1895.) Persons who are directors of two corporations have no implied authority to bind either by contracts with respect to subjects in which their interests are adverse. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463 (62 N. W. 899).

304. (1898.) If a transaction between two corporations, affected by the votes of directors common to both, can in any event be sustained, it must only be on an affirmative showing of good faith. *German Nat. Bank v. First Nat. Bank*, 55 Neb. 86 (75 N. W. 531).

305. (1898.) Where the president, one director, and a stockholder sold all visible assets of an insolvent corporation and turned the proceeds over to a corporation in which two of the persons so acting were interested, it was *held* that such acts amounted to a conversion of the corporate property. *German Nat. Bank v. First Nat. Bank*, 55 Neb. 86 (75 N. W. 531).

306.)1903.) The directors of a corporation cannot bind it by contract with another corporation of which they are also directors, and which they represent in making such contract. *McLeod v. Lincoln Medical College*, 69 Neb. 555 (98 N. W. 672).

Estoppel to deny authority.

307. (1871.) A corporation which has enjoyed the fruits of a loan, which it has authorized to be made, cannot avoid the security which its officer has given, until it has done equity by repaying the money loaned. *Cook v. Kuhn*, 1 Neb. 472.

Ratification.

308. (1878.) Although no officer of a bank can bind it by a promise to pay a debt which the corporation does not owe and was not liable to pay, ratification is equivalent to original authority to act in the matter, and corporations are bound in the same manner as natural persons. *Rich v. State Nat. Bank*, 7 Neb. 201 (29 Am. Rep. 382).

309. (1895.) Ratification by a corporation of an unauthorized act of an agent or officer may be proved by a direct recognition of the act or by an inference from facts and circumstances. *Reed v. First Nat. Bank of Weeping Water*, 46 Neb. 168 (64 N. W. 701).

310. (1895.) The unauthorized acts of an agent or officer of a corporation may be ratified by it indirectly or by express action. *Reed v. First Nat. Bank of Weeping Water*, 46 Neb. 168 (64 N. W. 701).

311. (1898.) Although the fact that after the act of the president, a director and a stockholder who was not a director, in selling all the available assets of the corporation and turning the proceeds over to a single creditor, was reported to a meeting of the board of directors, attended by four out of seven members, two of the four being directors of the preferred corporation also, no action was taken, this did not constitute a ratification of the acts of the persons selling the assets and paying out the proceeds. *German Nat. Bank v. First Nat. Bank*, 55 Neb. 86 (75 N. W. 531).

312. (1899.) A sale of corporate assets, made by an agent in excess of his authority, will be, ordinarily, ratified by the acts of the corporation in dealing with the purchaser as

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the owner of the property. *German Nat. Bank of Hastings v. First Nat. Bank of Hastings*, 59 Neb. 7 (80 N. W. 48).

313. (1899.) Ratification of the unauthorized act of a corporate officer may be inferred from silence, inaction and other circumstances indicating acquiescence and consent. *German Nat. Bank of Hastings v. First Nat. Bank of Hastings*, 59 Neb. 7 (80 N. W. 48).

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314. (1899.) The rule that the ratification of an unauthorized act of an agent estops disavowal, applies to a corporation. *German Nat. Bank of Hastings v. First Nat. Bank of Hastings*, 59 Neb. 7 (80 N. W. 48).

315. (1901.) An act done in behalf of a corporation by one having no authority to represent it may be ratified by conduct implying approval and adoption. *Alexander v. Culbertson Irrigation & Water Power Co.*, 61 Neb. 333 (85 N. W. 283).

316. (1901.) A corporation having power to ratify or repudiate a contract made in its name by a self-constituted agent, or one acting outside of his authority, should within a reasonable time determine which it will do, and if it do not disavow the agency and dissent from the contract, assent and approval may be presumed. *Alexander v. Culbertson Irrigation & Water Power Co.*, 61 Neb. 333 (85 N. W. 283).

317. (1902.) The action of the officers of a corporation based upon a void resolution is void; but it may be ratified by the directors or stockholders by proper corporate action for that purpose, and also by a continued acquiescence therein on the part of the stockholders with full knowledge of all of the facts, but such ratification can not make the transaction valid as to third persons, creditors, where the same unlawfully hinders and delays them in the collection of their just claims against the corporation. *First Nat. Bank of Omaha v. East Omaha Box Co.*, 2 Unof. 820 (90 N. W. 223).

318. (1903.) A corporation can not ratify an *ultra vires* act of an agent. *Preston v. Northwestern Cereal Co.*, 67 Neb. 45 (93 N. W. 136).

Notice to officer as notice to corporation or stockholders.

319. (1891.) A corporation is not chargeable with the knowledge nor bound by the acts of one of its officers in a matter in which he acts in behalf of his own interests, and deals with the corporation as a private individual, and in no way represents it in the transaction. *Koehler v. Dodge*, 31 Neb. 328 (47 N. W. 913; 28 Am. St. Rep. 518).

320. (1896.) Stockholders represented by an agent who was for three years an acting director and a stockholder in the corporation, *held* chargeable with the knowledge possessed by him in respect to the affairs of the corporation. *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434 (67 N. W. 493).

321. (1902.) The rule is well settled that a bank or other corporation, being once charged with notice of the character of a transaction, continues to be affected by such notice, whatever changes may occur in the personnel of its working force. *United States Nat. Bank of Holdrege v. Forstedt*, 64 Neb. 855 (90 N. W. 919).

322. (1902.) A corporation can act only by its agents who are empowered to act for it, and can only be bound by notice to some of its officers or agents who have the power to act upon the notice, or to one whose duty it is to communicate the notice to its officers or agents who have this power. *Nehawka Bank v. Ingersoll*, 2 Unof. 617 (89 N. W. 618).

Evidence as to authority.

323. (1871.) The existence of an agency of a corporation may be inferred by implication from the acts of the parties, or deed, informal writings, or verbal delegation. *Columbus Co. v. Huford*, 1 Neb. 146.

324. (1871.) A resolution recorded at length on the journal of the proceedings of a corporation, authorizing a party to negotiate a loan for it, and execute a mortgage to secure the same, is sufficient authority in that behalf. *Cook v. Kuhn*, 1 Neb. 472.

325. (1902.) Where a contract has been made by the corporation, by and through its president and general manager, it will not be permitted to receive and retain the benefits of a portion thereof and repudiate and reject the remainder. *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370 (91 N. W. 376).

C. Property and Conveyances.

Authority of officer to dispose of corporate property, see *ante*, §§ 295-297*a*.

Capacity to acquire and hold property.

326. (1872.) A corporation is presumed to be capable in law, to take a conveyance of real estate. *Myers v. Croft*, 2 Neb. 481 (13 Wall. (U. S.) 291).

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327. (1894.) The right of a corporation to hold title to real estate, or to purchase and hold a lien thereon, cannot be questioned collaterally, but can only be attacked in a direct proceeding instituted for the purpose. Such purchase and holding are not void but are voidable, and none but the sovereign can object. *Watts v. Gantt*, 42 Neb. 869 (61 N. W. 104).

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Right to question power.

328. (1872.) A grantor of land to a corporation, or his subsequent grantee, cannot question the capacity of the corporation to take the conveyance. *Myers v. Croft*, 2 Neb. 481 (13 Wall. (U. S.) 291).

329. (1881.) Want of capacity in a corporation, which is the vendor in a contract for the sale of real estate, to take a title to or hold such property, cannot be successfully urged by the vendee or his assignee, to defeat a recovery of the agreed price, in an action on the contract. *Missouri Valley Land Co. v. Bushnell*, 11 Neb. 192 (8 N. W. 389).

330. (1881.) Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign only can object. It is valid until assailed in a direct proceeding for that purpose. *Missouri Valley Land Co. v. Bushnell*, 11 Neb. 192 (8 N. W. 389).

331. (1902.) A party who has entered into a contract for the sale of real property to a corporation, in reliance whereon the corporation has erected valuable improvements on the property for the purposes of its corporate business, will not be heard to assert that such property was not necessary for the business of the corporation. *Coleridge Creamery Co. v. Jenkins*, 66 Neb. 129 (92 N. W. 123).

Mortgage of corporate property.

332. (1893.) Evidence *held* to sustain the findings of the district court that the indebtedness secured by the mortgage of the defendant corporation was not in excess of the limitation named in its charter. *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548 (54 N. W. 830).

——— of defective organization.

333. (1901.) Note and mortgage running to Creighton University, trustee for Creighton College, are valid and enforceable obligations, notwithstanding that there has been no legal incorporation of Creighton College. *Goddard v. Clark*, 1 Unof. 769 (96 N. W. 350).

D. Contracts and Indebtedness.

Contracts before incorporation.

334. (1887.) Where, after articles of incorporation were drawn up and signed by the promoters of a cattle company, but before they were recorded or filed for record in the office of the county clerk, and before the time fixed in such articles for the commencement of the business of such corporation, a president was selected by such promoters, who in the presence and with the approval of all of such promoters, executed and delivered to one M. a note, in payment for certain horses, cattle, ranch, and other property, which, after the perfecting of the said corporation and the time fixed for the commencement of the business thereof, came into its hands as its property, and continued to be used and enjoyed by it as such, the indorsee of M. could recover on said note. *Paxton Cattle Co. v. First Nat. Bank*, 21 Neb. 621 (33 N. W. 271; 60 Am. Rep. 852).

Manner of making contract.

335. (1877.) Corporations manifest their assent to and make contracts by deed or vote of the company, or by the agreement of their authorized agents, and not by the unauthorized declarations or promises of its individual members. *Clarke v. Omaha & S. W. R. Co.*, 5 Neb. 314.

Promissory notes of corporation.

336. (1898.) One who buys a corporation note unlawfully issued is not an innocent purchaser where it appears on the face of the note that the payee therein named and the officer by whom it was executed is the same person. *Stough v. Ponca Mill Co.*, 54 Neb. 500 (74 N. W. 868).

337. (1902.) A draft, drawn by an authorized agent of a corporation, on such corporation or the treasurer thereof in favor of a third party, for a debt due such third party from the corporation, is, in effect, the promissory note of the corporation. *National Fire Ins. Co. v. Eastern Building & Loan Ass'n*, 65 Neb. 483 (91 N. W. 482).

——— Accommodation indorsement.

338. (1903.) An accommodation indorsement by a manufacturing and trading corporation is *ultra vires*. *Preston v. Northwestern Cereal Co.*, 67 Neb. 45 (93 N. W. 136).

Taking mortgage.

339. (1895.) Where a bank takes a mortgage to secure a debt, a third person cannot

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attack the transaction or treat the mortgage as void on the ground that it is *ultra vires* of the bank to take such security. *Smith v. First Nat. Bank of Chadron*, 45 Neb. 444 (63 N. W. 796).

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340. (1896.) A notary public is not disqualified from taking an acknowledgment of a mortgage made to a corporation, merely because it is shown that he was at the time secretary and treasurer of the mortgagee, it not appearing that he was a stockholder in such corporation or otherwise beneficially interested in having the mortgage made. *Horbach v. Tyrrell*, 48 Neb. 514 (67 N. W. 485; 37 L. R. A. 434).

Validity of contracts.

341. (1906.) A clause of a contract of a corporation of *quasi*-public character, which, if enforced, would prevent its serving the public on such terms is illegal and void. *Sammons v. Kearney Power & Irrigation Co.*, 77 Neb. 580 (110 N. W. 308).

Contracts impossible to perform.

342. (1902.) Contracts in which a corporation, in consideration of stated payments made to it, makes promises, which are the main inducement to such contracts and are impossible to perform, are unlawful, being against public policy. *State, ex rel. Prout, v. Nebraska Home Co.*, 66 Neb. 349 (92 N. W. 763; 103 Am. St. Rep. 706; 60 L. R. A. 448).

Ratification of contract.

343. (1900.) A corporation can not ratify a contract which it had not the power to make. *Thompson v. West*, 59 Neb. 677 (82 N. W. 13; 49 L. R. A. 337).

Creation of trust fund for payment of debts.

344. (1898.) A corporation resolved to remove its stock of merchandise to a distant city and effect a consolidation there with another corporation. Afterwards its managing officers determined, in order to avoid trouble with creditors, to retain a portion of the goods, sell them, and apply the proceeds to the payment of debts. No trust was created and no provision made for the manner of the application of the proceeds. *Held*, That this arrangement did not constitute the goods a trust fund for the payment of creditors *pro rata*. *German Nat. Bank v. First Nat. Bank*, 55 Neb. 86 (75 N. W. 531).

E. Civil Actions.

Actions by or against foreign corporations, see *post*, §§ 473-481.

Actions to enforce liability of stockholders, see *ante*, §§ 197-220.

After dissolution, see *post*, §§ 462-465.

Judgment against stockholder in suit against corporation, see *ante*, §§ 194-196.

Right of stockholder to sue or defend on behalf of corporation, see *ante*, §§ 142-150.

Capacity to sue and be sued.

345. (1898.) Corporations for pecuniary profit may sue and be sued, complain and defend in courts of law and equity. *Solomon v. Schneider*, 56 Neb. 680 (77 N. W. 65).

Right of action.

346. (1903.) Where a corporation proceeding in equity to assert rights of an equitable nature, or is seeking relief upon rules or principles of equity, the court of equity will not forget that the stockholders are the real and substantial beneficiaries of a recovery; and if the stockholders have no standing in equity, and are not equitably entitled to the remedy sought to be enforced by the corporation in their behalf and for their advantage, the corporation will not be permitted to recover. *Home Fire Ins. Co. v. Barber*, 67 Neb. 644 (93 N. W. 1024; 108 Am. St. Rep. 716; 60 L. R. A. 927).

347. (1903.) Where a corporation is proceeding at law, or where it is asserting a title to property, or the title to property is involved, the corporation is regarded as a person separate and distinct from its stockholders, or any or all of them. *Home Fire Inc. Co. v. Barber*, 67 Neb. 644 (93 N. W. 1024; 108 Am. St. Rep. 716; 60 L. R. A. 927).

348. (1905.) Where a claim has been rejected or disallowed in part by the auditing board of a corporation (an irrigation district), an original action may be instituted on the claim, in the absence of a statute directing other proceedings to enforce it. *Willow Springs Irrigation District v. Wilson*, 74 Neb. 269 (104 N. W. 165).

Venue.

349. (1894.) An action against a domestic corporation may be brought in any county where it maintains a place of business and has an agent to conduct such business, though its principal office and chief officer are in another county. *Fremont Butter & Egg Co. v. Snyder*, 39 Neb. 632 (58 N. W. 150).

350. (1894.) A domestic corporation, except those governed by sections 56, 57, and 58 of the code of civil procedure, may be sued in any county where it is situated, and it is situated in any county where it has and

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maintains a place of business, and servants, employees, or agents engaged in conducting and carrying on the business for which it exists. *Fremont Butter & Egg Co. v. Snyder*, 39 Neb. 632 (58 N. W. 149).

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351. (1894.) A corporation whose principal place of business, as provided by its charter, was Dodge county, may, when it has a branch place of business in Saunders county, be sued in Saunders county. *Fremont Butter & Egg Co. v. Snyder*, 39 Neb. 632 (58 N. W. 149).

352. (1895.) That a corporation has been sued in a county in which it could not be lawfully sued under the statute is a defense which such corporation may waive; and if a corporation is wrongfully sued in a county and answers generally to the merits of the action without either specially appearing and challenging the jurisdiction of the court or without alleging as a defense to the action that such suit was wrongfully brought in said county, then the corporation will be conclusively presumed to have waived such defense. *Exeter Nat. Bank v. Orchard*, 43 Neb. 579 (61 N. W. 833).

353. (1901.) 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. *Western Travelers Accident Ass'n v. Taylor*, 62 Neb. 783 (87 N. W. 950).

354. (1901.) When the legislature provides the county in which a domestic corporation may be sued, such provision is exclusive. *Western Travelers Accident Ass'n v. Taylor*, 62 Neb. 783 (87 N. W. 950).

355. (1901.) 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*, 62 Neb. 783 (87 N. W. 950).

356. (1906.) The residence of a person who is employed as the agent of a domestic corporation is personal, and is immaterial in an inquiry as to whether a domestic corporation is situated in a county within the meaning of said section. *Security Mutual Life Ins. Co. v. Ress*, 76 Neb. 141 (106 N. W. 1037).

357. (1906.) The fact that an agent is temporarily employed in transacting the business of a domestic corporation in a county other than the one where the corporation has its principal place of business does not subject such corporation to the jurisdiction of the courts of that county under the provisions of section 55 of the code. *Security Mutual Life Ins. Co. v. Ress*, 76 Neb. 141 (106 N. W. 1037).

Process.

Process on foreign corporation, see *post*, §§ 476-479.

Service of process or notice in garnishment, see *Garnishment*, §§ 47-50.

358. (1871.) An agent invested with the general conduct and control, at a particular place, of the business of a corporation, is a managing agent, within section 75 of the code, upon whom a summons may be served. It is immaterial where he resides. *Porter v. Chicago & N. W. R. Co.*, 1 Neb. 14.

359. (1882.) Where the president or chief officer of a corporation is absent from the county, service may be made upon the treasurer. *McMurtry v. Tuttle*, 13 Neb. 232 (13 N. W. 213).

360. (1888.) Under section 912 of the civil code, a summons against a corporation may be served upon its chief officer, if he be found in the county; if not so found, then upon its cashier, treasurer, secretary, clerk, or managing agent; or if none of these can be found, by copy left at the office or usual place of business of such corporation, with the person having charge thereof. This, as well as section 914, applies to the foreign corporations, except where there are special provisions to the contrary. *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb. 552 (37 N. W. 462).

361. (1897.) Where attempt is made to serve a summons upon a corporation, and the persons served are not at the time officers of, or connected with, the corporation, the case is one of total absence of service, and a judgment founded thereon is void. *Campbell Printing Press & Mfg. Co. v. Marder*, 50 Neb. 283 (69 N. W. 774; 61 Am. St. Rep. 573).

362. (1899.) In suing a corporation it is not necessary that in the summons it be described as such. *German Ins. Co. v. Frederick*, 57 Neb. 538 (77 N. W. 1106).

363. (1902.) A manager of an agency established in this state by a foreign railroad corporation for the purpose of soliciting traffic over its line of road is a "managing agent," within the meaning of the

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statute with reference to service of summons on such corporations. *Fremont, E. & M. V. R. Co. v. New York, C. & St. L. R. Co.*, 66 Neb. 159 (92 N. W. 131; 59 L. R. A. 939).

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364. (1906.) No jurisdiction is obtained over a domestic corporation by service of process in a county in which it is neither situated nor has its principal office or place of business. *Cobbey v. State Journal Co.*, 77 Neb. 619 (110 N. W. 643).

365. (1906.) Section 65 of the code applies to corporations as well as individuals, and, if an action is rightly brought in one county, summons may be issued to another county for service upon a corporation. *Cobbey v. State Journal Co.*, 77 Neb. 619 (110 N. W. 643).

366. (1906.) One having authority to make sales of the products of his principal, with no additional privileges or duties, is not a general agent on whom process may be served. *Ord Hardware Co. v. Case Threshing Machine Co.*, 77 Neb. 847 (110 N W. 551).

Garnishment.

367. (1901.) Prior to the adoption of section 485*a* of the code of civil procedure, a corporation may properly be made a garnishee, where the only property sought to be attached is the capital stock of the corporation owned by the defendant. *Farmers & Merchants Nat. Bank v. Mosher*, 63 Neb. 130 (88 N. W. 552).

Parties.

368. (1895.) Stockholders of a corporation, merely as such, are not proper parties respondent in a proceeding to compel the corporation by mandamus to perform a corporate act. *State, ex rel. Gillilan, v. Home Street R. Co.*, 43 Neb. 830 (62 N. W. 225).

Pleading.

369. (1891.) At common law, a corporation may sue and be sued by the corporate name, without an averment of the act of incorporation, and the code has not changed the common law in that regard. *Exchange Nat. Bank v. Capps*, 32 Neb. 242 (49 N. W. 223; 29 Am. St. Rep. 433).

370. (1898.) A petition in a suit to foreclose a real-estate mortgage executed to "Western Trust and Security Company," and by it sold and assigned to the plaintiff, did not fail to state a cause of action, although the mortgagee's character as a legal entity did not affirmatively appear. *Barber v. Crowell*, 55 Neb. 571 (75 N. W. 1109).

371. (1899.) A petition, at least after answer to the merits, is not open to attack because it does not allege the corporate character of the defendant. *German Ins. Co. v. Frederick*, 57 Neb. 538 (77 N. W. 1106).

372. (1899.) In an action by a corporation, if its name imports a corporation, it is not essential to aver in terms its corporate existence or to plead the act of incorporation. *Fletcher v. Co-operative Publishing Co.*, 58 Neb. 511 (78 N. W. 1070).

373. (1902.) At common law a corporation may sue and be sued in its corporate name without an averment of its corporate capacity, and the provisions of our Code have not changed the common law rule in that regard. *Loan & Trust Savings Bank v. Stoddard*, 2 Unof. 486 (89 N. W. 301).

374. (1905.) A petition which alleges that a contract of a corporation was made, executed and delivered by it by its officer and agent, naming him, is not demurrable on the ground that authority by the agent does not sufficiently appear. *Johnson County v. Chamberlain Banking House*, 74 Neb. 549 (104 N. W. 1061).

374*a*. (1908.) Where the original action is brought against a corporation in its corporate name and certain persons alleged to be its officers, for the specific performance of a contract to convey real estate made by the alleged officers for the corporation, an amendment to the petition, pleading that at the time the contract was made the corporation was dissolved and some of the defendants were the trustees thereof, does not change the cause of action. *Heenan & Finlen v. Parmele*, 80 Neb. 514 (118 N. W. 324).

——— Verification.

375. (1895.) The fifth subdivision of section 120 of the code of civil procedure authorizes the verification of pleadings for a corporation by its attorney at law as such, irrespective of the consideration that a summons might or might not legally be served upon such attorney. *Beatrice Rapid Transit & Power Co. v. German Nat. Bank*, 45 Neb. 147 (63 N. W. 374).

——— Issues and proof.

376. (1879.) A general denial, in an action by a corporation, does not put in issue the corporate character of the corporation, or it's power to sue or be sued. *National Life Ins. Co. v. Robinson*, 8 Neb. 452; (1899) *Fletcher v. Co-operative Publishing Co.*, 58

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Neb. 511 (78 N. W. 1070); (1902) *Chamberlain Banking House v. Kemper, etc., Dry Goods Co.*, 3 Unof. 549 (92 N. W. 175).

377. (1882.) The existence of a corporation plaintiff is not put in issue by a general denial of an alleged cause of action. *Dietrichs v. Lincoln & N. W. R. Co.*, 13 Neb. 43 (13 N. W. 13).

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378. (1888.) In an action on a note executed and delivered to plaintiff by its corporate name, it is unnecessary to prove plaintiff's corporate existence. *Holland v. Commercial Bank*, 22 Neb. 571 (36 N. W. 113).

379. (1889.) In order to throw the burden of proving its corporate existence upon a corporation plaintiff, the allegation of the petition alleging such corporate character must be denied other than by a general denial of all allegations of the petition not admitted to be true. *Herron v. Cole Bros.*, 25 Neb. 692 (41 N. W. 765).

380. (1892.) An action for personal injuries was brought against "G. F. S. & Co., a corporation formed and doing business in Douglas county, Nebraska." In the answer and amended answer of G. F. S. & Co. they styled themselves the defendants, and denied that the corporation was formed under the laws of Nebraska, but made no denial that it was a corporation. An amended petition was thereupon filed against S. & Co., a corporation formed under the laws of Illinois and doing business in Nebraska. To this amended petition the corporation answered as defendant and denied the injuries of the plaintiff and pleaded negligence on his part. *Held*, There being no denial of the corporation of S. & Co. and G. F. S. & Co., that, so far as the pleadings show, they formed one and same corporation, and that the place where the corporation was formed was not a material fact in the case. *Swift & Co. v. Crawford*, 34 Neb. 450 (51 N. W. 1034).

381. (1895.) Where a pleading in one portion of it contains a denial of the corporate existence of a company and in another paragraph of the pleading the issue is raised of the right of the company, as a foreign corporation, to acquire or enforce a mechanic's lien in this state, the pleading will be construed as an admission of the corporate capacity of such company. *Chapman v. Brewer*, 43 Neb. 890 (62 N. W. 320; 47 Am. St. Rep. 779).

382. (1898.) A denial that the relator "is a corporation duly organized under the laws of the state of New York" does not put in issue the relator's corporate existence. *State, ex rel. Seth Thomas Clock Co., v. County Commisioners of Cass County*, 53 Neb. 767 (74 N. W. 254).

383. (1900.) The defense of *ultra vires* is not available under a general denial. *Citizens State Bank v. Pence*, 59 Neb. 579 (81 N. W. 623).

384. (1900.) A denial that plaintiff "is a corporation duly organized as a national bank under the act of congress of June 3, 1864, or any other act," does not put in issue the plaintiff's corporate existence. *First Nat. Bank v. Gibson*, 60 Neb. 767 (84 N. W. 259).

Presumptions and burden of proof.

385. (1893.) Contracts of a corporation which are not contrary to the express provisions of its charter are presumed to be within its powers, and the burden is upon one denying their valdity to prove the facts which render them *ultra vires*. *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548 (54 N. W. 830).

386. (1895.) Where the charter or powers of a railroad company are not shown by the pleadings or evidence, the court will not presume that the act of the company in organizing and conducting a relief department is *ultra vires*. *Chicago, B. & Q. R. Co. v. Bell*, 44 Neb. 44 (62 N. W. 314).

387. (1896.) The fact that one is shown to be secretary and treasurer of a corporation will not authorize the presumption that he is a stockholder. *Horbach v. Tyrrell*, 48 Neb. 514 (67 N. W. 485; 37 L. R. A. 434).

388. (1897.) The plaintiff sued as a corporation. The defendants, in their answer, specifically denied the corporate existence of plaintiff. *Held*, That the answer in this respect stated a defense and cast upon the plaintiff the burden of proving its corporate existence. *Davis v. Nebraska Nat. Bank of Omaha*, 51 Neb. 401 (70 N. W. 963).

389. (1905.) In an action against a corporation based on a contract, the presumption obtains that the contract is within the power of the corporation to make, and that the officers executing it on behalf of the corporation acted within the law, unless the petition states facts showing the contrary. *Willow Springs Irrigation District v. Wilson*, 74 Neb. 269 (104 N. W. 165).

Admissibility of evidence.

Admissibility in evidence of by-laws of building association, see *Building and Loan Assocations*, § 54.

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Evidence of corporate existence, see *ante*, §§ 45-47.

390. (1878.) Representations of the president of a bank, made in transacting its business, are admissible in evidence against the bank; but statements made by him away from the bank, in reference to matters in which the bank has no interest, are not admissible. *Kennedy v. Otoe County Nat. Bank*, 7 Neb. 59.

391. (1888.) The written instrument presented in evidence by the plaintiff at the trial in the court below, as containing the articles of incorporation of the plaintiff in said action, though certified by the secretary of state as a copy, contained intrinsic evidence of being the original articles, the signatures thereto of the corporators being proved as genuine; *held*, admissible in evidence. *Holland v. Commercial Bank*, 22 Neb. 571 (36 N. W. 113).

392. (1896.) The testimony on another trial of an officer of a corporation with relation to previous corporate acts cannot be proved as an admission binding upon the corporation. *Columbia Nat. Bank v. Rice*, 48 Neb. 428 (67 N. W. 165).

Weight and sufficiency of evidence.

393. (1894.) Where a bank brought an action upon a note indorsed to it and the answer denied the corporate existence of the bank, proof showing the adoption and recording of articles of incorporation, and that the bank had acted thereunder for a period of years, was sufficient to establish its corporate existence. *Haas v. Bank of Commerce*, 41 Neb. 754 (60 N. W. 85).

394. (1895.) Where there was contained in a mortgage a copy of resolutions described as having been adopted by the board of directors of the mortgagor, a corporation, from which resolutions it appeared that said board had, as required, authorized the making of such mortgage, no further proof was necessary to a *prima facie* showing of authorization by the board of directors. *Hayden v. Lincoln City Electric R. Co.*, 43 Neb. 680 (62 N. W. 73).

395. (1895.) Evidence *held* sufficient to establish the existence of a corporation so as to relieve it from collateral attack. *Chapman v. Brewer*, 43 Neb. 890 (62 N. W. 320; 47 Am. St. Rep. 779).

396. (1903.) Evidence in an action on a note signed by a corporation as surety, *held* to sustain a finding that the signature of the corporation was that of an accommodation indorsement, and created no liability. *Preston v. Northwestern Cereal Co.*, 67 Neb. 45 (93 N. W. 136).

Instruction.

397. (1895.) An instruction that "a director of a corporation, or a number of directors, cannot convey the property of a corporation to themselves for the purpose of securing them for indorsing notes for the corporation to the exclusion of other creditors," is erroneous since it withdraws from the jury the question whether the company was solvent, the rule stated applying only to insolvent companies. *Tillson v. Downing*, 45 Neb. 549 (63 N. W. 836).

Execution.

398. (1892.) Property of a public corporation, such as a bridge company, which is essential to the exercise of its franchise and the discharge of the duties it has assumed toward the general public, cannot, in the absence of statutory authority, be seized and sold to satisfy an ordinary judgment. The only remedy of creditors in such case is to obtain the appointment of a receiver and a sequestration of the company's earnings. *Overton Bridge Co. v. Means*, 33 Neb. 857 (51 N. W. 240; 29 Am. St. Rep. 514).

VIII. INSOLVENCY AND RECEIVERS.

Action by receiver on unpaid subscription, see *ante*, § 92.

Assets.

399. (1898.) The assets of an insolvent corporation constitute a trust fund in the hands of its directors to be used by them in paying corporate debts. *Stough v. Ponca Mill Co.*, 54 Neb. 500 (74 N. W. 868).

Preferences to creditors.

400. (1897.) An insolvent corporation may, in the absence of actual fraud, prefer one or more of its creditors to the exclusion of others. *Wallachs & Sons v. Robinson & Stokes Co.*, 50 Neb. 469 (70 N. W. 52); (1898) *Seeds Dry-Plate Co. v. Heyn Photo-Supply Co.*, 57 Neb. 214 (77 N. W. 660).

401. (1897.) There is no inflexible rule in existence which, under all conditions, prevents an insolvent corporation from transferring or incumbering its property in good faith and for proper purposes. *Shaw & Co. v. Robinson & Stokes Co.*, 50 Neb. 403 (69 N. W. 947).

402. (1897.) Whether or not a conveyance by an insolvent corporation is

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fraudulent as to creditors cannot be determined as a question of law, but is a question of fact, to be determined from a consideration of the evidence in each particular case. *Shaw & Co. v. Robinson & Stokes Co.*, 50 Neb. 403 (69 N. W. 947); (1897) *Wallachs & Sons v. Robinson & Stokes Co.*, 50 Neb. 469 (70 N. W. 52).

403. (1898.) An insolvent corporation, merely because it is a corporation, is not prohibited from preferring particular creditors. *German Nat. Bank v. First Nat. Bank*, 55 Neb. 86 (75 N. W. 531).

404. (1902.) The fact that a corporation, which is being pressed by its creditors for the payment of their claims, makes a trust agreement and deed, whereby it conveys practically all of its property to trustees to secure debts due, to the amount of about $2,500 and additional credit up to $10,000, that its property so conveyed is worth many times that amount, and that such conveyance did in fact hinder and delay its other creditors and prevent them from collecting their just claims against it, taken together with conflicting evidence on the question of the intention of the parties to the transaction and all other facts and circumstances surrounding it is sufficient to sustain the finding of the trial court that the act was fraudulent and void as to such creditors. *First Nat. Bank of Omaha v. East Omaha Box Co.*, 2 Unof. 820 (90 N. W. 223).

Preferences to officers and stockholders.

405. (1894.) The relation of the directors and managing officers of an insolvent private corporation toward the property and assets thereof is that of trustees for all of the creditors. Such officers cannot take advantage of their position to secure a preference for themselves, but are required to share ratably with other creditors. *Ingwersen v. Edgecombe*, 42 Neb. 740 (60 N. W. 1032).

406. (1895.) Directors of an insolvent corporation cannot take advantage of their position to obtain a preference of debts owing by the corporation to themselves. *Tillson v. Downing*, 45 Neb., 549 (63 N. W. 836).

407. (1895.) Where the holder of stock of an insolvent corporation, just before its final suspension of business, obtained assignments to himself of such an amount of the corporation's bills receivable as to fully secure claims owing to such stockholder and a partnership firm of which he was a member, leaving almost no assets for the payment of the other creditors of the corporation, the intent with which such preference was made and received was a question of fact for the jury, and its verdict upon proof of the above facts, that such preference was fraudulent as against creditors of the corporation, will not be disturbed as unwarranted in fact or in law. *Wortendyke v. Salladin*, 45 Neb. 755 (64 N. W. 215).

408. (1897.) A corporation may not prefer a debt owing to its own directors. *Campbell Printing Press & Mfg. Co. v. Marder*, 50 Neb. 283 (69 N. W. 774; 61 Am. St. Rep. 573).

409. (1898.) The directors of an insolvent corporation cannot lawfully appropriate its assets to the payment of debts due them from it to the entire exclusion of other corporate creditors. *Wyman v. Williams*, 53 Neb. 670 (74 N. W. 48).

410. (1898.) A mortgage executed by an insolvent corporation to secure a debt due from it to one of its officers or directors is illegal and void. *Stough v. Ponca Mill Co.*, 54 Neb. 500 (74 N. W. 868).

411. (1898.) A corporation may not prefer a debt owing to its director, secretary, and treasurer. *Seeds Dry-Plate Co. v. Heyn Photo-Supply Co.*, 57 Neb. 214 (77 N. W. 660).

412. (1899.) A director of an insolvent corporation may not through any advantage gained by reason of, or which may be taken of, his directorship obtain or secure a preference of debts of the corporation to him or in which he is materially interested, but a judgment for such debt secured without any such advantage will be upheld even though it may work a preference of the debt. *Nebraska Nat. Bank v. Clark*, 58 Neb. 183 (78 N. W. 527).

413. (1899.) One of the directors of the corporation who had made it a loan, and who, under the order of the managing board relative to issuance of promissory notes to members who had made loans to the company, was entitled to receive such a note, died and his son was appointed administrator of the estate, also became a director of the company, and applied for, and there was executed and delivered to him as administrator, a note of the corporation in the amount of the loan debt. The corporation became insolvent, and thereafter there was recovered a judgment against it, and in favor of the administrator, by default for

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the amount due on the note. *Held*, From the evidence, that there had been no advantage taken by the son of deceased director, and administrator of his estate, of the former's postion of director of the corporation to obtain in the suit and judgment on the note a preference over other creditors of the corporation. *Nebraska Nat. Bank v. Clark*, 58 Neb. 183 (78 N. W. 527).

414. (1900.) An insolvent corporation may not prefer a creditor of one of its officers and stockholders. *Ingwersen v. Edgecombe*, 42 Neb. 740; *Tillson v. Downing*, 45 Neb. 549; *Seeds Dry-Plate Co. v. Heyn Photo-Supply Co.*, 57 Neb. 214, followed. *Reynolds v. Smith*, 60 Neb. 197 (82 N. W. 627).

415. (1902.) The capital stock of a corporation is a trust fund for the benefit of creditors, in the sense that there can be no distribution of its capital among the stockholders without provision being first made for the payment of corporate debts; and the courts will be astute to detect and defeat any scheme or device which is calculated to withdraw the fund, or in any way place it beyond the reach of creditors. *State v. Bank of Ogallala*, 65 Neb. 20 (91 N. W. 497).

——— Preference of claims on which officers are personally liable.

416. (1895.) An insolvent corporation cannot prefer a debt on which its officers and directors are bound as sureties. *Tillson v. Downing*, 45 Neb. 549 (63 N. W. 836); (1897) *Campbell Printing Press & Mfg. Co. v. Marder*, 50 Neb. 283 (69 N. W. 774; 61 Am. St. Rep. 573); (1902) *Williams v. Turner*, 63 Neb. 575 (88 N. W. 668).

417. (1898.) A mortgage executed by an insolvent corporation to a third person to secure a debt, for the payment of which one of its officers or directors is personally bound, is illegal and void. *Stough v. Ponca Mill Co.*, 54 Neb. 500 (74 N. W. 868).

418. (1901.) Officers of an insolvent corporation cannot prefer debts to a third person for which they are obliged as sureties. *Merchants Nat. Bank v. McDonald*, 63 Neb. 363 (88 N. W. 492; 89 N. W. 770).

419. (1902.) Directors of an insolvent corporation who turn over its property and assets to third persons for the purpose of preferring claims upon which such directors are personally liable as sureties, may be required to account for such property and assets in an action by a receiver of the corporation appointed at the instance of other creditors. *Williams v. Turner*, 63 Neb. 575 (88 N. W. 668).

420. (1903.) When an insolvent corporation transfers all of its assets to a creditor in settlement of a claim upon which the officers of the corporation are personally liable, and the transfer is for that reason held invalid, the transferee holds the property in trust for all creditors of the corporation, and is entitled to participate in the distribution of the assets. *National Wall Paper Co. v. Columbia Nat. Bank*, 68 Neb. 47 (93 N. W. 1004).

421. (1904.) Where, by an attachment proceedings, without any fraud or irregularity, certain *bona fide* creditors of an insolvent corporation secure the application of all of the corporate assets to the payment of their claims, the fact that the directors of the corporation who had guaranteed the payment of such claims requested, and thus induced, the creditors to institute the attachment suits, without giving the said creditors any advantage or rights, other than those which as a matter of law they already possessed, does not make such directors liable in an action at law to the other creditors of the corporation. *Emanuel v. Barnard*, 71 Neb. 756 (99 N. W. 666).

Priorities of claims.

422. (1898.) Creditors of an insolvent corporation do not acquire any specific lien on the corporate assets. *Wehn v. Fall*, 55 Neb. 547 (76 N. W. 13; 70 Am. St. Rep. 397).

423. (1901.) A creditor of an insolvent corporation who has reduced his claim to judgment and had execution thereon returned unsatisfied, intervening in a creditor's action for distribution of assets, is entitled to a preference in the payment of his claim. *Merchants Nat. Bank v. McDonald*, 63 Neb. 363 (88 N. W. 492; 89 N. W. 770).

424. (1901.) A creditor whose claim has not been reduced to judgment cannot maintain an action against an insolvent corporation for distribution of its assets, and a creditor who has reduced his claim to judgment and had execution thereon returned unsatisfied, who intervenes in such action is entitled to a preference in the payment of his claim. *Merchants Nat. Bank of Omaha v. McDonald*, 63 Neb. 363 (88 N. W. 492; 89 N. W. 770).

Appointment of receiver.

425. (1898.) Where wrong-doers are in control of a corporation, both through its stock and by being officers, it is not essential for a complaining stockholder to show, as a condition of maintaining his suit for a re-

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ceiver, that he first made demand on the officers to proceed on behalf of the corporation to remedy the wrongs. *Ponca Mill Co. v. Mikesell*, 55 Neb. 98 (75 N. W. 46).

426. (1903.) The holder of a contract, purporting to be for the purchase of a diamond, issued by a tontine company, who has not reduced his claim to judgment, and who has no lien upon the property of the company, has no standing in a court of equity in an action to sequester or impound the assets of such company. *Mann v. German-American Inv. Co.*, 70 Neb. 454 (97 N. W. 600).

427. (1903.) The holder of a contract, purporting to be for the purchase and sale of a diamond, issued by what is commonly called a tontine company, is not a stockholder in such company, and cannot secure the appointmet of a receiver for such company because of the mismanagement of its affairs by its officers. *Mann v. German-American Inv. Co.*, 70 Neb. 454 (97 N. W. 600).

428. (1905.) A receiver will not readily be appointed in a stockholder's suit for mismanagement of corporate affairs where neither the corporation nor the corporate officers are insolvent and the corporation is a going concern profitably conducted. *Miller v. Kitchen*, 73 Neb. 711 (103 N. W. 297).

429. (1905.) Where it is within the ordinary powers of a court of equity to grant sufficient relief to a complaining minority stockholder who alleges mismanagement by corporate officers, a receiver will not be appointed. *Miller v. Kitchen*. 73 Neb. 711 (103 N. W. 297).

——— **Grounds.**

430. (1898.) A receiver will not be appointed for a corporation, at the instance of a stockholder, merely because of a difference of opinion between him and the officers, or the holders of a majority of the stock, as to the proper policy of managing the corporate affairs. *Ponca Mill Co. v. Mikesell*, 55 Neb. 98 (75 N. W. 46).

431. (1898.) A receiver will be appointed for a corporation, at the instance of a stockholder when it is shown that the officers and the holders of a majority of the stock are fraudulently mismanaging the corporate business, converting its property to their individual use, and abusing their powers to the injury of other stockholders. *Ponca Mill Co. v. Mikesell*, 55 Neb. 98 (75 N. W. 46).

432. (1903.) Jurisdiction to appoint a receiver of corporate property, cannot be conferred by the mere consent of the corporation where neither equitable nor statutory grounds exists and where other parties whose rights are affected have not been notified; nor is a stockholder concluded by such an order. *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.*, 68 Neb. 222 (94 N. W. 136; 110 Am. St. Rep. 400; 60 L. R. A. 791).

433. (1903.) Unless expressly authorized by statute, a court has no jurisdiction to appoint a receiver of corporate property upon grounds which would not be sufficient were the owner a natural person. *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.*, 68 Neb. 222 (94 N. W. 136; 110 Am. St. Rep. 400; 60 L. R. A. 791).

434. (1904.) The mere fact that the officers and stockholders of a corporation are incapable of managing the affairs of the company is not ground for the appointment of a receiver thereof *Smiley v. Sioux Beet Syrup Co.*, 71 Neb. 581 (99 N. W. 263).

435. (1904.) A petition by a stockholder of a corporation that states that there are sufficient assets to more than pay all debts but that the officers of the company are incapable of properly managing its affairs does not, in the absence of a charge of fraud of such officers, state grounds sufficient for the appointment of a receiver. *Smiley v. Sioux Beet Syrup Co.*, 71 Neb. 586 (101 N. W. 253).

——— **Jurisdiction.**

436. (1903.) In the absence of statutory authority, courts of equity do not possess jurisdiction over corporate bodies to the extent of, on the application of private parties, appointing a receiver, sequestrating the property and business and selling the same through the instrumentality of such receiver, and thereby wind up the affairs and terminate the business and indirectly dissolve the corporation. *Vila v. Grand Island Electrict Light, Ice & Cold Storage Co.*, 68 Neb. 222 (97 N. W. 613).

437. (1903.) An order of the district court appointing a receiver for a corporation, in an action wherein such relief is the only relief sought, will be vacated for want of authority in such court to make the same. *Mann v. German-American Investment Co.*, 70 Neb. 454 (97 N. W. 600).

——— **Petition.**

438. (1898.) A stockholder, seeking the appointment of a receiver because of mismanagement and fraud by the majority

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stockholders and officers, alleged among other wrongful act that the officers had conveyed away corporate property in secret trust for one of their number and for a grossly inadequate price; that plaintiff had been compelled to resort to a stockholder's suit to set aside the conveyance, and that the court had imposed as a condition that the corporation repay a certain sum of money, giving him the right to do so if the corporation refused, and a consequent lien upon the property to indemnify him; that he had been compelled to make the payment. He asked the establishment and foreclosure of the lien. *Held*, That the two transactions were connected with the same subject of action, within the meaning of section 87 of the code of civil procedure, and could be joined. *Ponca Mill Co. v. Mikesell*, 55 Neb. 98 (75 N. W. 46).

439. (1903.) Petition in the case at bar examined, construed, and *held* defective in substance, and insufficient to support the orders of the court appointing a receiver to take charge of and sequestrate the property and busniess of the defendant corporation, directing a sale thereof, and the confirmation of the sale made under such orders. *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.*, 68 Neb. 233 (97 N. W. 613).

Collection of assets.

440. (1897.) The authority of the receiver of an insolvent corporation to collect assessments made by its board of directors before his appointment as such receiver is sufficiently established by showing that such receiver, under his order of appointment, was required to collect all sums due such insolvent corporation from whomsoever such indebtedness might be owing. *Wyman v. Williams*, 52 Neb. 833 (73 N. W. 285).

Enforcement of liability of officers.

441. (1902.) An order appointing a receiver "of the property, effects, credits, and rights of action of every character" of an insolvent corporation, and directing him to bring such action as may be "necessary to enforce the payment of such debts and rights of action and for the recovery of the assets of such company," sufficiently authorizes an action against the directors to hold them to account for property and assets disposed of by them in unlawfully preferring debts for which they were personally liable. *Williams v. Turner*, 63 Neb. 575 (88 N. W. 668).

Receiver as party to action against corporation.

442. (1894.) A receiver appointed by a court in another state than Nebraska is not a necessary party in this state to a suit on behalf of or against the corporation for which such receiver was appointed. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374 (59 N. W. 838).

443. (1898.) A receiver of a corporation, appointed after the commencement of a suit against the corporation, may intervene in such action to defend the rights of the corporation. *Andrews v. Steele City Bank*, 57 Neb. 173 (77 N. W. 342).

Expenses of receivership.

444. (1901.) The expenses of procuring a receivership of an insolvent corporation, including services of an attorney in consultations, preparing papers and procuring the appointment of a receiver, are properly chargeable against the fund so brought into the court's control. *Stone v. Omaha Fire Ins. Co.*, 61 Neb. 834 (86 N. W. 468).

445. (1904.) Where a receiver is appointed for a corporation on application of a stockholder but no notice was served on a trustee who executed mortgages to secure a bond issued by the corporation, receivers certificate issued for expenses incidental to the receivership are not prior liens to that of the mortgage executed by the trustee. *Smiley v. Sioux Beet Syrup Co.*, 71 Neb. 581 (99 N. W. 263).

IX. REINCORPORATION AND REORGANIZATION.

Property of original corporation.

446. (1903.) The majority stockholders of a corporation have no power to exclude the minority stockholders therefrom, by organizing a new corporation and transferring all the property and good will of the old to the new corporation, without the consent of the minority stockholders. *McLeod v. Lincoln Medical College*, 69 Neb. 555 (98 N. W. 672).

Liabilities of original corporation.

447. (1896.) Where a partnership banking company sells out to a newly formed banking corporation, evidence that the latter assumed only a portion of the liabilities of the old company, and that it had in reality paid out more that it had agreed to do, sustains a judgment for such new company as against a holder of a certificate of deposit from the old company. *Campbell v.*

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Farmers & Merchants Bank of Elk Creek, 49 Neb. 143 (68 N. W. 344).

448. (1896.) The purchase of part of the assets of a copartnership or corporation by a new corporation, organized by the members of the old corporation or copartnership, does not raise a conclusive persumption against the new corporation that by its purchase it assumed or became liable for the debts of the old corporation or copartnership, notwithstanding the fact that the new corporation engaged in and continued to carry on the business in which the old corporation or copartnership had been engaged. *Campbell v. Farmers & Merchants Bank of Elk Creek*, 49 Neb. 143 (68 N. W. 344).

449. (1896.) In order to render a newly organized corporation liable at common law for the debts of an established corporation or firm to whose business and property it has succeeded, it should in the absence of a special agreement, affirmatively appear from the pleadings and proofs that the transaction in question is fraudulent as to creditors of the old corporation, or that the circumstances attending the creation of the new and its succession to the business and property of the old corporation are of such character as to warrant the finding that it is a mere continuation of the former. *Austin v. Tecumseh Nat. Bank*, 49 Neb. 412 (68 N. W. 628; 59 Am. St. Rep. 543; 35 L. R. A. 444)

450. (1897.) One corporation having acquired all the stock of another, and then, through its officers, having procured that other to execute to it a bill of sale of all its assets to secure an existing indebtedness, and there remaining as a consequence of such acts no officers or place of business or tangible assets of such second corporation, *semble*, that another creditor of the second corporation need not procure judgment against it preliminary to an action against the first for the purpose of enforcing its claim against the second. *Campbell Printing Press & Mfg. Co. v. Marder*, 50 Neb. 283 (69 N. W. 774).

451. (1903.) Where a debtor corporation transfers all of its assets to a new one, organized for the purpose of continuing the business of the old, and no provision is made for payment of its debts and it ceases to do business, one holding a judgment against the old corporation may bring an action at law against the new one. *Douglas Printing Co. v. Over*, 69 Neb. 320 (95 N W. 656).

452. (1907.) Where an insolvent corporation, in fraud of its creditors, transfers its assets to a new corporation, not the successor of the old, without consideration other than the issuance of stock to the stockholders of the old corporation, an action at law will not lie against the receiving corporation. *Sharples Co. v. Harding Creamery Co.*, 78 Neb. 795 (111 N. W. 783).

453. (1907.) Where an insolvent corporation, in fraud of its creditors, transfers its assets to a new corporation, not the successor of the old, without consideration other than the issuance of stock to the stockholders of the old corporation, the corporation receiving such assets is liable to the creditors of the old corporation only to the extent of the value of the property received. *Sharples Co. v. Harding Creamery Co.*, 78 Neb. 795 (111 N. W. 783).

X. CONSOLIDATION.

Consolidation of railroads, see *Railroads*, §§ 163-169.

Consolidation of street railroads, see *Street Railroads*, §§ 24-26.

In general.

454. (1888.) By virtue of a consolidation of the Chicago, Burlington & Quincy Railroad company, an Illinois corporation, and the Burlington & Missouri River Railroad Company, a Nebraska corporation, in compliance with the laws of this state, the corporation so created become a body corporate in accordance with the laws of this state, and is not a foreign corporation. *State, ex rel. Leese, v. Chicago, B. & Q. R. Co.*, 25 Neb. 156 (41 N. W. 125; 2 L. R. A. 564*n*).

454*a*. (1879.) When the president of a railway company becomes a partner in a construction company and such company assumes the debts of the railway company and agrees to pay all claims and expenses of the latter, the said president cannot recover against a subsequent purchaser of the railroad, a claim for his unpaid salary, as the construction company had assumed to pay the same. *Nebraska R. Co. v. Lett*, 8 Neb. 251.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

Deficiency of members.

455. (1897.) That one person becomes the owner of a majority of all of the shares of stock of the corporation does not work a dissolution of the corporation nor neces-

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sarily destroy its identity or individuality as a business concern. Property conveyed to the corporation does not become the property of such person individually. *Harrington v. Connor*, 51 Neb. 214 (70 N. W. 911).

Misuse of franchise.

456. (1881.) Repeated and wilful acts of misuser or nonuser by a corporation which are of the essence of the contract between it and the state, constitute a just ground of forfeiture of the franchise. *State v. Council Bluffs & N. Ferry Co.*, 11 Neb. 354 (9 N. W. 563).

457. (1900.) Sections 3 and 4 of the "Anti-trust law" (Compiled Statutes 1899, chapter 91*a*), providing for ousting corporations by civil action from the exercise of powers and privileges which have been abused, is declaratory of the common law. *State v. Standard Oil Co.*, 61 Neb. 28 (84 N. W. 413; 87 Am. St. Rep. 449).

458. (1902.) A corporation, organized under the laws of this state, which is engaged in a business forbidden by statute, or unlawful as against public policy, may be deprived of its charter and dissolved by proceedings in *quo warranto*. *State, ex rel. Prout, v. Nebraska Home Co.*, 66 Neb. 349 (92 N. W. 763; 103 Am. St. Rep. 706; 60 L. R. A. 448).

Jurisdiction of proceedings.

459. (1906.) Equity has no jurisdiction to dissolve and put an end to corporations unless expressly authorized to so do by statute. *State v. Omaha Elevator Co.*, 75 Neb. 654 (106 N. W. 979).

Parties to proceedings.

460. (1888.) In a proceeding by *quo warranto* against a corporation to forfeit its franchises and oust it from the same for nuisance or nonuser thereof, the corporation is the only necessary party defendant. *State, ex rel. Leese, v. Atchison & N. R. Co.*, 24 Neb. 143 (38 N. W. 43; 8 Am. St. Rep. 164). [Rehearing. *State v. Atchison & N. R. Co.*, 38 Neb. 437.]

Management of assets.

460*a*. (1907.) Where the managing directors or trustees of a bank in process of liquidation have in their hands funds of the bank, and the distribution of such funds is prevented by litigation or otherwise, and the custom of responsible banks in the community where they reside is to pay interest upon such deposits, and said funds were in fact bearing interest at and prior to the time such trustees obtained the custody of the same, and said trustees withdraw the moneys from such banks and deposit them in a bank in which one of the trustees is a stockholder, without interest, such trustees will be held personally liable for the customary rate of interest paid by responsible banks in such community for deposits of like character. *Gund v. Ballard*, 80 Neb. 385 (114 N. W. 420).

Distribution of property.

461. (1890.) The franchise of a corporation being annulled, the question of the rights of property and of an intervenor therein will not be determined until all claimants can be heard. *State v. Nebraska Distilling Co.*, 29 Neb. 700 (46 N. W. 155).

Compensation of trustees.

461*a*. (1907.) Where certain stockholders of a bank in process of liquidation employ counsel to litigate for them their contention as to the distribution of a fund which is already in existence in the hands of the trustees or managing directors, and subject to distribution to the parties entitled thereto, as their respective rights may be determined by the court, they will not be entitled to recover their attorneys' fees out of such fund. *Gund v. Ballard*, 80 Neb. 385 (114 N. W. 420).

461*b*. (1907.) The mere fact that managing directors of trustees of a bank in process of liquidation have not been active in interposing defenses to an action by one of their number against the bank upon an individual claim will not defeat their right to a reasonable compensation for services rendered and responsiblity assumed in closing up and settling the other affairs of said bank. *Gund v. Ballard*, 80 Neb. 385 (114 N. W. 420).

Actions by or against corporation after dissolution.

462. (1898.) Under the provisions of section 68, chapter 16, Compiled Statutes 1897, an action against a dissolved corporation may be commenced and prosecuted to final judgment. *Wehn v. Fall*, 55 Neb. 547 (76 N. W. 13; 70 Am. St. Rep. 397).

463. (1900.) A dissolved domestic corporation may, after such dissolution, prosecute any suit in its corporate name in the same manner and with like effect as if the corporation had not ceased to exist. *Schmitt Bro. Co. v. Mahoney*, 60 Neb. 20 (82 N. W. 99).

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464. (1900.) Under section 63, chapter 16, Compiled Statutes, a suit does not abate by the dissolution of a corporation plaintiff or defendant organized under the laws of this state. *Schmitt & Bro. Co. v. Mahoney*, 60 Neb. 20 (82 N. W. 99).

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465. (1906.) After the dissolution of a corporation by the expiration of its franchise, or otherwise, an action may be maintained in the corporate name upon a cause of action which accrued to the corporation. *Lincoln Butter Co. v. Edwards-Bradford Lumber Co.*, 76 Neb. 477 (107 N. W. 797).

465*a*. (1908.) Under section 62, chapter 16, Compiled Statutes 1907, a dissolved corporation may be sued in the corporate name and service made upon the trustee or person in charge of the assets. *Heenan & Finlen v. Parmele*, 80 Neb. 514 (118 N. W. 324).

XII. FOREIGN CORPORATIONS.

Right of foreign corporation to mechanic's lien, see *Mechanics' Lien*, § 10.

Right of foreign corporation to exercise right of eminent domain, see *Eminent Domain*, §§ 13-22.

Validity of contract with foreign building and loan company, see *Building and Loan Associations*, §§ 14-19.

Right of state to impose conditions.

466. (1903.) The state may impose such conditions and limitations as it sees fit upon foreign corporations seeking the privilege of doing business in this state. *State, ex rel. Breckenridge, v. Fleming*, 70 Neb. 523 (97 N. W. 1063).

467. (1904.) The state may impose on a foreign corporation, as a condition of coming into and doing business within its territory, any terms, conditions and restrictions it may think proper, not repugnant to fundamental laws. *State v. Insurance Co. of North America*, 71 Neb. 320 (99 N. W. 36).

Revocation of privilege.

468. (1900.) Foreign corporations do business here not by right, but by comity, and the state may, at pleasure, revoke the privilege which it has granted such corporations. *State v. Standard Oil Co.*, 61 Neb. 28 (84 N. W. 413; 87 Am. St. Rep. 449).

469. (1900.) The revocation of the privilege given a foreign corporation to do business here is not the infliction of a penalty. *State v. Standard Oil Co.*, 61 Neb. 28 (84 N. W. 413; 87 Am. St Rep. 449).

——— Proceedings.

470. (1900.) A foreign corporation, by reason of having done one or more of the criminal acts mentioned in section 2 of the "Anti-trust law" (Compiled Statutes 1899, chapter 91*a*), may, by injunction or *quo warranto*, be excluded from the state. *State v. Standard Oil Co.*, 61 Neb. 28 (84 N. W. 413; 87 Am. St. Rep. 449).

471. (1900.) A foreign corporation doing business in violation of the "Anti-trust law" (Compiled Statutes 1899, chapter 91*a*), may be required under section 394 of the code of civil procedure, to furnish evidence against itself in an action brought to exclude it from the state. *State v. Standard Oil Co.*, 61 Neb. 28 (84 N. W. 413, 87 Am. St. Rep. 449).

Acquiring property.

472. (1890.) Where a foreign corporation purchased real estate in this state at a judicial sale, its title is valid against every one but the state, and can be divested only by proceedings brought by the state for that purpose. *Carlow v. Aultman & Co.*, 28 Neb. 672 (44 N. W. 873).

Actions by or against.

473. (1896.) Where a foreign corporation has business transactions in the state with residents thereof, out of which accounts arise against the corporation, the accounts may be enforced in the courts of the state if jurisdiction can be obtained. *Council Bluffs Canning Co. v. Omaha Tinware Mfg. Co.*, 49 Neb. 537 (68 N. W. 929).

474. (1900.) By comity of the states, corporations of one state may sue in the courts of another state the same as can a domestic corporation, unless prohibited by legislative enactment. *Schmitt & Bro. Co. v. Mahoney*, 60 Neb. 20 (82 N. W. 99).

475. (1901.) A foreign corporation may sue in the courts of this state without a compliance with the provisions of section 215, chapter 16, Compiled Statutes. *Holt v. Rust-Owen Lumber Co.*, 2 Unof. 170 (96 N. W. 613).

——— Process.

476. (1892.) Where a foreign corporation contracts a debt in this state, as for labor and materials, service in this state upon the managing agent is sufficient, although he be but temporarily within the state. *Klopp, Bartlett & Co. v. Creston City Guarantee Waterworks Co.*, 34 Neb. 808 (52 N. W. 819; 33 Am. St. Rep. 666).

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477. (1896.) Service made within the state upon the managing agent of a foreign corporation is sufficient to confer jurisdiction upon a district court, under section 59 of the code. *Council Bluffs Canning Co. v. Omaha Tinware Mfg. Co.*, 49 Neb. 537 (68 N. W. 929).

478. (1906.) Under the provisions of sections 73, 75 of the code, a citizen of this state, who has a cause of action against a foreign corporation growing out of business transactions in this state, may have recourse to the courts of this state by the service of process upon the managing agent of such corporation. *Ord Hardware Co. v. Case Threshing Machine Co.*, 77 Neb. 847 (110 N. W. 551).

479. (1906.) An agent of a foreign corporation, whose contract of agency demands of him the exercise of judgment in the business matters of his principal, and who has charge of the business of his principal in the territory covered by his contract, is a managing agent within the meaning of sections 73 and 75 of the code, providing for the service of summons upon the managing agent of a foreign corporation. *Ord Hardware Co. v. Case Threshing Machine Co.*, 77 Neb. 847 (110 N. W. 551).

——— Pleading.

480. (1903.) Where the fact that a plaintiff, a foreign corporation, has been doing business in this state without complying with the conditions prescribed in the statute as to such corporations, does not appear affirmatively, a demurrer will not lie. Such defense must be set up by answer. *Northern Assurance Co. v. Borgelt*, 67 Neb. 282 (93 N. W. 226).

481. (1903.) Where the record discloses affirmatively that the plaintiff, a foreign corporation, has been doing business in this state without complying with the conditions prescribed by the statutes, a demurrer is properly sustained. *Northern Assurance Co. v. Borgelt*, 67 Neb. 282 (93 N. W. 226).

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I. NATURE, GROUNDS, AND EXTENT OF RIGHTS IN GENERAL.

Nature and grounds of right.

1. (1880.) A party can in no case recover costs from his adversary unless he can show some statute which gives him the right. *Stanton County v. Madison County*, 10 Neb. 304 (4 N. W. 1055); (1881) *Dow v. Updike*, 11 Neb. 95 (7 N. W. 857); (1897) *City of Hastings v. Mills*, 50 Neb. 842 (70 N. W. 381); (1898) *Wallace v. Sheldon*, 56 Neb. 55 (76 N. W. 418); (1902) *Douglas County v. Moores*, 66 Neb. 284 (92 N. W. 199).

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Stipulations and agreements.

2. (1902.) Discontinuance of a pending cause and agreement not to prosecute any further claim are sufficient consideration for a promise to pay accrued costs and attorneys' fees. *Weilage v. Abbott*, 3 Unof. 157 (90 N. W. 1128).

Discretion of court.

3. (1890.) The awarding of costs on the granting of a continuance is discretionary with the trial court. *Coombs v. Brenklander*, 29 Neb. 586 (45 N. W. 929).

4. (1895.) The awarding and taxation of costs rests in the discretion of the trial court, where no statutory provision controls. *Woodward v. Baird*, 43 Neb. 310 (61 N. W. 612).

5. (1898.) The discretion conferred on the courts by section 623 of the code, relating to costs, is not an arbitrary, but a legal, one, to be exercised within the limits of legal and equitable principles. *Wallace v. Sheldon*, 56 Neb. 55 (76 N. W. 418); (1902) *State, ex rel. Johnson, v. Holm*, 3 Unof. 768 (92 N. W. 1006); (1903) *Albers v. Dillavou*, 4 Unof. 340 (93 N. W. 937); (1905) *In re Clapham's Estate*, 73 Neb. 492 (103 N. W. 61).

6. (1901.) In other actions than those in which costs follow of course, the discretion of the trial court in awarding costs will not be interfered with, except where facts regularly brought before the supreme court shows abuse of such discretion. *Porter v. Trompen*, 2 Unof. 76 (96 N. W. 226).

7. (1906.) In an action in equity the trial court has a sound discretion in taxing the costs of the action to the different litigants, but this discretion is subject to review when unreasonably or arbitrarily exercised. *Hering v. Simon*, 77 Neb. 60 (108 N. W. 154).

Prevailing party.

8. (1876.) When a petition is filed to set aside a sale in which the sheriff levied on the wrong property and the defendant did not appear to be in default, the cost should be taxed to the plaintiff. *Frasher v. Ingham*, 4 Neb. 531.

9. (1892.) In an action to compel a county board to call an election to change the county seat, the relator, on the granting of the relief sought, is entitled to costs against the county. *State, ex rel. Wilcox, v. Crabtree*, 35 Neb. 106 (52 N. W. 842).

10. (1898.) The provisions of the code on the subject of costs examined, and *held* to establish the following principles: (1) Generally, costs follow the judgment—are awarded the successful and taxed to the losing party; (2) *prima facie*, the unsuccessful litigant is liable for costs; and, to justify a judgment awarding him costs, either an express statute must intervene, or the circumstances be such that a judgment against him for costs would be inequitable. *Wallace v. Sheldon*, 56 Neb. 55 (76 N. W. 418).

Amount or value of recovery.

11. (1879.) When the plaintiff sues for $50 and recovers only $15, he is entitled to costs. *Martin v. Grover*, 9 Neb. 263 (2 N. W. 354).

12. (1881.) D. sued M. & H. in the county court for a balance of $154.67. M. & H. answered denying D.'s cause of action and setting up an offset against him amounting to $138. The jury found that there was due from the defendants to the plaintiff upon the cause of action set forth in his bill of particulars, the sum of $193.40, and that there was due from the plaintiff to the defendants upon their set-off the sum of $118.40. That there was therefore found to be due to the plaintiff from the defendants the sum of $75.00. *Held*, On error, that the plaintiff was not entitled to costs. *Moore v. Darrow*, 11 Neb. 462 (9 N. W. 637).

13. (1884.) In an action under section 15, of chapter 50, of the Compiled Statutes, where the damages claimed were $500, in the county court, where the action was commenced, the plaintiff recovered $205. Upon appeal by the defendant to the district court the plaintiff recovered $181. *Held*, That plaintiff could not recover her costs. *Rosenbaum v. Dunston*, 16 Neb. 111 (19 N. W. 610).

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14. (1892.) In an action for an accounting by principal against his agent the recovery of cost is not dependent upon the amount of the recovery. *Carlson v. Beckman*, 35 Neb. 392 (53 N. W. 203).

15. (1894.) Where, in an action to foreclose a mechanic's lien, there was a finding for less than $200, and a personal judgment, but no decree of foreclosure, the general finding established the right to a lien and determined that the action was not one within the jurisdiction of a justice of the peace, and entitled the plaintiff to recover his costs. The fact that the court failed to enter judgment in accordance with the finding did not render a judgment for costs erroneous. *Guthrie v. Brown*, 42 Neb. 652 (60 N. W. 939).

Action which might have been brought in lower court.

16. (1872.) A plaintiff cannot have costs of his action, if he bring it in the district court, when it is within the jurisdiction of a justice of the peace, even though the district court have concurrent jurisdiction. *Geere v. Sweet*, 2 Neb. 76.

17. (1877.) Where a justice of the peace has jurisdiction of an action, and it has been brought in any other court, the plaintiff cannot recover costs. *Ray v. Mason*, 6 Neb. 101; (1887) *Goodman v. Pence*, 21 Neb. 459 (32 N. W. 219); (1894) *Pickens v. Polk*, 42 Neb. 267 (60 N. W. 566).

18. (1880.) R. brought an action against a sheriff and an attachment creditor in the district court to recover the sum of $300, the value of certain property levied upon by the sheriff under an order of attachment against S. R., and recovered judgment for the sum of $52.58. *Held*, Not an action against an officer for misconduct in office, and that a justice of the peace had jurisdiction, the amount recovered being less than $100. *Miller v. Roby*, 9 Neb. 471 (4 N. W. 65).

19. (1881.) Where plaintiff in county court claims more than $100 and finding in his favor exceeds that sum, but is by counter-claim or set-off reduced to less than $100, he is not entitled to costs. *Moore v. Darrow*, 11 Neb. 462 (9 N. W. 637).

20. (1894.) In an action brought in the district court where plaintiff obtains a judgment for $200, the costs of each party should be taxed to him. *Shields v. Gamble*, 42 Neb. 850 (61 N. W. 101).

21. (1897.) Mills sued the city in the district court claiming $5,000 damages which he alleged he had sustained by falling into an excavation in one of its streets negligently left unguarded. He recovered a verdict for $200. *Held*, That, assuming the excavation was a nuisance within the meaning of section 621 of the code of civil procedure, a justice of the peace had jurisdiction to render judgment for the amount of the verdict and therefore Mills was not entitled to recover costs; that the amount claimed by Mills in his petition deprived a justice of the peace of jurisdiction to try the case but the amount recovered determined his right to recover costs. *City of Hastings v. Mills*, 50 Neb. 842 (70 N. W. 381).

22. (1897.) Where a justice of the peace has jurisdiction of a cause, and the same has been brought in any other court, plaintiff cannot recover costs. Each party, in such case, is liable for his own costs. *Morsch v. Besack*, 52 Neb. 502 (72 N. W. 953).

Costs needlessly incurred.

Effect of including unnecessary papers in record, see *Appeal and Error*, §§ 1152, 1153.

23. (1880.) If costs are needlessly incurred, they should be taxed to the party at fault. *Miller v. Roby*, 9 Neb. 471 (4 N. W. 65).

24. (1880.) So far as it is consistent with its duty in enforcing and protecting the rights of the parties, the court should discourage the accumulation of costs. *Miller v. Roby*, 9 Neb. 471 (4 N. W. 65).

25. (1885.) Where a party to a proceeding before the county board causes the attendance of unnecessary witnesses, or in any other manner needlessly augments the costs and expenses of a trial, it is within the power of the board to tax such unnecessary costs to the party making them, and it should in all proper cases exercise such power. *State, ex rel. Castor, v. Saline County*, 18 Neb. 422 (25 N. W. 587).

Establishment of partial defense.

26. (1885.) In an action on a contract where it is pleaded that illegal interest has been contracted for or taken or reserved, and the truth of such plea shall be proved or admitted, the defendant is entitled to recover costs. *Cattle v. Haddox*, 17 Neb. 307 (22 N. W. 565).

27. (1897.) Where, in an action on a

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promissory note, the defense of usury is established, the defendant is entitled to recover his costs even though plaintiff has judgment and such recovery applies to costs incurred in the suing out of an attachment in the case. *Montgomery v. Albion Nat. Bank*, 50 Neb. 652 (70 N. W. 239).

28. (1899.) In a suit on a contract for payment of money, where the defense of usury is established, plaintiff is not entitled to costs on the judgment awarded him. *Interstate Savings & Loan Ass'n v. Strine*, 58 Neb. 133 (78 N. W. 377).

Effect of offer of judgment.

29. (1879.) An offer to confess judgment duly made in the court where the action is brought, under section 1004 of the code of civil procedure, need not be renewed in the appellate court in order to make it available to the party making it on final judgment. *Kleffel v. Bullock*, 8 Neb. 336; (1887) *Underhill v. Shea*, 21 Neb. 154 (31 N. W. 510).

30. (1886.) In a case pending in the district court an offer made by defendant to allow judgment to be taken by the plaintiff in a certain amount therein stated and costs, which offer was in writing and filed in the office of the clerk of said court, but was not served upon the plaintiff or his attorney, nor was it made in open court, the plaintiff being present or having notice thereof. *Held*, Unavailing to throw the costs made after the filing of such offer upon the plaintiff. *Rose v. Peck*, 18 Neb. 529 (26 N. W. 363).

31. (1887.) Where docket of justice shows that prior to trial, defendant offered to confess judgment, which plaintiff refused to accept, there is no presumption that the offer was made in writing; and the decision of the district court to tax costs to plaintiff, for the reason that judgment did not exceed the offer, will not be molested. *Underhill v. Shea*, 21 Neb. 154 (31 N. W. 510).

32. (1890.) In an action before a justice of the peace, if the defendant before trial offers in writing to allow judgment to be taken against him for a specified sum, and the plaintiff declines to accept the same, and fails to recover a sum equal to the offer, he cannot recover costs made after the offer. *Elsanger v. Grovijohn*, 29 Neb. 139 (45 N. W. 273).

33. (1896.) Section 565 of the code of civil procedure, providing that a defendant may serve on the plaintiff, or his attorney, an offer in writing to allow judgment to be taken against him for a specified sum, and that if such offer be not accepted, and the plaintiff fails to obtain judgment for more than the offer, he shall pay defendant's costs from the time of the offer, contemplates that where there is only one defendant, all costs from the time of the offer shall in such case be taxed against plaintiff. *Wachsmuth v. Orient Ins. Co.*, 49 Neb. 590 (68 N. W. 935).

34. (1898.) An offer to confess judgment duly made in a cause pending before a justice of the peace need not be renewed in the appellate court to make the provisions of said section 1004 of the code available to the defendant on final judgment. *Flower v. Nichols*, 55 Neb. 314 (75 N. W. 864).

35. (1898.) In an action before a justice of the peace, where the defendant before trial offers in writing to allow judgment to be taken against him for a specified sum, and the plaintiff declines to accept the same, and fails to recover a sum equal to the offer, he is not entitled, under section 1004 of the code of civil procedure, to recover costs subsequently made, but the same should be adjudged against him. *Flower v. Nichols*, 55 Neb. 314 (75 N. W. 864).

36. (1907.) An acceptance of an offer to allow judgment for a specified sum, coupled with the condition that the judgment shall include costs, is an acceptance of the offer according to its legal effect, and entitled the plaintiff to judgment for the amount offered, and costs, without further litigation. *Palmer v. Stiles*, 78 Neb. 362 (110 N. W. 1004).

37. (1907.) Where an acceptance of an offer to allow judgment in a specified sum is coupled with a condition that the judgment shall include costs, and is rejected by the defendant, his rejection thereof amounts to a withdrawal of his offer, and leaves the parties standing, with respect to costs, as though the offer had not been made. *Palmer v. Stiles*, 78 Neb. 362 (110 N. W. 1004).

38. (1907.) Section 1004 of the code, which provides that, in an action brought before a justice of the peace, if the defendant, at any time before trial, offer to allow judgment to be taken against him for a specified sum, and the plaintiff reject such offer and fail to recover a sum equal to the offer, he cannot recover costs subsequently

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accruing, contemplates an offer made in terms that, when accepted as made, entitles the plaintiff to judgment therefor, and costs, without further litigation. *Palmer v. Stiles*, 78 Neb. 362 (110 N. W. 1004).

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Effect of reversal of judgment.

39. (1885.) Where upon a new trial being granted the plaintiff was permitted to amend his petition by stating more fully a cause of action arising on his contract, not a new cause of action, an order requiring him to pay only a part of the costs then accrued would not be set aside. *Wallingford, Shamp & Co. v. Burr*, 17 Neb. 137 (22 N. W. 350).

40. (1901.) Where a decree was rendered denying one of the litigants any relief and taxing him with half the costs, and it was reversed, it also reversed the decree as to costs. *Olson v. Lamb*, 61 Neb. 484 (85 N. W. 397).

Condition to granting continuance.

41. (1879.) Under the act of February 25, 1875, the court may require the party moving for a continuance to pay a sum not exceeding $10 as costs. *Smith v. Silvis*, 8 Neb. 164.

On change of venue.

In criminal prosecutions, see *post*, § 159.

42. (1901.) The taxation of costs on a change of venue in justice court to the party applying therefor, is absolute, and the party paying the same, although ultimately successful in the suit, cannot recover the amount so paid. *Moss v. Lindsey*, 62 Neb. 829 (88 N. W. 119).

Presentation of claim as condition.

43. (1884.) Section 80, chapter 14, Compiled Statutes, does not require claims arising on tort for the death of a person through the negligence of the city, to be presented to the council in order to entitle plaintiff to recover costs. *Nance v. Falls City*, 16 Neb. 85 (20 N. W. 109).

Ownership of costs awarded.

44. (1897.) Unclaimed witness fees and costs remaining in the hands of the clerk of the district court are not public moneys, and the legislation of the state, in so far as it attempts to divest the persons for whose benefit such fees and costs were paid of title thereto, is unconstitutional and void. *State, ex rel. Broatch, v. Moores*, 52 Neb. 770 (73 N. W. 299).

45. (1902.) Since no costs of any kind can be taxed in a case unless the statute makes provision therefor, the legislature may, in providing for the taxation of witness fees and other costs, make a condition that such fees and costs shall be called for within a certain specified time, in default of which they shall be paid into the county treasury for the benefit of the school fund. *Douglas County v. Moores*, 66 Neb. 284 (92 N. W. 199).

II. PERSONS ENTITLED.

Defendant disclaiming interest.

46. (1897.) "Where defendants disclaim having any title or interest in land or other property the subject matter of the action, they shall recover costs, unless for special reasons the court decides otherwise," is declaratory merely of the rule in equity, since the discretion reserved to the court implies a determination from an inspection of the pleadings of defendant's right to be dismissed from the action. *Fowler v. Brown*, 51 Neb. 414 (71 N. W. 54).

III. PERSONS LIABLE.

Liability of infant for costs, see *Infants*, §§ 64-66.

Incompetent persons.

47. (1879.) The action of an infant must be brought by his guardian or next friend, who alone is liable for the costs. The infant is not liable to a judgment therefor. *Kleffel v. Bullock*, 8 Neb. 336.

48. (1879.) An infant is not liable to a judgment for costs after arriving at full age, in an action brought without a guardian or next friend, but not terminated during infancy, if on reaching majority at the first opportunity, he disclaims all benefit from the proceeding, and refuses to proceed further. *Kleffel v. Bullock*, 8 Neb. 336.

49. (1887.) Where an action was brought against certain minor heirs and others to quiet the title of real estate in the plaintiff, the principal object of the action being to divest the title of the minor heirs, as such minor heirs were unable to convey by deed, they should not be taxed with the costs of the action, and the relief will be granted to the plaintiff upon the payment of all costs. *Clark v. Clark*, 21 Neb. 402 (32 N. W. 157).

Official or representative capacity of party.

50. (1901.) A constable who in good faith levies an execution on personal prop-

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erty in the possession of the execution defendant, without knowledge or notice that such property belongs to a third person, cannot be made liable for the costs in an action of replevin brought by the owner to recover possession, unless a demand has been made for the surrender of the possession before the commencement of the action. *Littlefield v. Wilson*, 1 Unof. 581 (95 N. W. 677).

On intervention.

51. (1892.) An intervener cannot, in any event, be taxed with costs which accrued prior to the intervention. *Railsback, Mitchell & Co. v. Patton*, 34 Neb. 490 (52 N. W. 277).

IV. SECURITY FOR PAYMENT.

In criminal prosecutions, see *post*, §§ 152, 153.

Want of security for costs, as grounds for dismissal, see *Dismissal and Nonsuit*, §§ 57, 58.

Necessity.

52. (1881.) When an action is brought by partners in their firm name, the statute requires them to give security for costs. *Haskins v. Citizens Bank*, 12 Neb. 39 (10 N. W. 466).

53. (1882.) The plaintiff in an action, and also the defendant, is primarily liable for all costs which he makes, and their payment or security may be required in advance. Nor does the fact that his adversary may ultimately be compelled to pay them by the judgment of the court, relieve him from such liability to the officer entitled thereto. *Sechler v. Stark*, 12 Neb. 242 (11 N. W. 320).

54. (1895.) Prejudice does not result from an order overruling a motion to require plaintiff to give additional security, where a valid judgment including costs goes against defendant. *Watson v. Roode*, 43 Neb. 348 (61 N. W. 625).

55. (1897.) Refusal to require a nonresident plaintiff to give security for costs is not reversible error where, on final hearing, the costs are properly taxed to defendant. *Hard v. Hard*, 51 Neb. 412 (70 N. W. 1122).

56. (1898.) After judgment had been entered for defendant an order requiring plaintiff, on a motion filed before trial, to give security for costs, *held* not prejudicial error where plaintiff did not comply with the order. *Elliott v. Carter White-Lead Co.*, 53 Neb. 458 (73 N. W. 948).

57. (1898.) Under facts stated in opinion an order overruling a motion to require a cross-petitioner to give security for costs, *held* not erroneous. *Moss v. Robertson*, 56 Neb. 774 (77 N. W. 403).

Waiver.

58. (1881.) The requirement of security for costs, being for the benefit of defendant, may be waived by him, and he does waive it by failing properly to insist upon its being given. *Haskins v. Citizens Bank*, 12 Neb. 39 (10 N. W. 466).

Bond or undertaking.

59. (1901.) There is no substantial difference between "a bond for costs" and "an undertaking for costs." Each expression is the recognized equivalent of the other. *McPherson v. Commercial Nat. Bank*, 61 Neb. 695 (85 N. W. 895).

60. (1901.) An undertaking for costs is enforceable although no obligee is named therein. *McPherson v. Commercial Nat. Bank*, 61 Neb. 695 (85 N. W. 895).

Summary remedies against sureties.

61. (1902.) The provisions of sections 612 to 616 of the code of civil procedure, and especially of the latter section, do not authorize by summary proceedings the entry of a judgment for costs against sureties on a cost bond which is required to be given by the plaintiff in error or appellant under rule 12 adopted by the supreme court, with reference to security for costs in actions brought here on error or by appeal. *Dunn v. Bozarth*, 64 Neb. 862 (90 N. W. 954).

62. (1902.) The court is not authorized by the issuance of a writ of *scire facias*, or on a motion and notice to the adverse party in lieu thereof, to order an execution to issue against sureties on a cost bond, given in pursuance of the provisions of supreme court rule 12, for the costs made in the action in which the cost bond was given, and which are assessed against a plaintiff in error or appellant, or for the amount thereof remaining unpaid. *Dunn v. Bozarth*, 64 Neb. 862 (90 N. W. 954).

Action on bond or undertaking.

63. (1902.) The right to enforce the liability of a surety on a cost bond given in pursuance of supreme court rule 12, is by proceeding in an ordinary civil action on the undertaking and in pursuance of the rules governing civil actions generally.

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Dunn v. Bozarth, 64 Neb. 862 (90 N. W. 954).

V. AMOUNT, RATE AND ITEMS.

In general.

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64. (1906.) Nothing can be taxed as costs in an action except such items as are prescribed by statute or are expressly authorized by the consent or agreement of the parties. *Langan v. Whalen*, 77 Neb. 658 (110 N. W. 668).

65. (1906.) Where a new trial is granted for the reason that a correct transcript to perfect an appeal was not obtainable for the reason that the official reporter had absconded, the costs of an attempt to procure such transcript is not taxable in the second trial. *Langan v. Whalen*, 77 Neb. 658 (110 N. W. 668).

Attorneys' fees.

66. (1875.) Where an allowance is made for an attorney's fee, as provided by section 23, General Statutes, the amount thereof should be specifically stated and kept distinct from the amount of the judgment proper. *Rich v. Stretch*, 4 Neb. 186. [Changed by statute. *Hardy v. Miller*, 11 Neb. 395.]

67. (1877.) When the instrument sued on provides for an attorney's fee, the allowance of the fee is no part of the judgment for the debt itself, but it is taxed as costs, and is subject to exceptions and review in like manner as the taxation of other costs may be. *Hendrix v. Rieman*, 6 Neb. 516.

68. (1878.) Attorneys' fees are in the nature of costs and are to be taxed as such. *Rosa v. Doggett*, 8 Neb. 48.

69. (1878.) No attorneys' fees can be allowed except in cases where a judgment has been recovered, and only in cases where the instrument upon which the action is brought in express terms provides for their allowance. And in no case can such fee be recovered unless it is allowed by the court. *Rosa v. Doggett*, 8 Neb. 48. [Changed by statute. *Hardy v. Miller*, 11 Neb. 395.]

70. (1881.) There is no authority to allow attorney fees in actions founded on instruments executed since June 1, 1879. *Hardy v. Miller*, 11 Neb. 395 (9 N. W. 475); *Dow v. Updike*, 11 Neb. 95 (7 N. W. 857).

71. (1881.) The repeal of the act allowing attorney's fees on foreclosure, did not affect a contract entered into while the act was in force. *White v. Rourke*, 11 Neb. 519 (9 N. W. 689).

72. (1884.) If an allowance of attorneys' fees is made, the record should show the fact, and it should be kept entirely distinct from the judgment proper. It is considered in the nature of costs, and should be treated as such. *Aultman & Co. v. Stout*, 15 Neb. 586 (19 N. W. 464).

73. (1884.) In the absence of a statute authorizing it, there is no authority in this state to allow an attorney's fee, and tax the same as costs in the action. *Otoe County v. Brown*, 16 Neb. 394 (20 N. W. 274).

74. (1884.) There is no statute in this state authorizing the taxation of attorney's fee as part of the costs in an action by county commissioners to foreclose a tax lien. *Otoe County v. Brown*, 16 Neb. 398 (20 N. W. 641).

75. (1885.) Where a note was executed prior to the taking effect of act of February 24, 1879, a provision for attorneys' fees therein may be enforced. *Bond v. Dolby*, 17 Neb. 491 (23 N. W. 351).

76. (1886.) Under a statute which authorizes the allowance of an attorney's fee in certain cases, proportioned to the amount of recovery, the debtor cannot, by paying a considerable portion of the debt immediately proceding the rendition of judgment, defeat the recovery by the attorney of fees upon the entire sum for which, but for the payment, judgment would have been rendered. *Hand v. Phillips*, 18 Neb. 593 (26 N. W. 388; 54 Am. Rep. 824).

77. (1886.) An attorney's fee under the act of February 18, 1872, when allowable, should "be fixed" and allowed by the trial court upon a recovery of judgment by a plaintiff, and when once fixed within the statutory limits the amount thereof will not be changed by the supreme court. *Sedgwick v. Dixon*, 18 Neb. 545 (26 N. W. 247). [Changed by statute. *Hardy v. Miller*, 11 Neb. 395.]

78. (1888.) As vindictive damages cannot be recovered in this state, attorney fees are not recoverable in actions of tort, except where specifically provided for by statute. *Winkler v. Roeder*, 23 Neb. 706 (37 N. W. 607; 8 Am. St. Rep. 155).

79. (1891.) From the earliest history of this state until 1873 attorney fees were not allowed to the plaintiff in any action arising upon contract. In 1873 an act was passed to allow attorney fees not to exceed

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ten per cent of the recovery in an action upon a mortgage or promissory note. This act was repealed in 1879, taking effect June 1, 1879, and since that time a court has had no authority to allow attorney fees to the plaintiff in any action upon a promissory note or for the foreclosure of a mortgage. *In re Breckinridge*, 31 Neb. 489 (48 N. W. 142).

80. (1893.) A provision in a note executed since June 1, 1879, for the payment of attorneys' fees for collection is invalid. *Security Co. of Hartford v. Eyer*, 36 Neb. 507 (54 N. W. 838; 38 Am. St. Rep. 735).

81. (1893.) In a real estate mortgage foreclosure on property in this state it appeared that a resident of Nebraska executed the note and mortgage and agreed in the note to pay an attorney's fee for collection in case of foreclosure. The payee was a resident of Iowa. The papers were executed and delivered and the money paid to the borrower in this state. The note was payable in New York. The provision for payment of attorney's fee is binding in Iowa. It was stipulated in the note and mortgage that these instruments were made and executed in, and are to be construed by, the laws of Iowa. *Held*, That the law of the place of the forum governs the application of the remedy, such as the recovery of costs, and that the said provision in the note for attorney's fee, being contrary to the settled law of this state, will not be enforced. *Security Co. of Hartford v. Eyer*, 36 Neb. 507 (54 N. W. 838; 38 Am. St. Rep. 735).

82. (1894.) The provisions of chapter 48 of the Session Laws of 1889 empowered the courts of this state, upon rendering judgment against an insurance company on any policy of insurance on real property, to allow plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs of the case in which judgment is rendered. *Hanover Fire Ins. Co. v. Gustin*, 40 Neb. 828 (59 N. W. 375).

83. (1894.) Where attorneys' fees are taxed as costs, it is no objection that they were allowed to the attorneys of record by name. *Phœnix Ins. Co. v. Covey*, 41 Neb. 724 (60 N. W. 12).

84. (1894.) The taxation of attorneys' fees by a federal court is a matter of which such courts have sole cognizance, and such taxation cannot in the state courts be impeached as being contrary to public policy. *Mead v. Weaver*, 42 Neb. 149 (60 N. W. 385).

85. (1895.) On the foreclosure of a tax lien, based on a valid tax sale, the court should award the plaintiff an attorney's fee equal to ten per cent of the amount of the decree. *Alexander v. Thacker*, 43 Neb. 494 (61 N. W. 738).

86. (1897.) Under section 45, chapter 43, Compiled Statutes, the court may, in a suit on a policy covering both realty and personalty, allow a reasonable attorney's fee, based on the amount recovered on account of the realty. *Omaha Fire Ins. Co v. Thompson*, 50 Neb. 580 (70 N. W. 30).

87. (1897.) Upon review of a judgment for plaintiff in an action on a fire insurance policy covering realty, attorney's fees for services in the supreme court should not be allowed. *Home Fire Ins. Co. v. Skoumal*, 51 Neb. 655 (71 N. W. 290).

88. (1897.) In an action on a policy for insurance written on real property, the court in rendering judgment against the insurance company may allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs. *Home Fire Ins. Co. v. Skoumal*, 51 Neb. 655 (71 N. W. 290).

89. (1898.) A provision, in a note, for payment of attorney's fees in case suit should be brought against the maker, will not be enforced in Nebraska, though the note was executed and made payable in Iowa where the provision was lawful. *Hallam v. Telleren*, 55 Neb. 255 (75 N. W. 560).

90. (1898.) Courts cannot award attorney's fees to an unsuccessful contestant of a will solely because he acted in good faith, and probable cause for the contest existed. *Wallace v. Sheldon*, 56 Neb. 55 (76 N. W. 418).

91. (1902.) The provision of section 3 of the valued policy law (Comp. Stat. 1899, ch. 43, sec. 45), permitting the taxation as costs of a reasonable attorney's fee upon rendering judgment against an insurance company on a contract insuring real estate, is grounded on considerations of public policy, and is constitutional. *Farmers & Merchants Ins. Co. v. Dobney*, 62 Neb. 213 (86 N. W. 1070; 97 Am. St. Rep. 624).

92. (1903.) A recovery of counsel fees for the trial of a case will not be allowed as an element of damages for an injunction wrongfully obtained if the injunction proceedings be only ancillary to the main case. *Barr v. Post*, 4 Unof. 32 (93 N. W. 144).

93. (1906.) Where the court, instead of

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taxing the fees, enters a judgment therefor in favor of the attorneys by name, it is a mere error of form and not of substance, and does not constitute reversible error. *Chambers v. Chambers*, 75 Neb. 850 (106 N. W. 993).

94. (1906.) Attorneys' fees cannot be taxed as costs against the successful litigant in an action at law or in equity. *Hering v. Simon*, 77 Neb. 60 (108 N. W. 154).

Officers' fees for attendance.

95. (1895.) No fee is allowable by law to a sheriff or constable for attendance during the trial of a civil case before a justice of the peace. *Kissinger v. Staley*, 44 Neb. 783 (63 N. W. 55).

Interest or costs allowed.

96. (1891.) The judgment debtor is not liable for interest on the taxable costs where payment is delayed by error proceedings and plaintiff had not advanced the costs. *O'Donnell v. Omaha, N. & B. H. R. Co.*, 31 Neb. 846 (48 N. W. 880).

VI. TAXATION.

Effect of reversal on costs in lower court, see *ante*, §§ 39, 40.

Entry.

97. (1895.) A judgment of a justice of the peace, "It is therefore considered by me that the plaintiff recover from the defendant the sum of $7.48 and his costs herein expended, taxed at $37.55, as follows: See margin," is correct in form in its reference to costs, as it only allowed the recovery by plaintiff of his costs expended in the suit; and separately stating or entering the costs in itemized tables on the margin of the record was a sufficient compliance with the requirements of the law in regard to separate taxing and entering the costs on the record. *Kissinger v. Staley*, 44 Neb. 783 (63 N. W. 55).

Parties.

98. (1887.) Under section 30, chapter 28, Compiled Statutes 1885, the costs of the parties to an action must be taxed and entered on the record separately. *Cooper & Co. v. Hall*, 22 Neb. 168 (34 N. W. 349).

99, 100. (1887.) In all actions, motions and proceedings in the district court the costs of the parties should be taxed and entered on the record separately. *Wallace v. Flierschman*, 22 Neb. 203 (34 N. W. 372); (1895) *Kissinger v. Staley*, 44 Neb. 783 (63 N. W. 55).

Retaxation.

101. (1880.) Where the costs taxed appear to be excessive, the proper remedy is by motion to retax made to the court where the error occurred. *Woods v. Colfax County*, 10 Neb. 552 (7 N. W. 269).

102. (1885.) A motion for retaxation of costs made necessary by mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order, may be made at any time within three years after judgment upon reasonable notice to the adverse party, or his attorney in the action. *Cattle v. Haddox*, 17 Neb. 307 (22 N. W. 565).

103. (1885.) Where costs taxed in a cause appear to be exorbitant or excessive, the proper remedy is by a motion to retax, made to the court where the alleged mistakes are made. *Cozine v. Hatch*, 17 Neb. 694 (24 N. W. 389); (1898) *Citizens Nat. Bank v. Gregg*, 53 Neb. 760 (74 N. W. 273).

104. (1897.) Where the supreme court in remanding a cause directs the trial court to tax all costs to appellee, the latter may move for a rehearing or for a modification of the order as to costs. *Oliver v. Lansing*, 51 Neb. 818 (71 N. W. 735).

105. (1901.) A court is without jurisdiction to act upon a motion to retax costs given by a decree filed at a subsequent term. *Olson v. Lamb*, 61 Neb. 484 (85 N. W. 397).

106. (1906.) Any mistake made by the clerk in taxing fees in favor of or against a party may be corrected by the court on motion at any time; but an award of costs in favor of a party is a part of the judgment as much as the award of damages, and this cannot be changed after the term, except for some statutory cause allowing the court to set aside or modify its judgment at a subsequent term. *Meade Plumbing, Heating & Lighting Co. v. Irwin*, 77 Neb. 385 (109 N. W. 391).

107. (1907.) While the award of costs made in a judgment cannot be changed after the term, except for some cause provided by statute for modifying a judgment after the term at which it was entered, this rule does not apply to an application made by a party to retax items of the costs illegally or through mistake taxed against him. *Smith v. Bartlett*, 78 Neb. 359 (110 N. W. 991).

Review of order.

108. (1895.) Where from statements in the record it appears certain items of the

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costs as taxed are proper charges, in the absence of any showing to the contrary they will be presumed to be correct. *Kissinger v. Staley*, 44 Neb. 783 (63 N. W. 55).

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109. (1897.) An order of the district court taxing costs as directed by a mandate of the supreme court *held* not reversable. *Oliver v. Lansing*, 51 Neb. 818 (71 N. W. 735).

110. (1901.) A party who claims that unnecessary costs were taxed against him must point out the items of which he complains. *National Life Ins. Co. v. Butler*, 61 Neb. 499 (85 N. W. 437; 87 Am. St. Rep. 462).

111. (1901.) A foreign statute provided for the reference, by the court, of a solicitor's bill to a taxing master, on the application of the party to be charged, and that the amount taxed by such master should be binding and conclusive on the parties, unless set aside or altered; plaintiff's bill, as solicitors, was so referred, and taxed by such master; at the time of ordering the reference, it was also ordered by the court that the party to be charged should pay the amount taxed by such master within a given time. *Held*, That the order of the court was a final judgment against the party to be charged for the amount found and taxed by the master. *Linton v. Janson*, 1 Unof. 352 (95 N. W. 675).

112. (1906.) Where the court, instead of taxing the fees, enters a judgment therefor in favor of the attorneys by name, it is a mere error of form, and not of substance, and does not constitute reversible error. *Chambers v. Chambers*, 75 Neb. 850 (106 N. W. 993).

——— Necessity for motion to retax.

In criminal prosecutions, see *post*, § 154.

113. (1886.) A party complaining of the taxation of costs in the district court must file a motion in that court to retax the same. The ruling on the motion to retax is subject to review. *Whitall v. Cressman*, 18 Neb. 508 (26 N. W. 245); (1892) *Railsback, Mitchell & Co. v. Patton*, 34 Neb. 490 (52 N. W. 277).

114. (1887.) Before judgment for costs will be reviewed in the supreme court, there must be a motion to retax sustained or overruled, in whole or in part, by the trial court. *Wilkinson v. Carter*, 22 Neb. 186 (34 N. W. 351); (1894) *Real v. Honey*, 39 Neb. 516 (58 N. W. 136); (1894) *Richards v. Borowsky*, 39 Neb. 774 (58 N. W. 277); (1894) *Cahn v. Lipson*, 39 Neb. 776 (58 N. W. 280); (1894) *Haskell v. Valley County*, 41 Neb. 234 (59 N. W. 680); (1894) *Roberts v. Drehmer*, 41 Neb. 306 (59 N. W. 911); (1894) *Shields v. Gamble*, 42 Neb. 850 (61 N. W. 101); (1895) *Insurance Co. of North America v. Bachler*, 44 Neb. 549 (62 N. W. 911); (1896) *Yankton, N. & S. W. R. Co. v. State*, 49 Neb. 272 (68 N. W. 487).

115. (1897.) A motion to retax costs is essential to obtain a review of a mistake, neglect, or omission of the clerk of the trial court in the taxation of costs, but such motion is unnecessary where the court has determined that a party is liable for certain costs and rendered judgment against him therefor. *Hartford Fire Ins. Co. v. Corey*, 53 Neb. 209 (73 N. W. 674).

116. (1897.) Where the question as to liability for costs was directly considered by the trial court, the party against whom they were taxed may have the ruling reviewed without having filed a motion to retax. *Lamaster v. Elliott*, 53 Neb. 424 (73 N. W. 925).

117. (1898.) A motion in the lower court to retax costs is unnecessary to review a judgment awarding an attorney's fee in an action on an insurance policy. *American Fire Ins. Co. v. Landfare*, 56 Neb. 482 (76 N. W. 1068).

VII. ON APPEAL AND ERROR.

Review of decisions of justice of the peace, or county court.

118. (1880.) In an appeal from the justice of the peace, where the district court rendered judgment in favor of the plaintiff for costs, the judgment was reversed, and each party is required to pay his own costs. *Miller v. Roby*, 9 Neb. 471 (4 N. W. 65).

119. (1880.) Where a plaintiff appeals from judgment in a justice court, and does not recover more than $20 on the appeal, exclusive of interest, he cannot recover his costs, but shall be adjudged to pay all costs in the appellate court, including $5 to defendant's attorneys. *Weast v. Sheppard*, 10 Neb. 508 (7 N. W. 284).

120. (1906.) When a plaintiff in an action in a justice's court, in which no set-off is pleaded, recovers a judgment from which the defendant appeals, and the plaintiff has judgment also in the district court, he is entitled to recover costs in the latter court without regard to the amount of his

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judgment therein. *Miller v. Henderson*, 76 Neb. 383 (107 N. W. 586).

Expenses of record.

121. (1881.) If unnecessary matter appear in a record, costs thereof taxed to party in fault. *Eaton v. Carruth*, 11 Neb. 231, (9 N. W. 58).

122. (1891.) In preparing a transcript for the supreme court, the clerk of the district court is not entitled to charge a fee for a certificate and seal attached to each paper and journal entry of which a copy is made, one certificate at the end of the transcript being sufficient. *Lydick v. Palmquist*, 31 Neb. 300 (47 N. W. 918).

123. (1892.) Where unnecessary papers are included in the transcript, as the original petition where there is an amended one, the summons and return to the same, together with motions and demurrers to the petition where no point is made upon such pleadings or papers, the costs of the same will be taxed to the party at fault. *Streitz v. Hartman*, 35 Neb. 406 (53 N. W. 215).

124. (1904.) The necessary expense of settling a bill of exceptions upon the determination of a cause in the district court is taxable as costs incurred in that court to be adjudged against the unsuccessful party in the final determination of the litigation. *Pettis v. Green River Asphalt Co.*, 71 Neb. 519 (101 N. W. 333).

Effect of petition for removal.

125. (1881.) Although the timely filing of a proper petition and bond under the provisions of the act of congress, approved March 3, 1875, may render it the imperative duty of the state court to make an order removing the cause to the circuit court of the United States for the proper district, yet when it does not appear from the record that the attention of the district court has ever been called to such petition and bond, nor any motion made to set aside a judgment rendered after the filing of such petition and bond, this court will deny costs in a proceeding in error to reverse such judgment. *Merriam v. Dunbar*, 11 Neb. 208 (7 N. W. 443).

Dismissal.

126. (1895.) An appellant, against whom there was no finding below, may be released from payment of costs where the appeal from a judgment against the other appellants has been dismissed. *Scott v. Cornish*, 44 Neb. 376 (62 N. W. 1065).

Recovery of more favorable judgment.

127. (1884.) In an action under section 15 of chapter 50 of the Compiled Statutes, where the damages claimed were five hundred dollars; in the county court, where the action was commenced, the plaintiff recovered $205. Upon appeal by the defendant to the district court the plaintiff recovered $181. *Held*, That plaintiff could not recover her costs. *Rosenbaum v. Dunston*, 16 Neb. 111 (19 N. W. 610).

128. (1884.) On trial in the county court the plaintiff recovered judgment for $38.77½ when the defendant appealed to the district court, and in that court the plaintiff recovered judgment for $18, whereupon the district court refused to render judgment in favor of plaintiff for his costs. *Held*, No error. *Wilde v. Boldt*, 16 Neb. 539 (20 N. W. 849).

Modification.

129. (1889.) Where a judgment is affirmed as to some items and reversed as to others, the costs in the supreme court will be divided equally between the parties. *Carter v. Munson*, 27 Neb. 172 (42 N. W. 1032).

Reversal.

130. (1889.) Where a judgment is reversed in the supreme court and remanded, the plaintiff in error is entitled to recover his costs which accrue in said court. *Republican V. R. Co. v. Finck*, 28 Neb. 397 (44 N. W. 434).

131. (1899.) Where, in an error proceeding, a judgment of reversal is entered in this court, the plaintiff in error is entitled to recover his costs made in said court from the defeated party. Those which accrued in the district court abide the final determination of the cause. *National Masonic Accident Ass'n v. Burr*, 57 Neb. 437 (77 N. W. 1098).

VIII. PAYMENT AND REMEDIES FOR COLLECTION.

Sufficiency.

132. (1891.) One H. was permitted to file an amended petition upon payment of costs. He paid a large amount of costs and filed an amended petition on which the case was tried and a decree rendered. *Held*, That as the court below had deemed the order of the court as to payment of costs satisfied by trying the cause and rendering a decree, if more costs were still due, the remedy of the defendant was a motion to

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retax, and that should additional costs still be due from the plaintiff it would not be cause for the reversal of the judgment. *Hoagland v. Van Etten*, 31 Neb. 292 (47 N. W. 920).

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Evidence of payment.

133. (1903.) The testimony of the witness who paid them is competent proof of a payment of costs. *Arabian Horse Co. v. Bivens*, 4 Unof. 823 (96 N. W. 621).

Summary remedies.

134. (1886.) Judgments for costs in mandamus cases can only be collected by execution in the same way as other judgments. A respondent failing to pay such judgment is not in contempt and cannot be proceeded against therefor. *State, ex rel. Mechleny, v. Jaynes*, 19 Neb. 697 (28 N. W. 295).

Lien and enforcement thereof.

Costs in criminal prosecutions, see *post*, §§ 175, 176.

135. (1903.) The costs of the error proceeding, like other costs incident to the litigation, are secured by the attachment lien, and the attached property may be sold to satisfy the same. *Rhodes v. Samuels*, 67 Neb. 1 (93 N. W. 148).

Enjoining collection.

136. (1898.) A court of equity will not enjoin the collection of a fee bill where all the legal costs therein taxed have not been paid or tendered. *Citizens Nat. Bank v. Gregg*, 53 Neb. 760 (74 N. W. 273).

IX. IN CRIMINAL PROSECUTION.

See, also, specific crimes or offenses.

Costs of prosecution for breach of the peace, see *Breach of the Peace*, §§ 1, 2.

In prosecution for violating liquor laws, see *Intoxicating Liquors*, § 319.

Validity of law taxing costs in prosecution for violating liquor laws, see *Intoxicating Liquors*, § 27.

Statutory provisions in general.

137. (1880.) The several provisions of the criminal code relative to costs are clearly embraced in the title of the act, which is, "An act to establish a criminal code," and are constitutional. *Boggs v. Washington County*, 10 Neb. 297 (4 N. W. 984).

Rights and liabilities on conviction.

138. (1885.) The constitution does not deprive the legislature of the authority to impose a reasonable jury fee to be taxed as a part of the costs against a person convicted of an offense. *Shaw v. State*, 17 Neb. 334 (22 N. W. 772).

139. (1896.) An attorney's fee cannot be taxed against a defendant, under section 22, chapter 50, Compiled Statutes, in a case prosecuted by the county attorney. *Hornberger v. State*, 47 Neb. 40 (66 N. W. 23).

140. (1902.) Costs properly taxable to a defendant in a criminal case are not all the costs which the person having charge of the prosecution may see fit to make, but only such as there was actual, apparent or probable necessity for incurring. *Biester v. State*, 65 Neb. 276 (91 N. W. 416).

141. (1902.) In determining what costs were actually, apparently or probably necessary, the district court is vested with a large discretion, which will not be interfered with if fairly exercised. *Biester v. State*, 65 Neb. 276 (91 N. W. 416).

142. (1902.) The costs of prosecution which may be taxed against the defendant in a criminal case are the costs incurred in establishing guilt, and not those made in connection with an accusation shown to be groundless. *Biester v. State*, 65 Neb. 276 (91 N. W. 416).

143. (1902.) Litigants should ordinarily anticipate the discretion of the trial court to limit the number of witnesses to prove a collateral issue, and where an unnecessary number are subpœnaed costs should not be taxed as to all of them. *Biester v. State*, 65 Neb. 276 (91 N. W. 416).

144. (1902.) Costs made by the state in a futile effort to prove that an assault was felonious cannot be taxed against the defendant, although convicted of an assault and battery. *Biester v. State*, 65 Neb. 276 (91 N. W. 416).

——— **Lesser offense than that charged.**

145. (1883.) Where one is charged with a felony before a justice of the peace, but ought to have been for a misdemeanor only, the county board may, in their discretion, allow or disallow the entire bill for costs, or any part thereof. *Kepley v. Irwin*, 14 Neb. 300 (15 N. W. 719); *Dodge County v. Gregg*, 14 Neb. 305 (15 N. W. 741).

146. (1902.) Costs made by the state in a futile effort to prove that an assault was felonious cannot be taxed against the defendant, although convicted of an assault and battery. *Biester v. State*, 65 Neb. 276 (91 N. W. 416).

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Liability of prosecuting witness.

147. (1880.) Where a complaint in a prosecution for assault and battery fails, only the costs of the prosecution may be taxed against the complainant, and not the cost of defending. *Errickson v. State*, 10 Neb. 585 (7 N. W. 333).

148. (1882.) In cases of complaint for misdemeanor, before a magistrate, whether the case is tried on the merits or dismissed before trial, costs can be adjudged against the complainant only after a finding that the complaint was without probable cause or malicious. *Cobbey v. Berger*, 13 Neb. 463 (14 N. W. 396).

149. (1892.) S. was arrested on a charge of felony on complaint made by B. The accused waived examination and gave bond for his apearance at the next term of the district court, at which an information was filed by the county attorney for the crime charged in the complaint of B. Subsequently the prosecution was dismissed upon the motion of the county attorney, whereupon the court entered judgment against B. for the costs of prosecution. *Held*, Error. *Burton v. State*, 34 Neb. 125 (51 N. W. 601).

——— **Statutory provisions.**

150. (1886.) Section 287 of the criminal code does not apply to prosecutions instituted by a public officer. *State, ex rel. Thomas, v. McCutcheon*, 20 Neb. 304 (30 N. W. 58).

151. (1902.) Section 322 of the code of criminal procedure, in so far as it authorizes the question of the good faith of the prosecuting witness in instituting the prosecution to be tried and determined at the same time that the defendant is tried, and the taxation of costs against him in case it is found that in filing the information he acted maliciously or without probable cause, is unconstitutional and void. *Rickley v. State*, 65 Neb. 841 (91 N. W. 867; 61 L. R. A. 489*n*).

——— **Security for costs.**

152. (1886.) Where the complainant in a prosecution for misdemeanor is a public officer, he is not required to furnish security for costs before the issuance of a warrant. *State, ex rel. Thomas, v. McCutcheon*, 20 Neb. 304 (30 N. W. 583).

153. (1889.) In cases of misdemeanor the statute authorized the magistrate to require the complaining witness to give security for costs. This security is designed as a protection to all persons entitled to fees in the case in the event that the complaint is dismissed; but the law does not authorize a constable to demand his fees in advance in such cases as a condition precedent to performing his duty in the county, as by summoning a jury. *Beach v. State, ex rel. Emmons*, 27 Neb. 398 (43 N. W. 177).

——— **Review.**

154. (1892.) Where costs are improperly taxed to a complaining witness on dismissal of the prosecution by the county attorney, a motion to retax costs is not neccssary in order to entitle him to have the judgment reviewed in the supreme court. *Burton v. State*, 34 Neb. 125 (51 N. W. 601).

155. (1896.) The right of appeal from the county court to the district court in a criminal case is restricted to defendant, and appeal will not lie in favor of the complaining witness against whom a judgment for costs has been rendered. *O'Chander v. Hansen*, 48 Neb. 485 (67 N. W. 604).

——— **Actions.**

156. (1882.) Whether under our code an action can be maintained, in any event, by an officer for fees earned in a misdemeanor case before a magistrate, against the complainant, or security for costs given under the provisions of section 287 of the criminal code, *quære*. But no such action can be maintained unless it has been found by such magistrate that the complaint in such misdemeanor case was malicious or without probable cause. *Cobbey v. Berger*, 13 Neb. 463 (14 N. W. 396).

Liability of county.

157. (1880.) The complaint under which costs are made, although charging a felony, is not conclusive on the question of allowance and payment. If upon investigation by the commissioners they shall find that it ought to "have been for a misdemeanor only, they may, in their discretion, disallow the entire bill or any part thereof." *Boggs v. Washington County*, 10 Neb. 297 (4 N. W. 984).

158. (1880.) Costs incurred in prosecutions for felony or misdemeanor before magistrates are payable from the county treasury only as provided in sections 536 and 541 of the criminal code. *Boggs v. Washington County*, 10 Neb. 297 (4 N. W. 984).

159. (1880.) Upon a change of venue under section 456 of the criminal code, the expenses of the county in which the cause

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is tried, including jurors, bailiffs, use of court room, etc., are not costs within the meaning of said section, "to be borne by the county where the indictment is found." Whether the language of the statute includes anything more than clerk's fees for transcript of the record of the case, *quære*. *Stanton County v. Madison County*, 10 Neb. 304 (4 N. W. 1055).

160. (1883.) A county is not liable for fees of witnesses of a defendant, who is indicted for a felony. *Hewerkle v. Gage County*, 14 Neb. 18 (14 N. W. 549). [Changed by statute, section 461, Compiled Statutes.]

161. (1883.) The county is liable for costs of a criminal examination before the magistrate. *Dodge County v. Gregg*, 14 Neb. 305 (15 N. W. 741).

162. (1894.) An act appropriating a definite sum of money to reimburse a county for expenses of a murder trial, and directing the auditor to draw a warrant in favor of the county treasurer for the amount appropriated, is not unconstitutional. *State, ex rel. Sayre, v. Moore*, 40 Neb. 854 (59 N. W. 755; 25 L. R. A. 774).

163. (1901.) 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. Johnson County*, 62 Neb. 754 (87 N. W. 909).

164. (1901.) 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. Johnson County*, 62 Neb. 754 (87 N. W. 909).

165. (1901.) 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. *Worthen v. Johnson County*, 62 Neb. 754 (87 N. W. 909).

166. (1906.) The county from which a change of venue in a criminal case is taken is not liable to the county in which the trial is had for the fees of such jurors of the regular panel as did not sit upon the trial of that case. *Dawes County v. Sioux County*, 77 Neb. 567 (110 N. W. 378).

Liability of city.

167. (1903.) Fees of officers and witnesses for services rendered in a prosecution for the violation of an ordinance of a city, either in police court or in district court upon appeal, cannot be collected from such city, unless their payment by the city is required by statute or by ordinance authorized by statute. *Kreader v. City of Fremont*, 69 Neb. 762 (96 N. W. 616).

Imprisonment for non-payment.

168. (1881.) Where a complaint is found to be without probable cause, and judgment for costs is entered against complainant, such judgment is a mere civil liability and complainant cannot be imprisoned for the costs. *State, ex rel. McGraw, v. Ensign*, 11 Neb. 529 (10 N. W. 449).

169. (1881.) The provisions of section 322 of the criminal code, that a complainant against whom costs are adjudged may be imprisoned unless they are paid, are void, since the costs are a mere civil liability, for which imprisonment cannot be had. *State, ex rel. McGraw, v. Ensign*, 11 Neb. 529 (10 N. W. 449).

170. (1893.) Where a person is convicted of a criminal offense it is the duty of the court in which the conviction was had to render judgment against the prisoner for the costs of prosecution, and the court may make it a part of the sentence that the party be imprisoned in jail until the costs are paid, or secured to be paid, or he is otherwise legally discharged. (Criminal code, secs. 500, 501.) *In re Dobson*, 37 Neb. 449 (55 N. W. 1071).

171. (1893.) A defendant in a criminal case confined in jail for the nonpayment of costs assessed against him, and who is unable to pay the same, is not entitled to be discharged from further imprisonment for such costs, under section 528 of the criminal code, where it appears he has not been imprisoned at least one day for each three dollars of the costs. *In re Dobson*, 37 Neb. 449 (55 N. W. 1071).

172. (1894.) A court or magistrate, upon entering judgment in a criminal prosecution against a prisoner, may order that he shall stand committed until the fine and costs are paid, or secured to be paid. *In re Newton*, 39 Neb. 757 (58 N. W. 436).

173. (1894.) Imprisonment for the nonpayment of fines and costs is no part of the punishment, but is merely one of the means of enforcing compliance with the order of the court. *In re Newton*, 39 Neb. 757 (58 N. W. 436).

174. (1894.) Where the offender is un-

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able to pay the amount adjudged against him, he may obtain relief under section 528 of the criminal code. *In re Newton*, 39 Neb. 757 (58 N. W. 436).

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Lien and enforcement thereof.

175. (1899.) By section 524 of the criminal code a judgment of the district court in favor of the state for costs is a lien on all real estate, within the county, owned by the accused at the time of docketing the cause. *Predohl v. O'Sullivan*, 59 Neb. 311 (80 N. W. 903).

176. (1899.) A judgment in favor of the state for costs of a criminal prosecution becomes dormant and ceases to be a lien on real estate at the end of five years from the date of the assignment. *Predohl v. O'Sullivan*, 59 Neb. 311 (80 N. W. 903).

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I. CREATION, ALTERATION, EXISTENCE AND POLITICAL FUNCTIONS.

Nature and status.

1. (1880.) A county is a mere subdivision of the state created by it without the request or consent of the people residing therein. *Woods v. Colfax County*, 10 Neb. 552 (7 N. W. 269).

Constitutional and statutory provisions.

2. (1885.) A special act of the legislature, which provides that certain territory, the boundaries of which are given, shall be designated Harlan county, appoints certain persons commissioners, and requires them within thirty days to call an election for the purpose of electing county officers and selecting a site for a county seat, is not in conflict with the constitution, which inhibits

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the conferring of corporate powers by special act. *State, ex rel. Harvey, v. Piper*, 17 Neb. 614 (24 N. W. 204).

Unorganized territory.

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3. (1893) B. county was organized in 1891, at which time it was unorganized territory, and has never, by general apportionment law or special act, been attached to any representative district. It is a narrow strip lying between H. county and the northern boundary of the state, eight townships long from east to west and has less than three townships in width. It adjoins K. county along its entire eastern boundary, although further west it extends north to the 43d parallel about ten miles beyond the northern boundary of K. county, at which point it is bounded on the east by the state of South Dakota. *Held*, That it is directly west of K. county, within the meaning of section 146, chapter 18, Compiled Statutes, and was, while unorganized territory, attached to said county for election purposes. *State, ex rel. Norton, v. Van Camp*, 36 Neb. 91 (54 N. W. 113).

Establishment of boundaries.

4. (1887.) Act of March, 1855, defining boundaries of Blackbird county, *held* inoperative and void as being in violation of organic act of territory of Nebraska. *State, ex rel. Peebles, v. Thayer*, 22 Neb. 413 (35 N. W. 200).

5. (1903.) The banks of a river are essential parts thereof, and when a county boundary is fixed at "the south bank," the river may be said to divide the county from the one on the opposite side, within the meaning of section 87, chapter 78, Compiled Statutes. *Dodge County v. Saunders County*, 70 Neb. 442 (97 N. W. 617).

6. (1906.) The boundary line between Colfax and Butler counties is the south bank of the Platte river, which flows between those counties. *State, ex rel. Sumption, v. Smith*, 77 Neb. 1 (108 N. W. 173).

Alteration, and creation of new counties.

7. (1881.) When a new county, formed by the legislature from "unorganized territory" taken from two judicial districts, becomes organized for county purposes, as the statute directs, it thereupon ceases to be "unorganized territory," and is entitled to all the rights and privileges, under the constitution, bestowed upon these governmental divisions of the state. Its territory is no longer divided between the two judicial districts, but is completely severed from both, and of necessity must so remain until the legislative duty of assigning it to one of them is performed. Under the constitution a county cannot be parts of two judicial districts. *Olive v. State*, 11 Neb. 1 (7 N. W. 444).

8. (1881.) Upon the holding of an election for county and precinct officers, pursuant to the call of the special commissioners appointed by the governor for the purpose of organizing a new county, and the canvassing of the votes cast at such election by such special commissioners, such county "is permanently organized according to law." *Behr v. Willard*, 11 Neb. 601 (10 N. W. 525).

9. (1886.) Upon the organization of a new county, and the election and qualification of its officers, the ligament which bound to the county to which it was attached for election, judicial, and revenue purposes is severed, and all business must thereafter be transacted with the new county. *Fremont, E. & M. V. R. Co. v. Brown County*, 18 Neb. 516 (26 N. W. 194).

10. (1890.) New county cannot be formed from old one, so as to reduce latter to less than constitutional area. *State, ex rel. Pennell, v. Armstrong*, 30 Neb. 493 (46 N. W. 618; 9 L. R. A. 382).

——— **Submission of question to popular vote.**

11. (1888.) When it is proposed to erect a new county from an old one, it is the duty of the county commissioners to issue an order submitting the proposition to the people at the next general election, when a petition, describing the proposed new county, shall be presented. *State, ex rel. Anderson, v. Newman*, 24 Neb. 40 (38 N. W. 40).

12. (1888.) When it is sought to erect from a county more than one new county, and petitions for the submission of the proposition to erect such new counties are severally presented, they may be separately submitted at the same election, without reference to the number of propositions to be voted upon thereat. *State, ex rel. Anderson, v. Newman*, 24 Neb. 40 (38 N. W. 40).

13. (1890.) A county board cannot lawfully submit, to be voted upon at the same election, two propositions to erect from a county two new counties, when the territory described in one proposition embraces a

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part of that included in the other. When conflicting petitions for the submission of the question of creating new counties are presented, it is the duty of the county board to grant the petition that is first filed, provided it meets all the requirements of the law, and refuse to submit the others. *State ex rel. Pennell, v. Armstrong*, 30 Neb. 493 (46 N. W. 618; 9 L. R. A. 382).

14. (1892.) The provisions of section 2, article X of the constitution, which declares that "No county shall be divided or have any part stricken therefrom without first submitting the question to a vote of the people of the county, nor unless a majority of all the legal voters of the county voting on the question shall vote for the same," is a restriction upon the powers of the legislature to the extent named, but is not a prohibition upon that power to require more than a majority in favor of the proposition —as three-fifths of the legal votes cast upon that question. *State, ex rel. Packard, v. Nelson*, 34 Neb. 162 (51 N. W. 648).

15. (1892.) The boundaries of an organized county cannot be lawfully changed so as to add to such county adjoining unorganized territory, unless a majority of the inhabitants of such territory so petition the county board of the county to which it is proposed to be added, nor unless the proposition has received the sanction of a majority of the voters of such county at an election duly called and held therein for that purpose. *Wayne County v. Cobb*, 35 Neb. 231 (52 N. W. 1102).

16. (1893.) In 1883 an act was approved extending the boundaries of H. county directly north, so as to include the unorganized territory which is now B. county, but providing that it should not take effect until a majority of the legal voters of said county should give their assent at the time of the next general election. At the general election in 1883 there was cast in said county 1821 votes, of which 878 only were in favor of said proposition. *Held*, That the proposition was defeated, and an order entered by the county board in 1885 declaring it adopted is a nullity. *State, ex rel. Norton, v. Van Camp*, 36 Neb. 91 (54 N. W. 113).

17. (1900.) Under section 11, article I, chapter 18, Compiled Statutes, to effect the division of a county, the proposition therefor must receive a majority of the legal votes cast at the general election, at which the same was submitted, whether cast for the filling of an office or on any proposition. *State, ex rel. Saunders, v. Clark*, 59 Neb. 702 (82 N. W. 8).

18. (1900.) The provisions of section 2, article X of the constitution, do not preclude the legislature from passing a law requiring that the question of county division shall receive a majority of all votes cast at the election at which the same was submitted to the electors, to effect the erection of a new county out of one then existing. *State, ex rel. Saunders, v. Clark*, 59 Neb. 702 (82 N. W. 8).

19. (1900.) Section 2, article X of the constitution, prohibits the division of a county where the proposition has not received a majority of the legal votes cast thereon. *State, ex rel. Saunders, v. Clark*, 59 Neb. 702 (82 N. W. 8).

20. (1900.) Section 11, article I, chapter 18, Compiled Statutes, is not inimical to section 2, article X of the state constitution. *State, ex rel. Saunders, v. Clark*, 59 Neb. 702 (82 N. W. 8).

21. (1900.) In determining the question of whether the county division has been adopted, the total vote cast in the county, at the election at which the same was submitted, will be presumed to be the highest vote cast for any office or on any proposition. But this presumption, if not conclusive, may be overcome by proper evidence. *State, ex rel. Saunders, v. Clark*, 59 Neb. 702 (82 N. W. 8).

——— Adjustment of rights and liabilities.

22. (1886.) Brown county was created in March, 1883, being attached to Holt county under the general statute for election, judicial, and revenue purposes. In June, 1883, the county commissioners of Holt county levied state, county, and school taxes upon the property in Brown county. In July, 1883, an election was had for county officers, and officers elected, who qualified and entered upon the duties of their office. In April, 1884, the Fremont, Elkhorn & Missouri Valley Railway Company paid to the treasurer of Holt county the taxes levied by the county commissioners of that county on the railroad in Brown county. *Held*, That the taxes should have been paid to the treasurer of Brown county. *Fremont, E. & M. V. R. Co. v. Brown County*, 18 Neb. 516 (26 N. W. 194).

23. (1886.) It is the duty of the clerk of a county to take or procure a transcript of all deeds, mortgages, judgments, and

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liens of every description upon real or personal property lying and being in the newly organized county. *Morse v. Hitchcock County*, 19 Neb. 566 (27 N. W. 637).

24. (1886.) A mere taxpayer cannot, in the first instance at least, institute proceedings against the county clerk of the county to which the new county was attached to compel him to furnish a transcript of deeds, mortgages, judgments, etc. *Morse v. Hitchcock County*, 19 Neb. 566 (27 N. W. 637).

25. (1889.) On an application for mandamus to compel the treasurer of a county to collect taxes due from the taxpayers of another county which had been organized out of a portion of the former, the question as to which county is entitled to the taxes cannot be determined, where the latter county is not a party. *State, ex rel. Malloy, v. Clevenger*, 27 Neb. 422 (43 N. W. 243; 20 Am. St. Rep. 674).

26. (1889.) Where a county is formed by dividing one already organized, jurisdiction of the county treasurer of the old county over the new ceases, and it is not his duty to collect from the latter unpaid taxes levied prior to the division. *State, ex rel. Malloy, v. Clevenger*, 27 Neb. 422 (43 N. W. 243; 20 Am. St. Rep. 674).

27. (1897.) In an action for the recoveary of a proper proportion of the value of real property retained and used by a county from the territory of which the territory of another county has been segregated, it is no defense to show that said real property was originally conveyed by a deed with conditions, when thereafter the said property was dedicated as county property by a plat duly recorded by the grantor and as such was accepted by the county and at great expense improved by the erection thereon of county buildings. *Brown County v. Rock County*, 51 Neb. 277 (70 N. W. 943).

28. (1899.) Where a new county is formed out of the territory of a county previously organized, the county boards of the two counties are authorized by section 16, article I, chapter 18, Compiled Statutes 1897, to meet and agree upon a division of the corporate property and of the corporate liabilities. *Perkins County v. Keith County*, 58 Neb. 323 (78 N. W. 630).

29. (1899.) Where a county has been divided and a new one formed, and the balance due one from the other has been definitely settled, the claim may be made the subject of an original suit in the district court without having been presented to the county board for examination and allowance. *Perkins County v. Keith County*, 58 Neb. 323 (78 N. W. 630).

Annexation of territory.

30. (1902.) An unconstitutional act attaching territory to a county, accepted and acquiesced in, will suffice to render the acts of the register of deeds of such county, as to such territory, done before the law was declared unconstitutional, acts of a *de facto* officer. *State Bank of Pender v. Frey*, 3 Unof. 83 (91 N. W. 239).

Precincts and subdivisions.

31. (1880.) Precincts are mere territorial divisions or districts created for certain political and administrative purposes, and without the semblance of corporate character. They can neither plead nor be impleaded in actions, nor are they capable of imposing upon themselves any obligation or liability, except in pursuance of express legislative authority. *State, ex rel. Chandler, v. Dodge County*, 10 Neb. 20 (4 N. W. 370).

32. (1897.) Under section 8, article II, chapter 14, Compiled Statutes, 1885, providing that "each city governed by this act shall be divided into not less than four nor more than six wards," and section 9, providing "precinct lines in that part of any county not under township organization, embraced within the corporate limits of a city of the second class, shall correspond with the ward lines in such city, and such precincts shall correspond in number with the wards of the city, and be co-extensive with the same," the county commissioners of Otoe county, in which is situated Nebraska City, a city of the class referred to, divided into four wards, have no power to establish a precinct designated as Nebraska City precinct, and included therein the whole territory of Nebraska City and a number of sections of land. *Morton v. Carlin*, 51 Neb. 202 (70 N. W. 966).

33. (1901.) The board of county commissioners in counties having over 125,000 population is empowered by section 54, article I, 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. *State, ex rel. Connolly, v. Haverly*, 62 Neb. 767 (87 N. W. 959).

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34. (1903.) For purposes of taxation and revenue, a precinct actually formed and organized will be deemed a *de facto* organization, whether the meeting of the county commissioners at which it was made was lawfully adjourned and held or not. *City of South Omaha v. O'Rourke*, 70 Neb. 479 (97 N. W. 608).

Classification.

35. (1902.) The United States census reports, showing the population of a county, are not conclusive evidence that the population is in fact as given in such report. *State, ex rel. Blessing, v. Davis*, 66 Neb. 333 (92 N. W. 740).

36. (1902.) Evidence *aliunde* the census reports may be resorted to for fixing the population of a county. *State, ex rel. Blessing, v. Davis*, 66 Neb. 333 (92 N. W. 740).

37. (1902.) Finding of referee that Valley county had less than 8,000 inhabitants in 1899, *held* supported by the evidence. *State, ex rel. Blessing, v. Davis*, 66 Neb. 333 (92 N. W. 740).

II. GOVERNMENT AND OFFICERS.

A. Organization and Powers of Government in General.

Governmental powers in general.

38. (1885.) Counties and bounty boards can only exercise such powers as are expressly granted by statute, and such grant of power must be strictly construed. *State, ex rel. Grady, v. Lincoln County*, 18 Neb. 283 (25 N. W. 91); (1897) *Morton v. Carlin*, 51 Neb. 202 (70 N. W. 966).

Public improvements.

Construction and maintenance of public bridges, see *Bridges*.

Construction of county roads, see *Highways*.

39. (1897.) The act of Douglas county in making an improvement extending across a highway, one-half of which was in the city of Omaha, *held* not *ultra vires*, though it was the duty of the city to improve the part of the street within its jurisdiction. *Douglas County v. Taylor*, 50 Neb. 535 (70 N. W. 27).

40. (1901.) Section 6, article IX of the constitution, does not prohibit the legislature from conferring the power to make local improvements by special assessments upon counties. *Dodge County v. Acom*, 61 Neb. 376 (82 N. W. 292).

41. (1901.) The findings of the county board as to the necessity of a proposed drainage ditch cannot be made the subject of controversy as to whether they are correct and well founded. *Dodge County v. Acom*, 61 Neb. 376 (82 N. W. 292).

B. County Seat.

Validity of note given to secure location of county seat, see *Bills and Notes*, § 65.

Location.

42. (1884.) In a proceeding in the district court to contest an election held for the purpose of locating a county seat, it is competent for the contestee or any other party to the action to plead by way of answer any facts which would show a want of jurisdiction on the part of the county commissioners to call said election. *Laws v. Vincent*, 16 Neb. 208 (20 N. W. 213).

43. (1884.) In 1871 an election was held in H. county under the provisions of an act of the legislature, for the location of a county seat and the election of county officers. A majority of the votes cast were in favor of "A." as the county seat. The returns of the election were duly certified to and filed by the secretary of state, but the county officers elected failed to qualify. In 1872 the acting governor of the state issued his proclamation calling an election for the election of county officers and the location of a county seat. At this election county officers were elected who subsequently qualified. There being no choice as to the location of the county seat, two other successive elections were held, resulting in an apparent majority for M., but the final vote was not canvassed by the county clerk, and the result of said election was not officially declared. The county offices were not held, nor were the records kept, at any one place until the year 1875. From that time to the present the county offices and records have all been kept. and the district courts have all been held, at "A." In 1881 the board of county commissioners, without the presentation of a petition therefor, called an election for the location of a county seat. *Held*, They had no authority or jurisdiction to call said election. *Laws v. Vincent*, 16 Neb. 208 (20 N. W. 213).

44. (1885.) At an election held in Harlan county on the 3d day of July 1871, the place which received the majority of all the votes cast thereby became the county seat of that county; and the court will not in collateral proceeding, fourteen years afterwards, inquire into irregularities at

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such election where no direct proceedings have been had to set it aside. *State, ex rel. Harvey, v. Piper*, 17 Neb. 614 (24 N. W. 204).

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Election for removal.

45. (1876.) A party who charges that an election for the relocation of the county seat of M. county was carried in favor of M. by fraudulent means, must state the facts on which he bases his charge; and an affidavit for a continuance of an application for a peremptory writ of mandamus to compel the removal of the county records and offices to M., the place declared by the county commissioners to be the county seat, is not sufficient where it merely states that the affiant is informed and believes that a greater number of fraudulent votes were cast in one of the precincts of said county in favor of M. than the entire majority in favor of that place, and that certain votes were cast in favor of B. that were not counted. *State, ex rel. Barnes, v. Thatch*, 5 Neb. 94.

46. (1876.) Where the intention of the voter, in an election to relocate a county seat, is clearly ascertainable from the ballot, with the aid of extrinsic facts of a public nature connected with the election, the law will require his vote to be counted. *State, ex rel. Birmingham, v. Dinsmore*, 5 Neb. 145.

47. (1876.) In an election for the relocation of a county seat, where three points only can be voted for, designated as "Fairfield, Sutton, or Harvard," and ballots voted for the first are entitled "Fairfield ticket," describing accurately a subdivision of land within the limits of the town site of Fairfield, such ballots must be counted for Fairfield. *State, ex rel. Birmingham, v. Dinsmore*, 5 Neb. 145.

48. (1888.) Where the returns of an election for the relocation of a county seat show new and illegal votes to have been put into the ballot box, mandamus will not issue to compel the canvassing board to canvass the votes as returned. *State, ex rel. Hanna, v. Kavanaugh*, 24 Neb. 506 (39 N. W. 431).

49. (1892.) Where, at an election called for the purpose of relocating a county seat, the place at which the county seat is then located receives three-fifths of all the votes cast, there is a relocation within the meaning of the statute, and there is no authority for the calling of another election to relocate the county seat in such county within five years next following such relocation. *Solomon v. Fleming*, 34 Neb. 40 (51 N. W. 304).

50. (1892.) No form of bribery to secure votes will be sanctioned by the courts. This rule is equally as important in county seat elections as in other cases. The design of the law is to secure the free and voluntary expression of each voter of his choice for the county seat. *Ayers v. Moan*, 34 Neb. 210 (51 N. W. 830).

51. (1896.) A county seat can only be relocated by a three-fifths vote of all the electors of the county at an election held for that purpose. *State, ex rel. Hocknell, v. Roper*, 46 Neb. 724 (61 N. W. 753). [Overruled. *State v. Roper*, 47 Neb. 417.]

52. (1896.) Within the meaning of section 1, article III, chapter 17, Compiled Statutes, a county seat shall not be relocated in any place unless three-fifths of all the electors of the county shall express their will to that effect by their votes at an election held for that purpose; and that the law presumes when such an election is held all the electors of the county vote at such election. *State, ex rel. Hocknell, v. Roper*, 46 Neb. 724 (61 N. W. 753).

53. (1896.) Where there were cast upon the question of relocation of the county seat of Red Willow county 867 votes for Indianola, and for McCook 1,339 votes, and the return of county canvassers showed ballots to have been rejected or not to have been voted or accounted for, *held*, that McCook, having received more than three-fifths of the numbers above given, became the county seat of said county. *State, ex rel. Hocknell, v. Roper*, 47 Neb. 417 (66 N. W. 539).

54. (1896.) Under the provisions of the act for the relocation of county seats, there being no requirement that abortive ballots shall be certified to the county canvassing board, such ballots cannot be counted for the purpose of making up the grand total, of which a place other than the existing county seat must receive three-fifths to be entitled to the relocation of the county seat, merely because in the certified return of the county election board such ballots were referred to as "ballots not reported or accounted for," or as "rejected" or "blank ballots." *State, ex rel. Hocknell, v. Roper*, 47 Neb. 417 (66 N. W. 539).

——— Petition for submission of question.

55. (1878.) The proper place to raise questions concerning the sufficiency of a pe-

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tition for the relocation of a county seat is before the commissioners themselves; and if no objection be made there, the party complaining not being prevented from so doing, equity will not interfere to prevent a removal, conformably with the result of the election, because of defects in the petition. *Ellis v. Karl*, 7 Neb. 381.

56. (1878.) The act of 1875, for the relocation of county seats, gives the board of county commissioners exclusive authority to receive petitions for that purpose, and also, incidentally, to determine whether the signatures to such petitions are genuine, and of persons authorized to sign them. And when, in the exercise of this jurisdiction, the commissioners receive a petition for the relocation of a county seat, and judge it to be in all respects sufficient, and call an election accordingly, no objection being interposed either to the petition or to the action of the commissioners until after the election has been held and the result declared, it is too late to question the sufficiency of the petition; and an injunction to restrain the removal of the county officers to the new county seat, on the ground that such petition did not conform to the requirements of the law, will not be granted. *Ellis v. Karl*, 7 Neb. 381.

57. (1880.) Signers of a petition for an election to relocate a county seat are in the attitude of plaintiffs, and may withdraw their names at any time before the petition is acted upon. *State, ex rel. Morgan, v. Nemaha County*, 10 Neb. 32 (4 N. W. 373).

58. (1880.) To authorize the board of county commissioners in calling an election for the purpose of relocating a county seat, the petition must contain the requisite number of names at the time it is acted upon by them. *State, ex rel. Morgan, v. Nemaha County*, 10 Neb. 32 (4 N. W. 373).

59. (1887.) A finding of a board of county commissioners, that a petition for a special election for the relocation of a county seat, was not signed by the requisite number of lawful petitioners, for the reason that a portion of the signers were minors and non-residents, is not subject to collateral attack, but if erroneous must be reviewed on error. *State, ex rel, Hymer, v. Nelson*, 21 Neb. 572 (32 N. W. 589).

60. (1892.) Under the provisions of section 1, article III of chapter 17, Compiled Statutes, a petition for the removal of a county seat must be signed by "resident electors" of the county equal in number to three-fifths of all the votes cast in the county at the last general election. The words "resident electors" are used to distinguish actual residents of the county from such persons as are temporarily therein. *Ayers v. Moan*, 34 Neb. 210 (51 N. W. 830).

61. (1892.) In addition to the name of each petitioner the petition for removal of a county seat must show the section, township, and range on which, or the town or city in which, he resides, together with his age and time of residence in the county. The omission of any of these particulars will be sufficient to cause his rejection as a petitioner. *Ayers v. Moan*, 34 Neb. 210 (51 N. W. 830).

62. (1892.) In examining the names of the petitoners for removal of a county seat, it is the duty of the board to carefully scrutinize the entire list and reject all that are fictitious, false, or repetitions, and to permit proof tending to show that some or all of those who have signed the petition or remonstrance were not in fact resident electors of the county. *Ayers v. Moan*, 34 Neb. 210 (51 N. W. 830).

63. (1892.) The petition for removal of a county seat, when presented, must contain the names of all persons who desire to sign the same as petitioners. A supplemental petition is unauthorized. *Ayers v. Moan*, 34 Neb. 210 (51 N. W. 830).

64. (1893.) Where objections are made to a petition for an election for the relocation of a county seat, by any resident elector on oath charging that a certain number of the petitioners are minors, certain other number are not electors, certain names are fictitious, a certain number have been bribed, the aggregate of which will reduce the number of petitioners below three-fifths of the votes cast at the preceding general election, it is the duty of the board to set a reasonable time for a hearing of said objections to enable parties to offer proof in support of their charges. *Crews v. Coffman*, 36 Neb. 824 (55 N. W. 265).

65. (1893.) The petition for an election for the relocation of a county seat must show the section, township, and range on which, or the town or city in which the petitioner resides, together with his age and time of residence in the county. *Crews v. Coffman*, 36 Neb. 824 (55 N. W. 265).

66. (1893.) To entitle a county board to call an election for the removal of a county

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seat a petition must be presented to it by resident electors of the county equal in number to three-fifths of all the votes cast in the county at the last general election. *Crews v. Coffman*, 36 Neb. 824 (55 N. W. 265).

67. (1893.) Persons interested in the removal of a county seat are entitled to examine the original petition in the office of the county clerk before the election is called and should have a reasonable time for that purpose. It is not sufficient to furnish a certified copy as such parties have the right to see the purported signatures of the petitioners. *Crews v. Coffman*, 36 Neb. 824 (55 N. W. 265).

68. (1901.) Action of county board, in reckoning, among the petitioners for a call of a special election upon the question of relocation of county seat, certain signers who had subsequently signed a remonstrance and then, before action by the county board, signed a withdrawal of such remonstrance and a request that their names be counted among the petitioners, *held*, no error. *Hoffman v. Nelson*, 1 Unof. 215 (95 N. W. 347).

——— Notice.

69. (1874.) It is an imperative requirement, in an election for the removal of a county seat, that the notice thereof should in all respects conform to the law authorizing such election. *State, ex rel. Darnell, v. Hamilton County*, 3 Neb. 244.

70. (1874.) Where the law provides that in the notice of an election for the removal of a county seat, the electors shall be directed "to designate on their ballots the place of their choice for the county seat," and the notice merely authorizes the electors to vote "for removal of a county seat; against removal of county seat," such notice is insufficient, the vote taken at the election is void. *State, ex rel. Darnell, v. Hamilton County*, 3 Neb. 244.

71. (1878.) In ordering an election on the question of the relocation of a county seat, thirty days' notice is required. But even if the notice be for a less time than this, a court of equity will not, for this reason alone, declare the election void at the suit of a party who participated therein, especially where it is not shown that a different result would probably have been obtained if the full statutory notice had been given. *Ellis v. Karl*, 7 Neb. 381.

——— Mandamus to compel holding of election.

72. (1899.) An action of mandamus may be maintained to require a board of county commissioners to order a special election for the purpose of voting upon the removal of a county seat, if a proper petition for such election has been presented and the refusal of the prayer of the petition is the exercise of an arbitrary or capricious authority. *Barry v. State, ex rel. Hampton*, 57 Neb. 464 (77 N. W. 1096).

Mandamus to compel removal.

73. (1876.) If it appears that the number of fraudulent votes cast at an election to remove a county seat were sufficient to give the successful place a majority, it is sufficient grounds for mandamus to compel a relocation and renewal of county records. *State, ex rel. Barnes, v. Thatch*, 5 Neb. 94. [Overruled. *State v. Roper*, 46 Neb. 730.]

74. (1883.) Where mandamus is sought to compel the county officers to remove and keep their offices to a town having received 293 of a total of 400 votes cast on the question of removal of the county seat, mere allegations of fraud and illegal voting without any statement of facts will not sustain a defense thereto. *Hunter v. State, ex rel. Patterson*, 14 Neb. 506 (16 N. W. 830).

75. (1883.) Where, in the defense to a mandamus to require certain county officers to remove and hold their respective offices at a town receiving more than three-fifths of all the votes cast at an election for the removal of the county seat, there was no claim or allegation of the bribery of voters, *held*, that that matter must be pleaded to be available. *Hunter v. State, ex rel. Patterson*, 14 Neb. 506 (16 N. W. 830).

76. (1896.) A petition in mandamus to compel the removal of a county seat which fails to show that the new location received three-fifths of all the electors of the county, does not state a cause of action. *State, ex rel. Hocknell, v. Roper*, 46 Neb. 724 (61 N. W. 753). [Overruled. *State v. Roper*, 47 Neb. 417.]

77. (1896.) On an application for a mandamus to compel the removal of a county seat in pursuance of the declared result of a canvass of the vote on the question of relocation, the court cannot go behind the returns and investigate issues of fraud and illegality in the manner of conducting the election. *State, ex rel. Hocknell, v. Roper*, 46 Neb. 730 (65 N. W. 802).

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78. (1896.) On application for mandamus to compel the removal of a county seat pursuant to the declared result of an election, an answer tendering only issues as to fraud in the election presents no defense. *State, ex rel. Hocknell, v. Roper*, 46 Neb. 730 (65 N. W. 802).

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Enjoining removal.

79. (1883.) There was an election on the question of relocation of a county seat, which resulted in favor of the proposition. An action was then brought to enjoin county officers from removing their offices, etc., to the place selected, on grounds which would have been available, if at all, in a contest of the election, under the statute. *Held*, That the action would not lie. *Scott v. McGuire*, 15 Neb. 303 (18 N. W. 93).

C. County Board.

Powers of commission in location of public road, see *Highways*.

Review of decision of county board by supreme court, see *Appeal and Error*, § 53.

Nature in general.

80. (1896.) While boards of county commissioners exercise functions judicial in their nature in the allowance and rejection of claims against the county, such boards are not courts in a constitutional sense, or within the general recognized acceptation of that term. *Sternberg v. State, ex rel. Keller*, 48 Neb. 299 (67 N. W. 190).

81. (1901.) County boards are not courts in a constitutional sense. *Sheibley v. Dixon County*, 61 Neb. 409 (85 N. W. 399).

Statutory provisions.

82. (1895.) Chapter 28, Session Laws 1895, which provides for seven supervisors in all counties under township organization, is valid. *Van Horn v. State, ex rel. Abbott*, 46 Neb. 62 (64 N. W. 365).

Election and appointment.

83. (1886.) Where a vacancy occurs in the office of county commissioner more than thirty days before a general election, it is to be filled thereat; and the failure of the county clerk to call attention to such vacancy in the election notices posted by him, where the fact is generally known and acted on by the voters of the county, will not invalidate the votes cast to fill said vacancy. *State, ex rel. Malloy, v. Skirving*, 19 Neb. 497 (27 N. W. 723).

84. (1892.) The act approved April 9, 1891, provides that in counties containing less than 125,000 inhabitants the board of county commissioners shall consist of three persons, but also providing that in counties containing less than 125,000 inhabitants which had five commissioners when the act took effect the incumbents "shall continue to hold and occupy said offices until the expiration of the terms for which elected." There is also a provision for redistricting counties where the number was changed from five to three. Section 7, chapter 26, Compiled Statutes, also provides that in counties not under township organization, "one county commissioner shall be elected annually, who shall serve three years," etc. *Held*, That a county commissioner who was elected in November, 1891, to fill the vacancy caused by the expiration of the term of the commissioner of the third district, was properly elected, and that the fourth and fifth commissioners would hold until the expiration of their respective terms. *State, ex rel. Snell, v. Wescott*, 34 Neb. 84 (51 N. W. 599).

85. (1896.) A court of equity will not, at the suit of a private individual, enjoin the county clerk, treasurer, and county judge from appointing county commissioners under section 68, article IV, chapter 18, Compiled Statutes, the remedy being complete at law, by *quo warranto* against the appointees. *Fort v. Thompson*, 49 Neb. 772 (69 N. W. 110).

86. (1901.) 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, ex rel. Hunker, v. West*, 62 Neb. 461 (87 N. W. 176).

87. (1901.) Under chapter 18, article IV, 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, ex rel. Brown, v. Welsh*, 62 Neb. 721 (87 N. W. 529).

88. (1901.) 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 in boundary lines, become a resident of another district, is not an adjudication that such commis-

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sioner 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. *State, ex rel. Connolly, v. Haverly*, 62 Neb. 767 (87 N. W. 959).

89. (1901.) By an alteration of boundary lines of commissioner districts of a county 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. *State, ex rel. Connolly, v. Haverly*, 62 Neb. 767 (87 N. W. 959).

Eligibility and qualifications.

90. (1886.) A county commissioner must continue to reside in the district in and from which he was elected, and his removal from the district, although he remains in the county, vacates the office. *State, ex rel. Malloy, v. Skirving*, 19 Neb. 497 (27 N. W. 723).

91. (1901.) Alterations of boundary lines of commissioner districts, 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. *State, ex rel. Connolly, v. Haverly*, 62 Neb. 767 (87 N. W. 959).

Term of office, vacancies and holding over.

92. (1879.) The effect of the repeal and re-enactment of a statute is to continue the uninterrupted operation of the statute. The act approved March 1, 1879, did not therefore vacate the office of county commissioner. *State, ex rel. Baldwin, v. McColl*, 9 Neb. 203 (2 N. W. 213).

93. (1879.) Section 55 of the act concerning counties, approved March 1, 1879, is a re-enactment of section 9 of the act concerning counties and county officers, approved February 27, 1873 (Gen. Stat. 233), and is a continuation of that act. *State, ex rel. Baldwin, v. McColl*, 9 Neb. 203 (2 N. W. 213).

94. (1889.) Where a new county is created by the division of a larger one, the county commissioners elected at an election of officers, merely continue in office until the next general election for such officrs, and until their successors are elected and qualified. *State, ex rel. Nichols, v. Field*, 26 Neb. 393 (41 N. W. 988); (1891) *Wheeler v. State, ex rel. Lonarosh*, 32 Neb. 472 (49 N. W. 442).

Removal.

95. (1877.) Two members of the board of county commissioners have no authority under the provisions of chapter 13, General Statutes, to try a third member for an alleged misdemeanor. *Hutchinson v. Ashburn*, 5 Neb. 402.

96. (1877.) The words "all county officers" in the first section of the act (Gen. Stat., 250) are not from the nature of the case intended to include county commissioners. *Hutchinson v. Ashburn*, 5 Neb. 402.

Compensation.

97. (1904.) There is no warrant of law for the allowance of extra salary to the chairman of a board of county commissioners. *Otoe County v. Stroble*, 71 Neb. 415 (98 N. W. 1065).

Powers and functions in general.

98. (1875.) A board of county commissioners is a *quasi* corporation. A grant of powers to it must be strictly construed. *People, ex rel. Putman, v. Commissioners of Buffalo County*, 4 Neb. 150.

99. (1877.) The authority of the county commissioners to license the sale of intoxicating liquors is confined to those portions of the county lying outside the limits of incorporated towns and cities. *Phillips v. City of Tecumseh*, 5 Neb. 312.

100. (1877.) County commissioners possess no powers except such as are expressly granted, or are incidentally necessary to carry such powers into effect. *Hamlin v. Meadville*, 6 Neb. 227.

101. (1878.) The board of county commissioners is a tribunal possessed of but very limited jurisdiction, which is clearly defined by the statutes. If they presume to act without an observance of these plain statutory requirements, their acts would be void. *Doody v. Vaughn*, 7 Neb. 28.

102. (1895.) There is no principle more firmly established or resting on sounder reasons than the rule which requires public bodies when acting under special powers to

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act strictly within the conditions prescribed. *Douglas County v. Keller*, 43 Neb. 635 (62 N. W. 60).

103. (1898.) A board of county commissioners, in addition to the powers specially conferred by statute, has such other powers as are incidentally necessary to enable such board to carry into effect the powers granted. *Lancaster County v. Green*, 54 Neb. 98 (74 N. W. 430).

104. (1898.) The word "necessary" considered and, in respect to the implied powers of boards of county commissioners, *held* to mean no more than the exercise of such powers as are reasonably required by the exigencies of each case as it arises. *Lancaster County v. Green*, 54 Neb. 98 (74 N. W. 430).

Mode of action in general.

105. (1877.) The board of county commissioners consists of three persons, and the entire board must sit to hear the case, although a majority may pronounce a valid judgment. *Hutchinson v. Ashburn*, 5 Neb. 402.

106. (1895.) County commissioners cannot legally transact county business except at a regular session of the county board, or one specially called by the county clerk of which notice is given in the mode provided by law. *Morris v. Merrell*, 44 Neb. 423 (62 N. W. 865).

Meetings.

107. (1876.) When the county commissioners are assembled in meeting they are not confined strictly to the business specified in the notice thereof, but may make orders respecting property of the county. *Commissioners of Kearney County v. Kent*, 5 Neb. 227.

108. (1876.) In calling special meetings of the board of county commissioners, the county clerk is required to state in the notice the "object of calling the commissioners together." *Commissioners of Kearney County v. Kent*, 5 Neb. 227.

109. (1880.) County commissioners are required by law to hold their sessions at the county seat, and they have no authority to enter into contracts in relation to county business at any other place *Merrick County v. Batty*, 10 Neb. 176 (4 N. W. 959).

110. (1901.) Where the minutes show a session of the county board for the transaction of business of the county, the session will be presumed to have been legally convened, and the burden is on the party assailing its legality to prove that it was neither a called nor a regular session. *Green v. Lancaster County*, 61 Neb. 473 (85 N. W. 439).

Minutes and records.

111. (1888.) The only limitations upon the power and duty of the county board of any county to cause to be published at the close of each annual, regular, or special meeting of such board, a brief statement of the proceedings thereof, in one newspaper of general circulation, published in the county, or to in like manner publish their proceedings upon the equalization of the assessment roll, is, that such publication shall not be required unless the same can be done at an expense not exceeding one-third of the legal rates for advertising notices. *State, ex rel. Huse, v. Dixon County*, 24 Neb. 106 (37 N. W. 936).

Orders.

112. (1893.) Where the county board has before it a matter which it may reject or allow, and its action thereon will be final unless appealed from, its order in the premises cannot be attacked collaterally, except for fraud. *Ragoss v. Cuming County*, 36 Neb. 375 (54 N. W. 683).

113. (1901.) The rule that there must be a finding of fact set out to support the judgment of the court has no application to the orders made by the county board. *Lexington Mill & Elevator Co. v. Dawson County*, 1 Unof. 872 (96 N. W. 62).

Reconsideration and rescission of action.

114. (1878.) The board of county commissioners has no power to review, vacate, or set aside its former adjudications. *Kemerer v. State*, 7 Neb. 130. [Changed by statute. *State v. Baushausen*, 49 Neb. 558.]

Appeals from decision.

115. (1894.) Appeals from the decision of a county board should be entered, tried, and determined in the district court the same as appeals from justices of the peace. *Haskell v. Valley County*, 41 Neb. 234 (59 N. W. 680).

116. (1894.) Where an appeal from the county board has been tried in the district court without pleadings the supreme court will not examine the evidence on error to ascertain what issues were litigated. *Haskell v. Valley County*, 41 Neb. 234 (59 N. W. 680).

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117. (1894.) A district court should never proceed with the trial of an appeal from a county board, until the parties to such appeal have made up the issues therein, by filing the proper pleadings in the case. *Haskell v. Valley County*, 41 Neb. 234 (59 N. W. 680).

118. (1901.) Where a county board has acquired jurisdiction to act, the presumption is in favor of the correctness and regularity of the proceedings taken, and its action should only be overturned where it is made to affirmatively appear that the action taken is erroneous. *Dodge County v. Acom*, 61 Neb. 376 (85 N. W. 292).

119. (1902.) A bill of exceptions of the evidence offered in a proceeding before the board of county commissioners must be signed, settled, and allowed by the chairman of such board. *Union Stock Yards Nat. Bank v. Thurston County*, 65 Neb. 408 (91 N. W. 286).

119*a*. (1907.) Generally, where the determination of a matter has been committed to a particular administrative or legislative board or officer, and no appeal is provided for from such decision, its order or determination is final, and will not be subject to collateral attack. *Campbell v. Youngson*, 80 Neb. 322 (114 N. W. 415).

Liabilities of members.

120. (1902.) The duty imposed upon county commissioners under section 11, subdivision 2, chapter 79, Compiled Statutes, of levying the tax voted by a school district meeting and certified by the district board is one owing to the public only, and county commissioners who in good faith but by mistake levy a less tax than that voted are not personally liable to the school district. *School District v. Burress*, 2 Unof. 554 (89 N. W. 609).

121. (1904.) The fact that the county commissioners have made a settlement with the treasurer, by which he is allowed to retain fees in excess of the statutory limit, does not, of itself, render the county commissioners liable for the excess of fees retained by the treasurer with their consent. A fraudulent participation on their part, with corrupt knowledge, of a wrong to the county, or else a change of situation owing to their negligence in failing to bring an action against him, which would prevent a recovery from the treasurer, would be necessary. *Otoe County v. Dorman*, 71 Neb. 408 (98 N. W. 1064).

122. (1904.) Where, by the action of the board of county commissioners, a warrant is drawn upon the county treasury without any legal authority so to do, each member of the board voting for such illegal claim is jointly and severally liable to the county for the amount of money so disbursed. *Otoe County v. Stroble*, 71 Neb. 415 (98 N. W. 1065).

D. Officers and Agents.

County attorney, see *County Attorneys*.

Road supervisors, see *Highways*, §§ 145-150.

Contracts with county officers, see *post*, §§ 354, 355.

Liability of treasurer for loss of county funds, see *post*, §§ 411-419.

Liability of county for redemption money paid to treasurer, see *post*, § 560.

Embezzlement by treasurer, see *Embezzlement*, §§ 26, 66-68.

Compelling officers to perform duty, see *Mandamus*, §§ 103-216.

Compelling deposit of funds, see *Mandamus*, §§ 169, 170.

Compelling treasurer to account for fees, see *Mandamus*, § 167.

Custody of city funds by county treasurer, see *Municipal Corporations*, § 915.

Liability of county treasurer for loss of state funds, see *Taxation*, §§ 1011-1017.

Custody of state taxes by county treasurer, see *Taxation*, §§ 1011-1017.

Election or appointment.

123. (1880.) Where a county clerk issued notice of an election of a clerk of the district court, as one of the officers to be elected, the person receiving the majority of the votes cast is not entitled to possession of the office, by means of *quo warranto*, where it appears that at the last census the the county had a population of only fifty-five hundred, but that the population has been constantly increasing since, without showing that the present population is over eight thousand. *State, ex rel. Welna, v. Steuffer*, 10 Neb. 506 (6 N. W. 604).

124. (1884.) Section 7, chapter 26, Compiled Statutes, providing that in counties under township organization certain county officers shall be elected "at the first general election held after the adoption of township organization," means the first general election at which county officers are to be

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chosen. *State, ex rel. Crossley, v. Hedlund*, 16 Neb. 566 (20 N. W. 876).

125. (1893.) A county having less than 18,003 inhabitants at the national census of 1890 was not entitled to elect a register of deeds, even though the state census of 1885 shows it possessed more than the above number of inhabitants. *State, ex rel. Miller, v. Lewis*, 38 Neb. 191 (56 N. W. 885).

126. (1893.) Each county in this state having a population of 18,003 or more, as shown by the last national census, was entitled to elect a register of deeds at the last general election. *State, ex rel. Miller, v. Lewis*, 38 Neb. 191 (56 N. W. 885).

127. (1905.) The legislature cannot appoint county officers, nor by an act solely for that purpose extend the terms of such officers. *State, ex rel. Hensley, v. Plasters*, 74 Neb. 653 (105 N. W. 1092).

128. (1907.) In a contest of an election to the office of county treasurer under sections 80 and 81, Compiled Statutes 1907, it is necessary to allege and prove that the contestant is an elector of the county in and for which the contestee is declared elected. *Dodson v. Bowlby*, 78 Neb. 190 (110 N. W. 698).

——— Deputies.

129. (1893.) Under the provisions of section 42, chapter 28, Compiled Statutes 1893, where the fees of the county clerk exceed $1,500, the county board may appoint such number of deputies as may be necessary and fix their salary at not to exceed $700, the same to be paid out of the fees received by the clerk. *Ragoss v. Cuming County*, 36 Neb. 375 (54 N. W. 683).

Eligibility and qualifications.

130. (1882.) Section 10 of the election law of 1879, which provides that county treasurers shall be ineligible for more than two consecutive terms, has no retroactive effect. *State, ex rel. Glenn, v. Stein*, 13 Neb. 529 (14 N. W. 481).

131. (1888.) The relator was elected to the office of county treasurer at the annual election held November 3, 1885. At that date he had been a resident of the state for five months only, but was otherwise eligible. At the commencement of the term his residence in the state had been continuous for seven months. *Held*, That being ineligible to such election at the date thereof, under a fair construction of section 1, article VII of the constitution, and section 64, chapter 26, Compiled Statutes, such ineligibility was not removed, for the purposes of that election, by reason of six months' continuous residence previous to the commencement of the term. *State v. McMillen*, 23 Neb. 385 (36 N. W. 587).

132. (1893.) The judgment in *State, ex rel. Richards, v. McMillen*, 23 Neb. 385, is conclusive of the question of the eligibility of the relator therein to the office of treasurer of Dawes county by election at the general election in 1885, but not of his eligibility to said office by appointment in the month of January, 1886. *Richards v. McMillin*, 36 Neb. 352 (54 N. W. 566).

133. (1907.) Section 10 of the general election law of 1879 (laws 1879, p. 240), providing that "A county treasurer shall be ineligible to office for more than two consecutive terms," is not unconstitutional, since the subject of the section is germane to the act and is sufficiently expressed in the title, "An act to provide a general election law," the procedure relative to contested elections, and the filling of vacancies in office. *Dobson v. Bowlby*, 78 Neb. 190 (110 N. W. 698).

134. (1907.) By section 10 of the general election law (laws 1879, p. 240), a county treasurer is disqualified to be elected to office for more than two consecutive terms. An appointment to complete the term of another is not an election to office for a term, and such appointment and holding for ten months thereunder does not disqualify one to be elected to the office for the two consecutive terms immediately following the term during which he was so appointed. *Dobson v. Bowlby*, 78 Neb. 190 (110 N. W. 698).

——— Bond.

135. (1895.) Under the statute which provides that the official bonds of all county officers, except county commissioners and supervisors, shall be approved by the county board, the approval to be indorsed on the bond, and that no bond shall be filed and recorded until so approved, where the bond of a county treasurer is not accepted and approved by the county board, but is rejected, such person is not a *de jure* officer. *McMillin v. Richards*, 45 Neb. 787 (64 N. W. 242).

136. (1897.) By section 21, chapter 10, Compiled Statutes, a county board is empowered, according to circumstances, to require the treasurer either to give an addi-

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tional bond, or to give additional sureties on the subsisting bond. *Holt County v. Scott*, 53 Neb. 176 (73 N. W. 681).

137. (1899.) Bonds of county officers must be joint and several in form. *Clark v. Douglas*, 58 Neb. 571 (79 N. W. 158).

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138. (1899.) The provisions of section 17, chapter 10, Compiled Statutes, that a re-elected officer shall furnish a bond, are mandatory, and are applicable to any person elected to the office of county treasurer as his own successor who has failed to account for or produce to the proper accounting officers all the public funds or property of which he had control. *Woodward v. State, ex rel. Thomssen*, 58 Neb. 598 (79 N. W. 164).

139. (1900.) A county officer elect may properly rely upon the presumption that a board of county commissioners will do its duty and convene in timely session to act upon official bonds presented to it for approval, within the time limited by statute. *Duffy v. State, ex rel. Edson*, 60 Neb. 812 (84 N. W. 264).

140. (1905.) The act of April 1, 1901, entitled "An act to amend section 19 of chapter 10, Compiled Statutes 1899, and to repeal said section as now existing (laws 1901, ch. 11), and providing that premiums to sureties of official bonds of county officers, should be paid by the county, is void, because the matter sought to be added by amendment is not germane to the subject of the section as enacted. *Knight v. Lancaster County*, 74 Neb. 82 (103 N. W. 1064).

141. (1907.) The bond of a county treasurer who has been elected to serve a second term should be approved by the board of county commissioners when he has accounted, or stands ready to account, for all funds collected by him during his first term. *State, ex rel. Clark, v. Vinnedge*, 79 Neb. 270 (112 N. W. 858).

Term of office, vacancies and holding over.

142. (1884.) The adoption of township organization by a county does not shorten the term of office of county judge, clerk, treasurer, sheriff, superintendent of public instruction, or coroner. *State, ex rel. Crossley, v. Hedlund*, 16 Neb. 566 (20 N. W. 876).

143. (1886.) County boards have authority to fill vacancies in all county offices. Where an officer of court is merely suspended it is the duty of the court of which he is such officer to "supply his place by appointment for the term" of such court. The word "suspended," in section 9 of article II, chapter 18 of the Compiled Statutes, is not synonymous with the word "removed," in section 1 of the same article. *State, ex rel. Dodson, v. Meeker*, 19 Neb. 444 (27 N. W. 427).

144. (1893.) A county board is not authorized to declare vacant a county office and make an appointment to fill such vacancy on the sole ground that an officer elect is ineligible and therefore unable to qualify. The incumbent of such office has a right to qualify within ten days after it is ascertained that his successor elect is ineligible, and upon qualifying in the manner provided by law will be entitled to hold over until a successor is elected and qualified. *Richards v. McMillin*, 36 Neb. 352 (54 N. W. 566).

145. (1895.) Section 4, article X of the constitution, enacting that the legislature shall provide by law for the election of such county and township officers as may be necessary, does not prevent the legislature when it reduces the number of officers from providing that those already elected shall cast lots to determine whose terms of office shall be discontinued; nor does it prevent the legislature from providing for the filling of vacancies provisionally by appointment. *Van Horn v. State, ex rel. Abbott*, 46 Neb. 62 (64 N. W. 365).

Removal.

146. (1880.) It is not sufficient for the board of county commissioners to declare and resolve that the office of county treasurer is vacant. There must be a judgment of ouster. *State, ex rel. Craig, v. Sheldon*, 10 Neb. 452 (6 N. W. 757).

147. (1883.) Repeated acts of removal of government section corner-stones by a county surveyor, under a claim of right so to do, for the purpose of rectifying the original government survey, amount to wilful maladministration in office within the meaning of section 1, article II, chapter 18, Compiled Statutes. *Minkler v. State*, 14 Neb. 181 (15 N. W. 330).

148. (1883.) The trial and ousting from office of a sheriff, for corruption, under paragraph 5 of section 1, article II, chapter 18, Compiled Statutes, by the board of county commissioners, is not the exercise of judicial power, nor of the power of impeachment. but of a *quasi* political and administrative power, not denied to such

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bodies by the constitution. *State, ex rel. Walters, v. Oleson*, 15 Neb. 247 (18 N. W. 45).

149. (1885.) While the supreme court can by a mandamus compel a board of county supervisors to act upon a complaint against a county officer, yet it can in no way control its judgment or legal discretion. *State, ex rel. Castor, v. Saline County*, 18 Neb. 422 (25 N. W. 587).

150. (1885.) When the board of supervisors has assumed jurisdiction of a complaint against a county officer, and has passed upon the sufficiency of the complaint, and afterwards refused to act in the case, and upon an application to the supreme court in the exercise of its original jurisdiction for a mandamus to compel action, the court will not inquire into the sufficiency of the complaint further than to ascertain if it is such a complaint. To that extent the complaint was examined, and *held* sufficient. *State, ex rel. Castor, v. Saline County*, 18 Neb. 422 (25 N. W. 587).

151. (1894.) Chapter 18, article II, Compiled Statutes, relating to the removal of county officers, was not repealed by the act of 1879, specifying powers of county boards. *Hopkins v. Scott*, 38 Neb. 661 (57 N. W. 391).

152. (1901.) It is official misconduct for a county clerk to permit ballots committed to his official care to be abstracted from his office. He cannot urge as a defense to a proceeding to remove him from office that the ballots so abstracted possessed no evidential value. *Stewart v. Bole*, 61 Neb. 193 (85 N. W. 33).

——— **Proceedings.**

153. (1880.) Proceedings to remove a county treasurer from office for wilful neglect of duty must be instituted by a complaint containing the charges against him, with the necessary specifications under them, and verified by the oath of an elector of the state. *State, ex rel. Craig, v. Sheldon*. 10 Neb. 452 (6 N. W. 757).

154. (1885.) A respondent, in a proceeding to remove him from a county office, has the right to present as many legal questions for decision by the county board as he may think necessary for his proper defense, but the board has the authority and right to decide such questions either with or without argument, as it may deem proper. It is not required to waste time in listening to unnecessary arguments. *State, ex rel. Castor, v. Saline County*, 18 Neb. 422 (25 N. W. 587).

155. (1885.) Where a party to a proceeding before the county board causes the attendance of unnecessary witnesses, or in any other manner needlessly augments the costs and expenses of a trial, it is within the power of the board to tax such unnecessary costs to the party making them, and it should in all proper cases exercise such power. *State, ex rel. Castor, v. Saline County*, 18 Neb. 422 (25 N. W. 587).

156. (1885.) In a proceeding before a board of supervisors to remove from office a county officer two-thirds of all the members elected constitute a quorum. It is not essential that all the members be present. But of a special meeting all must be notified. *State, ex rel. Castor, v. Saline County*, 18 Neb. 422 (25 N. W. 587).

157. (1885.) In counties under township organization the board of supervisors have authority to hear and determine complaints against county officers under the provisions of article II, chapter 18 of the Compiled Statutes 1885. *State, ex rel. Castor, v. Saline County*, 18 Neb. 422 (25 N. W. 587).

158. (1885.) When a complaint against a county officer is made and filed with the county clerk it is the duty of the county board to hear it. They have no authority to order its removal to the district court for trial. *State, ex rel. Castor, v. Saline County*, 18 Neb. 422 (25 N. W. 587).

159. (1894.) In proceedings by supervisors to remove a county treasurer, the fact that he appears and obtains a continuance and then goes to trial without objection will prevent him from being heard to claim in supreme court that he was not allowed sufficient time. *Hopkins v. Scott*, 38 Neb. 661 (57 N. W. 391).

160. (1894.) It is not necessary that all the members of the board of supervisors be present at the hearing of a proceeding to remove a county officer. A quorum is sufficient. *Hopkins v. Scott*, 38 Neb. 661 (57 N. W. 391).

161. (1894.) There is no authority of law for the settlement of a bill of exceptions embodying the evidence taken on the hearing of proceedings by supervisors to remove a county officer. *Hopkins v. Scott*, 38 Neb. 661 (57 N. W. 391).

162. (1894.) In proceedings by supervisors to remove a county treasurer the

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fact that some of the supervisors who tried the case were also witnesses does not invalidate the judgment. *Hopkins v. Scott*, 38 Neb. 661 (57 N. W. 391).

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163. (1895.) An appeal does not lie from the judgment of a board of supervisors removing from office a county officer impeached before and convicted by them on charges of maladministration in office. *State, ex rel. Skirving, v. Betha*, 43 Neb. 451 (61 N. W. 578).

Employment of attorney by county board.

164. (1891.) The county attorney is the law officer of the county. The county board cannot lawfully employ an attorney to perform the duties required by law to be discharged by the county attorney, and pay for such services out of the treasury of the county. *Brome v. Cuming County*, 31 Neb. 362 (47 N. W. 1050).

Fees and compensation.

Compensation of county attorney, see *County Attorneys*, §§ 15, 16.

165. (1892.) A county board has no power to allow a public officer compensation in excess of that allowed by statute or where none is authorized. *Logan County v. Doan*, 34 Neb. 104 (51 N. W. 598).

——— Statutory provisions.

166. (1882.) The act to regulate fees, approved February 15, 1877, is not an amendment of sections 1, 5, 8 and 14 of chapter 19 of the Revised Statutes of 1866, but an original act. *State, ex rel. County Commissioners, v. Whittemore*, 12 Neb. 252 (11 N. W. 310).

167. (1884.) The act of February 15, 1877, to regulate fees of county officers, is not one primarily to raise revenue, but to fix a limit to the amount of compensation to be received by the officers named, and is not unconstitutional. *State, ex rel. Hamilton County, v. Ream*, 16 Neb. 681 (21 N. W. 398).

168. (1884.) The act of February 15, 1877, to regulate the fees of county judges, etc., *held* to be a complete act in itself and not an amendment. *State, ex rel. Hamilton County, v. Ream*, 16 Neb. 681 21 N. W. 398).

——— Deputies.

169. (1893.) A deputy county clerk is to be paid his salary out of the fees received by the county clerk in excess of the amount which he is authorized to retain. The county is not liable for such salary. *Gage County v. Wilson*, 38 Neb. 165 (66 N. W. 810).

170. (1893.) The county judge, clerk, treasurer, and sheriff, where the fees exceed the amount fixed by statute, and are authorized to appoint a deputy or deputies, may, in addition to their own salary, retain from the fees of their respective office "such amount as may be necessary to pay the salaries of such deputies or assistants as the same shall be fixed by the county board, but in no instance shall such officers receive more than the fees by them respectively and actually collected, nor shall any money be retained for deputy service unless the same be actually paid to such deputy for his services." The county is not liable for the deputy's salary. It is to be paid out of the fees of the particular office. *Gage County v. Wilson*, 38 Neb. 168 (56 N. W. 880).

——— Increase or reduction.

171. (1891.) Section 16, article III, constitution, prohibiting increase or reduction of compensation of "any public officer" during his term, applies alone to those offices created by the constitution; hence the legislature may increase the compensation of a county commissioner during his term. *Douglas County v. Timme*, 32 Neb. 272 (49 N. W. 266).

——— Allowance by board.

172. (1878.) Where the compensation for services rendered for the county is definitely fixed by law, the audit of the same and drawing a warrant therefor, by the board, are merely ministerial duties unattended with the exercise of any official discretion, and therefore, in such case, the board cannot make such compensation any greater nor any less than that fixed by the law. *Kemerer v. State*, 7 Neb. 130; (1889) *State, ex rel. Grable, v. Roderick*, 25 Neb. 629 (41 N. W. 404).

173. (1898.) By chapter 52, laws 1893, the legislature legalized settlements already made between county treasurers and county boards of counties under township organization, in and by which said treasurers had been allowed to retain fees, to which by law they were not entitled. *Kearney County v. Taylor*, 54 Neb. 542 (74 N. W. 965).

174. (1898.) Chapter 52, Session Laws 1893, legalizing the payment and allowance of fees to county treasurers, is retroactive in its nature, in a sense special legislation and will not be so construed as to embrace

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any subject not specifically named therein. *Kearney County v. Taylor*, 54 Neb. 542 (74 N. W. 965).

175. (1898.) Chapter 52, laws 1893, did not, in express terms nor by necessary implication, satisfy or attempt to vacate a judgment already obtained by a county against its treasurer on a cause of action to recover fees unlawfully allowed him by the county board. *Kearney County v. Taylor*, 54 Neb. 542 (74 N. W. 965).

176. (1901.) Where a claim for salary and extra compensation is presented by a county clerk to the county board and allowed, the order of allowance is available to the clerk as an adjudication, only to the extent that the board acted judicially. *Hayes County v. Christner*, 61 Neb. 272 (85 N. W. 73).

177. (1901.) If the clerk relies on the action of the board as an adjudication in his favor for the allowance of a claim for salary and extra commission he must show affirmatively what part of the claim allowed was for extra compensation and what part for salary. *Hayes County v. Christner*, 61 Neb. 272 (85 N. W. 73).

178. (1901.) When a board of county commissioners audit and adjust the claim of an officer whose salary is prescribed by statute, it acts ministerially and not judicially. *Gallaher v. Lincoln*, 63 Neb. 339 (88 N. W. 505); (1903) *Chase County v. Kelly*, 69 Neb. 426 (95 N. W. 865); (1904) *Otoe County v. Stroble*, 71 Neb. 415 (98 N. W. 1065).

179. (1903.) Where on settlment of the accounts of a county officer, by the county commissioners, the compensation to be allowed the officer is fixed by law, the allowance of the claim is formal only. *Mitchell v. Clay County*, 69 Neb. 779 (96 N. W. 673).

180. (1903.) If the amount to be allowed a county officer for compensation, on the settlement of his accounts, is in the discretion of the commissioners, or if, in fixing such amount, the law requires them to decide questions of fact, their action is *quasi* judicial. *Mitchell v. Clay County*, 69 Neb. 779 (96 N. W. 673).

181. (1903.) When the law commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is *quasi* judicial. *Mitchell v. Clay County*, 69 Neb. 779 (96 N. W. 673).

182. (1904.) The powers exercised by the county board in examining the accounts of and settling with the county treasurer in this case are ministerial only; and in so far as they allowed such officer to retain a greater compensation than that fixed and limited by law, their action is void, and the county is not bound thereby. *Maurer v. Gage County*, 72 Neb. 441 (100 N. W. 1026).

183. (1904.) Where the county board in examining the accounts of and settling with a county treasurer have allowed him to retain a greater compensation than that fixed and limited by law, the county may, in a proper action recover from the officer the amount of the excess so allowed and retained by him. *Maurer v. Gage County*, 72 Neb. 441 (100 N. W. 1026).

——— **Additional compensation.**

184. (1885.) A county clerk is not entitled to extra compensation for making out the tax list. *Bayha v. Webster County*, 18 Neb. 131 (24 N. W. 457). [Changed by statute. *Richardson County v. Mussleman*, 25 Neb. 624.]

185. (1895.) By the statute in force in 1883 county clerks of counties having less than 25,000 inhabitants were required as a part of the duties of their office to make out the tax lists of such counties for said year, and for this service such clerks were not entitled to any extra compensation. *Heald v. Polk County*, 46 Neb. 28 (64 N. W. 376).

186. (1901.) An agreement or understanding between the county board and county clerk that the latter shall receive, for performing his official duties, compensation in excess of the limit fixed by law is null and void. *Hayes County v. Chrisner*, 61 Neb. 272 (85 N. W. 73).

187. (1901.) A county board may lawfully contract with a county judge to perform extra-official services in connection with the records of his office; and where such services have been performed without any valid contract, the county may accept the product of the judge's labor and pay him therefor. In such case, a taxpayer cannot maintain an equitable action against the county judge on the theory that the money received by him for such services belongs in equity and good conscience to the county and should be paid over to the county treasurer. *Shepard v. Easterling*, 61 Neb. 882 (86 N. W. 941). [Overruled. *Wilson v. Otoe County*, 71 Neb. 435.]

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188. (1904.) A contract between a county and one of its officers, whereby such officer undertakes to perform extra-official services, for which the county undertakes to pay him compensation in addition to the fees and salary allowed by law, is in violation of section 51, article I, chapter 18, Compiled Statutes, and will not support an action for such extra compensation. *Wilson v. Otoe County*, 71 Neb. 435 (98 N. W. 1050).

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——— Payment.

189. (1893.) Where a county has once made payment of the salary of a county officer to one actually in possession of the office, performing its duties with color of title, before his right to the office has been determined against him by a competent tribunal, it cannot afterwards be compelled to pay the same salary to the *de jure* officer. *State v. Milne*, 36 Neb. 301 (54 N. W. 521; 38 Am. St. Rep. 724; 19 L. R. A. 689*n*).

——— Recovery.

190. (1901.) Where a county clerk seeks to recover from the county, compensation for making and correcting the assessor's books, the county may, by way of counterclaim, set up fees collected by plaintiff, by virtue of his office, which he failed to report and account for. *Sheibley v. Dixon County*, 61 Neb. 409 (85 N. W. 399).

——— Clerk.

191. (1879.) The latter clause of section 3 of an act entitled "An act to amend sections 1, etc.," approved February 19, 1877, is in these words: "The county clerk shall receive for making out the tax list and duplicate thereof, the sum of four cents each for every description of lots and lands, and extension thereof, upon such tax list, and duplicate, including footings and recapitulation." *Held*, That the word "each," as it occurs in the said subdivision, refers to the "descriptions of lots and lands," and not to the "tax list and duplicate thereof." *Lamb v. Stanton County*, 8 Neb. 279.

192. (1879.) The compensation allowed county clerks by the act to amend the revenue law, approved February 18, 1877, of four cents for each description of lots and lands upon the tax list and duplicate, is in excess of the limitation of $1,500, and is for extra servies. *State v. Silver*, 9 Neb. 85 (9 N. W. 215).

193. (1879.) The act making an allowance for preparing the duplicate and tax list, being passed after that fixing the salary of clerk, appears to have been intended as compensation for extra labor. *Gilbert v. Brown*, 9 Neb. 90 (2 N. W. 376).

194. (1880.) Under section 3 of the act of February 9, 1877, Session Laws, page 44, the compensation of a county clerk for completing the tax list and duplicate thereof is fixed at four cents for each separate tract or lot of land properly entered therein for taxation. *Jackson v. Washington County*, 10 Neb. 381 (6 N. W. 463).

195. (1889.) Section 2, chapter 42, laws 1887, providing for fees of the county clerk for preparing tax lists, is not repealed or modified by section 1, chapter 44, laws 1887. *Richardson County v. Mussleman*, 25 Neb. 624 (41 N. W. 553).

196. (1889.) Under the provisions of chapter 42, laws 1887, the county clerk is entitled to four cents per line for preparing the tax list, but is not required to enter the same on his fee book. *Richardson County v. Mussleman*, 25 Neb. 624 (41 N. W. 553).

197. (1890.) While the county clerk of a county under township organization is entitled to four cents per line for preparing the tax list he is not entitled to any compensation for the making of a duplicate. *Radford v. Dixon County*, 29 Neb. 113 (45 N. W. 275).

198. (1894.) A county clerk has no authority to charge for official services less than the fees prescribed by statute. *State, ex rel. Holt County, v. Hazelet*, 41 Neb. 257 (59 N. W. 891).

199. (1898.) In the absence of a contract to the contrary, the first county clerk of a newly organized county, who compiles a numerical index therefor, is entitled to a compensation of fifteen cents for each necessary entry made in compiling such index, to be paid by such county. *Bastedo v. Boyd County*, 57 Neb. 100 (77 N. W. 387).

200. (1903.) The county board acts judicially in fixing the amount of the salary of the clerk when acting as clerk of the board, but when such fees have been allowed, as such, and paid to the clerk, if the total amount of his fees for the year, including the fees so allowed, is more than the limit of his annual salary as fixed by statute, he is liable to the county for the excess. *Mitchell v. Clay County*, 69 Neb. 796 (96 N. W. 657).

201. (1906.) In counties of more than

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25,000 inhabitants the salary of the county clerk is fixed at $2,500 per annum by chapter 72, laws 1905, and he is also entitled to one deputy whose salary shall be $1,000 per annum. *State, ex rel. Douglas County, v. Drexel*, 75 Neb. 614 (106 N. W. 791).

——— Treasurer.

202. (1889.) The compensation of county treasurers, for moneys collected by them, is fixed by section 20 of chapter 28 of the Compiled Statutes, and cannot exceed ten per cent. on the first $3,000; four per cent. on all sums over $3,000 and under $5,000; and two per cent. on all sums over $5,000 (school moneys excluded); and in computing the amount collected, for the purpose of charging percentage, all sums, from whatever funds derived, shall be included together (except the school fund), the fees to be charged to the different funds *pro rata*, and allowed but once. *State, ex rel. Grable, v. Roderick*, 25 Neb. 629 (41 N. W. 404).

203. (1892.) Under section 20, chapter 28, Compiled Statutes, allowing the county treasurer fees on all money collected by him, a county treasurer is not entitled to fees on tax money paid to him by a township treasurer collected under section 87, chapter 77. *Taylor v. Kearney County*, 35 Neb. 381 (53 N. W. 211).

204. (1896.) A county treasurer is not entitled to a commission or collection fee on funds, the proceeds of sales of bonds paid or delivered to him as such officer. *Stoner v. Keith County*, 48 Neb. 279 (67 N. W. 311).

205. (1896.) The words, "on all moneys collected by him"—the county treasurer—in section 20, chapter 28, Compiled Statutes, in relation to fees, refer solely to such taxes as he has collected from the taxpayers. *Stoner v. Keith County*, 48 Neb. 279 (67 N. W. 311).

206. (1897.) Section 1, chapter 44, Session Laws of 1887, limited the compensation of county treasurers of counties of 25,000 inhabitants or less to $2,000 per annum for all services rendered by such treasurers by virtue of their office. *Bedwell v. Custer County*, 51 Neb. 387 (70 N. W. 945).

207. (1897.) By chapter 80, Session Laws of 1887, allowing a county treasurer of counties having 25,000 inhabitants or less, a fee of one per cent on educational land funds collected and remitted by them to the state treasurer, the legislature intended the state to reimburse such county for the services rendered by its treasurer in the collection and remittance of such fund. *Bedwell v. Custer County*, 51 Neb. 387 (70 N. W. 945).

208. (1898.) A county treasurer is not entitled to ten per cent commission on the first $3,000 of state taxes, and a like percentage on the first $3,000 of county moneys, collected by him for each fiscal year, but a fee of ten per cent alone is chargeable on the first $3,000 from whatever source derived, without regard to the year the taxes were levied, except school moneys, and such fees or commissions are to be apportioned *pro rata* among the various funds on account of which the collections were made. *State, ex rel. Pearson, v. Cornell*, 54 Neb. 647 (75 N. W. 25).

209. (1901.) 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. *Barnes v. Red Willow County*, 62 Neb. 505 (87 N. W. 319).

210. (1901.) 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 cannot exceed in the aggregate the sum fixed by statute as compensation for one year, plus the amount expended for a deputy and clerk hire. *Barnes v. Red Willow County*, 62 Neb. 505 (87 N. W. 319).

211. (1904.) Section 42 of chapter 28 of the Compiled Statutes of 1901, which provides that in counties having more than 25,000 inhabitants the county treasurer shall receive a salary of $3,000 a year, and such an amount as may be allowed by the county board as compensation for clerks and assistants, not exceeding $2,400 per annum, also limits the sum which may be retained by the treasurer for all such purposes to the amount of the fees and commissions actually received and collected by him. *Maurer v. Gage County*, 72 Neb. 441 (100 N. W. 1026).

——— Accounting.

212. (1884.) Under the title of "An act to regulate the fees of county judges, county clerks, sheriffs, and county treasurers" the legislature may require such officers to report the fees received, and pay

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the excess over a sum named into the county treasury. The authority to regulate includes the power to control. *State, ex rel. Hamilton County v. Ream*, 16 Neb. 681 (21 N. W. 398).

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213. (1885.) The numerical index of instruments affecting the title of real estate filed in the office of the county clerk, which he is required to keep, is a public record, and fees received by him for certified copy of the same must be reported to the county board. *State, ex rel. Miller, v. Sovereign*, 17 Neb. 173 (22 N. W. 353).

214. (1885.) Where the law has provided a tribunal to which the county clerk is required to report the fees received by him by virtue of his office, it is the duty of such tribunal to require him to make such report, and a mere taxpayer cannot proceed against such clerk by mandamus to return certain fees in his report. *State, ex rel. Miller, v. Sovereign*, 17 Neb. 173 (22 N. W. 353).

215. (1888.) It is the duty of the county treasurer to make searches of the tax lists, books, and records in his care and custody as such county treasurer, and to make abstracts and copies therefrom, and attach his certificate and seal thereto, when lawfully demanded, and to demand and receive reasonable fees therefor. And it is also his duty to enter in the fee book, to be kept by him for that purpose, every item of fees received by him, including those received for such abstracts, copies and certifiates, and make quarterly report thereof to the county board. *State, ex rel. Buffalo County, v. Allen*, 23 Neb. 451 (36 N. W. 756).

216. (1890.) It is the duty of a county clerk to report all the fees of his office and pay the excess over the amount to which he is entitled into the county treasury. *State, ex rel. Cuming County, v. Shearer*, 29 Neb. 477 (45 N. W. 784).

217. (1890.) The duty of a county clerk to pay into the county treasury the excess of his fees over the amount to which he is entitled, is personal to himself, and in case of his failure to perform his duty in that regard, a mandamus may be issued even after the expiration of his term of office to compel the performance of such duty. *State, ex rel. Cuming County, v. Shearer*, 29 Neb. 477 (45 N. W. 784).

218. (1890.) It is only the fees received by a county clerk which are in excess of the salary fixed by law that he is required to pay into the county treasury. *State, ex rel. Frontier County, v. Kelly*, 30 Neb. 574 (46 N. W. 714).

219. (1890.) The county clerk of a county containing less than 18,003 inhabitants is required to report to the county board all fees received by him for making and certifying to abstracts of title, although he may be a bonded abstracter, and performed the services as such abstracter. *State, ex rel. Frontier County, v. Kelly*, 30 Neb. 574 (46 N. W. 714).

220. (1890.) Where a county clerk, who is also a notary public, takes acknowledgments of deeds and mortgages, and takes affidavits and depositions as a notary public, it is his duty to enter upon his fee book as county clerk and report to the county board every item of fees received by him for such services. *State, ex rel. Frontier County, v. Kelly*, 30 Neb. 574 (46 N. W. 714).

221. ((1890.) Either the county or county board is a proper party plaintiff in a proceeding to compel the county clerk to account for fees received by him and which it is his duty to report. *State, ex rel. Frontier County, v. Kelly*, 30 Neb. 574 (46 N. W. 714).

222. (1894.) Where lands are seized on execution or order of sale, it is the duty of the county clerk of the county wherein such real estate is situated, on application of the sheriff in writing, to certify to the sheriff, under his seal of office, the amount and character of all liens existing of record against said lands which are prior to the lien of the levy, and for which certificate, and the necessary search therefor, said county clerk is authorized and required to collect and enter upon his fee book, and report to the county board, the sum of $2, even though the labor of examining the records and preparing the certificate was performed out of office hours by an employe of the office, or some person other than the county clerk or his authorized deputy. *State, ex rel. Holt County, v. Hazelet*, 41 Neb. 257 (59 N. W. 891).

223. (1895.) The county board, under the laws in force in 1883, exercised ministerial functions in examining the reports of fees received by the county clerk and in adjusting the account between him and the county. *Heald v. Polk County*, 46 Neb. 28 (64 N. W. 376).

224. (1896.) The requirements of the law in regard to a fee book to be kept by

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the county clerk, and the reports of his fees, to be regularly made to the county board, are sufficient to charge the board with notice of any discrepancy between the amounts of the fees of the officer reported by him as collected and the true amounts; from which it follows that the right of action to enforce the duty of making a true report for any current year, and to pay any excess of fees into the county treasury, would accrue at the time the report was due. *State, ex rel. Commissioners of Brown County, v. Boyd*, 49 Neb. 303 (68 N. W. 510).

225. (1897.) The fees paid by the state to a county treasurer of a county of 25,000 inhabitants or less, for collecting and remitting the educational land fund, should by the latter be added to all other fees received by him as such treasurer, and if the aggregate exceeds the sum of $2,000 per annum the excess should be turned into the treasury of his county by him. *Bedwell v. Custer County*, 51 Neb. 387 (70 N. W. 945).

226. (1897.) A county board, in its examination of reports of a county clerk, of fees received by him, and in the adjustment of the account between him and the county, acts ministerially; and if, through fraud or mistake, he is allowed to retain fees which he should not, such adjustment is no defense or bar to an action by the county to recover such fees. *Hazelet v. Holt County*, 51 Neb. 716 (71 N. W. 717).

227. (1897.) It is a duty in respect to which the statute is mandatory, that a county clerk shall keep a fee book and shall enter therein every item of fees received or earned by him in the manner and with the particular information in regard to it prescribed by statute; also to make a correct report, as required by law, of the same to the county board, and to pay, without demand, any excess received over and above the amount stated and which may be allowed by law, into the county treasury. *Hazelet v. Holt County*, 51 Neb. 716 (71 N. W. 717).

228. (1897.) Under the provisions of chapter 28, Compiled Statutes, it is the duty of the county clerk to enter in the proper fee book a full statement of the several amounts paid him for his services as clerk of the board of county commissioners and for making out the tax lists during his incumbency of office, and the performance of these duties may be compelled in an action of mandamus brought by the county as relator after the expiration of the term of office of such clerk. *State, ex rel. Wayne County, v. Russell*, 51 Neb. 774 (71 N. W. 785).

229. (1897.) A county board, in examining the reports and adjusting the accounts of a county officer, acts ministerially, and an adjustment so made is no bar to an action subsequently brought to recover moneys unlawfully withheld by the officer. *Trites v. Hitchcock County*, 53 Neb. 79 (73 N. W. 215).

230. (1901.) A county clerk must account to the county board for all money received by him as salary. *Hayes County v. Christner*, 61 Neb. 272 (85 N. W. 73); (1901) *Holcombe v. Dawson County*, 1 Unof. 743 (95 N. W. 835).

231. (1901.) A county clerk must account for all fees earned by him whether collected or not. *Sheibley v. Dixon County*, 61 Neb. 409 (85 N. W. 399).

232. (1901.) The approval by the county board of the report of a county officer made in compliance with the requirements of section 43, chapter 28, Compiled Statutes 1899, is not a judicial order; it has not the force or conclusiveness of a judgment and is not appealable. *Shepard v. Easterling*, 61 Neb. 882 (86 N. W. 941).

233. (1903.) The action of county commissioners in adjusting the accounts of county officers under sections 43 and 44, article I, chapter 18, Compiled Statutes, is ministerial only. *Mitchell v. Clay County*, 69 Neb. 779 (96 N. W. 673).

234. (1903.) A settlement with a county officer which, in substance, is an adjustment of his accounts, does not become *quasi* judicial, so as not to be reviewable otherwise than by appeal, merely because claims were filed for sums claimed to be due such officer and allowed for the purpose of enabling warrants to be drawn therefor. *Mitchell v. Clay County*, 69 Neb. 779 (96 N. W. 673).

235. (1903.) The salary allowed a county clerk for services as clerk of the county board must be accounted for as fees of his office. *Mitchell v. Clay County*, 69 Neb. 796 (96 N. W. 657).

236. (1903.) A county officer is not required to account for and pay over to his county money received by him in payment for services performed for another, by private agreement, which are no part of the

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duties of his office, and which are not incompatible with, and are not included within his official duties. *State, ex rel. Board of County Commissioners, v. Holm*, 70 Neb. 606 (97 N. W. 821; 64 L. R. A. 131).

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Authority and powers.

Authority of clerk to take acknowledgment, see *Acknowledgment*, § 14.

237. (1877.) Where power is given to public officers in the permissive form, "may," if the public interests of individual rights call for its exercise, it is peremptory. *State, ex rel. Clark, v. Buffalo County*, 6 Neb. 454.

238. (1897.) Sections 40 and 41, chapter 8, Compiled Statutes (laws 1879, ch. 156, secs. 1, 2), providing that the successors of public officers who have made deposits or loans of public moneys may maintain actions to recover the same, operates prospectively as well as retrospectively. *McIntosh v. Johnson*, 51 Neb. 33 (70 N. W. 522).

239. (1898.) A public corporation is bound by the acts and contracts of its authorized agents within the scope of their authority. *Dean v. Saunders County*, 55 Neb. 759 (76 N. W. 450).

240. (1907.) County officers have by implication such powers as are necessary to enable them to perform the duties expressly enjoined upon them. *Christner v. Hayes County*, 79 Neb. 157 (112 N. W. 347).

——— Ratification.

241. (1895.) There is no authority for submission to electors of a county of a proposition to ratify the unauthorized acts of its officers. *Douglas County v. Keller*, 43 Neb. 635 (62 N. W. 60).

Duties and liabilities.

242. (1888.) A county treasurer is not liable for the penalty provided by section 12 of chapter 93, Compiled Statutes of 1885, for the failure to register a county warrant presented to him for such registration, prior to the expiration of ten days after it is issued, that time being given in which an appeal may be taken by a taxpayer, and within which the county clerk is prohibited from delivering the warrant. *Means v. Webster*, 23 Neb. 432 (36 N. W. 809).

243. (1902.) The duty imposed upon the county clerk by section 85, article I, chapter 77, Compiled Statutes, of apportioning railroad property among the several school districts for purposes of taxation is one owing to the public only; hence a county clerk is not personally liable to a school district for an honest mistake in the apportionment. *School District v. Burress*, 2 Unof. 554 (89 N. W. 609).

244. (1902.) The duty imposed upon the county clerk by section 77, article I, chapter 77, Compiled Statutes, is one owing to the public only; hence a county clerk who by mistake omits to levy the tax reported in accordance with said section is not personally liable to the school district. *School District v. Burress*, 2 Unof. 554 89 N. W. 609).

245. (1904.) Chapter 32, laws of 1903, entitled "An act to constitute the county surveyor ex-officio county engineer in addition to his powers and duties of the county surveyor," etc., is in violation of section 15, article III of the constitution, which prohibits the passage of local or special laws regulating county or township offices, and further provides that, in all cases where a general law can be made applicable, no special law shall be enacted, and is void. *State v. Scott*, 70 Neb. 685 (100 N. W. 812).

246. (1904.) An information in the nature of *quo warranto* will not lie to inquire into the right of county surveyors, in counties having more than 50,000 population, to perform and exercise the duties of county engineer, as provided for by chapter 32 of the laws of 1903. *State v. Scott*, 70 Neb. 681 (97 N. W. 1021).

247. (1904.) Under Compiled Statutes, chapter 18, article III, sections 18 and 20, and chapter 83, article XIII, section 3*a*, as amended by the act of 1891, it is the duty of each county treasurer to keep at all times on deposit in each of the depository banks of his county such a proportionate share of the public money subject to deposit as the amount of the paid up capital stock of each bank bears to the whole amount of paid up capital stock of all of such banks. *State, ex rel. First Nat. Bank of Atkinson, v. Cronin*, 72 Neb. 636 (101 N. W. 325).

——— Custody of public funds.

248. (1893.) Chapter 50, laws 1891, relating to the keeping of state and county funds, did not operate to repeal article II, chapter 18, Compiled Statutes, relating to the removal of county officers. *Hopkins v. Scott*, 38 Neb. 661 (57 N. W. 391).

249. (1897.) The statutes in force in 1888 and 1889 made it the duty of the

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county treasurers of counties having 25,000 inhabitants or less, to collect and remit to the state treasurer moneys owing to the state arising from the leasing and sale of the educational lands of the state situate in such counties. *Bedwell v. Custer County*, 51 Neb. 387 (70 N. W. 945).

250. (1907.) In the absence of bad faith, a county treasurer is not liable for depositing county funds in a legal depository in excess of the depository bank's *pro rata* share of such funds, as provided by section 18, ch. 18, art. III, Comp. St. 1905, unless the amount of such deposit exceeds the sum which might lawfully be deposited under the provisions of section 20 of the same chapter. *Holt County v. Cronin*, 79 Neb. 424 (112 N. W. 561).

Accounting for public funds and property.

251. (1880.) The fact that the public funds have been stolen from the treasury is no legal justification for the failure of the treasurer to account for them. *State, ex rel. Craig, v. Sheldon*, 10 Neb. 452 (6 N. W. 757).

252. (1883.) The payment of money in the hands of a county treasurer, at the termination of his office, to his successor, can be effectuated only by the delivery of that which by the law of the land is recognized as money. *Cedar County v. Jenal*, 14 Neb. 254 (15 N. W. 369).

253. (1883.) The mere delivery of certificates of deposit of a banker—no money having been realized from them, even if assented to by the successor, is not a payment; nor will it relieve the outgoing treasurer and his sureties from liability on his official bond, for failing to pay over money found to be due from him to the county on final settlement. *Cedar County v. Jenal*, 14 Neb. 254 (15 N. W. 369).

254. (1892.) A proceeding by mandamus to compel a county treasurer to pay over county funds in his hands at the expiration of his term of office is barred by the statute of limitations at the expiration of four years from the time the right to the writ accrued. *State, ex rel. Gage County, v. King*, 34 Neb. 196 (51 N. W. 754; 33 Am. St. Rep. 635).

255. (1896.) Negligence or carelessness of the county board in the examination and settlement of the accounts or report of the county treasurer is not a defense available to the sureties of the treasurer in a suit to recover funds which he failed to turn over. *Bush v. Johnson County*, 48 Neb. 1 (66 N. W. 1023; 58 Am. St. Rep. 741; 32 L. R. A. 223).

256. (1896.) The periodical settlements assigned by our statutes to be made between the county board and the treasurer of the county do not have in them the elements of a judicial determination of the subjects involved. *Bush v. Johnson County*, 48 Neb. 1 (66 N. W. 1023; 58 Am. St. Rep. 741; 32 L. R. A. 223).

257. (1896.) An incoming county treasurer, receives from the outgoing one, a certificate of deposit representing the county funds in his hands, and delivered the same to the bank which had issued it, and it was canceled and a new one issued to him in its stead. *Held*, That he and his bondsmen were chargeable with the amount thereof, and a subsequent failure of the bank during the time the deposit was continued, and his consequent inability to realize the money, did not relieve them of the liability. *Bush v. Johnson County*, 48 Neb. 1 (66 N. W. 1023; 58 Am. St. Rep. 741; 32 L. R. A. 223).

258. (1896.) The duty imposed on a county treasurer by law, and assumed by him, of safely keeping, accounting for and turning over the public funds which come into his hands by virtue of his office, is an absolute one; and where his bond is conditioned for the faithful performance of the duties of the office by him, the sureties on the bond are bound and liable in like manner and their responsibility is the same as that of their principal, and it will be no defense for either of the parties, in an action on the bond to recover public funds, predicated on an alleged failure of the treasurer to account for or pay them over, that the funds have been lost or stolen without the fault or negligence of the treasurer. *Bush v. Johnson County*, 48 Neb. 1 (66 N. W. 1023; 58 Am. St. Rep. 741; 32 L. R. A. 223).

259. (1896.) A county treasurer, during his first term, had on deposit in a bank $6,000 of the public funds, such deposit being evidenced by a certificate of deposit. At the close of this term of office and the beginning of the second term, in his report to and settlement with the county board, he included and stated the amount of the certificate of deposit as so much cash, the board possessing no knowledge of the existence of the certificate, or of the deposit of the

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money. Before the close of the treasurer's first term, the bank failed. *Held*, That such settlement did not bind the county as an acceptance or approval of the certificate of deposit as so much cash accounted for, nor did its retention by the treasurer, or turning it over to himself as his own successor, constitute a paying over of the public funds, but was a failure to do so which rendered him, and the obligors on his bond for his first term, liable. *Bush v. Johnson County*, 48 Neb. 1 (66 N. W. 1023; 58 Am. St. Rep. 741; 32 L. R. A. 223).

260. (1897.) An incoming county treasurer accepting a bank check in payment of public funds due from his predecessor is chargeable with the amount of such payment, where the check is surrendered by the incoming officer to the bank which issued it, the amount deposited therein in open account under the depository law, other deposits of county funds are likewise made therein from time to time, checks against the account drawn by the treasurer aggregating a sum in excess of said first deposit are honored and paid by the depository bank, and said acts have been ratified by the county. *Whitney v. State*, 53 Neb. 287 (73 N. W. 696).

261. (1901.) Where a full and complete settlement of a county officer with the county commissioners, who are authorized to make the same, has been made, such settlement is final and conclusive unless there is fraud, mistake or imposition in making the same. *Douglas County v. Bennett*, 61 Neb. 660 (85 N. W. 833). [Overruled. *Mitchell v. Clay County*, 69 Neb. 794.]

262. (1902.) In this state a county treasurer is an insurer of the funds which come into his hands *ex officio*, and such treasurer and his bondsmen cannot, in an action by the county to recover funds not accounted for, plead that such funds were lost without any fault or neglect on the part of the treasurer, by the failure of a bank in which they were deposited for safe keeping only, and in good faith, believing such bank to be solvent. *Thomssen v. Hall County*, 63 Neb. 777 (89 N. W. 389; 57 L. R. A. 303).

263. (1902.) A county treasurer is not excused from liability for loss of county funds, deposited in a bank that afterwards fails, on the ground that the supervisors fail to provide a safe place for the keeping of such funds in his office. *Thomssen v. Hall County*, 63 Neb. 777 (89 N. W. 389; 57 L. R. A. 303).

264. (1903.) Where a full and complete settlement of a county officer with the county commissioners, who are authorized to make the same, has been made, such settlement is final and conclusive, unless there is fraud, mistake or imposition in making the same. *Wilcox v. Perkins County*, 70 Neb. 139 (97 N. W. 236; 113 Am. St. Rep. 779).

265. (1907.) Where the refusal of county commissioners to settle with a county treasurer is based on his failure to account for interest due on taxes collected by him, such commissioners should call the treasurer's attention to the same, or pay the cost of legal proceedings brought to compel an approval of his bond, if such objection is not disclosed before an action brought to require acceptance and approval of his official bond for a second term of office. *State, ex rel. Clark, v. Vinnedge*, 79 Neb. 270 (112 N. W. 858).

266. (1907.) Where irregularities occur, in the disbursement of county funds by a county treasurer, on the advice of the county attorney, it is not a valid objection to the approval of the settlement of such treasurer's accounts or to the approval of his bond for a second term of office. *State, ex rel. Clark, v. Vinnedge*, 79 Neb. 270 (112 N. W. 858).

——— **Employment of person to examine accounts.**

267. (1882.) County commissioners have authority under section 160 of the revenue law of 1879 to employ a competent person at a reasonable compensation to examine the accounts of the county treasurer when in their opinion it is necessary to do so. And where such appointment has been made, and the services rendered, necessity for the appointment will be presumed. *Laws v. Harlan County*, 12 Neb. 637 (12 N. W. 114).

268. (1884.) County commissioners have authority under section 160, chapter 77 of the Compiled Statutes, to employ competent persons to examine the accounts of the county treasurer, when in their opinion it is necessary to do so. And they are the sole judges as to when the necessity exists. *Kearney County v. Tuttle*, 16 Neb. 34 (19 N. W. 637).

Liabilities on bonds.

269. (1897.) The official bond of a county treasurer with the oath indorsed thereon was filed within the statutory limit for such act. It had not then been approved, and was not approved until a date beyond the

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limit prescribed. He entered upon the duties of the office and during the time he continued therein, received the fees and emoluments appertaining thereto. In an action on the bond for an alleged breach of its conditions, *held*, that the fact of the lack of approval at the time prescribed by law was not matter of forceful defense for the sureties on the bond. *Holt County v. Scott*, 53 Neb. 176 (73 N. W. 681).

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270. (1897.) A person who was holding the office of county treasurer, and was re-elected, filed a bond with the oath of office indorsed thereon within the time fixed by law. The bond then, however, lacked approval, and was not approved until a date without the time fixed by law for such action. The treasurer continued in the office. *Held*, That he was in the office as of the new term under color of right, and was an officer *de facto*, and the sureties on the bond were precluded or estopped from denying that he was in possession of the office of the second term and *de jure*. *Holt County v. Scott*, 53 Neb. 176 (73 N. W. 681).

271. The failure of a county judge to pay to his successor in office or the person entitled thereto money which was deposited with him in condemnation proceedings constitutes a breach of the obligation of his official bond, and there accrues a cause of action in favor of the person damaged by said breach. (1898) *Chicago, B. & Q. R. Co. v. Philpott*, 56 Neb. 212 (76 N. W. 550); (1899) *Clark v. Douglas*, 58 Neb. 571 (79 N. W. 158).

——— **Validity of bond.**

272. (1896.) A county treasurer's bond should be approved by the county board. *Stoner v. Keith County*, 48 Neb. 279 (67 N. W. 311).

273. (1896.) Consideration *held* sufficient for an additional official bond of county treasurer which was executed, delivered, and approved during the principal's term of office. *Stoner v. Keith County*, 48 Neb. 279 (67 N. W. 311).

274. (1896.) The approval of the official bonds of county, precinct, and township officers, is the act of the county board as a body, and not the act of an individual member or members. *Stoner v. Keith County*, 48 Neb. 279 (67 N. W. 311).

275. (1896.) An official bond which has been presented to a county board and approved, binds the sureties though they signed the bond conditionally, the board having no notice of the condition and there being nothing to raise the duty of inquiry as to the manner of executing the bond. *Stoner v. Keith County*, 48 Neb. 279 (67 N. W. 311).

276. (1896.) The knowledge of one member of a county board, at the time of its approval by them, of the conditional signing of a county treasurer's bond by the sureties, not shown to have been imparted to the board, is not knowledge of or notice to the board of such fact. *Stoner v. Keith County*, 48 Neb. 279 (67 N. W. 311).

277. (1896.) Parties who signed a county treasurer's bond subsequent to its approval, as additional sureties must be presumed to have known what would be the effect of such signing, including the discharge of the prior sureties, and they became bound and liable for any subsequent failure or default of the principal in the bond to perform its obligations. *Stoner v. Keith County*, 48 Neb. 279 (67 N. W. 311).

278. (1898.) The official bond of a county officer is not void because it does not specify or designate the term for which the principal obligee was elected or appointed. *Perkins County v. Miller*, 55 Neb 141 (75 N. W. 577).

279. (1898.) The official bond of county clerk is not void by reason of its being, in form, joint, instead of joint and several as required by statute, nor because it fails to designate the term for which he was elected. *Perkins County v. Miller*, 55 Neb. 141 (75 N. W. 577).

280. (1899.) If the bond of a county officer is given and approved, the office obtained and enjoyment of the fees and emoluments, in an action on the bond for damages for a breach of the obligation it will not, in favor of the signers of it, be adjudged void because joint alone, but will be held good to the extent it in form complies with the statutory requirements in such regard. *Clark v. Douglas*, 58 Neb. 571 (79 N. W. 158).

281. (1903.) The fact that an official bond of a county officer as executed, is joint, instead of joint and several as required by statute, is not an objection thereto of which the obligors upon the instrument can avail themselves as a defense. The bond is good to the extent it complies with the staute in that regard. *Wilcox v. Perkins County*, 70 Neb. 139 (97 N. W. 236; 113 Am. St. Rep. 779).

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——— Indemnification of sureties.

282. (1902.) Although a county may not demand of a county treasurer to indemnify the sureties on his official bond, a mortgage given by him to indemnify his sureties is not illegal or void because at the time it was given the grantor was suspected of embezzling public funds, and the mortgage was given to protect the sureties in case a defalcation should ensue. *Harlan County v. Whitney*, 65 Neb. 105 (90 N. W. 993, 101 Am. St. Rep. 610).

——— Discharge of sureties.

283. (1896.) Additional sureties, by signing a county treasurer's bond after its approval without the knowledge and consent of the original sureties, release the latter from future liability on the bond and become liable thereon for any subsequent default of the principal. *Stoner v. Keith County*, 48 Neb. 279 (67 N. W. 311).

284. (1897.) Sureties executed a county treasurer's bond with the provision of section 21, chapter 10, Compiled Statutes, in contemplation and forming a part of their contract, and they are not released from liability on the bond by the board's requiring additional sureties. *Holt County v. Scott*, 53 Neb. 176 (73 N. W. 681).

Action on bond.

285. (1888.) Where a county treasurer is in default in respect to the county, state, school district, precinct bond, city, and other funds, and his bond has been canceled and bondsmen discharged by a judgment of the district court of the proper county, an action will lie against him in the name of the proper county for all such funds in respect to which he is a defaulter. In such case the county proceeds under a form analogous to that of a trustee of an express trust, in respect to all of such funds other than those of the county proper. *Thorne v. Adams County*, 22 Neb. 825 (36 N. W. 515).

286. (1891.) Prior to the act of 1891, p. 347, a civil action by the county would not lie to recover back profits made by its treasurer in dealing with the public funds; the only remedy was a prosecution under sec. 124 of the criminal code. *Wayne County v. Bressler*, 32 Neb. 818 (49 N. W. 782).

287. (1901.) Where through mistake a county clerk is allowed to retain fees in excess of his salary, the adjustment of the account between him and the county is not a bar to an action by it to recover the excess. *Sheibley v. Dixon County*, 61 Neb. 409 (85 N. W. 399).

——— Accrual of cause of action.

288. (1896.) A county treasurer, at the close of his term of office, must pay over to his successor all moneys in his hands belonging to the county, or for which he is liable to account. If there has been no proof of any particular date at which it is claimed that the money was misappropriated by a county treasurer, or other proof than that he failed to account for and pay over to his successor at the close of the term of office all funds for which he was liable to account, it will be presumed to have occurred at the close of the term and the liability accrues as of such time. *Stoner v. Keith County*, 48 Neb. 279 (67 N. W. 311).

289. (1902.) An action brought against a county treasurer and his bondsmen for the recovery of moneys alleged to have been converted by such treasurer, is not prematurely brought if commenced after the termination of the term of office of such treasurer, and after he has given a bond and qualified as his own successor in office. *Thomssen v. Hall County*, 63 Neb. 777 (89 N. W. 389; 57 L. R. A. 303).

——— Defenses.

290. (1898.) That plaintiffs were not the owners of the claim on which the action was predicated and were not the real parties in interest were proper matters of defense in an action by one holding tax certificates to recover against sureties of a county treasurer for the latter's failure to turn over redemption money in his bonds. *Levy v. Cunningham*, 56 Neb. 348 (76 N. W. 882).

——— Limitation of action.

291. (1887.) The statute of limitations commences to run against an action on the bond of a county treasurer, by the purchaser of land at an illegal tax sale, from the date of such sale. *Merriam v. Miller*, 22 Neb. 218 (34 N. W. 625).

292. (1887.) An action on the official bond of a county treasurer for selling to the plaintiff certain lands for delinquent taxes, which sale is alleged to be void for the want of legal proceedings by the said county treasurer and other taxing officers, as to the time within which the same may be commenced, comes within the provisions of section 14 of the code of civil procedure, and may be commenced at any time within ten years from the time the cause of action

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accrued. *Merriam v. Miller*, 22 Neb. 218 (34 N. W. 625); (1887) *Alexander v. Overton*, 22 Neb. 227 (34 N. W. 629).

——— Parties.

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293. (1891.) An action brought by a county on the bond of its treasurer to recover taxes collected by him for the state, was properly brought in the name of the county, while the taxes were due the state, yet they were levied and collected through the county authorities and were a charge against the county until paid into the state treasury. *Valley County v. Robinson*, 32 Neb. 254 (49 N. W. 356).

294. (1896.) Where the bond of a county treasurer was presented and approved at or prior to the commencement of his term of office, which bond was signed by additional sureties during the term and also an additional bond given and approved, and the default or failure, if any, of the principal in the discharge of the duties of the office occurred at the close of his term, it was proper to join all the sureties as defendants in one action on the bonds. *Stoner v. Keith County*, 48 Neb. 279 (67 N. W. 311).

295. (1898.) That plaintiffs were not the owners of the claim on which the action was predicated and were not the real parties in interest were proper matters of defense in an action by one holding tax certificates to recover against sureties of a county treasurer for the latter's failure to turn over redemption money in his bonds. *Levy v. Cunningham*, 56 Neb. 348 (76 N. W. 882).

——— Pleading.

296. (1879.) A suit on behalf of the public against a county treasurer, for a breach of conditions of his bond must be brought by the county clerk at the direction of the state auditor or the county commissioners, and the petition must allege that it is so instituted. *Albertson v. State*, 9 Neb. 429 (2 N. W. 742, 892).

297. (1884.) A petition in an action on a county treasurer's bond, which contains no allegation that the treasurer had any of the county money in his hands during the term covered by the bond, is insufficient. *Buffalo County v. Van Sickle*, 16 Neb 363 (20 N. W. 261).

298. (1884.) A petition in an action on a county treasurer's bond, which contains no allegation that the treasurer had any of the county money in his hands during the term covered by the bond, lays no foundation for the introduction of evidence tending to prove that the treasurer committed a defalcation by taking money belonging to one fund to pay warrants drawn upon another fund, or by his taking money collected by him during one term of office, and applying it to purposes which should have been supplied by funds collected in a former term, and by him misapplied. *Buffalo County v. Van Sickle*, 16 Neb. 363 (20 N. W. 261).

299. (1891.) In an action on bond of county treasurer to recover taxes collected by him for the state, the petition held to state a cause of action. *Valley County v. Robinson*, 32 Neb. 254 (49 N. W. 356).

300. (1896.) In an action on the bonds of a county treasurer, the county pleaded the reception by him of the proceeds of the sales of certain bonds, the disbursement of a part of the funds, and the failure to turn over to his successor in office an amount of such money. The treasurer and his bondsmen admitted receiving the money, but as to his failure to turn any portion thereof over to his successor in office the answer was a general denial. The county introduced proof showing that the treasurer charged a per cent. of the amount of the proceeds of the bonds as collection fees, which sum he retained and did not pay to his successor. *Held*, Under the issues joined by the pleadings, to be sufficient to show a failure to comply with the obligations of his bonds and that it did not devolve upon the county to further show that the treasurer had received all the fees to which he was by law entitled for his services; that if there was any sum or sums due the treasurer from the county, the legitimate subject of set-off or counter-claim in his favor, or which he had allowed to remain in the county treasury in payment of the amount claimed by the county as before indicated, they were matters constituting a defense and should have been pleaded as such and proved. *Stoner v. Keith County*, 48 Neb. 279 (67 N. W. 311).

301. (1897.) In an action on the official bond of a county treasurer, answer *held* to plead an adjudication against the county by the allowance of a claim by the county board in its judicial capacity rather than an allowance of the accounts of such treasurer, and hence to state a defense. *Trites v. Hitchcock County*, 53 Neb. 79 (73 N. W. 215).

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302. (1901.) In an action by a county on an official bond of a county officer for fees, an answer alleging a full settlement with the county commissioners presents a good defense, and in the absence of a reply entitles the defendant to a judgment on the pleadings. *Douglas County v. Bennett*, 61 Neb. 660 (85 N. W. 833).

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——— **Evidence.**

303. (1879.) In an action against a county treasurer for moneys collected by him for the state, the original receipts received by him from the state treasurer, and used by him in his settlement with the county commissioners, *prima facie* control as to the amount paid by him to the state. *Albertson v. State*, 9 Neb. 429 (2 N. W. 742, 892).

304. (1884.) The payment by a county treasurer, in his third term, of warrants drawn against the several funds during his second term, *held*, under the circumstances disclosed by the evidence, no evidence of defalcation during the third term. *Buffalo County v. Van Sickle*, 16 Neb. 363 (20 N. W. 261).

305. (1893.) In an action on a county clerk's official bond to recover fees collected by him while in office he may prove that the county board appointed a deputy and fixed his salary, and that the deputy actually rendered the services, even if there is no record of such order in the minutes of the county board. *Ragoss v. Cuming County*, 36 Neb. 375 (54 N. W. 683).

——— **Amount of recovery.**

306. (1897.) In an action on the bond of a county clerk, the sureties are liable for interest on a claim for fees retained by him in excess of his salary, though the county made no demand upon him for payment of the excess. *Hazelet v. Holt County*, 51 Neb. 716 (71 N. W. 717).

307. (1902.) In an action by a county against a county treasurer and his bondsmen to recover funds alleged to have been converted by the treasurer, it is not error to compute interest on such funds from the date at which, under the terms of the statute and the official bond, the funds should have been accounted for and turned over to the successor in office of such treasurer. *Thomssen v. Hall County*, 63 Neb. 777 (89 N. W. 389; 57 L. R. A. 303).

III. PROPERTY, CONTRACTS AND LIABILITIES.

A. Public Buildings and Other Property.

Construction and maintenance of public bridges, see *Bridges*.

County roads, see *Highways*.

Liability of county for taking over private bridge, see *Eminent Domain*, § 44.

Authority to make public improvements in general, see *ante*, §§ 39-41.

Damages from construction and maintenance of public building, see *post*, § 371.

Liability for land taken for public roads, see *Highways*, §§ 88-90.

Purchase of poor-farm.

308. (1872.) County commissioners have power to buy a poor-farm for the county, but not to give promissory notes or a mortgage in payment for the same. *Stewart v. Otoe County*, 2 Neb. 177.

Sale.

309. (1897.) The question of the title to the land attempted to be sold by the commissioners, and the validity of the conveyance or deed, were but incidental to the main one of the validity of the sale and must follow its decision, hence were not so involved in the consideration and adjudication of the claim before the commissioners as to present the question of their effect on the jurisdiction to hear and pass thereon. *Stenberg v. State, ex rel. Keller*, 50 Neb. 127 (69 N. W. 849).

——— **Submission of question to popular vote.**

310. (1889.) The language of section 30 of part 1, chapter 18, of the Compiled Statutes, *held* to require a number of votes equal to two-thirds of all the votes cast upon any one question, or for all of the candidates for any one office voted for, or to be filled, at the election at which is submitted a question of selling the public grounds or buildings of a county, to be cast in favor of such proposition, in order to the adoption of such proposition. *State, ex rel. Mann, v. Anderson*, 26 Neb. 517 (42 N. W. 421).

311. ((1889.) The "two-thirds of the votes cast" at an election, as provided for by section 30 of chapter 18, Compiled Statutes, means two-thirds of the votes cast at the election. *State, ex rel. Mann, v. Anderson*, 26 Neb. 517 (42 N. W. 421).

312. (1895.) The provision of section 24, chapter 18, Compiled Statutes, that county

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boards shall not sell the public grounds of any county without having first submitted the question to the electors thereof, is mandatory and an express limitation upon the powers of the several counties. *Douglas County v. Keller*, 43 Neb. 635 (62 N. W. 60).

313. (1895.) A sale of the public property of a county made without the consent of a majority of the electors voting at an election authorized by law, is a nullity and passes no title to the purchaser. *Douglas County v. Keller*, 43 Neb. 635 (62 N. W. 60).

314. (1895.) Where a county board offers for sale the public property of the county, claiming as authority for such action the consent of a majority of the electors expressed at a general election, a purchaser at such sale in an action to recover the price paid (the sale having been adjudged void for want of authority), will not be chargeable with constructive notice of the fact that the proposition to sell was in fact defeated. *Douglas County v. Keller*, 43 Neb. 635 (62 N. W. 60).

315. (1896.) The mere segregating by the county board of the fifty acres from the poor-farm tract and the platting thereof into blocks and lots, did not confer power upon the county commissioners to sell such lots until first empowered to make such sale in the mode indicated by section 24, article I, chapter 18, Compiled Statutes. *Stenberg v. State, ex rel. Keller*, 48 Neb. 299 (67 N. W. 190).

316. (1897.) The requirements of section 30, article I, chapter 18, Compiled Statutes, in regard to the proportion of votes which must have been cast in favor of a proposition submitted at an election, to work its adoption, *held* applicable to the submission of a proposition to sell the public grounds of a county. *Stenberg v. State, ex rel. Keller*, 50 Neb. 127 (69 N. W. 849).

317. (1897.) The act passed during the legislative session of 1887 entitled "An act to amend section 23 of an act entitled 'An act concerning counties and county officers,' approved March 1, A. D. 1879," did not repeal the succeeding section 24 of the act of 1879, as dependent upon section 23; neither did it repeal section 24 by implication. (Session Laws, 1887, p. 350, ch. 26.) *Stenberg v. State, ex rel. Keller*, 50 Neb. 127 (69 N. W. 849).

318. (1897.) The determination of whether or not the proposition to sell the public grounds of the county received the required number of votes to work its adoption, was not a matter for the official determination of the county board. The authority to make the sale depended upon it appearing from the abstract of the votes made during the official canvass of the returns of the election and filed with the county clerk that in favor of the proposition the requisite number of votes had been cast. As no official finding of the board which attempted the sale was necessary, the action of the county board which subsequently entertained and passed upon the claim of purchasers at the sale for repayment of the consideration, the claim being based on the void character of the sale for lack of authority in the commissiners to make it, did not involve a review of reversal of the finding of the former board. *Stenberg v. State, ex rel. Keller*, 50 Neb. 127 (69 N. W. 849).

Construction of public buildings.

319. The act approved February 26, 1889, to amend the second division of section 25 of chapter 18 of Compiled Statutes of 1887, relating to county buildings and offices, as amended by act of March 31, 1887, *held*, to be constitutional and valid from the date of passage. (1888) *State, ex rel. Burnham, v. Babcock*, 23 Neb. 128 (36 N. W. 348); (1889) *Fenton v. Yule*, 27 Neb. 758 (43 N. W. 1140); (1889) *Baird v. Todd*, 27 Neb. 782 (43 N. W. 1143); (1889) *State v. Partridge*, 29 Neb. 158 (45 N. W. 290).

320. (1889.) Designation of the ground upon which a public building is to be erected in proposition for erection thereof, is mere surplusage, unless it appear plainly that voters were misled thereby. *Fenton v. Yule*, 27 Neb. 758 (43 N. W. 1140).

321. (1889) The act of February 26, 1889, by amending section 25, chapter 18, Compiled Statutes 1887, also amends by implication section 30 of the same chapter, and the vote therein required for the erection of public buildings, is to be understood as changed from two-thirds to a simple majority, though said section verbally remains as before. *Fenton v. Yule*, 27 Neb. 758 (43 N. W. 1140); (1890) *State v. Partridge*, 29 Neb. 158 (45 N. W. 290).

Record books.

322. (1892.) The record books of a county are purchased and paid for by the county and owned by it, although they may relate to private transactions between in-

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dividuals. *Toncray v. Dodge County*, 33 Neb. 802 (51 N. W. 235).

Court reports distributed to county judges.

323. (1900.) Under the provisions of section 20, chapter 19, Compiled Statutes, the supreme court reports distributed to county judges belong to the office and not to the individual. *Clifford v. Hall County*, 60 Neb. 506 (83 N. W. 661; 50 L. R. A. 733).

324. (1900.) A county as a municipal corporation has no such interest in or right of possession to the reports of the supreme court, distributed to county judges in accordance with law, as will authorize it to maintain replevin proceedings against one who wrongfully retains possession of the same. *Clifford v. Hall County*, 60 Neb. 506 (83 N. W. 661; 50 L. R. A. 733).

Rental of offices.

325. (1898.) Where a county rents rooms for one of its officers and puts him in possession thereof with the records and property pertaining to his office, it is bound to pay the stipulated rental so long as such officer continues in possession. *Dean v. Saunders County*, 55 Neb. 759 (76 N. W. 450).

B. Contracts.

Specific performance of contract by county to purchase lands, see *Specific Performance*, § 38.

Claims by contractors for compensation, see *post*, § 606.

Contracts at meetings of board away from county seat, see *ante*, § 109.

Employment of person to examine accounts of officers, see *ante*, §§ 267, 268.

Limitation on power to incur indebtedness, see *post*, §§ 404-409.

Contract to prevent competition in bids for public contracts, see *Contracts*, §§ 133-135.

Liabilities for necessaries furnished to pest house, see *Health*, § 3.

Contracts for repair or construction of highway, see *Highways*, §§ 155-157.

Compelling award of contract to lowest bidder, see *Mandamus*, §§ 193-203.

Compelling letting contract to bidder for publishing tax list, see *Mandamus*, §§ 208, 209.

Formal requisites.

326. (1880.) A county is not liable on a contract entered into by the commissioners with another to grade an approach to a bridge where such contract was made verbally and not while the board was in public session. *Merrick County v. Batty*, 10 Neb. 176 (4 N. W. 959).

327. (1895.) Where a contract was made by plaintiff and the county board whereby the former was to construct a bridge before the act requiring counties to build and keep all bridges repaired went into effect, an action for extra work ordered by the commissioners cannot be maintained when the petition does not show that such extra work was ordered after the above statute took effect, and that the proper proceedings had been complied with by the board in awarding such contract. *Tullock v. Webster County*, 46 Neb. 211 (64 N. W. 705).

328. (1904.) Unless the statute regulating the letting of contracts for the furnishing of county supplies is strictly complied with, the proceeding and consequent contract will be void. *Woodruff v. Welton*, 70 Neb. 665 (97 N. W. 1037).

329. (1907.) A resolution adopted by a county board whereby a particular newspaper is designated as the one in which delinquent tax list shall be published does not constitute a contract between the county and the newspaper publishers. *World Publishing Co. v. Douglas County*, 79 Neb. 849 (113 N. W. 539).

Compliance with vote authorizing contract.

330. (1902.) Where county commissioners, acting for a precinct which has voted bonds in aid of internal improvements under section 14, chapter 45, Compiled Statutes, have entered into a contract differing substantially as to the parties thereto or terms thereof from that voted upon, it is not binding upon the municipality. *Keith County v. Ogallala Power & Irrigation Co.*, 64 Neb. 35 (89 N. W. 375).

331. (1902.) Where bonds are voted by a precinct in aid of a work of internal improvement under section 14, chapter 45, Compiled Statutes, the terms of the proposition set forth in the notice of election are to be taken as defining the authority of the county commissioners in contracting with reference to such improvement. *Keith County v. Ogallala Power & Irrigation Co.*, 64 Neb. 35 (89 N. W. 375).

Proposals or bids.

332. (1882.) Bids for supplies, when filed, must conform to advertisement; bid to furnish articles "at what it cost to lay them down," *held* indefinite; omission of

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two articles of insignificant value, *held* not to invalidate bid. *State, ex rel. Whedon, v. York County*, 13 Neb. 57 (12 N. W. 816).

333. (1882.) All bids for books, blanks, and stationery, for supplies for county officers must be filed with the county clerk on or before the first day of January. The commissioners have no authority to consider a bid filed thereafter. *State, ex rel. Whedon, v. York County*, 13 Neb. 57 (12 N. W. 816).

334. (1882.) A bid for supplies must state the price for which the articles will be furnished, a proposal to furnish them for "what it costs to lay them down" being insufficient. *State, ex rel. Whedon, v. York County*, 13 Neb. 57 (12 N. W. 816).

335. (1882.) The omission of two articles of insignificant value from a bid to furnish supplies will not invalidate it. *State, ex rel. Whedon, v. York County*, 13 Neb. 57 (12 N. W. 816).

336. (1886.) The county board may reject all bids for supplies; but upon doing so it is its duty to again advertise for the furnishing of supplies. *State, ex rel. Globe Publishing Co., v. Saline County*, 19 Neb. 253 (27 N. W. 122).

337. (1886.) A taxpayer, in a proper case, may compel the county board to take the necessary steps to let the contract for supplies to the lowest bidder. *State, ex rel. Globe Publishing Co., v. Saline County*, 19 Neb. 253 (27 N. W. 122).

338. (1894.) Under the provisions of section 83, chapter 78, Compiled Statutes, an increase of $500 from the contract price for the erection of a bridge cannot be enforced when such increase was contracted for without bids being required or made in respect thereto. *Townsend v. Holt County*, 40 Neb. 852 (59 N. W. 381).

339. (1897.) The question of the responsibility of the bidder for public contracts was not left for the general judgment and discretion of the board. *State, ex rel. Woodruff-Dunlap Co., v. Cornell*, 52 Neb. 25 (71 N. W. 961).

——— **Advertisement.**

340. (1885.) Where a county board advertises for bids for the erection of a public bridge which will cost to exceed $500, in a newspaper printed and of general circulation in the county, and also with a considerable circulation throughout the state, but one advertisement continued for four consecutive weeks is necessary. *Brown v. Merrick County*, 18 Neb. 355 (25 N. W. 356).

341. (1885.) Where the county board act in good faith, their decision as to the selection of a paper in which to advertise cannot be attacked in a collateral proceeding. *Brown v. Merrick County*, 18 Neb. 355 (25 N. W. 356).

——— **Plans and specifications.**

342. (1875.) The commissioners have no authority to require each bidder for the erection of a bridge to accompany his bid with his own plans and specifications, they adopting such plans as they see fit and accepting the bid accompanying the same, no opportunity being given to others to bid on such plans. Such conduct opens the door to corruption, favoritism, and fraud; and a contract awarded on such a letting is void. *State v. Buffalo County*, 4 Neb. 150.

343. (1903.) The adoption of plans and specifications is a necessary preliminary to advertising for and letting a contract by the year for the building of bridges, and such advertising and letting must be in accordance with the plans and specifications so adopted. *Clark v. County of Lancaster*, 69 Neb. 717 (96 N. W. 593).

——— **Duty to let to lowest bidder.**

344. (1875.) In letting contracts for the erection of county buildings, and for improvement of such roads as may be of general necessity, county commissioners must award the same to the lowest responsible bidder. *State v. Buffalo County*, 4 Neb. 150.

345. (1875.) Public bridges are part of public roads, and the provisions of section 16, chapter 67, General Statutes, requiring contracts for the construction of roads to be let to the lowest competent bidder, apply to the letting of contracts for the erection of bridges; and it is the duty of county commissioners to adopt plans and specifications, in advance of the letting, as a basis on which bids may be received. *State v. Buffalo County*, 4 Neb. 150.

346. (1875.) Where precinct or county bonds are placed at the disposal of county commissioners for the purpose of erecting a wagon bridge over the Platte river, it is their duty to let the contract for the construction of the same to the lowest responsible bidder; failing to do so, such bidder or a taxpayer of the county may maintain an action to compel them to so award the contract. *State v. Buffalo County*, 4 Neb. 150.

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347. (1880.) Contracts for the permanent improvement of roads must be let to the lowest responsible bidder. *Merrick County v. Batty*, 10 Neb. 176 (4 N. W. 959).

348. (1886.) In the absence of fraud, where the board rejects all bids, the lowest bidder cannot compel the awarding of the contract to himself. *State, ex rel. Globe Publishing Co., v. Saline County*, 19 Neb. 253 (27 N. W. 122).

349. (1886.) In procuring the supplies for a county mentioned in section 149, chapter 18, Compiled Statutes, where the cost exceeds $200, it is the duty of the county board, after due notice, to let the contract to the lowest bidder that can give adequate security for the performance of the agreement and there is no authority to let such contracts in any other way. *State, ex rel. Globe Publishing Co., v. Saline County*, 19 Neb. 253 (27 N. W. 122).

350. (1888.) There being no law making it the duty of a county board to let by contract to the lowest bidder the printing and publishing of the delinquent tax list, or the proceedings of such board, a mandamus will not be issued from this court to compel such action by them. *State, ex rel. Huse, v. Dixon County*, 24 Neb. 106 (37 N. W. 936).

351. (1893.) Where the cost of a county bridge exceeds $100, contracts for the erection of the same must be let to the lowest competent bidder after due advertisement stating the general character of the work. *State, ex rel. Scott, v. Cunningham*, 37 Neb. 687 (56 N. W. 485).

Indemnity against liens

352. (1895.) It was stipulated in a contract for the erection of a county court house that the contractor should receive eighty-five per cent. of the money earned thereunder, payable on monthly estimates; also "that in each case of payment a certificate shall be obtained by the contractor from the clerk of the county that he has carefully examined the records and finds no liens or claims against said work or an account of said contractor. Neither shall there be any lawful claims against the contractor in any manner, from any source whatever, for work or material furnished on said work." *Held*, A promise by the contractor to satisfy the lawful claims of laborers and material-men, and that the sureties on his bond for the faithful performance of the contract are liable for a breach of such condition. *Korsmeyer Plumbing & Heating Co. v. McClay*, 43 Neb. 649 (62 N. W. 50).

Annual or continuing contracts.

353. (1903.) There is no authority for the letting of annual contracts for repairing of bridges or for the doing of such repairing under an annual contract, where the amount exceeds $100. *Clarke v. County of Lancaster*, 69 Neb. 717 (96 N. W. 593).

353*a*. (1908.) Where a county board has entered into a contract for the construction of bridges for the period of one year, and before the expiration thereof attempts to supersede the same with a contract much less favorable to the county, damages to the taxpayers will be presumed. *Whedon v. Lancaster County*, 80 Neb. 682 (114 N. W. 1102).

353*b*. (1908.) Where the county board has a yearly contract for the construction of all bridges in the county, it may not make another to take effect before the expiration of the first; but it may, if the occasion for building a bridge arises during the life of the yearly contract, require it to be done thereunder, even though the same cannot be completed within the term thereof. *Whedon v. Lancaster County*, 80 Neb. 682 (114 N. W. 1102).

353*c*. (1908.) Under the statute authorizing the county board to make yearly contracts for the construction of all bridges, such contracts may not be made for a shorter period than one year, nor may the county board evade the provisions of the statute by terminating before its expiration a contract made for one year. *Whedon v. Lancaster County*, 80 Neb. 682 (114 N. W. 1102).

Contracts with county officials.

354. (1877.) County commissioners have no authority either personally or by agent to engage in the business of erecting public bridges on the credit of the county. The law defines their power and points out the mode of its exercise, and that mode is exclusive. *Follmer v. Nuckolls County*, 6 Neb. 204.

355. (1904.) Section 51, article I, chapter 18, Compiled Statutes, which prohibits county officers from being pecuniarily interested in or receiving the benefit of any contract executed by the county for the furnishing of supplies or any other purpose, is general in its nature, and applies to all

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county officers and to every class of contracts. *Wilson v. Otoe County*, 71 Neb. 435 (98 N. W. 1050).

Implied contracts.

356. (1902.) One who furnishes labor and materials for the creation of a public work, in good faith, but in the absence of a contract such as is required by statute, is entitled to recover their reasonable value, in the absence of a statute expressly or by necessary implication denying such right. *Cass County v. Sarpy County*, 66 Neb. 476 (97 N. W. 352).

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Estoppel to deny validity of contract.

357. (1884.) Parties dealing with a county, or other municipal corporation, are under peculiar obligation to act with fairness and 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 what they show, but also, if such be the case, of their failure to show, matters material to the business in hand. *Merriam v. Otoe County*, 15 Neb. 408 (19 N. W. 479).

358. (1901.) A party who has received the benefits of an executed contract entered into with the county at a meeting of the county board is estopped from denying the legality of the session at which such contract was entered into. *Green v. Lancaster County*, 61 Neb. 473 (85 N. W. 439).

Enjoining letting of contract or payment.

359. (1877.) Where a contract provides for the payment of the cost of a bridge in excess of the $9,000 received from county bonds, on warrants drawn on the bridge and road fund, a petition that alleges the want of sufficient money in the road fund to justify such contract is fatally defective if no mention is made of the condition of the special bridge fund. *Clark v. Dayton*, 6 Neb. 192.

360. (1904.) The fact that a taxpayer seeking to enjoin a county board from letting a contract for the furnishing of supplies, is also a member of a company competing with the person to whom such contract has been attempted to be let, does not estop him from maintaining the proceeding. *Woodruff v. Welton*, 70 Neb. 665 (97 N. W. 1037).

Validity of particular contracts.

361. (1879.) County commissioners have no power to purchase a private bridge over a stream within the county; and an award made under such a contract is a nullity. *McCann v. Otoe County*, 9 Neb. 324 (2 N. W. 707).

362. (1882.) A contract between county commissioners and a firm of attorneys whereby the latter were to assist in placing on the tax list all property erroneously left off, for which they were to receive as compensation 25 per cent. of the taxes so collected, is void. *Platte County v. Gerrard*, 12 Neb. 244 (11 N. W. 298).

363. (1886.) A contract between an attorney and the county commissioners to procure the refunding of certain bonds issued to a railroad, for a per cent. of the proceeds is void, as being without authority on the part of such commissioners to enter into such a contract. *State, ex rel. Webster, v. Lancaster County*, 20 Neb. 419 (30 N. W. 538).

364. (1907.) A county attorney, who is required by law and by the order of the county board to institute actions for the benefit of the county, may bind the county to pay the reasonable and necessary expense incident thereto. *Christner v. Hayes County*, 79 Neb. 157 (112 N. W. 347).

Rights and remedies of contractor.

365. (1877.) The publisher of the delinquent tax list for a county has no right to withhold from the treasurer the proof of publication, which the statute requires him to deliver to that officer, because of the non-payment of his fees, and if he do so it is good ground for a refusal of the county commissioners to allow his account for publishing the list. *Brown v. Otoe County*, 6 Neb. 111.

366. (1877.) Although a contract was illegal by reason of the failure of the commissioners to advertise for proposals under a plan and specifications, still the contractor having completed the bridge, and the same having been accepted by the commissioners, he is entitled to compensation. Under such circumstances payment will not be enjoined at the suit of taxpayer. *Clark v. Dayton*, 6 Neb. 192.

367. (1880.) When the state conveys land to a county in aid of the erection of a bridge and the same is conveyed to a contractor who erects the bridge as required, he may recover the value of the bridge when his title to the land fails in consequences of the state having no title to the same. *Clark v. Saline County*, 9 Neb. 516 (4 N. W. 246).

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368. (1886.) Where a county employs an agent to refund its bonds, and before the revocation of the authority he necessarily performs labor and expends money in the prosecution of the business from which the county derives benefit, he is entitled to a fair compensation for said labor, and the repayment of said money. *State, ex rel. Webster, v. Lancaster County*, 20 Neb. 419 (30 N. W. 538).

C. County Expenses and Charges.

Liability of county for redemption money paid to treasurer, see *post*, § 560.

Expenses connected with administration of justice.

369. (1906.) Where the judgment of conviction of one found guilty of a felony is suspended and he is remanded to the sheriff of the county where the alleged crime was committed, the county is liable for the cost of keeping the prisoner between the time of the first conviction and his final acquittal. *Brown County v. Lampert*, 76 Neb. 536 (107 N. W. 746).

370. (1906.) The county from which a change of venue in a criminal case is taken is not liable to the county in which the trial is had for the fees of such jurors of the regular panel as did not sit upon the trial of that case. *Dawes County v. Sioux County*, 77 Neb. 567 (110 N. W. 378).

D. Torts.

Notice of defects in bridge, see *Bridges*, §§ 67-70.

Actions against counties for negligence, see *post*, §§ 670-704.

Construction and condition of public buildings.

Necessity of presentation of claim, see *post*, § 597.

371. (1877.) A county is not liable at the suit of a private person for damages occasioned by reason of the erection of a county jail in near proximity to his residence. Neither is it liable if the jail be kept in so filthy a condition as to become an actual nuisance to those persons living near it. *Wehn v. Commissioners of Gage County*, 5 Neb. 494 (25 Am. Rep. 497).

Injuries from construction of highway or ditch.

372. (1897.) Although an action for tort does not lie against a county, in the absence of a statute authorizing it, yet since section 21, article I, constitution, provides that property shall not be taken or damaged for public use without compensation, an action will lie against a county, by a property owner, a portion of whose property is appropriated and the balance injured by the grading of a highway. *Douglas County v. Taylor*, 50 Neb. 535 (70 N. W. 27).

373. (1901.) 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*, 62 Neb. 1 (86 N. W. 936).

374. (1903.) A county is not liable to landowners for injuries caused by the discharge of surface water from ditches constructed by the county authorities diverting such water from its natural course. *Stocker v. Nemaha County*, 4 Unof. 230 (93 N. W. 721).

375. (1905.) A county is not liable in damages to an individual landholder for the negligent diversion of surface water in the improvement and construction of its public highways. *Hopper v. Douglas County*, 75 Neb. 329 (106 N. W. 330).

Negligence in maintenance of highways.

376. (1903.) Counties governed by the township organization act of 1895 are relieved from the duty and liability to construct, maintain and keep in repair ordinary highways and culverts. *Goes v. Gage County*, 67 Neb. 616 (93 N. W. 923).

377. (1903.) The township in counties under township organizations are bound to maintain and repair the highways within the township districts, and are liable for injuries resulting from defects in such highways. *Goes v. Gage County*, 67 Neb. 616 (93 N. W. 923).

378. (1903.) Counties which have adopted the ownership organization act, were thereby taken out of the operation of section 4 of chapter 7 of the Session Laws of 1889, making counties liable for damages sustained by means of the insufficiency or want of repair of highways and culverts. Not being liable at common law for a failure to properly construct and repair the same, no recovery can be had against a county so governed for damages sustained

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by reason of such failure or neglect. *Goes v. Gage County*, 67 Neb. 616 (93 N. W. 923).

Negligence in maintenance of bridges.

379. (1880.) At common law a county is not liable for the failure of the commissioners to keep a bridge in repair. *Woods v. Colfax County*, 10 Neb. 552 (7 N. W. 269). 269).

380. (1880.) A county is not liable in damages at common law, or under the Revised Statutes of 1866, for injuries caused by the breaking down of a public bridge, which was caused by the negligence of the county commissioners. *Woods v. Colfax County*, 10 Neb. 552 (7 N. W. 269). [Overruled by statute. 36 Neb. 141; 50 Neb. 535; 53 Neb. 755.]

381. (1893.) A person injured by the failure of a county board to keep a public bridge in repair may maintain an original action for damages against the county in any court of competent jurisdiction. He is not required to present his claim to the county board for allowance or rejection. *Hollingsworth v. Saunders County*, 36 Neb. 141 (54 N. W. 79).

382. (1895.) A county is liable in damages for injuries resulting from an unsafe county bridge, though no notice of the defect, not discernible from the ordinary tests county. *Raasch v. Dodge County*, 43 Neb. 508 (61 N. W. 725).

383. (1904.) The county cannot be held as an insurer of those who have occasion to use a county bridge. If the defect in a bridge, from which injury and damages occur to the person using it, is a latent defect, not discernible from the ordinary tests and examinations usually made to ascertain its condition, and if those charged with such examination have not been negligent in their duty in that regard, the county cannot be held liable for damages caused by such latent and undiscovered defects. *Johnson County v. Carmen*, 71 Neb. 682 (99 N W. 502).

384. (1905.) A party attempting to cross a bridge which is a part of a highway in the absence of notice to the contrary, or facts sufficient to put him on inquiry, has a right to assume that it is reasonably safe for the accommodation of the public at large in the various occupations pursued in the locality where the bridge is situated. *City of Central City v. Marquis*, 75 Neb. 233 (106 N. W. 221).

385. (1906.) One who is injured by reason of a defective bridge while riding in a private vehicle may recover from a county otherwise liable, notwithstanding the negligence of the driver, which may have contributed to produce the injury, the injured party being free from negligence and having no authority or control over the driver. *Loso v. Lancaster County*, 77 Neb. 466 (109 N. W. 752).

Acts of officers and agents.

386. (1877.) There is nothing in the legislation of this state, either directly or by reasonable implication, recognizing the liability of counties to private actions for the neglect of their officers in the performance of public duties. *Wehn v. Commissioners of Gage County*, 5 Neb. 494 (25 Am. St. Rep. 497).

387. (1879.) It is the duty of the treasurer of each county to take all proper measures to secure to each school district the amount of liquor licenses to which it is entitled. But the county is in no way answerable for the acts of the treasurer in respect of this duty. *School District No. 2 v. Saline County*, 9 Neb. 403 (2 N. W. 877).

388. (1903.) A county is only liable under section 131 of the revenue act for the mistakes and wrongful acts of its own officers —the officers through whom its taxes are levied and collected. *Kelley v. Gage County*, 67 Neb. 6 (93 N. W. 194).

389. (1905.) A county is not liable in damages for the negligent acts of its officers, unless made so by legislative enactment. *Hopper v. Douglas County*, 75 Neb. 329 (106 N. W. 330).

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES AND TAXATION.

Depositaries of county funds, see *Depositaries*.

Deposits in bank by treasurer as subject to garnishment, see *Garnishment*, § 20.

Funds subject to payment of damage for highway appropriation, see *Highways*, §§ 120, 121.

Liability of commissioners allowing illegal claim, see *ante*, §§ 120-122.

In general.

390. (1898.) The fiscal year of a county is the calendar year. *State, ex rel. Pearson, v. Cornell*, 54 Neb. 647 (75 N. W. 25).

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Limitation of amount of indebtedness.

391. (1872.) The provisions of the constitution, that "the state shall never contract any debt for works of internal improvement, or be a party in carrying on such works," and that the debts of the state "shall never in the aggregate exceed fifty thousand dollars," refer to the state alone, and not to municipal corporations. *Hallenbeck v. Hahn*, 2 Neb. 377.

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392. (1881.) The limitation upon county indebtedness, imposed by section 2, article XII of the constitution, relates solely to such as is created to aid in the construction of works of internal improvement. *De Clerq v. Hager*, 12 Neb. 185 (10 N. W. 697).

393. (1891.) A county board cannot lawfully incur an indebtedness against the county in excess of the taxes levied for the current year. *State, ex rel. Wessel, v. Weir*, 33 Neb. 35 (49 N. W. 785).

——— Warrants.

394. (1880.) No warrant can be drawn on the treasury in excess of the fifty per cent. unless there are funds therein available for the payment of that particular warrant. *State, ex rel. Cody, v. Colfax County*, 10 Neb. 29 (4 N. W. 377).

395. (1891.) As under the present statute each warrant must specify the amount levied and appropriated to the fund upon which it is drawn, and the amount already expended of such sum, and any warrant drawn after seventy-five per cent. of the amount levied for the year is exhausted, where there are no funds in the treasury for the payment of the same, shall not be chargeable against the county, it will be impossible for any county to issue warrants in excess of the amount authorized by the statutes now in force without amending such statutes. *In re House Roll 284*, 31 Neb. 505 (48 N. W. 275).

396. (1891.) A county board cannot lawfully issue warrants in any one year, exceeding in the aggregate 85 per cent. of the levy, unless there is money in the treasury for the payment of the same. *State, ex rel. Wessel, v. Weir*, 33 Neb. 35 (49 N. W. 785).

397. (1902.) Warrants drawn upon the general fund of the county, in excess of 85 per cent. of the levy for that fund, and where there is no money in the treasury belonging to that fund, are void. *Bacon v. Dawes County*, 66 Neb. 191 (92 N. W. 313); (1903) *National Life Ins. Co. v. Dawes County*, 67 Neb. 40 (93 N. W. 187).

——— Bonds.

398. (1878.) Where a county votes aid to a railroad company in excess of the amount authorized by law, it is simply a void act, conferring no authority on the county commissioners to issue the bonds of the county in any amount whatever. *Reineman v. Covington, C. & B. H. R. Co.*, 7 Neb. 310.

399. (1882.) The amount for which a county may vote its bonds is not affected by the precinct bonds voted at the same time which if considered would make the amount exceed that for which the county could vote bonds. *Jones v. Hurlburt*, 13 Neb. 125 (13 N. W. 5).

400. (1882.) Unpaid interest on former donations made by a county to railroads should not be considered in making up aggregate which county is entitled to vote for another donation. *Jones v. Hurlburt*, 13 Neb. 125 (13 N. W. 5).

401. (1885.) Under the provisions of the act of 1873, as amended in 1883, authorizing counties to issue bonds "to pay the outstanding unpaid bonds, warrants, and indebtedness of a county," such bonds, with those previously issued and unpaid, cannot exceed 10 per cent. of the assessed valuation of the county. *State v. Babcock*, 18 Neb. 141 (24 N. W. 556).

402. (1889.) County bonds for internal improvements, creating a public debt prior to November 1, 1875, to be satisfied by levy on the total valuation of the county, are not an assessment of taxes within the limitation of section 5 of article IX of the constitution, but are an "indebtedness existing at the adoption of the constitution," not subject to the restriction "of one and a half dollars per one hundred dollars valuation" of the total levy of the board of county commissioners. *Baird v. Todd*, 27 Neb. 782 (43 N. W. 1143); (1890) *State, ex rel. Powers, v. Partridge*, 29 Neb. 158 (45 N. W. 290).

403. (1904.) Where, by the terms of the proposition voted on, the bonds are not to be issued until a future time and on the happening of a future event, the assessed valuation of the county last made before such bonds are actually issued should be taken as the basis in limiting the amount of such issue. *Colburn v. McDonald*, 72 Neb. 431 (100 N. W. 961).

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Contracts involving indebtedness or expenditure.

404. (1877.) Section 16 of the road law, as construed by this court in the case of *People v. Commissioners of Buffalo County*, 4 Neb. 150, applies to contracts for erection of bridges as well as to those for the improvement of roads, and prohibits the commissioners from entering into a contract for the expenditure of more than double the amount of money on hand to the credit of the bridge fund. *Clark v. Dayton*, 6 Neb. 192.

405. (1902.) Under the provisions of section 34, article I, chapter 18, Compiled Statutes 1899, it is not unlawful for a county board, after estimate made and prior to its meeting as a board of equalization, to anticipate the levy for the current year, and contract an indebtedness upon a particular fund within the estimate, although there is at the time no money in the treasury to the credit of such fund for the payment of the indebtedness, if in contracting such indebtedness the board remain within the limits prescribed by the constitution and the statutes. *Austin Mfg. Co. v. Brown County*, 65 Neb. 60 (90 N. W. 929). [Modified. *Clark v. Lancaster County*, 69 Neb. 717.]

406. (1903.) It is unlawful for the county board of any county in this state to make any contracts for or incur any indebtedness against the county in excess of the tax levied for county expenses during the current year. *Austin Mfg. Co. v. Colfax County*, 67 Neb. 101 (93 N. W. 145).

407. (1903.) A contract by county commissioners to purchase a road scraper, to be paid for in three payments from tax levies for three following years, is void. *Austin Mfg. Co. v. Colfax County*, 67 Neb. 101 (93 N. W. 145).

408. (1903.) The limitation on the power of the county board to contract for bridge building to cost a sum not greater than the amount of money on hand in the county bridge fund derived from a levy of previous years and two-thirds of the levy of the current year, gives no authority to the board to take into account the levy of the current calendar year prior to the making of such levy. Until it is made there is no "levy of the current year." *Clark v. County of Lancaster*, 69 Neb. 717 (96 N. W. 593).

409. (1907.) In mandamus to compel repair of bridges, the court will not presume, when the whole contracted sum is in excess of the statutory allowance, that any one contract is in excess of the amount allowed, and therefor void. *State, ex rel. Ellis, v. Switzer*, 79 Neb. 78 (112 N. W. 297).

Borrowing money.

410. (1896.) A county has sufficient authority to raise money otherwise, and an agreement of its treasurer that if money is advanced by a bank for certain county purposes, such bank shall be relieved to a certain extent from liability to the county as a depository is not enforceable. *Commercial State Bank of Neligh v. Antelope County*, 48 Neb. 496 (67 N. W. 465).

Custody and deposit of funds.

411. (1888.) A county treasurer may be compelled, by mandamus, to pay over money belonging to a city. *State, ex rel. Grable, v. Roderick*, 23 Neb. 505 (37 N. W. 77).

412. (1894.) Chapter 50, Session Laws, 1891, relating to the keeping of state and county funds, is not in conflict with the constitution, either as containing more than one subject, or because of its providing that it shall not apply until the expiration of the terms of office of the state treasurer and of the several county treasurers in office at the time of its passage. *Hopkins v. Scott*, 38 Neb. 661 (57 N. W. 391).

413. (1894.) The mere fact that a county treasurer has assumed to designate the bank in which he himself shall deposit current funds of the county, and to fix the penal sum of the necessary bond, confers upon the bank designated no right by mandamus to compel the county board to approve the sufficiency of the sureties on such bond. *State, ex rel. First Nat. Bank, v. Owen*, 41 Neb. 651 (59 N. W. 886).

414. (1897.) Where a county treasurer collected taxes to pay a school district bond and, without the knowledge and consent of the holder, lost the money by depositing it in insolvent banks, it was *held* that the loss did not fall on the bondholder, and that the collection of a tax levied on the property of the district to pay the amount due on the bond would not be restrained by injunction. *Jacobson v. Cary*, 51 Neb. 762 (71 N. W. 723).

415. (1898.) A county treasurer is a trustee of moneys which come into his hands by virtue of his office, and if he wrongfully deposits them to his own credit in a bank aware of their character, which

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afterwards becomes insolvent, the county is entitled to have its claim decreed a first lien upon any asset of the insolvent which it shows is the product of its moneys. *State v. Bank of Commerce*, 54 Neb. 725 (75 N. W. 28).

416. (1898.) The county treasurer of Hall county wrongfully deposited to his own credit in the Bank of Commerce $15,860.18 of public funds, the bank being aware of their character. The bank failed, having in its vaults only $140 in cash. It had used the treasurer's deposit in paying off its other depositors. It was not shown that any part of this public money was represented by or embraced in any asset of the bank which came into the possession of its receiver. *Held*, (1) That the county was entitled to reclaim the $140 as being part of the trust fund; (2) that it was not entitled to have its claim against the insolvent bank decreed a first lien upon the other assets thereof. *State v. Bank of Commerce*, 54 Neb. 725 (75 N. W. 28).

417. (1900.) A county treasurer is the custodian of the funds of his office and it is for him, within the provisions and restrictions of the depository act, to deposit and withdraw, as the requirements in the discharge of his official duties shall make necessary, all the funds coming into his custody as such treasurer. *State, ex rel. Irrigators Bank, v. Whipple*, 60 Neb. 650 (83 N. W. 921).

418. (1904.) The act of 1903, amending sections 18 and 20 of article III, chapter 18, and section 3*a* of article XIII, chapter 83 of the Compiled Statutes of 1901, so far as it relates to the deposit of county funds, was constitutionally adopted and is a valid law. *State, ex rel. First Nat. Bank of Atkinson, v. Cronin*, 72 Neb. 636 (101 N. W. 325).

419. (1907.) The amount received by the county treasurer as interest from depository banks should be credited to the general fund of the county immediately on its receipt, and can be disbursed only as other moneys belonging to that fund. *State, ex rel. Mann, v. Clark*, 79 Neb. 263 (112 N. W. 857).

Disbursements in general.

420. (1880.) The money with which to meet the obligations of a precinct is raised and paid out with the same formality, and through precisely the same agencies, as are the ordinary county funds, and, except where there is some special provision of statute authorizing it, payment therefrom can be legally made only on "warrants issued by the county commissioners according to law." *State v. Thorne*, 9 Neb. 458 (4 N. W. 63).

421. (1881.) The county treasurer not authorized to pay out county school fund until it has been apportioned by county superintendent. *Donnelly v. Duras*, 11 Neb. 283 (9 N. W. 45).

General fund.

422. (1882.) The "general fund" of a county, as its name implies, is one devoted to a variety of uses, and its expenditure is left mainly to the discretion of the board of county commissioners. *Burlington & M. R. R. Co. v. Lancaster County*, 12 Neb. 324 (11 N. W. 332).

Special funds.

423. (1876.) There is no such fund known to the law as a "court house fund." Buildings of this kind should be paid for out of the fund derived from the ordinary revenue, and warrants drawn on that fund. *Commissioners of Jefferson County v. State*, 5 Neb. 127.

424. (1877.) County funds must be devoted exclusively to the object for which the levy was made. *Clark v. Dayton*, 6 Neb. 192).

425. (1882.) The county commisisioners have no authority to divert a sinking fund tax from the purpose for which it was raised and transfer it to the general fund. *Union P. R. Co. v. Dawson County*, 12 Neb. 254 (11 N. W. 307).

426. (1882.) The act of 1875 merely authorizes the transfer to the general fund of the surplus sinking fund, after the debt for which it was levied is extinguished. *Union P. R. Co. v. Dawson County*, 12 Neb. 254 (11 N. W. 307).

427. (1898.) The provisions of chapter 89, article I, Compiled Statutes, examined, and *held* to require the formation of a special ditch fund, which alone is available for payments for improvements made entirely within a single county, under the provisions of said article, and that for the purpose of making such payments moneys can only be obtained from the county general fund by borrowing as provided by section 26 of said article. *Hall v. State, ex rel. Renard*, 54 Neb. 280 (74 N. W. 590).

428. (1902.) Section 4, article III, chap-

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ter 18 of the Compiled Statutes of 1901, provides that the county commissioners may appropriate to the general fund certain money that remains on hand in the county treasury, not required for the purposes for which it was levied. The levy made for another fund can not be transferred by the county board to the general fund before the tax has been collected. *Bacon v. Dawes County*, 66 Neb. 191 (92 N. W. 313).

429. (1903.) Allowance of a claim and drawing a warrant for its payment against the "advertising fund" of a county will be deemed, in an action on such warrant, equivalent to allowance of the claim, and drawing a warrant against the county general fund. Such so-called "advertising fund" is legally only a part of the general fund, known by a term which designates its source. *Dakota County v. Bartlett*, 67 Neb. 62 (93 N. W. 192).

Warrants and certificates of indebtedness.

Necessity for presentation for examination and adjustment, see *post*, § 600.

430. (1880.) A warrant, in fact, is a mere certificate of indebtedness, although negotiable in form, as it does not partake of the character of negotiable paper so far as to estop the county from availing itself of any defense it may have against it, even in the hands of a bona fide purchaser for value without notice. *Union P. R. Co. v. Buffalo County*, 9 Neb. 449 (4 N. W. 53).

431. (1882.) Warrants of county are not commercial paper. *Burlington & M. R. R. Co. v. Clay County*, 13 Neb. 367 (13 N. W. 628); (1903) *National Life Ins. Co. v. Dawes County*, 67 Neb. 40 (93 N. W. 187).

——— Power to issue.

432. (1879.) A county clerk has no authority to draw warrants upon the county treasury. Such warrants must be drawn by the chairman of the board of county commissioners, be countersigned by the county clerk, and be sealed with the county seal. *State, ex rel. Conger, v. Maccuaig*, 8 Neb. 215.

433. (1879.) Section one of chapter two, General Statutes, to the extent that it authorized county clerks to draw warrants upon the county treasury, was repealed by implication by the "act concerning counties and county officers," passed February 27, 1873. *State, ex rel. Conger, v. Maccuaig*, 8 Neb. 215.

434. (1879.) County commissioners have no authority to issue certificate of indebtedness after the exhaustion of a levy. *Union P. R. Co. v. Buaffalo County*, 9 Neb. 449 (4 N. W. 53).

435. (1880.) County commissioners have no authority to draw warrants after 50 per cent. of the amount levied for the year is exhausted, unless there is money in the treasury to the credit of the particular fund for the payment of the same. If they do so they are personally liable thereon. *State, ex rel. Cody, v. Colfax County*, 10 Neb. 29 (4 N. W. 377).

436. (1880.) The authority to draw warrants on a fund which had been levied but not collected was derived entirely from the statute, and that the limitations in the act of 1879 applied to all claims. *State, ex rel. Hayes, v. Richardson County*, 10 Neb. 198 (4 N. W. 967).

437. (1885.) Under the provision of the constitution of the state, that "no money shall be drawn from the treasury, except in pursuance of a specific appropriation made by law," the auditor of public accounts has no authority to draw a warrant upon the treasury for commissions due county treasurers for money collected by them and paid into the treasury, unless a specific appropriation had been made for that purpose. *State, ex rel. Graham, v. Babcock*, 18 Neb. 221 (24 N. W. 683).

438. (1897.) It is only after the allowance of a claim upon the treasury of a county that a warrant in payment thereof may be properly drawn. *Wilson v. State, ex rel. Plasters*, 53 Neb. 113 (73 N. W. 456).

——— Funds against which warrants may be drawn.

439. (1894.) Under the revenue law of 1869 and the road law of 1866 (Gen. Stats., 1873, pp. 896, 950) money in the hands of a county treasurer belonging to the road districts of a county was held in trust by him for such road districts, and such money was at the disposal of the supervisors of said road districts, and at their disposal only, and the chairman of the board of county commissioners of a county had no authority to draw warrants against such funds. *Oakley v. Valley County*, 40 Neb. 900 (59 N. W. 368).

——— Issuance, requisites and validity.

440. (1903.) The purpose of the requirement that county warrants shall express on their face the amount levied and appropriated to the fund upon which they are

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drawn, and the amount already expended of such sum, is to guard against the overdrawing of warrants against the fund. *National Life Ins. Co. v. Dawes County*, 67 Neb. 40 (93 N. W. 187).

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——— Interest.

441. (1883.) Where county warrants issued in compliance with a judgment on mandamus, which provided for interest at 10 per cent., contain no recital as to the rate of interest which they are to draw, and after their issue, but before they were presented for payment, an act was passed reducing the rate of interest on county warrants to 7 per cent., mandamus will not issue to compel the clerk to pay 10 per cent. thereon, since the right to such interest cannot be tested in such a proceeding. *State, ex rel. Clark, v. Scott*, 15 Neb. 147 (17 N. W. 263).

——— Validity of unauthorized warrants.

442. (1883.) Warrants issued by county commissioners for a purpose not within their jurisdiction are void, and do not bind the county. *Walsh v. Rogers*, 15 Neb. 309 (18 N. W. 135).

443. (1883.) Where one purchases what purports and is supposed to be the genuine warrants of a county, but which are void because issued without authority, the purchaser, upon discovering their true character, may at once rescind the contract of purchase, and recover the price paid for them, and in order to recover from the seller the price paid for them, it is not necessary for the purchaser to first seek their payment from the county. *Walsh v. Rogers*, 15 Neb. 309 (18 N. W. 135).

444. (1894.) Warrants issued by a board of county commissioners for a purpose not within their jurisdiction are void and do not bind the county. *Walsh v. Rogers*, 15 Neb. 309, followed. *Oakley v. Valley County*, 40 Neb. 900 (59 N. W. 368).

——— Payments.

445. (1871.) An act requiring the holder of a county warrant, which is overdue and which draws 10 per cent. per annum interest, to present the same at the treasury, and surrender it and take in its place bonds drawing interest at 7 per cent. per annum payable at a distant day, is unconstitutional as impairing the obligation of a contract. *Brewer v. Otoe County*, 1 Neb. 373.

446. (1880.) Warrants must be paid in the order of their entry upon the record. *State, ex rel. Cody, v. Colfax County*, 10 Neb. 29 (4 N. W. 377).

447. (1881.) Money raised by a tax levy cannot be used for the payment of county warrants of a preceding year, unless such warrants were included in the estimate made by the county commissioners, or, at least, until all expenditures contemplated by the estimate have been paid. *State, ex rel. Hitchcock, v. Harvey*, 12 Neb. 31 (10 N. W. 406).

448. (1898.) A county board cannot be compelled to provide, through a use of the county general fund, for the payment of a warrant which, upon its face, requires that payment thereof, when made, shall be charged to a certain designated ditch fund. *Hall v. State, ex rel. Renard*, 54 Neb. 280 (74 N. W. 590.)

449. (1907.) A county warrant issued against the general fund of a certain year is not payable out of the general fund of a subsequent year, unless included in the estimate of the latter year, or unless, after deducting the items included in such estimate, sufficient remains to pay such warrant. *State, ex rel. Mann, v. Clark*, 79 Neb. 263 (112 N. W. 857).

——— Actions.

450. (1871.) The statute of limitations does not limit the time within which proceedings to enforce the payment of county warrants shall be instituted. *Brewer v. Otoe County*, 1 Neb. 373.

451. (1871.) The cause of action upon a county warrant does not accrue when the warrant is issued, but only when the money for its payment is collected, or time sufficient for the collection of the money has elapsed. *Brewer v. Otoe County*, 1 Neb. 373).

452. (1899.) County warrants in suit disclosed that they were for road district funds. They were in terms in favor of private individuals and by law should have been to road supervisors. A petition which contained no statement that they were issued to road supervisors *held* defective and open to attack by general demurrer. *Pollock v. Stanton County*, 57 Neb. 399 (77 N. W. 1081).

453. (1902.) No right of action accrues upon county warrants until there is money for their payment in the fund upon which they are drawn, or the proper authorities have had opportunity to provide funds to pay them, and have neglected to do so.

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Bacon v. Dawes County, 66 Neb. 191 (92 N. W. 313).

454. (1903.) Where the record contains a general admission that county warrants were "issued" by and signed by the proper county authorities, a subsequent objection to them, and motion to strike them from the record because not bearing the county seal, is too late. *Dakota County v. Bartlett*, 67 Neb. 62 (93 N. W. 192).

455. (1903.) Mere testimony by a county clerk to the conclusion that prior to a certain time the general fund levy of that year was exhausted, and the last warrant drawn on it bore date about a month before the one sued on, does not require a reversal of a finding that the latter is valid. Such a conclusion does not overcome the presumption that officers do their duty. *Dakota County v. Bartlett*, 67 Neb. 62 (93 N. W. 192).

456. (1905.) An action to recover a money judgment upon a county warrant may be maintained when the money for the payment of such warrant has been collected and wrongfully applied by the county authorities to the payment of other claims against the county. *Thurston County v. McIntyre*, 75 Neb. 335 (106 N. W. 217).

Mandamus to compel issue of warrant.

457. (1898.) One whose claim against a county has been duly allowed by the county board may compel the issuance of a warrant for its payment. *State, ex rel. Seth Thomas Clock Co., v. County Commissioners*, 53 Neb. 767 (74 N. W. 254).

458. (1902.) The board of county commissioners should draw a warrant in favor of the judgment creditor for the amount of any judgment tax collected, when demand is made by him therefor, and when any considerable amount has been collected, and is in the hands of the county treasurer applicable to the payment of the judgment; and the duty of the treasurer to pay such warrant may be enforced by mandamus. *State, ex rel. Clark & Leonard Investment Co., v. Scott's Bluff County*, 64 Neb. 419 (89 N. W. 1063).

459. (1902.) When an application for a writ of mandamus and the alternative writ to require the chairman of the county commissioners to sign a warrant drawn against an "advertising" fund contain no allegation of money in the treasury or tax levied, or appropriation, for such fund, they state no cause of action. *Patterson v. State*, 2 Unof. 765 (89 N. W. 989).

Power to issue bonds.

Bonds in aid of bridge construction, see *Bridges*, §§ 4-11.

460. (1877.) Counties have no authority at common law to issue bonds. They are *quasi* corporations, mere governing agencies, charged with certain objects of necessary local administration. *Hamlin v. Meadville*, 6 Neb. 227.

461. (1877.) A vote of the people of a county authorized the county commissioners to subscribe for stock in a railroad company, does not empower the commissioners to donate the bonds of the county to a railroad company. *Hamlin v. Meadville*, 6 Neb. 227).

462. (1879.) Counties and precincts have no authority to issue bonds unless authorized to do so by express statute. *Dundy v. Richardson County*, 8 Neb. 508; (1885) *State, ex rel. Wiant, v. Babcock*, 18 Neb. 141 (24 N. W. 556).

463. (1891.) The legislature has authority to pass a law to authorize the county board of any county of the state "to issue bonds of the county to an amount not exceeding 3 per cent. of the assessed valuation of the county for the year 1890, and not exceeding the sum of $20,000, for the purpose of raising money to purchase grain to be planted and sown for the purpose of raising crops for the year 1891, and for feeding teams used in raising said crops." The question of issuing such bonds must be submitted to the people in the mode provided in sections 27 and 28, article I, chapter 18, Compiled Statutes, and they cannot be issued on a mere petition for the issuance thereof signed by a majority of the electors of the county. *In re House Roll 284*, 31 Neb. 505 (48 N. W. 275).

464. (1898.) An appropriation of the money arising from the sale of the bonds issued under chapter 24, laws 1897, for the erection of suitable buildings, and maintaining the same, and a county exhibit at the Trans-Mississippi and International Exposition to be held in the city of Omaha in 1898, is for a public purpose or use, and not in violation of the constitution. *State, ex rel. Douglas County, v. Cornell*, 53 Neb. 556 (74 N. W. 59; 68 Am. St. Rep. 629; 39 L. R. A. 513).

——— Statutory provisions.

465. (1872.) The act of the legislature of February 15, 1869, authorizing any county

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or city of this state to issue bonds to aid the construction of railroads, does not conflict with the provision of the Bill of Rights, that "the property of no person shall be taken for public use without just compensation therefor." *Hallenbeck v. Hahn*, 2 Neb. 377.

466. (1872.) (U. S.) A statute authorizing a county to issue bonds in aid of a railroad company, beyond the limits of the state, is constitutional. *Chicago, B. & Q. R. Co. v. Otoe County*, 2 Neb. 496.

467. (1876.) The legislature has full constitutional power to pass an act authorizing the commissioners of Jefferson county to provide funds for the payment of certain outstanding warrants, by issuing bonds, the proceeds from the sale of which to pay off the warrants issued for the construction of a court house. *Commissioners of Jefferson County v. State*, 5 Neb. 127.

468. (1878.) The act of February 15, 1869, as amended March 3, 1870, and February 17, 1875, enabling counties, cities, and precincts to issue bonds to aid works of internal improvement, in force at the adoption of the new constitution, is not in conflict with section 2, article XII of that instrument, and is still in full force. *Reineman v. Covington, C. & B. H. R. Co.*, 7 Neb. 310.

469. (1878.) Section 2 of article XII of the constitution is to be taken as restrictive only upon the exercise of legislative discretion in the authorization of county and municipal indebtedness in aid of railroads and other internal improvements. It fixes a boundary beyond which the legislature cannot go, but within which its authority is still supreme. *Reineman v. Covington, C. & B. H. R. Co.*, 7 Neb. 310.

470. (1879.) The act approved February 14, 1873, "to authorize Falls City precinct to issue bonds to aid in the construction of a courthouse for Richardson county" is in conflict with section 1, article VIII of the constitution of 1867, and bonds issued thereunder are void. *Dundy v. Richardson County*, 8 Neb. 508.

471. (1880.) The act entitled "An act to enable counties, cities, and precincts to borrow money on their bonds, or to issue bonds, to aid in the construction of works of internal improvement in this state, and to legalize bonds already issued for such purpose," approved February 15, 1869, and the act amendatory thereof, approved March 3, 1870, are constitutional. *Dawson County v. McNamar*, 10 Neb. 276 (4 N. W. 991).

472. (1887.) Section 14, chapter 45, Compiled Statutes 1885, authorizing precincts, townships, etc., to issue bonds in aid of works of internal improvement and providing a method therefor, is constitutional. *State v. Babcock*, 21 Neb. 187 (31 N. W. 682).

473. (1888.) Chapter 28, laws 1887, authorizing county boards to borrow money and issue bonds for the payment thereof, to erect or otherwise provide the necessary county buildings, is constitutional. *State, ex rel. Burnham, v. Babcock*, 23 Neb. 128 (36 N. W. 348).

474. (1890.) The act of the legislature, approved February 26, 1889, amending the second division of section 25 of chapter 18 of the Compiled Statutes of 1887, relating to county buildings and offices, as amended by the act of March 31, 1887, having been considered in the case of *State, ex rel., etc., v. Babcock*, 23 Neb. 128, and held valid and in force from its passage and not obnoxious to sections 11 and 15 of article III of the constitution of this state, *held*, that the seventy-five bonds of the denomination of $1,000 each, issued by the county of Adams and dated July 1, 1889, for the purpose of erecting a court house and jail, are issued in accordance with law and are valid, and that it is the duty of the county clerk to levy the tax for the payment of the annual interest and a sinking fund for the final redemption of the principal according to the tenor of the bonds, and for this purpose the relator will take his writ. *State v. Partridge*, 29 Neb. 158 (45 N. W. 290).

475. (1895.) Statutes which authorize the issuance of bonds by the minor political subdivisions of the state are subjects for strict construction when an interpretation is necessary, and where from a careful study and analysis of the whole act and its several parts the meaning and intent is doubtful, the doubt should be resolved in favor of the public or taxpayers. *State, ex rel. School District, v. Moore*, 45 Neb. 12 (63 N. W. 130).

476. (1898.) Chapter 24, laws 1897, authorizing counties to participate in interstate expositions, to issue bonds for such purpose, and to provide for the levy of a tax for their payment, does not contravene the constitution on the ground that the ob-

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ject of the statute is to advance individual interest merely and not to promote the public welfare. *State, ex rel. Douglas County, v. Cornell*, 53 Neb. 556 (74 N. W. 59; 68 Am. St. Rep. 629; 39 L. R. A. 513).

477. (1898.) The amendment to section 134, article I, chapter 18, Compiled Statutes, pertaining to the issuing of bonds for county funds, made by the legislature of 1883 (Session Laws 1883, p. 191) is germane to the original section, and fairly within the scope of the title of the amendatory act. *State, ex rel. Douglas County, v. Cornell*, 54 Neb. 72 (74 N. W. 432).

——— **In aid of internal improvements.**

478. (1876.) County bonds issued for the purpose of erecting a public bridge over the Platte river, conformable in all respects to the laws of this state, authorizing the issuance of bonds in aid of works of internal improvement, are valid. *Union P. R. Co. v. Colfax County*, 4 Neb. 450).

479. (1876.) A bridge over the Platte river is a work of internal improvement, and from the course of legislation, in this state, it is clear that aid may be granted in its erection by the issuance of county bonds, by grant from the state, donations, or by two counties bordering on the river uniting in the enterprise. *Union P. R. Co. v. Colfax County*, 4 Neb. 450).

480. (1876.) In determining what constitutes a work of internal improvement it must be tested by the benefits to be derived by the public, and not by its extent or cost. *Union P. R. Co. v. Colfax County*, 4 Neb. 450.

481. (1878.) Under the act of February 15, 1869, enabling counties, cities and precincts to issue bonds in aid of internal improvements, precincts may issue such bonds to aid in the construction of bridges for public use, and when such bonds are issued in conformity with the provisions of the law, they are valid, and the collection of taxes, levied on the property of the precinct to pay the interest thereon, may be legally enforced. *South Platte Land Co. v. Buffalo County*, 7 Neb. 253. [Changed by statute. 19 Neb. 159; 26 Neb. 705.]

482. (1878.) Until the adoption of the constitution of 1875, the whole matter of municipal aid to works of internal improvement was within the sole control of the legislature, and subject to no restraint other than such as that body saw fit to impose. *Reineman v. Covington C. & B. H. R. Co.*, 7 Neb. 310.

483. (1880.) Authority for a county to issue bonds for the building of a court house is given in sections 21 and 22, chapter 9, Revised Statutes 1866, and such bonds are valid. *Dawson County v. McNamar*, 10 Neb. 276 (4 N. W. 991).

484. (1880.) The building of a county courthouse is not a work of internal improvement, nor was it contemplated by the internal improvement act (Gen. Stats., 448) authorizing the issue of bonds in aid of internal improvements. *Dawson County v. McNamar*, 10 Neb. 276 (4 N. W. 991).

485. (1881.) Bridges built by a county upon the line of its highways and wholly within such county, are not "works of internal improvement," according to the constitutional meaning of that term; and money raised and expended therefor cannot be counted as a donation to a work of internal improvement. *De Clerq v. Hazer*, 12 Neb. 185 (10 N. W. 697).

486. (1883.) A water grist-mill erected for public use, the rates of toll to be determined by the county commissioners and being subject to regulation by the legislature, is a work of internal improvement within the meaning of the act of 1869, and bonds voted to aid its construction are valid. *Traver v. Merrick County*, 14 Neb. 327 (15 N. W. 690; 45 Am. Rep. 111).

487. (1883.) The test of determining the character of an improvement is the use of which it is designated. *Traver v. Merrick County*, 14 Neb. 327 (15 N. W. 690; 45 Am. Rep. 111).

488. (1884.) There is no statute in this state authorizing the voting of aid to steam grist mills, and bonds voted for that purpose are invalid. *State v. Adams County*, 15 Neb. 568 (20 N. W. 96).

489. (1884.) A bridge across the Platte river is a work of internal improvement, and county bonds voted to erect the same are valid. Nor does the fact that the entire bridge is within the limits of the county voting the bonds, change its character or affect the validity of the bonds. *State v. Keith County*, 16 Neb. 508 (20 N. W. 856).

490. (1885.) Under the provisions of the law of 1879, now in force, county commissioners have no authority to issue county bonds for the purpose of raising money to build a jail, and a vote of the people of the

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county instructing them to issue such bonds will confer no authority so to do. *State, ex rel. Grady, v. Lincoln County*, 18 Neb. 283 (25 N. W. 91).

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491. (1886.) Bonds issued pursuant to law for grist mill propelled by water are valid. *State, ex rel. Perry, v. Clay County*, 20 Neb. 452 (30 N. W. 528).

492. (1890.) A proposition to issue bonds to a railway company is in the nature of a contract, upon the acceptance of which both parties are bound by the agreement. *Wullenwaber v. Dunigan*, 30 Neb. 877 (47 N. W. 420; 13 L. R. A. 811).

493. (1902.) A grant of power to a county to issue bonds in aid of internal improvements, if seasonably challenged, should be strictly construed; but after a long acquiescence in the exercise of the power, and after the consideration has fully passed and bonds are issued under an apparent authority which have passed into the hands of purchasers for value, a more liberal rule of construction in favor of the existence of the power should be applied. *Washington County v. David*, 2 Unof. 649 (89 N. W. 737).

——— Submission of question to popular vote.

494. (1876.) (U. S.) In the absence of a provision to the contrary in the statute authorizing the issue, county commissioners may issue bonds in aid of a railroad, without first submitting to a vote the question of issuing the bonds and levying a tax to pay them. *Chicago, B. & Q. R. Co. v. Otoe County*, 2 Neb. 496.

495. (1877.) Where the vote is regular in all other respects it is not a valid objection to bonds issued in aid of bridges constructed that the proposition provided for the collection of tolls. *Fremont Building Ass'n v. Sherwin*, 6 Neb. 48.

496. (1877.) Where the question of issuing bonds to any railroad company was submitted to the people of a county, but without accompanying the same by a proposition to levy a tax to meet the liability incurred, bonds issued in pursuance of such vote were void. *Hamlin v. Meadville*, 6 Neb. 227.

497. (1877.) In voting aid to works of internal improvement, it is not necessary that the proposition shall contain a provision for the levy of a tax to pay the principal of the bonds, but simply to pay the interest as it falls due. As to the principal, it is made the duty of the proper officers to levy taxes to pay it independently of any vote on that subject; but this cannot be done until after the year 1880. *Fremont Building Ass'n v. Sherwin*, 6 Neb. 48.

498. (1880.) County bonds may be issued to raise money to meet current expenses in case of a deficit in the county revenue, but to do this, they must be first authorized by "a vote of the electors of the county." *Dawson County v. McNamar*, 10 Neb. 276 (4 N. W. 991).

499. (1882.) A proposition to vote county bonds in aid of railroads, to be given to two persons or corporations in the alternative is insufficient to pass title, unless power of election is given. *Jones v. Hurlburt*, 13 Neb. 125 (13 N. W. 5).

500. (1882.) The proposition submitted to the legal voters of Seward county for the issuance and donation of $36,000 of its bonds to aid in the construction of the railroad therein named, contained the following provision: "*Provided* said county commissioners shall be authorized by a two-thirds vote of the legal voters of said county of Seward to issue and give thirty-six thousand dollars of Seward county bonds to aid the construction of said line of railroad, and be also authorized by a two-thirds vote of the legal voters of the precincts through which said line of railroad shall be located, to issue and give thirty-nine thousand dollars to aid the construction of said line of railroad, which amount of precinct bonds shall be made up as follows: 'P' precinct, three thousand dollars," etc. *Held*, To vitiate the election, and the issuance and delivery of the bonds voted thereon enjoined, since such a condition cannot be attached to such a proposition. *Jones v. Hurlburt*, 13 Neb. 125 (13 N. W. 5).

501. (1883.) No vote of the people is necessary in the issue of bonds under the act of February 19, 1877, to authorize the issue of county bonds. *State v. Alexander*, 14 Neb. 280 (15 N. W. 365).

502. (1887.) Under the provisions of section 14, chapter 45, of the Compiled Statutes of 1885, to authorize the county commissioners to call a special precinct election for the purpose of voting bonds in a precinct in aid of works of internal improvements, etc., a petition signed by not less than fifty freeholders of such precinct must be presented to such county commis-

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sioners, setting forth the nature of the work contemplated, the amount of bonds sought to be voted, the rate of interest, and the date when the principal and interest shall become due. An election called and held without such petition is of no validity. *State v. Babcock*, 21 Neb. 187 (31 N. W. 682).

503. (1887.) The provision of section 28 of chapter 18 of the Compiled Statutes of 1885, which requires the adoption of the amount of tax to be levied to meet the liability incurred by the issuance of bonds, is mandatory and must be complied with in the issuance of precinct bonds under the provisions of chapter 58 of the Session Laws of 1885, as well as in the issuance of county bonds. *State, ex rel. Berry, v. Babcock*, 21 Neb. 599 (33 N. W. 247).

504. (1887.) Proposition to vote bonds in aid of a railroad must designate the donee; an alternative proposition to issue to one of two named corporations, even if adopted by the voters, is ineffectual to authorize issuance of bonds. *State, ex rel. Gardner, v. Roggen*, 22 Neb. 118 (34 N. W. 108); (1890) *North v. Platte County*, 29 Neb. 447 (45 N. W. 692) 26 Am. St. Rep. 395).

505. (1888.) On the 7th day of October, 1880, the county commissioners of Otoe county submitted to the voters of said county the proposition to issue the coupon bonds of said county for the purpose of refunding the bonded indebtedness of said county, and called a special election, for the purpose of voting thereon, said election to be held on the 2d day of November following. At that time the commissioners had no authority to submit such proposition, nor to call such election. *Held*, That the vote adopting said proposition was without legal effect. *State, ex rel. Otoe County, v. Babcock*, 23 Neb. 802 (37 N. W. 645).

506. (1890.) Where petitioners to an election were induced, by misrepresentations, to sign, such facts may be set up in a suit to enjoin the issuing of the bonds. *Wullenwaber v. Dunigan*, 30 Neb. 877 (47 N. W. 420; 13 L. R. A. 811).

507. (1890.) At least fifty freeholders, residents of the township, etc., must sign a petition to the county commissioners requesting them to call an election in said township for the purpose of voting aid for a railway. Without a petition so signed by the full number required, the commissioners have no jurisdiction. *Wullenwaber v. Dunigan*, 30 Neb. 877 (47 N. W. 420; 13 L. R. A. 811).

508. (1895.) Under section 14, chapter 45, Compiled Statutes, it is necessary, to confer jurisdiction upon county commissioners to order the holding of an election on a proposition to vote bonds by a township in aid of a work of internal improvement, that a petition should be presented to such commissioners signed by not less than fifty freeholders of such township. *Hoxie v. Scott*, 45 Neb. 199 (63 N. W. 387).

509. (1897.) After the commissioners of Otoe county had unlawfully established a precinct including all of the city of Nebraska City, they issued a call for an election in the so-called Nebraska City precinct, at which was to be submitted to vote of the electors thereof a proposition to issue bonds of the precinct in the sum of $40,000 to aid in the construction of a railroad. This call was issued under the provisions of section 14, chapter 45, Compiled Statutes, by which precincts were authorized to issue bonds for such purpose if the proposition so to do be approved by a specified majority of the votes of the electors at an election called and held pursuant to and in accordance with the provisions of the section. The proposition received the requisite majority and the commissioners issued, or caused the bonds to be issued. *Held*, That there was no precinct in existence which could, by its vote, authorize the issuance of bonds in its name and the bonds were void. *Morton v. Carlin*, 51 Neb. 202 (70 N. W. 966.

510. (1898.) An affirmative vote of two-thirds of all of those cast on the proposition is sufficient to carry county bonds issued under chapter 24, Session Laws 1897, for the purpose of making a county exhibit at an interstate exposition. *State, ex rel. Douglas County, v. Cornell*, 53 Neb 556 (74 N. W. 59; 68 Am. St. Rep. 629; 39 L. R. A. 513).

511. (1898.) A married woman who holds lands in fee is a "freeholder" within the meaning of the word as used in section 14, chapter 45, of the Compiled Statutes, relative to the signers of a petition calling an election and submission to the vote of the electors for the issuance of bonds in aid of works of internal improvements, it being therein prescribed that the signers shall be "freeholders." *Cooley v. Jansen*, 54 Neb. 33 (74 N. W. 391).

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512. (1898.) Under section 134, article I, chapter 18, Compiled Statutes, a majority of all the votes cast at the election is sufficient for the adoption of a proposition to issue county funding bonds, where, by their issuance, the amount of the county indebtedness is not increased, and the rate of interest is reduced. *State, ex rel. Douglas County, v. Cornell*, 54 Neb. 72 (74 N. W. 432).

513. (1899.) Under section 27, article I, chapter 18, Compiled Statutes, providing that notice of a proposition submitted to the electors of a county to issue bonds to build a court house must be given "for four weeks in some newspaper published in the county," in case one is printed therein, the word "for," means "during," and the notice must be published for, or during, four weeks before the day of election. Four full weeks must elapse between the date of the first publication and the day fixed for the election. *State v. Cherry County*, 58 Neb. 734 (79 N. W. 825).

514. (1901.) A proposition to issue county bonds for internal improvement, and the result of the vote, must be entered on the records of the county, and notice of adoption must be published for two weeks in a newspaper in said county, if one be published therein, before such bonds can be legally issued. *Wilbur v. Wyatt*, 63 Neb. 261 (88 N. W. 499).

515. (1904.) A proposition to vote bonds to aid in the construction of a railroad or other work of internal improvement, otherwise in due form, will not be rendered void because it contains a clause authorizing the county to accept capital stock of the company. *Colburn v. McDonald*, 72 Neb. 431 (100 N. W. 961).

——— **Refunding.**

516. (1892.) In 1877 the legislature passed "An act to authorize the issue of county bonds in certain cases." This provided for issuing refunding bonds to replace bonds issued to railroad companies or any work of internal improvement. This act was carried into the Compiled Statutes of 1881 as sections 11, 12, and 13, chapter 45. In 1883 the legislature passed an act to authorize counties to issue refunding bonds, at not to exceed six per cent. interest, to replace other bonds previously issued by the county and then payable. *Held*, That the act of 1883 applied to all bonds previously issued by a county and then payable. *State, ex rel. Seward County, v. Benton*, 33 Neb. 823 (51 N. W. 140).

517. (1892.) Under the act of 1883, where a county has issued refunding bonds bearing interest at six per cent, it may, after such bonds are payable, issue other refunding bonds at a lower rate of interest, as four and one-half per cent, to replace them. *State, ex rel. Seward County, v. Benton*, 33 Neb. 823 (51 N. W. 140).

518. (1892.) County bonds issued to aid in the construction of works of internal improvement can be refunded only under the provisions of the act of February 28, 1883, entitled "An act to authorize counties to issue bonds for refunding their bonded indebtedness, and providing for registering and certifying the same, and for levying a tax to pay the interest and principal thereof." *State, ex rel. Gage County, v. Benton*, 33 Neb. 834 (51 N. W. 144).

519. (1904.) Chapter 8 of the laws of 1899, commonly known as the "Refunding Bond Act," as found in chapter 9 of the Compiled Statutes of 1903, provides for an appeal from the findings of the district court as to the validity of county bonds sought to be refunded, and authorizes the supreme court to make a finding and decision in such a proceeding which is binding upon the county board, the protestant and other parties to the record. *Colburn v. McDonald*, 72 Neb. 431 (100 N. W. 961).

520. (1904.) In an appeal from the findings of the district court as to the validity of county bonds sought to be refunded the supreme court should attempt to do no more than render a decision as to the validity of the bonds, and thereby affirm or reverse the finding of the district court as the case may be. It is not necessary to determine the effect of the decision as to innocent purchasers of the bonds, who are not parties to the record. *Colburn v. McDonald*, 72 Neb. 431 (100 N. W. 961).

Issuance, requisites and validity of bonds.

521. (1877.) The power to issue commercial paper must be conferred by statute. And such power must be exercised in the manner prescribed; but if the authority to issue the bonds existed at the time of their issuance, a mere irregularity in its exercise will not invalidate the bonds. *Hamlin v. Meadville*, 6 Neb. 227.

522. (1880.) A recital in county bonds that the same were issued under author-

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ity of the internal improvement act (Gen. Stats., 448) is not ground for declaring such bonds invalid, so long as ample authority was found elsewhere which had been observed. *Dawson County v. McNamar*, 10 Neb. 276 (4 N. W. 991).

523. (1880.) Although county bonds have been issued to run for a period longer than the ten years contemplated by statute, a court of equity will not hold them void for that reason, where there is no positive prohibition in the statute against a longer credit than ten years being given. *Dawson County v. McNamar*, 10 Neb. 276 (4 N. W. 991).

524. (1882.) Bonds properly voted in aid of railroad are not void because signed and sealed in adjoining county, although not delivered on account of service of writ of injunction. *Jones v. Hurlburt*, 13 Neb. 125 (13 N. W. 5).

525. (1887.) Bonds issued by a county as a donation to a railroad company are invalid unless they have endorsed thereon a certificate, signed by the secretary and auditor of state, showing that they were issued pursuant to law. *State ex. rel. Gardner, v. Roggen*, 22 Neb. 118 (34 N. W. 108).

526. (1895.) The antedating of county bonds, which were dated January 2 when in fact they were not issued until in April following, was not a substantial defect. *State, ex rel. Hoffman, v. Moore*, 46 Neb. 590 (65 N. W. 193; 50 Am. St. Rep. 626).

527. (1901.) Where an election was held on August 16 to vote on a proposition to issue county bonds to aid in the construction of an irrigation ditch, and on the 21st day of the same month notice was ordered published, and the bonds were issued on September 1, following, the bonds were illegally issued. *Wilbur v. Wyatt*, 63 Neb. 261 (88 N. W. 499).

528. (1902.) While a recital in bonds that they were ordered to be issued on a certain date would be notice of their invalidity to all persons acquiring them, if issued prior to the time fixed by law, the recital is not conclusive, but, if such was the fact, it may be shown that they were not ordered to be issued and were not issued until after the expiration of the statutory period. *Chicago, B. & Q. R. Co v. Dundy County*, 3 Unof. 391 (91 N. W. 554).

Mandamus to compel issue of bonds.

529. (1876.) In an action of mandamus to compel county commissioners to issue bonds to replace outstanding warrants, any valid defense existing against the payment of the warrants should be set up by a statement of the facts constituting such defense in the answer. *Commissioners of Jefferson County v. State*, 5 Neb. 127.

Sale of bonds.

530. (1881.) Commissioners have no power to permit one bid for county bonds to be privately amended so as to make it better than another. *State, ex rel. Clark, v. Douglas County*, 11 Neb. 484 (9 N. W. 691).

531. (1881.) In a sale of county bonds the commissioners have no right to consider a bid proposing payment in anything except money. Certificates of deposit are not sufficient. *State, ex rel. Clark, v. Douglas County*, 11 Neb. 484 (9 N. W. 691).

532. (1881.) Where a notice inviting bids for county bonds proposed two plans, one for payment of the whole amount when the bonds were delivered, and one for payment in installments, a bid offering to pay in certificates of deposit payable at a future date is invalid. *State, ex rel. Clark, v. Douglas County*, 11 Neb. 484 (9 N. W. 691).

533. (1881.) Where one purchases void county warrants, illegally issued, he may recover back the price paid for them. *Rogers v. Walsh*, 12 Neb. 28 (10 N. W. 467).

Estoppel to deny validity of bonds or warrants.

534. (1886.) Where a county has issued refunding bonds in exchange for general bonds, in aid of the construction of a railroad, in the hands of a *bona fide* purchaser, it is estopped to deny the validity of the refunding bonds. *State, ex rel. Leese, v. Wilkinson*, 20 Neb. 610 (31 Neb. 376); (1887) *State v. Dakota County*, 22 Neb. 448 (35 N. W. 225).

535. (1902.) Where bonds of a county are issued without any authority, the subsequent conduct of the officers of the county toward bonds so issued cannot create an estoppel which will supply this want of original authority. *Washington County v. David*, 2 Unof. 649 (89 N. W. 737).

536. (1903.) A county warrant in excess of 85 per cent. of the levy against which it is drawn is void. The county board cannot estop the county to assert the invalidity of such warrant by indorsing on the warrant a false statement of the amount of the levy, which makes the warrant on its

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face appear to be within the statutory limit. *National Life Ins. Co. v. Dawes County*, 67 Neb. 40 (93 N. W. 187).

537. (1904.) A municipality ought not to be allowed to repudiate its bonds after the compromise of a suit, in which their validity was an issue, by which it received a substantial decrease of the interest rate thereon, and after it has paid the interest for thirty years and a part of the principal thereof, unless such bonds were absolutely void at the time they were issued. *Colburn v. McDonald*, 72 Neb. 431 (100 N. W. 961).

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Registration of bonds.

538. (1883.) In registering and certifying bonds issued under the act "To authorize the issue of county bonds in certain cases," approved February 19, 1877, the auditor and secretary of state have no right to review the action of their predecessors upon the original bonds. *State v. Alexander*, 14 Neb. 280 (15 N. W. 365).

539. (1884.) Where a county presents its refunding bonds to the auditor for registration, it must pay one-fourth of one per cent upon the dollar for each bond registered. *State v. Wallichs*, 16 Neb. 110 (20 N. W. 27).

540. (1888.) It is not the duty of the auditor of state to register or certify bonds issued by virtue of an illegal election, and a writ of mandamus will not issue to require him to do so. *State, ex rel. Otoe County, v. Babcock*, 23 Neb. 802 (37 N. W. 645).

541. (1903.) By section 10, chapter 9, Compiled Statutes, 1901, it is made the duty of proper county officers, when bonds are issued, to make registration in a book kept for that purpose of all of the several transactions connected with the issuance of such bonds as therein enumerated, and transmit to the auditor of state a certified statement of such registry for his information. *State, ex rel. Niles, v. Weston*, 67 Neb. 175 (93 N. W. 182).

Payment of bonds.

542. (1879.) The money with which to pay precinct bonds is raised and disbursed with the same formality, and through precisely the same agencies, as are ordinary county funds; and the county treasurer is authorized to make payment of such bonds only on warrants issued by the county commissioners. *Dell v. Oppenheimer*, 9 Neb. 454 (4 N. W. 51).

Actions on bonds.

543. (1886.) Where bonds are issued by a county for the erection of a grist mill on the Little Blue river, after erection of the mill, and there is no question made in the pleadings that the mill is not propelled by water, it will be presumed that it is propelled. *State, ex rel. Perry, v. Clay County*, 20 Neb. 452 (30 N. W. 528).

Taxation.

Levy and collection of taxes in general, see *Taxation*.

544. (1883.) County warrants that have not been paid out of a former levy cannot be included in an estimate and levy of taxes in excess of the maximum fixed by law; where the ordinary tax is insufficient the remedy is to fund the debt. *State, ex rel. Bank, v. Gosper County*, 14 Neb. 22 (14 N. W. 801).

545. (1891.) Where bonds are issued by a county in favor of works of internal improvement, they become a charge against the county, the principal and interest to be paid by a levy upon the property therein, whether such property was in the county when the bonds were voted or was afterwards brought in. And where additional territory has been added to a county after voting on such bonds, the taxable property in such additional territory is liable, like other property in the county, to taxation, for the payment of said obligations. *Chicago, St. P., M. & O. R. Co. v. Cuming County*, 31 Neb. 374 (47 N. W. 1121).

546. (1897.) The discretion and action of a county board in levying taxes to the constitutional limit should not be controlled by the court. *State, ex rel. Rock County v. Sheldon*, 53 Neb. 365 (73 N. W. 694).

547. (1897.) When taxes levied by a county exceed the maximum permitted by the constitution, the excess is levied for an illegal and unauthorized purpose. *Chicago, B. & Q. R. Co. v. Nemaha County*, 50 Neb. 393; (1899) *Chase County v. Chicago, B. & Q. R. Co.*, 58 Neb. 274 (78 N. W. 502).

548. (1899.) The constitution permits a levy of taxes by a county in excess of 15 mills on the dollar valuation in only two classes of cases: First, to pay debts existing when the constitution was adopted; and secondly, when authorized by a vote of the people. This brings within the general limitation taxes levied to pay judg-

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ments rendered against the county on debts not contracted before the constitution was adopted, when such additional levy has not been authorized by vote of the people. *Chase County v. Chicago, B. & Q. R. Co.*, 58 Neb. 274 (78 N. W. 502).

549. (1901.) An order of a county board allowing a claim against a county is not a judgment, within the meaning of the statute providing for the levy of a tax to pay judgments against the county. *Custer County v. Chicago, B. & Q. R. Co.*, 62 Neb. 657 (87 N. W. 341).

——— Levy for special purposes.

550. (1879.) A provision in the constitution that "the legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by taxation of property benefits," merely prescribes the rule of apportionment of such special taxes, and does not prohibit the legislature from conferring the power to make local improvements by special assessments or taxation upon property benefited, upon other municipal corporations than those designated. *State, ex rel. Abbott, v. Dodge County*, 8 Neb. 124 (30 Am. Rep. 819).

551. (1885.) The "act concerning counties and county officers," approved March 7, 1879, did not take effect till September 1 of that year. The provisions of section 26 of that act have no application to valid county bonds issued before September 1, 1879. *Burlington & M. R. R. Co. v. Saunders County*, 17 Neb. 318 (22 N. W. 560).

552. (1892.) The county board is authorized to make a special levy to provide for the payment of judgments against the county since the levy for general expenses. *Jackson v. Washington County*, 34 Neb. 680 (52 N. W. 169).

553. (1892.) The act approved February 18, 1867, entitled "An act to provide for the payment of judgments against municipal corporations," article V, chapter 77, Compiled Statutes, entitled "Revenue," is not repealed by the provisions of section 77 of the general revenue law. *Jackson v. Washington County*, 34 Neb. 680 (52 N. W. 169).

554. (1899.) By section 77, article I, chapter 77, Compiled Statutes 1899, the power conferred on the board of county commissioners to levy a road tax is limited to the levy of such tax for county purposes. *Libby v. State, ex rel. Davis*, 59 Neb. 264 (80 N. W. 817).

555. (1901.) Where county commissioners have made a levy of nine mills for general fund purposes, they cannot 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*, 62 Neb. 44 (86 N. W. 934).

556. (1902.) Where a county board has levied the full amount of tax allowed by law for a county general fund, and also designedly levies a larger amount of bridge tax than is necessary for use in that fund, and immediately transfers a large part thereof to said general fund, the tax so unnecessarily levied and transferred is levied for an illegal and unauthorized purpose and is void. *Chicago, B. & Q. R. Co. v. Lincoln County*, 66 Neb. 228 (92 N. W. 208).

557. (1902.) It is not a valid objection to a tax levied against the taxable property of a precinct in a county not under township organization, for local improvements, that such improvements are for the use of the public at large. *Union P. R. Co. v. Howard County*, 66 Neb. 663 (97 N. W. 280).

——— Division of county after levy.

558. (1882.) In June, 1872, Kearney county, which till then had been attached to Adams county for election, revenue and judicial purposes, was organized, and prepared to transact its own business. On the 13th of July following, the commissioners of Adams, as they had been accustomed to do, and in good faith, made a formal levy of a tax for Kearney county, upon the property therein, which levy the commissioners of Kearney adopted and caused to be extended upon their own tax books. *Held*, That this adoption of the levy by the commissioners of Kearney county made it their own; and, although irregular, was not a valid objection to the collection of the tax in an equitable point of view. *Hull v. Kearney County*, 13 Neb. 539 (14 N. W. 529).

559. (1886.) Where an unorganized county is attached to an organized one for election, judicial, and revenue purposes, and the proper officers of the organized county levy taxes upon the property of the unorganized one, and prior to the time such taxes become due the unorganized county becomes organized by the election and qualification of the proper officers, such taxes are to be paid to the treasurer of the new

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county. *Morse v. Hitchcock County*, 19 Neb. 566 (27 N. W. 637).

——Liability of county for redemption money paid to treasurer.

560. (1881.) A county is not liable for money paid to the county treasurer for the redemption of land sold for taxes, unless same has been paid into county treasury. *Eaton v. Cass County*, 11 Neb. 229 (9 N. W. 60); (1881) *Richardson County v. Meyer*, 11 Neb. 357 (9 N. W. 549).

——Wrongful exaction of redemption money.

561. (1881.) When money is wrongfully exacted in the nominal redemption of lands, where no sale was in fact made, to the extent of the taxes and interest actually due, it is a payment; beyond this it is an unauthorized exaction, for which the treasurer, but not the county, is liable. *State, ex rel. Myers, v. Richardson County*, 11 Neb. 403 (9 N. W. 550).

Mandamus to compel levy to pay claim.

Compelling county to include agriculture expenses in tax list, see *Agriculture*, § 3.

562. (1880.) The statute provides for the payment of precinct bonds issued to aid works of internal improvement by means of special taxes to be levied and collected on all the taxable property in the precinct. In case of the failure or refusal of the proper officers to levy the necessary taxes and make payment to the holders of such bonds, it is provided that they may be compelled by mandamus to do so. And this is the appropriate remedy. *State, ex rel. Chandler, v. Dodge County*, 10 Neb. 20 (4 N. W. 370).

563. (1880.) In the application for a mandamus to compel the payment of bonds issued to aid in the construction of works of internal improvement, it is not sufficient to show merely that they were issued "for works of internal improvement"; there should be such particular descriptions of the works as to enable the court to see, by an inspection of the petition alone, that they were really of that character. *State, ex rel. Osborne, v. Thorne*, 9 Neb. 458 (4 N. W. 63).

564. (1880.) A writ of mandamus to compel the county commissioners to levy a tax for the payment of a judgment against the county, of which the plaintiff claims as assignee, will be denied, when it appears that proceedings in garnishment had been instituted by a creditor of the assignee, which action is still pending. *State, ex rel. Warren, v. Otoe County*, 10 Neb. 384 (6 N. W. 464).

565. (1883.) In a proper case, county commissioners will be compelled to include in their estimate of taxes for the current year a sufficient amount, within the limits fixed by law, to pay claims against the county. *State, ex rel. Bank, v. Gosper County*, 14 Neb. 22 (14 N. W. 801).

566. (1888.) Where an account has been duly allowed against a county in a case where the county board had jurisdiction, it is the duty of such board to include the same in its estimates of the taxes to be levied for the ensuing year, and if it fails to do so it may be compelled by mandamus to perform its duty. *State, ex rel. Clarke, v. Cather*, 22 Neb. 792 (36 N. W. 157).

567. (1891.) Where a county board audits and allows *bona fide* claims against the county, mandamus lies to compel it to include the same in the estimate of taxes to be levied for the ensuing year. *State, ex rel. Wessel, v. Weir*, 33 Neb. 35 (49 N. W. 785).

568. (1892.) Mandamus lies to compel board of county supervisors to include in its estimate of expenses the amount payable to an agricultural society under section 12, chapter 2, Compiled Statutes. *State, ex rel. Agricultural Society, v. Robinson*, 35 Neb. 401 (53 N. W. 213; 17 L. R. A. 383).

569. (1896.) The allowance of a writ of mandamus to compel a county board to include relators' claim in its estimates of the taxes to be levied for the ensuing year is not necessarily an adjudication that a definite sum is due from the county to the relators. *State, ex rel. Marquett, v. Baushausen*, 49 Neb. 558 (68 N. W. 950).

570. (1897.) The discretion and action of a county board in levying taxes to the constitutional limit should not be controlled by the court. *State, ex rel. Rock County, v. Sheldon*, 53 Neb. 365 (73 N. W. 694).

571. (1903.) When the statute requires of an official board the duty of doing a particular act on a particular day as, for instance, the levy of a tax, and the body has announced its determination not to comply therewith, a mandamus may issue to compel the performance of the duty at the prescribed time. *State, ex rel. State Journal Co., v. Knievel*, 5 Unof. 219 (98 N. W. 798).

572. (1904.) The levy of a tax under the provisions of sections 1 to 5, inclusive,

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of article VI, chapter 77, Compiled Statutes, with which to satisfy a judgment against a county, school district, or municipality, will not be enforced by a writ of mandamus where such proposed levy is in excess of constitutional or statutory limitations. *State, ex rel. Young, v. Royse*, 71 Neb. 1 (98 N. W. 459).

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Rights and remedies of taxpayers.

573. (1879.) To entitle a taxpayer to enjoin a county officer, it must appear that his rights will be greatly or irreparably affected by the acts sought to be restrained, and the right must be clear and the remedy at law inadequate. *Normand v. Otoe County*, 8 Neb. 18.

574. (1879.) Taxpayers of the proper county may maintain an action for themselves and all other taxpayers of the county, to restrain the county commissioners from an illegal exercise of their powers to the injury of such taxpayers. *Normand v. Otoe County*, 8 Neb. 18.

575. (1882.) The collection of a tax levied for the payment of county warrants issued in settlement of an amount found to be due for building a bridge under a contract with the county, will not be enjoined at the suit of taxpayers on the ground that the commissioners exceeded their authority in letting the contract, the contract having been let, the bridge built, and the settlement made in good faith and without objection at the time. *Hull v. Kearney County*, 13 Neb. 539 (14 N. W. 529).

576. (1884.) One attacking the validity of county bonds on the ground that they were issued under an unconstitutional act, thirteen years after the bonds were issued, during which time the interest has been paid without objection, must show that the taxes sought to be enjoined, levied to pay interest on such bonds, are inequitable and unjust. *Burlington & M. R. R. Co. v. Saunders County*, 16 Neb. 123 (19 N. W. 698).

577. (1885.) A taxpayer who seeks to enjoin the payment of money for the erection of a public bridge which he claims is being constructed in violation of law, must act with reasonable promptness. If he is guilty of gross laches, and knowingly permits the contractor to incur liabilities in good faith in the construction of the greater portion of the work, an injunction will be denied. *Brown v. Merrick County*, 18 Neb. 355 (25 N. W. 356).

578. (1890.) While a proposition to vote county bonds in aid of railroads, submitted in alternative form is void, their payment will not be enjoined after they passed into the hands of an innocent purchaser. *North v. Platte County*, 29 Neb. 447 (45 N. W. 692; 26 Am. St. Rep. 395).

579. (1891.) Where objections are made to certain assessments on the ground of irregularities, the court, as a condition of granting relief, may require the property owner to do equity by paying the amount which his property is benefited by the improvement. *Darst v. Griffin*, 31 Neb. 668 (48 N. W. 819).

580. (1891.) A party who sees a public improvement being carried on calculated to benefit his property, cannot wait until it is completed and the expenditure has been made and his property received the benefit before proceeding to avoid the tax, but must, as a condition of relief by injunction, do equity by paying the amount thereof justly chargeable against such property. *Darst v. Griffin*, 31 Neb. 668 (48 N. W. 819).

581. (1894.) Appeal by a taxpayer will not lie from an order of a county board directing a warrant to be drawn for an illegal purpose. *Ackerman v. Thummel*, 40 Neb. 95 (58 N. W. 738).

582. (1894.) An injunction lies at the suit of a taxpayer of the proper county to restrain the issuance by the county clerk of a warrant on the county treasurer for an illegal or unauthorized purpose, and to enjoin the payment of such warrant by the county treasurer. *Ackerman v. Thummel*, 40 Neb. 95 (58 N. W. 738).

583. (1895.) A party who is not guilty of laches may invoke the aid of a court of equity to restrain the collection of a void tax or assessment. *Morris v. Merrell*, 44 Neb. 423 (62 N. W. 865).

584. (1898.) A court of equity will not, at the suit of a private individual, enjoin the payment of a warrant issued upon a claim duly audited by the county board, the remedy being complete at law, by appeal from the order allowing the claim. *Taylor v. Davey*, 55 Neb. 153 (75 N. W. 553).

585. (1904.) A resident taxpayer, without showing any interest or injury peculiar to himself, may enjoin illegal expenditures by a public board or officer. *Woodruff v. Welton*, 70 Neb. 665 (97 N. W. 1037).

586. (1904.) In an action by a resident

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taxpayer to enjoin an illegal expenditure by a public board or officer, the plaintiff will not be required to show what the amount of the expenditure would have been if the law had been obeyed. *Woodruff v. Welton*, 70 Neb. 665 (97 N. W. 1037).

587. (1906.) On an appeal to the district court by a taxpayer from an order of the county board allowing aid to an agricultural society under section 12, article I, chapter 2, Compiled Statutes 1903, the appellee is not required to plead that the county board included the amount allowed by it in its annual estimate, nor that there were funds in the treasury, or taxes levied, against which a warrant could be drawn. *Sheldon v. Gage County Society of Agriculture*, 75 Neb. 485 (106 N. W. 474).

V. CLAIMS AGAINST COUNTY.

Allowance of claim of officers for compensation, see *ante*, §§ 172-183.

Character of county board as a court, see *ante*, §§ 80, 81.

Levy of tax to pay claim, see *ante*, §§ 544-561.

Liability of commissioners allowing illegal claim, see *ante*, §§ 120-122.

Mandamus to compel levy to pay claim, see *ante*, §§ 562-572.

Right of original action on claim in district court, see *post*, §§ 672-677.

Statutory provisions.

588. (1899.) Section 37, article I, chapter 18, Compiled Statutes, regarding the audit and allowance of claims against a county, is not a grant of power to the county board, but is a provision regulating the exercise of the power granted in section 23 of said chapter. *Perkins County v. Keith County*, 58 Neb. 323 (78 N. W. 630).

Jurisdiction to examine claims.

589. (1877.) The board of county commissioners is invested by statute with exclusive original jurisdiction in the examination and allowance of accounts against a county. *Brown v. Otoe County*, 6 Neb. 111; (1896) *Stenberg v. State*, 48 Neb. 299 (67 N. W. 190).

590. (1882.) The board of county commissioners have exclusive original jurisdiction in the examination and allowance of claims against a county, and the only mode of prosecuting an action on such claims is by appeal from their decision. *Dixon County v. Barnes*, 13 Neb. 294 (13 N. W. 623).

591. (1897.) A county board may not delegate to its chairman and clerk the power to audit claims against the county. *Wilson v. State, ex rel Plasters*, 53 Neb. 113 (73 N. W. 456).

592. (1900.) Article I, chapter 18, page 37, Compiled Statutes, merely regulates the grant of power and mode of procedure of the county board in the allowance of claims against the county, and failure to observe its provisions does not deprive the commissioners of jurisdiction to act upon claims against the county. *State, ex rel. Seth Thomas Clock Co., v. County Commissioners of Cass County*, 60 Neb. 566 (83 N. W. 733).

593. (1900.) The power and jurisdiction of the county board to act upon claims is derived from article I, chapter 18, page 23, Compiled Statutes, and not from page 37. *State, ex rel. Seth Thomas Clock Co., v. County Commissioners of Cass County*, 60 Neb. 566 (83 N. W. 733).

593*a*. (1908.) The allowance by the board of county commissioners of a claim against the county, there being no money in the treasury at the time, and no tax levy against which a warrant can be drawn, while it may be irregular, is not in excess of the power given the board to examine and settle all claims against the county. *State, ex rel. McDonald, v. Farrington*, 80 Neb. 628 (114 N. W. 1100).

Presentation.

594. (1890.) A railroad company claiming compensation for constructing a crossing on a highway laid out across its right of way, must, under section 16, chapter 78, Compiled Statutes, file its claim with the county clerk. *State, ex rel. Lancaster County, v. Chicago, B. & Q. R. Co.*, 29 Neb. 412 (45 N. W. 469).

595. (1894.) Where a tax purchaser under an illegal levy seeks to recover back the amount paid by him he must file his claim with the county clerk, have it passed upon by the board of commissioners, and if unsatisfied, appeal to the district court. In no other manner can the district court acquire jurisdiction on such a claim. *Pennock v. Douglas County*, 39 Neb. 293 (58 N. W. 117; 42 Am. St. Rep. 579; 27 L. R. A. 121).

596. (1895.) All claims against a county

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must be filed with the county clerk thereof and presented to the county board, and it alone has power and authority to audit and allow such claims. *State, ex rel. Wyckoff, v. Merrell*, 43 Neb. 575 (62 N. W. 754).

597. (1897.) A claim against a county for damages for the appropriation of and injury to plaintiff's property by the grading of a highway, is not such a one as is required to be filed with the county clerk by section 37, article I, chapter 18, Compiled Statutes. *Douglas County v. Taylor*, 50 Neb. 535 (70 N. W. 27).

598. (1900.) A claim against a county is filed when delivered to the county clerk to be acted upon by the county board, even though the clerk fail to indorse upon such claim the fact and time of filing. *State, ex rel. Seth Thomas Clock Co., v. County Commissioners of Cass County*, 60 Neb. 566 (83 N. W. 733).

599. (1901.) A claim against a county must be presented, in writing, to the county board before that body has jurisdiction or authority to act upon it. *Shepard v. Easterling*, 61 Neb. 882 (86 N. W. 941).

600. (1901.) County warrants are not within the class of claims which must, in the first instance, be presented to the county board for examination and adjustment. *Ayres v. Thurston County*, 63 Neb. 96 (88 N. W. 178).

Time for presentation.

601. (1897.) A claim against a county cannot be audited and allowed in advance of the furnishing of the items or the rendition of the services therein charged. *Wilson v. State, ex rel. Plasters*, 53 Neb. 113 (73 N. W. 456).

Claims which may be audited and allowed.

602. (1900.) A claim in favor of a party for property sold to a county under a contract with the county, wherein it is recited that the property was sold to the county commissioners of such county as per agreement, *held* to be a claim against the county, and the failure to designate the county by name as debtor was only an irregularity which did not affect the validity of the claim. *State, ex rel. Seth Thomas Clock Co., v. County Commissioners of Cass County*, 60 Neb. 566 (83 N. W. 733).

603. (1901.) The only claim which the county board is, by section 37, article I, chapter 18, Compiled Statutes, 1899, authorized to examine, adjust and allow, or reject, is one which must be paid by the issuance of a warrant upon the county treasurer. *Shepard v. Easterling*, 61 Neb. 882 (86 N. W. 941).

Allowance or disallowance.

604. (1879.) While the commissioners, in passing upon claims against the county, act judicially, it is not essential or even proper for them to enter a formal judgment after the manner of courts of law. It is sufficient if it appear that the claim was duly presented, and that it was allowed or rejected. *Block v. Saunders County*, 8 Neb. 440.

605. (1882.) Commissioners have no authority to audit claims against the county unless there are funds in the treasury, or sufficient taxes have been levied for the payment of the same. *Lancaster County v. State, ex rel. Miller*, 13 Neb. 523 (14 N. W. 517).

606. (1888.) A claim by a contractor for the construction of a bridge across the Republican river, in Webster county, was duly allowed by the county board in 1875, and a number of payments made thereon up to the year 1881. In 1884 the contractor and county board made a computation of the amount still due such contractor, which was found to be $1,605.71. *Held*, That this was not the allowance of a new account, but the determination of the balance remaining due on a claim allowed in 1785, after deducting all the payments, and hence a statute passed in 1879 respecting allowance of claims did not apply. *State, ex rel. Clarke, v. Cathers*, 25 Neb. 250 (41 N. W. 182).

607. (1901.) When a city council or a board of county commissioners audit and adjust the claim of an officer whose salary is prescribed by statute, they act ministerially and not judicially. *Gallaher v. City of Lincoln*, 63 Neb. 339 (88 N. W. 505).

608. (1903.) County commissioners, in passing upon claims against the county, have no judicial power or discretion as to interpretation of the law. Whenever the course to be pursued or the amount to be allowed is fixed by law, they must follow the law, and their acts in so doing or endeavoring so to do are ministerial only. *Mitchell v. Clay County*, 69 Neb. 779 (96 N. W. 673).

609. (1903.) County commissioners act *quasi*-judicially in passing upon claims against the county, whenever their action

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is not merely a formal prerequisite to the issuance of a warrant, but involves the determination of questions of fact, upon evidence or the exercise of discretion in ascertaining or fixing the amount to be allowed. *Mitchell v. Clay County*, 69 Neb. 779 (96 N. W. 673).

610. (1903.) Where judicial discretion is called for in the allowance of a claim presented, the board then acts as any other judicial body, and its findings can be questioned and set aside only by an appeal taken from the decision as provided by statute. Neither can the members of the board be made liable for a mere mistake made in passing judgment on the claim, the commissioners, in such case, being entitled to the same immunity as other judicial officers. *Crouch v. Pyle*, 70 Neb. 60 (96 N. W. 1049).

611. (1903.) The board of county commissioners in allowing claims made for salaries of county officers and other claims against the county, where the amounts to be allowed therefor are fixed by law and where no judicial inquiry is required to determine the amount, act in a mere ministerial capacity and have no power or jurisdiction to allow an amount in excess of the fixed statutory compenseation. *Crouch v. Pyle*, 70 Neb. 60 (96 N. W. 1049).

——— **Effect.**

612. (1877.) The legislature having provided that an appeal may be taken to the district court from the decision of the commissioners in any matter within their jurisdiction, by any person aggrieved, this remedy must be followed or the decision of the board is final and conclusive. *Brown v. Otoe County*, 6 Neb. 111.

613. (1877.) In the audit, adjustment, and allowance or disallowance of a claim against the county, the board of county commissioners acts judicially, and its judgment in the matter is conclusive, unless appealed from, or reversed in the mode prescribed by law. *State, ex rel. Clark, v. Buffalo County*, 6 Neb. 454; (1893) *State, ex rel. Ensey, v. Churchill*, 37 Neb. 702 (56 N. W. 484); (1895) *Sioux County v. Jameson*, 43 Neb. 265 (61 N. W. 596); (1895) *Heald v. Polk County*, 46 Neb. 28 (64 N. W. 376); (1895) *State, ex rel. Franklin County, v. Vincent*, 46 Neb. 408 (65 N. W. 50); (1897) *Gage County v. Hill*, 52 Neb. 444 (72 N. W. 581) [overruled, *Mitchell v. Clay County*, 69 Neb. 794]; (1897) *Trites v. Hitchcock County*, 53 Neb. 79 (73 N. W. 215); (1898) *Taylor v. Davey*, 55 Neb. 153 (75 N. W. 553).

614. (1895.) Where a county clerk files and is allowed a claim for making up a tax list, the county board in allowing such claim exercises judicial functions, and where not appeal from its decision is final. *Heald v. Polk County*, 46 Neb. 28 (64 N. W. 376).

615. (1896.) Where a claim presented to the county board for examination and audit is disallowed, which decision is appealed from by the claimant, and he afterwards dismisses such appeal, the action of the board is final and conclusive. *State, ex rel. Marquett, v. Baushausen*, 49 Neb. 558 (68 N. W. 950).

616. (1901.) An order of a county board, acting in pursuance of section 145, article I, chapter 77, Compiled Statutes, 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. *Custer County v. Chicago, B. & Q. R. Co.*, 62 Neb. 657 (87 N. W. 341).

617. (1907.) Action of the board of county supervisors in disallowing a claim against the county is final, unless appealed from. *Lincoln Township v. Kearney County*, 79 Neb. 299 (112 N. W. 608).

——— **Reconsideration.**

618. (1877.) The board of county commissioners has no power to review, reverse, vacate, or set aside, its former adjudication of a claim against the county. *State, ex rel. Clark, v. Buffalo County*, 6 Neb. 454. [Changed by statute. 7 Neb. 267; 39 Neb. 745; 49 Neb. 558.]

619. (1888.) Whatever effect the statute of 1879, which authorizes the disallowance of claims after they are allowed, may have, it can only apply to claims allowed since the act took effect, and cannot destroy vested rights in claims allowed before the act took effect. *State, ex rel. Clarke, v. Cathers*, 25 Neb. 250 (41 N. W. 182).

620. (1896.) Under section 40 of the act of the legislature of 1879, entitled "An act concerning counties and county officers" (Compiled Statutes, ch. 18), a county board has authority to once reconsider its action in the allowance of a claim against the county, upon notice to the parties interested. *State, ex rel. Marquett, v. Baushausen*, 49 Neb. 558 (68 N. W. 950).

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621. (1896.) The formal notice required by section 40, chapter 18, Compiled Statutes, to be given may be waived by the person entitled thereto. *State, ex rel. Marquett, v. Baushausen*, 49 Neb. 558 (68 N. W. 950).

622. (1898.) Upon due notice to parties interested, a county board may once reconsider its action in allowing or disallowing a claim against the county. *Dean v. Saunders County*, 55 Neb. 759 (76 N. W. 450).

623. (1898.) Where an order disallowing a claim against a county has been reconsidered, such order of disallowance will not operate as an adjudication of the claim. *Dean v. Saunders County*, 55 Neb. 759 (76 N. W. 450).

——— **By succeeding county board.**

624. (1896.) In the absence of statutory authority one county board cannot review or reverse the act of a prior board performed within the scope of authority conferred by law. *Sternberg v. State, ex rel. Keller*, 48 Neb. 299 (67 N. W. 190).

——— **Notice of disallowance.**

625. (1907.) The action of the board of county supervisors in disallowing a claim of a township is not affected by the fact that the notice of such disallowance was mailed to a person who was an officer of the township at the time of the filing of the claim, but who had resigned his office, when the written notice was delivered by such ex-official to his successor in office within five days from the order of disallowance. *Lincoln Township v. Kearney County*, 79 Neb. 299 (112 N. W. 608).

Appeal from decision.

626. (1897.) A question of fact determined by a county board cannot be reviewed on error in absence of a statute providing a method for preserving the evidence. *Keens v. Buffalo County*, 53 Neb. 1 (73 N. W. 214).

627. (1901.) The right of a taxpayer to test the validity of a claim against the county does not arise until there has been an adjudication by the county board in favor of the claimant. *Shepard v. Easterling*, 61 Neb. 882 (86 N. W. 941).

628. (1903.) An appeal by a claimant from a decision of the county board upon a claim presented for adjustment and allowance vacates the decision, even though it be in part favorable to the claimant. *Dakota County v. Borowsky*, 67 Neb. 317 (93 N. W. 675).

629. (1905.) Appeals from the decision of a county board should be entered, tried and determined in the district court the same as appeals from justices of the peace. *Loup County v. Wirsig*, 73 Neb. 505 (103 N. W. 56).

——— **Right of appeal.**

630. (1879.) When the record of the proceedings of the board, as kept by the county clerk, shows the proper presentation of the claim, and that they refused to grant it, this is enough to authorize an appeal by the claimant to the district court. *Black v. Saunders County*, 8 Neb. 440.

631. (1880.) As the owner of the claim or a taxpayer could appeal from their decision allowing or rejecting a claim against the county, an admission by them of the justness of the claim could not prevent such appeal. *State, ex rel. Hagberd, v. Furnas County*, 10 Neb. 361 (6 N. W. 434).

632. (1881.) Where an account is filed with the board of county commissioners and allowed in part, and a warrant, drawn for the sum thus allowed, is accepted by the claimant, he thereby waives his right of appeal. *Hamilton County v. Bailey*, 12 Neb. 56 (10 N. W. 539).

633. (1883.) An appeal from the final decision of the county board by an applicant for damages claimed to be caused by the establishment of a road, should be taken under the provisions of section 39, chapter 78, Compiled Statutes, and not under those of section 37, article I, chapter 18. *Richardson County v. Miles*, 14 Neb. 311 (16 N. W. 150).

634. (1892.) An appeal will lie from the action of a county board in allowing or rejecting claims against the county, but to authorize such an appeal it must appear from the proceedings of the board that they have taken final action upon such claim by either allowing or rejecting the same in whole or in part, an order adopting the report of a committee as to the amount due not being appealable. *State, ex rel. Thiele, v. Slocum*, 34 Neb. 368 (51 N. W. 969).

635. (1898.) A taxpayer may prosecute an appeal to the district court from the decision of a county board in the allowance of claims. *Taylor v. Davey*, 55 Neb. 153 (75 N. W. 553).

636. (1899.) A taxpayer may appeal from the allowance by a county board of a claim against a county. Such appeal is not

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entirely a personal and private matter of the appellant, but is of public interest and concern. *Gage County v. King Bridge Co.*, 58 Neb. 827 (80 N. W. 56).

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637. (1901.) No appeal lies from an order of the county board disallowing a claim made in pursuance of the provisions of section 145, article I, chapter 77, Compiled Statutes. *Custer County v. Chicago, B. & Q. R. Co.*, 62 Neb. 657 (87 N. W. 341).

638. (1903.) When a claim is by the county board allowed in part and rejected in part, the claimant must deal with the decision as an entirety. He cannot accept the part that is in his favor and appeal from the remainder. *Dakota County v. Borowsky*, 67 Neb. 317 (93 N. W. 675).

639. (1904.) The application of an agricultural society for assistance from the county funds is a claim, and an appeal from its allowance by a taxpayer will lie to reexamine the facts as to the organization and competency of the society. No reexamination as to the public interest in assisting such a society is permissible. *Sheldon v. Gage County Society of Agriculture*, 71 Neb. 411 (98 N. W. 1045).

——— **Parties.**

640. (1899.) On appeal by a taxpayer, form the allowance by the county board, of a claim against the county, the county is a party to the suit in the appellate court, but may not by any action therein rob the appeal of its significance or hinder or prevent the hearing of the appeal. *Gage County v. King Bridge Co.*, 58 Neb. 827 (80 N. W. 56).

——— **Proceedings for transfer of cause.**

641. (1884.) A bond for an appeal from an order of the board of county commissioners disallowing an account is not invalid because signed immediately beneath the penal of the bond. *Gage County v. Fulton*, 16 Neb. 5 (19 N. W. 781).

642. (1892.) The appeal of a taxpayer from the allowance of a claim against a county will not be dismissed on account of informalities or omission in the undertaking, but an opportunity will be given to file a proper bond in the district court. *Rube v. Cedar County*, 35 Neb. 896 (53 N. W. 1009).

643. (1901.) An appeal to the district court, from an order of the county board rejecting a claim, should be dismissed, unless the appeal bond has been approved by the county clerk. *Cedar County v. McKinney Loan & Investment Co.*, 1 Unof. 411 (95 N. W. 605).

644. (1902.) A notice of appeal from an order of the county board disallowing a claim for money paid for a void tax sale certificate, addressed to the county clerk, is served within the meaning of section 37, chapter 18, article I, Compiled Statutes 1901, by delivery to such clerk, and the fact of delivery to the clerk is a necessary inference from a statement in the record that it was filed with the clerk by appellant. *Jarvis v. Chase County*, 64 Neb. 74 (89 N. W. 624).

645. (1902.) Where a claim has been disallowed by the county commissioners and a notice of appeal given to the county clerk within the time limited by statute, an indorsement upon such notice as follows: "I hereby accept service of the within notice," is sufficient proof that the service of the notice has been made. *Greeley County v. Gebhardt*, 2 Unof. 661 (89 N. W. 753).

646. (1905.) Where an appeal is taken from the order of a board of county commissioners disallowing a claim, and a bond as required by statute is filed with the county clerk within the time allowed, and approved by him, the mere fact that such officer, who is also ex-officio clerk of the district court, is not a sufficient irregularity to defeat the ends of the appeal. *Hitchcock County v. Brown*, 73 Neb. 254 (102 N. W. 456).

——— **Dismissal of appeal.**

647. (1888.) Dismissal of an appeal from the decision of a county board upon a claim presented to it is a final disposition of the case from which appeal will lie. *Richardson County v. Hull*, 24 Neb. 536, (39 N. W. 608).

648. (1899.) Where a taxpayer's appeal from a county board's allowance of a claim against the county has been prosecuted for corrupt purposes, the appeal may be dismissed. The attack on the appeal may be by motion to dismiss. *Gage County v. King Bridge Co.*, 58 Neb. 827 (80 N. W. 56).

649. (1899.) The findings herein, upon which the order of dismissal of the appeal of a taxpayer from an allowance of a claim against the county was predicated on the ground that such appeal was taken for corrupt motives were sustained by the evidence. *Gage County v. King Bridge Co.*, 58 Neb. 827 (80 N. W. 56).

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Review.

650. (1898.) The validity of an order of a county board allowing a claim cannot be raised for the first time in the supreme court on error or appeal. *State, ex rel. Seth Thomas Clock Co., v. County Commissioners*, 53 Neb. 767 (74 N. W. 254).

651. (1898.) In a case appealed from an order of a county board issues should be joined in the district court as in cases appealed from justices of the peace. *Box Butte County v. Noleman*, 54 Neb. 239 (74 N. W. 582).

652. (1898.) In a case appealed from an order of a county board disallowing a claim the district court cannot lawfully render judgment against the county without pleadings being filed or a trial had. *Box Butte County v. Noleman*, 54 Neb. 239 (74 N. W. 582).

653. (1898.) An appeal from an order of a county board, allowing a claim against the county, brings the matter to the district court for trial *de novo*. *Box Butte County v. Noleman*, 54 Neb. 239 (74 N. W. 582).

654. (1901.) The rule requiring issues in the appellate court to be the same as in the court of original jurisdiction, does not apply to appeals as to the district court from the decision of the county board in the allowance and rejection of claims. *Sheibley v. Dixon County*, 61 Neb. 409 (85 N. W. 399).

655. (1902.) On appeal from an order of the county commissioners disallowing a claim for purchase money under a void tax sale, the pleadings and issues need not be the same as before the commissioners, it being merely necessary that the claims be identical. *Battelle v. Douglas County*, 65 Neb. 329 (91 N. W. 412).

Payment.

656. (1876.) County commissioners may pay a debt due from the county by transferring to its creditor chattel property of the county. *Commissioners of Kearney County v. Kane*, 5 Neb. 227.

657. (1877.) Upon the final adjudication of a claim against the county, it is the duty of the board to issue to the claimant his warrant for the amount, or so much thereof as shall not exceed the aggregate amount levied by tax for the current year for the fund out of which it is payable. *State, ex rel. Clark, v. Buffalo County*, 6 Neb. 454.

658. (1880.) Indebtedness against a county in the form of accounts audited and allowed are to be paid out of the ordinary levy, but when this cannot be done, the only remedy is that provided in the statute, by submitting a proposition to the people of the county for authority to borrow the necessary funds. *Union P. R. Co. v. Buffalo County*, 9 Neb. 449 (4 N. W. 53).

659. (1880.) One having a claim for services rendered during a previous year is entitled to be paid out of the levy for a following year. *State, ex rel. Hagberd, v. Furnas County*, 10 Neb. 361 (6 N. W. 434).

660. (1883.) Where county warrants issued in compliance with a judgment on mandamus, which provided for interest at 10 per cent., contain no recital as to the rate of interest which they are to draw, and after their issue, but before they were presented for payment, an act was passed reducing the rate of interest on county warrants to 7 per cent., mandamus will not issue to compel the clerk to pay 10 per cent. thereon, since the right to such interest cannot be tested in such a proceeding. *State, ex rel. Clark, v. Scott*, 15 Neb. 147 (17 N. W. 263).

Set-off against claim.

661. (1898.) Where mutual demands arise out of a contract between a county board and plaintiff, the latter is entitled to an allowance of his claim only to the extent that it exceeds the claim of the county against him. *Box Butte County v. Noleman*, 54 Neb. 239 (74 N. W. 582).

Mandamus to compel action on claim.

662. (1880.) Mandamus will not lie to compel county commissioners to audit an account due for services, rendered the previous year. *State, ex rel. Hagberd, v. Furnas County*, 10 Neb. 361 (6 N. W. 434).

663. (1892.) Mandamus will issue in a proper case, to compel a county board to act upon a claim against the county where final action has been refused, but in a proceeding in mandamus the court will not determine the validity of any offset set up by the county. *State, ex rel. Thiele, v. Slocum*, 34 Neb. 368 (51 N. W. 968).

664. (1893.) A county board in the adjustment of claims against a county acts judicially, and this court cannot, by mandamus, control the judicial discretion of such board. *State, ex rel. Ensey, v. Churchill*, 37 Neb. 702 (56 N. W. 484); (1895) *State, ex*

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rel. Wyckoff, v. Merrell, 43 Neb. 575 (62 N. W. 754).

665. (1895.) The supreme court has no authority under the constitution and the laws of the state to compel by mandamus the county board of a county to allow a claim against such county, although the court may be of opinion that such claim is a valid obligation against the county and that it has no defense thereto. *State, ex rel. Wyckoff, v. Merrell*, 43 Neb. 575 (61 N. W. 754).

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666. (1901.) In the allowance of the claim of an agricultural society which has complied with all the requirements of section 12, chapter 2, Compiled Statutes 1899, a board of county supervisors acts ministerially and not judicially, and when it refuses to act on such a claim it may be compelled to do so by mandamus. *State v. Coufal*, 1 Unof. 128 (95 N. W. 362).

Mandamus to compel payment of warrants

667. (1881.) Where it appears that there are sufficient funds in the treasury, a peremptory writ of mandamus will be issued to compel a county treasurer to pay certain county warrants. *State, ex rel. Moore, v. Gandy*, 12 Neb. 232 (11 N. W. 296).

668. (1895.) Mandamus will not issue to compel a treasurer to pay a warrant unless the right of relator to receive payment is clear. *State, ex rel. First Nat. Bank, v. Cook*, 43 Neb. 318 (61 N. W. 693).

669. (1898.) Mandamus will not lie to compel the payment of a county warrant, charged to a designated fund, out of the general fund. *Hall v. State, ex rel. Renard*, 54 Neb. 280 (74 N. W. 590).

VI. ACTIONS.

Conduct of supervisor while on witness stand as evidence, see *Eminent Domain*, § 294.

Action by county against officer on official bond, see *ante*, §§ 285-307.

Action on county bond, see *ante*, § 543.

Actions on warrants, see *ante*, §§ 450-456.

Capacity to sue or be sued.

670. (1901.) Where a public corporation incurs a legal liability, it may be sued and a money judgment recovered against it. *Ayres v. Thurston County*, 63 Neb. 96 (88 N. W. 178).

671. (1901.) Section 20, article I, chapter 18, Compiled Statutes 1901, declaring that counties may be sued either in law or in equity, is express authority to enforce by action any claim of which the county board has not exclusive original cognizance. *Ayres v. Thurston County*, 63 Neb. 96 (88 N. W. 178).

Right of action.

672. (1877.) An original action on an account against a county does not lie. The account must be presented to the county board, and the remedy of a party aggrieved by the decision is by appeal to the district court. *Brown v. Otoe County*, 6 Neb. 111.

673. (1888.) A cause of action against a county, under the provisions of section 71 of the revenue act of 1869 (General Statutes), *held*, to be a claim against a county within the meaning of section 37 of chapter 18 of the Compiled Statutes, and that no action can be maintained on such claim other than by presenting the same to the county board for audit and allowance. *Richardson County v. Hull*, 24 Neb. 536 (39 N. W. 608).

674. (1888.) A cause of action against a county under the provisions of section 71 of the revenue act of 1869 is a claim against a county within the meaning of section 37 and chapter 18 of the Compiled Statutes, and no action can be maintained on such claim other than by presenting the same to the county board for audit and allowance. *Richardson County v. Hull*, 24 Neb. 536; (1890) *Richardson County v. Hull*, 28 Neb. 810 (45 N. W. 53).

675. (1894.) One seeking to recover back from a county taxes illegally levied, must file his claim with the county clerk of the county, have it passed upon by the board of county supervisors, or commissioners, and appeal from their decision, if unsatisfactory, to the district court. In no other manner could the district court acquire jurisdiction of a suit founded on such a claim. *Pennock v. Douglas County*, 39 Neb. 293 (58 N. W. 117; 42 Am. St. Rep. 579).

676. (1901.) The jurisdiction of the district court to hear and determine actions for the enforcement of claims against counties arising *ex contractu* and embraced within the provisions of section 37, chapter 18, article I, Compiled Statutes 1899, is derivative and not original. *Shepard v. Easterling*, 61 Neb. 882 (86 N. W. 941).

677. (1901.) An action to recover a money judgment upon a county warrant

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may be maintained when the money for the payment of such warrant has been collected and wrongfully applied by the county authorities to the payment of other claims against the county. *Ayres v. Thurston County*, 63 Neb. 96 (88 N. W. 178).

Garnishment.

678. (1882.) A county is not subject to garnishment. *State, ex rel. Crawford, v. Eberly*, 12 Neb. 616 (12 N. W. 96).

Appearance.

679. (1903.) A county attorney has authority to waive issuance and service of summons in error in a case against a county in which he has appeared for it at the trial. *Dakota County v. Bartlett*, 67 Neb. 62 (93 N. W. 192).

Parties.

680. (1901.) A taxpayer has a right of equitable action to enforce a municipal corporate right which its governing body refuses to enforce, but he should make the corporation a party defendant. *Shepard v. Easterling*, 61 Neb. 882 (86 N. W. 941).

681. (1905.) A county in its corporate character is a competent and proper party to sue for the enforcement of all contracts and obligations in its behalf, unless the statute expressly provides otherwise. This right is not impaired by the fact that the obligation may be, or is required by law to be, discharged by payment of a liquidated sum to the county treasurer or to his order, upon demand. *Johnson County v. Chamberlain Banking House*, 74 Neb. 549 (104 N. W. 1061).

Limitation of action.

682. (1887.) The legal maxim, "Lapse of time does not bar the right of the state," can only apply in favor of the sovereign power, and has no application to school districts or other municipal corporations deriving their power from the sovereign. The statute of limitations runs for or against school districts in the same manner as it does for or against individuals. *May v. School District*, 22 Neb. 205 (34 N. W. 377; 3 Am. St. Rep. 266).

683. (1898.) The proviso clause of section 4, chapter 7, laws 1889, which requires an action against a county for injury or damages resulting from a defective public highway to be brought within thirty days after the occurring of such injury or damages, is not inimical to that part of section 11, article III of the constitution, which declares that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title." *Bryant v. Dakota County*, 53 Neb. 755 (74 N. W. 313).

683*a*. (1908.) The duty of the board of county commissioners to provide for the payment of all allowed claims, where such allowance is not absolutely void, is a continuing duty against which the statute of limitations is no defense. *State, ex rel. McDonald, v. Farrington*, 80 Neb. 628 (114 N. W. 1100).

Pleading.

684. (1871.) A petition alleging the issue and non-payment of a county warrant, without alleging that there is money in the treasury for its payment, or that time has elapsed for the collection of the money by taxation, will be dismissed without prejudice. *Brewer v. Otoe County*, 1 Neb. 373.

685. (1877.) An allegation in a petition that a claim presented to the county commissioners for allowance "was unjust, and was audited and allowed through fraudulent and undue means," is too general for either the admission of proof, or the entry of a decree establishing fraud against any of the parties to the transaction. *Clark v. Dayton*, 6 Neb. 192.

686. (1893.) The petition to recover damages from a county for injuries resulting from a failure of the county board to keep a public bridge in repair, set out in the opinion, *held to state* a cause of action. *Hollingsworth v. Saunders County*, 36 Neb. 141 (54 N. W. 79).

687. (1902.) In an action against a county to recover the purchase price of certain road machines which have been received and retained by the county, an answer which alleges that at the time the contract of purchase was made there was no money in the treasury to the credit of the proper fund for the payment of the same, fails to state a defense. *Austin Mfg. Co. v. Brown County*, 65 Neb. 60 (90 N. W. 929).

688. (1902.) A petition in an action to enforce against a public corporation a purely statutory obligation, is demurrable, unless it states all the facts necessary to make the alleged liability complete. And in such cases, the party must bring himself within the terms of a statutory proviso. *Town of Clearwater v. Town of Garfield*, 65 Neb. 697 (91 N. W. 496).

689. (1904.) A demurrer is not the

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proper pleading by which to raise a question as to whether or not an action in the county's name by the county attorney was sufficiently authorized. *Otoe County v. Dorman*, 71 Neb. 408 (98 N. W. 1064).

690. (1904.) In a suit against a county for damages on account of the death of a party caused by the giving way of a county bridge, the petition contained a general statement that the bridge was "out of repair and unsafe," a motion for a more specific statement should be sustained. *Johnson County v. Carmen*, 71 Neb. 682 (99 N. W. 502).

Presumptions.

691. (1896.) When a petition alleges and a demurrer admits that the plaintiff was employed by the county board to render professional services as a physician for a pauper, the presumption will be indulged that the county board kept within the law in employing the physician, and that a poorhouse, had, prior to that time, been established and opened in said county for the reception of its paupers. *Red Willow County v. Davis*, 49 Neb. 796 (69 N. W. 138).

Admissibility of evidence.

692. (1902.) The declarations of a deceased person made to a third party, as to his knowledge of the condition of a bridge, which gave way while he was attempting to cross it and caused his death, before the accident occurred, may be properly received in evidence as tending to establish contributory negligence. *Seyfer v. Otoe County*, 66 Neb. 566 (92 N. W. 756).

693. (1902.) In an action against a county by the administrator of the estate of a deceased person to recover damages alleged to have been caused by the breaking down of a bridge while the deceased was attempting to cross it with a steam traction engine and separator, it is for the jury to determine whether the bridge was properly constructed and maintained, and whether the use the deceased was making of it was unusual and extraordinary, and such as the county was not bound to anticipate. *Seyfer v. Otoe County*, 66 Neb. 566 (92 N. W. 756).

Weight and sufficiency of evidence.

694. (1897.) Evidence *held* sufficient to sustain a judgment for plaintiff for $500 in a suit against a county for damages resulting from the action of the county in grading a street in front of plaintiff's lots. *Douglas County v. Taylor*, 50 Neb. 535 (70 N. W. 27).

695. (1898.) Evidence of delivery of a warrant to the husband of claimant's agent *held* insufficient to sustain a plea of payment of a claim against a county. *State, ex rel. Seth Thomas Clock Co., v. County Commissioners*, 53 Neb. 767 (74 N. W. 254).

Instructions.

696. (1898.) An instruction which withdrew from a jury the consideration of the necessity of employing brokers to refund county bonds, because in the contract, for the performance of which the recovery was sought against the county, its commissioners had assumed to determine the existence of such necessity, *held* erroneous. *Lancaster County v. Green*, 54 Neb. 98 (74 N. W. 430).

697. (1901.) In an action on a claim for commission in selling county bonds, wherein the defense of accord and satisfaction was relied on by the county, ruling of the trial court, refusing an instruction requested to the effect that the claims filed by the plaintiffs were in part only of their demands against the county, was proper. *Green v. Lancaster County*, 61 Neb. 473 (85 N. W. 439).

698. (1905.) In an action for injuries caused by a defect in a bridge at a point near one side, an instruction that it is not necessary that defendant keep the entire width of its highways and bridges in good condition for travel, while stating a correct proposition of law, *held* erroneous under the circumstances of this case. *Clingan v. Dixon County*, 74 Neb. 807 (105 N. W. 710).

699. (1905.) In an action to recover for personal injuries resulting from the defective condition of a bridge, it is not error to instruct the jury that actual notice to the municipality is not necessary, where "the defects are of such a nature or have existed for such a length of time that they might by the exercise of ordinary diligence have been discovered and repaired." *City of Central City v. Marquis*, 75 Neb. 233 (106 N. W. 221).

Confession of judgment.

700. (1901.) A resolution by a county board will not confer authority on the county attorney to confess judgment against the county. *Custer County v. Chi-*

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cago, B. & Q. R. Co., 62 Neb. 657 (87 N. W. 341).

701. (1901.) A county attorney has no authority to enter a voluntary appearance in court, and confess judgment against the county. *Custer County v. Chicago, B. & Q. R. Co.*, 62 Neb. 657 (87 N. W. 341).

Execution and enforcement of judgment.

702. (1902.) Article VI of chapter 77 of the Compiled Statutes, making provision for the levy and collection of a tax to pay judgments entered against a county or other municipal corporation in this state, contains no special provision for disbursing the fund; hence the usual course of drawing money from the county treasury by obtaining a warrant against the fund must be pursued by the judgment creditor. *State, ex rel. Clark & Leonard Investment Co., v. Scott's Bluff County*, 64 Neb. 419 (89 N. W. 1063).

——— Mandamus to compel payment.

703. (1896.) A writ of mandamus to compel county officers to pay judgments against the county is not void because the judgments were void. *Boasen v. State*, 47 Neb. 245 (66 N. W. 303).

704. (1896.) The validity of a judgment against a county may be determined on application for a mandamus to compel the county officers to pay the judgment. *Boasen v. State*, 47 Neb. 245 (66 N. W. 303).

COUNTY ATTORNEYS.

ANALYSIS.

In general, §§ 1, 2.
Creation and existence of office, §§ 3-5.
Election and appointment.
——— Statutory provisions, § 6.
——— Election, when held, §§ 7, 8.
——— Appointment to fill vacancy, §§ 9-11.
Duties in general, §§ 12, 13.
Authority to prosecute state treasurer for embezzlement, § 14.
Compensation of county attorney, §§ 15, 16.
Authority of county to employ special attorney, §§ 17, 17a.
Assistants and deputies.
——— Absence or disability of prosecutor, §§ 18-20.
——— Allowed in criminal prosecutions, §§ 21-23.
——— Compensation, §§ 24-28.
——— Proof of appointment, § 29.

CROSS-REFERENCES.

See, also, *Attorney and Client; Attorney General.*

Authority to delegate authority to file indictment, see *Indictment and Information*, §§ 14, 15.

Authority to verify information, see *Indictment and Information*, §§ 29-31.

In general.

1. (1901.) The terms "prosecuting attorney" and "county attorney" are used interchangeably in our statutes, and are synonymous. *Bush v. State*, 62 Neb. 128 (86 N. W. 1062).

2. (1901.) The words "prosecuting attorney" in sections 579 and 580, criminal code, construed to mean county attorney. *Trimble v. State*, 61 Neb. 604 (85 N. W. 844).

Creation and existence of office.

3. (1901.) The legislature had the constitutional power to create the office of county attorney. *Dinsmore v. State*, 61 Neb. 418 (85 N. W. 445).

4. (1901.) The office of district attorney was not created by the constitution, but by general law before the adoption of that instrument. *Dinsmore v. State*, 61 Neb. 418 (85 N. W. 445).

5. (1901.) The office of district attorney has been abolished. *Dinsmore v. State*, 61 Neb. 418 (85 N. W. 445).

Election and appointment.

——— Statutory provisions.

6. (1891.) Section 47 of chapter 18, Compiled Statutes, which provides for the appointment of a county attorney by the county board was repealed by implication

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by the "act to provide for the election of county attorneys, to define their duties and fix their salaries," etc., approved March 10, 1885. *Brome v. Cuming County*, 31 Neb. 362 (47 N. W. 1050).

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——— Election, when held.

7. (1900.) Election for county attorney can be held only in even numbered years. *State, ex rel. Parker, v. County Commissioners of Saline County*, 60 Neb. 275 (83 N. W. 70).

8. (1891.) A county attorney can only be elected at a general election held in even numbered years. *State, ex rel. Easterling, v. Rankin*, 33 Neb. 266 (49 N. W. 1121).

——— Appointment to fill vacancy.

9. (1890.) Under section 25 of chapter 7, Compiled Statutes 1889, authorizes the county board to fill a vacancy in the office of county attorney by appointment, an appointment made by entering the fact upon the records of the proceedings of the county board is sufficient. *State, ex rel. Hull, v. Walker*, 30 Neb. 501 (46 N. W. 648).

10. (1891.) Where a vacancy occurs in the office of county attorney, it is the duty of the county board to fill the same by appointment, and the appointee will hold his office until a successor is elected and qualified. *State, ex rel. Easterling, v. Rankin*, 33 Neb. 266 (49 N. W. 1121).

11. (1900.) A vacancy in the office of county attorney should be filled by appointment, and the appointment holds until his successor is elected and qualified. *State, ex rel. Parker, v. County Commissioners of Saline County*, 60 Neb. 275 (83 N. W. 70).

Duties in general.

12. (1889.) Upon the removal of a criminal prosecution from the county in which the offense was committed, to an adjoining county upon change of venue, it is not the duty of the county attorney of the former county to follow the case to the latter county, but it is the duty of the county attorney of such adjoining county to represent the state in the prosecution of the case; and in such case where the county attorney of the adjoining county is under the disability of having appeared in the case as counsel for the accused, it is the duty of the court to appoint an attorney to act as county attorney in the prosecution. *Gandy v. State*, 27 Neb. 707 (43 N. W. 108).

13. (1901.) It is the duty of the county attorney to file informations for crimes and prosecute all criminal cases in his county. *Dinsmore v. State*, 61 Neb. 418 (85 N. W. 445).

Authority to prosecute state treasurer for embezzlement.

14. (1897.) A county attorney of the proper county may institute a criminal proceeding against a state treasurer for embezzlement of money of the state, notwithstanding such prosecutor had received no direction from the auditor of public accounts to so do. *Bartley v. State*, 53 Neb. 310 (73 N. W. 744).

Compensation of county attorney.

15. (1882.) Previous to the act of March 1, 1879, the statutory provision requiring a district attorney to give opinions and advice to county commissioners without extra charge, was exclusive of all other lawful methods of obtaining opinions or legal advice. *Platte County v. Gerrard*, 12 Neb. 244 (11 N. W. 298).

16. (1889.) Where an attorney has been acting as county attorney under a contract with the county board, and after being elected to the office continues to perform the duties of the office without any other agreement as to salary he is held to have accepted to hold under a continuation of the old agreement. *Capps v. Adams County*, 27 Neb. 360 (43 N. W. 114).

Authority of county to employ special attorney.

17. (1891.) The county attorney is the law officer of the county. The county board cannot lawfully employ an attorney to perform the duties required by law to be discharged by the county attorney, and pay for such services out of the treasury of the county. *Brome v. Cuming County*, 31 Neb. 362 (47 N. W. 1050).

17*a*. (1907.) A county attorney, who is required by law and by the order of the county board to institute actions for the benefit of the county, may bind the county to pay the reasonable and necessary expense incident thereto. *Christner v. Hayes County*, 79 Neb. 157 (112 N. W. 347).

Assistants and deputies.

——— Absence or disability of prosecutor.

18. (1896.) The provision of section 21, chapter 7, Compiled Statutes, for the appointment of a county attorney to act during the absence, sickness, or disability of the public prosecutor and his deputies, does not conflict with section 10, article I

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of the constitution, relating to criminal prosecutions. *Korth v. State*, 46 Neb. 631 (65 N. W. 792).

19. (1896.) The provision of section 21, chapter 7, Compiled Statutes, for the appointment of a county attorney to act during the absence, sickness, or disability of the public prosecutor and his deputies is applicable to informations under section 579, criminal code. *Korth v. State*, 46 Neb. 631 (65 N. W. 792).

20. (1901.) Where a county attorney is disqualified, the court may appoint other counsel to prosecute. *Spaulding v. State*, 61 Neb. 289 (85 N. W. 80).

——— **Allowed in criminal prosecutions.**

21. The district attorney, in a criminal trial, may have the assistance of counsel employed on private account. (1883) *Polin v. State*, 14 Neb. 540 (16 N. W. 1898); (1885) *Bradshaw v. State*, 17 Neb. 147 (22 N. W. 361); (1889) *Gandy v. State*, 27 Neb. 707 (43 N. W. 747).

22. (1891.) Under the proviso clause of section 20, chapter 7, Compiled Statutes, a county attorney, when the public interests demand, may, under the direction of the district court, procure at the expense of the county an attorney to assist him in the trial of a person charged with a felony. *Fuller v. Madison County*, 33 Neb. 422 (50 N. W. 255).

23. (1901.) 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 qualify and give a bond as deputy county attorney. *Bush v. State*, 62 Neb. 128 (86 N. W. 1062).

——— **Compensation.**

24. (1880.) No authority exists for the payment by a county of compensation to a deputy district attorney or a person appointed by the court to perform the duties of district attorney during his absence. *Cuming County v. Tate*, 10 Neb. 193 (4 N. W. 1044).

25. (1891.) When services are rendered, in assisting a county attorney in the trial of a person upon a change of venue, compensation therefor is to be made by the county in which the offense was committed. *Fuller v. Madison County*, 33 Neb. 422 (50 N. W. 255).

26. (1894) Where attorneys claim compensation on account of services rendered as assistants of the county attorney in the trial of a criminal cause, they must make proper proof that their employment by the county attorney was under the direction of the district court of the proper county. *Sands v. Frontier County*, 42 Neb. 837 (60 N. W. 1017).

27. (1894.) Attorneys duly employed by the county attorney of one county to assist in the trial of a cause therein pending are not required or authorized, even on the request of such county attorney, to follow said cause on change of venue to another county; and if, notwithstanding this fact, they do so, they will not thereby entitle themselves to compensation for such unauthorized assistance as thereafter they may render. *Sands v. Frontier County*, 42 Neb. 837 (60 N. W. 1017).

28. (1904.) A county is not bound to pay for legal services rendered at the instance of the county attorney, without the previous authorization or subsequent official ratification of the county board. *Card v. Dawes County*, 71 Neb. 788 (99 N. W. 662).

——— **Proof of appointment.**

29. (1887.) Where the appointment of a deputy prosecuting attorney is challenged, and there is no copy of his appointment or evidence that he took the oath or gave the bond as required by law, the proof is insufficient to show his appointment as deputy. *Richards v. State*, 22 Neb. 145 (34 N. W. 346).

COUNTS.

Joinder of, in indictments, see *Indictment and Information*, §§ 87-92.

COUNTY BOARD.

See *Counties*, II, C.

COUNTY CLERKS.

See *Clerks of Court; Counties*, §§ 191-201.

COUNTY COURTS.

See *Justices of the Peace and County Courts; Courts*, IV.

COUNTY SEAT.

See *Counties*, §§ 42-79.

COURSES AND DISTANCES.

See *Boundaries*.

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COURT COMMISSIONERS.

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CROSS-REFERENCES.

See, also, *Courts; Judges.*

Opinions of commissioners, see *Courts*, §§ 107-114.

1. (1893.) The act approved March 9, 1893, authorizing the supreme court to appoint three supreme court commissioners to assist in disposing of the business of the supreme court, who were to prepare opinions in cases pending in the supreme court, the syllabus of each case being examined by the court and approved by it, and the opinion then filed under the general rule of court that when so filed it should stand as the judgment of the court, is not in conflict with the constitution of the state. *In re Supreme Court Commissioners*, 37 Neb. 655 (56 N. W. 298).

2. (1898.) A commissioner of the supreme court, in addition to his salary as such, may receive from the state compensation for lectures delivered by him before the law class of the state university. *Cornell v. Irvine*, 56 Neb. 657 (77 N. W. 114).

COURTS.

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Authority of United States commissioners to issue writ of habeas corpus, see *Habeas Corpus*, §§ 38-40.

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I. NATURE AND EXTENT OF JURISDICTION IN GENERAL.

Jurisdiction of justice of the peace and county court, see *Justices of the Peace and County Court*, §§ 35-86.

Nature and source of jurisdiction.

1. (1873.) Jurisdiction is a power constitutionally conferred upon a judge or magistrate to take cognizance of and determine causes according to law, and to carry his sentence into execution. *Johnson v. Jones*, 2 Neb. 126.

2. (1871.) The power to hear and determine a matter in controversy, is jurisdictional. It is *coram judice*, whenever a case is presented which brings the power into action. It may be exercised according to the rules of the common law, or by special direction, or informally. *Smiley v. Sampson*, 1 Neb. 56.

3. (1897.) The general equity jurisdiction of the district courts, including authority to enjoin the collection of a void tax, cannot be taken away or impaired by the legislature. *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369 (70 N. W. 955).

4. (1900.) The word "court," as used in section 582 of the code of civil procedure, means not only the tribunal over which a judge presides, but also the judge himself when exercising, at chambers, judicial power conferred by statute. *Porter v. Flick*, 60 Neb. 773 (84 N. W. 262).

5. (1900.) Courts possess a portion of the sovereign power; they are authorized by the constitution to decide between litigants; and authority to decide implies, always, power to make their judgments effective. *State, ex rel. Smyth, v. Kennedy*, 60 Neb. 300 (83 N. W. 87).

Constitutional and statutory provisions.

6. (1897.) Within the limits of the constitution the legislature may enact laws defining the jurisdiction and powers of all courts in the state, but such a law, to be valid, must be uniform as to all courts of the same grade, wherever situate. *State, ex rel. Smyth, v. Magney*, 52 Neb. 508 (72 N. W. 1006).

7. (1897.) Construction of section 19, article VI of the constitution, requiring uniformity as to jurisdiction, powers, proceedings, and practice of courts. *State, ex rel. Smyth, v. Magney*, 52 Neb. 508 (72 N. W. 1006).

8. (1897.) The territorial jurisdiction of the district and county courts, respectively, must be uniform. *State, ex rel. Smyth, v. Magney*, 52 Neb. 508 (72 N. W. 1006).

9. (1897.) Section 8, chapter 25, Session Laws of 1897, violates the constitutional rule of uniformity of jurisdiction and powers, as regards the district, county, and justices' courts of the state. *State, ex rel. Smyth, v. Magney*, 52 Neb. 508 (72 N. W. 1006).

10. (1897.) The constitution classifies or grades all courts which exist or may exist in the state and the legislature has no authority to alter such classification. *State, ex rel. Smyth, v. Magney*, 52 Neb. 508 (72 N. W. 1006).

11. (1897.) The words "jurisdiction and powers," in the sense they are employed in section 19, article VI of the constitution, embrace not only the subject-matter of the cause, but as well the territory within which a court may act or send process for service, so that the territorial jurisdiction of all courts of the same grade or class must be uniform. *State, ex rel. Smyth, v. Magney*, 52 Neb. 508 (72 N. W. 1006).

County boards as courts.

12. (1896.) While boards of county commissioners exercise functions judicial in their nature in the allowance and rejection of claims against the county, such boards are not courts in a constitutional sense, or within the general recognized acceptation of that term. *Sternberg v. State, ex rel. Keller*, 48 Neb. 299 (68 N. W. 190).

13. (1901.) County boards are not courts in a constitutional sense. *Sheibley v. Dixon County*, 61 Neb. 409 (85 N. W. 399).

Jurisdiction of the person.

14. (1878.) In cases arising under the constitution, laws, and treaties of the

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United States, the subject-matter gives the jurisdiction without regard to the citizenship of the parties. But when questions of that character are not involved, it is the citizenship of the parties alone that confers the jurisdiction, and it must appear on the face of the record that the citizenship of the parties supports the jurisdiction. *Blair v. West Point Mfg. Co.*, 7 Neb. 147.

15. (1878.) Except in proceedings *in rem*, the party whose rights are to be affected in any proceeding must be brought within the jurisdiction of the tribunal competent to pass upon the subject-matter, by service of process or his voluntary appearance. *South Platte Land Co. v. Buffalo County*, 7 Neb. 253.

16. (1884.) A cause of action which accrued in the state of Iowa under a staute of that state, which is not in contravention of the public policy of the laws of this state, may be enforced in the courts of this state. *Delahaye v. Heitkemper*, 16 Neb. 475 (20 N. W. 385).

Jurisdiction of subject-matter.

17. (1905.) A court of chancery has power, in a proper case, to compel a conveyance of land situated in another country or state, when the persons of the parties interested are within the jurisdiction of the court. *Fall v. Fall*, 75 Neb. 120 (106 N. W. 412).

18. (1905.) A decree and order to convey lands situated in this state, by a court in another state, can act only upon the person and cannot affect the title to the land. It imposes a mere personal obligation enforceable by the usual weapons of a court of chancery. *Fall v. Fall*, 75 Neb. 120 (106 N. W. 412).

19. (1905.) The court of one state cannot by its decree directly affect the legal title to lands situated in another state, but, if all the parties interested in the land are brought personally before a court of another state, its decree, establishing their equities in the land, would be conclusive upon them and thus in effect determine the title. *Fall v. Fall*, 75 Neb. 104 (106 N. W. 412).

Jurisdiction by consent of parties.

20. Jurisdiction of the subject-matter of an action cannot be conferred upon a court even by consent. (1897) *Burkland v. Johnson*, 50 Neb. 858 (70 N. W. 388); (1898) *Johnson v. Bouton*, 56 Neb. 626 (77 N. W. 57); (1899) *Dufrene v. Smeaton*, 59 Neb. 67 (80 N. W. 267); (1900) *Armstrong v. Mayer*, 60 Neb. 423 (83 N. W. 401); (1901) *Crawford v. Hathaway*, 61 Neb. 317 (85 N. W. 303); (1903) *Cizek v. Cizek*, 69 Neb. 800 (99 N. W. 28); (1903) *Edney v. Baum*, 70 Neb. 159 (97 N. W. 252).

21. (1873.) It is the law which gives jurisdiction; and consent of parties cannot, therefore, confer it in a matter which the law excludes. *Johnson v. Jones*, 2 Neb. 126.

22. (1902.) The jurisdiction of the district court in forcible entry and detainer, being derivative only, is not aided by consent of parties. *Selleck v. Feeney*, 2 Unof. 739 (89 N. W. 1003).

Scope and extent of jurisdiction.

23. (1871.) The courts have no jurisdiction of matters which are committed to the discretion of the legislature. *Bradshaw v. City of Omaha*, 1 Neb. 16.

24. (1884.) The courts of this state have jurisdiction of civil actions co-extensive with the boundaries of the state. *Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 16 Neb. 254 (20 N. W. 198; 49 Am. Rep. 718).

25. (1886.) When a district court has gained jurisdiction of a cause for one purpose, it may and should, retain it generally for relief. *Swift v. Dewey*, 20 Neb. 107 (29 N. W. 254).

26. (1889.) Courts of general equity and common law jurisdiction are not necessarily limited in exercise thereof by statutory provisions. *Earle v. Earle*, 27 Neb. 277, (43 N. W. 118; 20 Am. St. Rep. 667).

Exercise of jurisdictional authority.

27. (1878.) The court cannot deprive a suitor of a substantial right under the plea of the exercise of descretion. *Blair v. West Point Mfg. Co.*, 7 Neb. 146.

Determination of jurisdiction from petition.

28. (1876.) The amount claimed in the petition or bill of particulars determines the jurisdiction, yet if the verdict is for less than one hundred dollars the plaintiff is entitled to judgment thereon, but the court can render no judgment for costs in his favor. *Beach v. Cramer*, 5 Neb. 98.

Jurisdiction presumed.

29. (1901.) In a court of general jurisdiction, jurisdictional facts are presumed. *Parsons v. State*, 61 Neb. 244 (85 Neb. 65).

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Effect of adding name of unnecessary party.

30. (1881.) A plaintiff can not give a court jurisdiction of a given case by adding the name of an unnecessary party as defendant. *Behr v. Willard*, 11 Neb. 601 (10 N. W. 525).

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II. ESTABLISHMENT AND ORGANIZATION, AND PROCEDURE IN GENERAL.

A. Terms, Adjournment, and Time of Holding Court.

Appointment of term of district court.

31. (1879.) The power granted by section 26, article XVI of the constitution, is a continuing power, and is not exhausted by user. *Candy v. State*, 8 Neb. 482.

32. (1879.) The statute authorizes a judge of a district court, upon request of the county commissioners of a county, to call a special term of court for that county for the transaction of general business, at least twenty days notice thereof to be given. *McElvoy v. State*, 9 Neb. 157 (2 N. W. 378).

33. (1879.) Section 26, article XVI of the constitution, authorizes the judges of the district court to fix the time of holding courts in their respective districts. This refers to regular terms. There is no authority under this provision to call special terms of court. *McElvoy v. State*, 9 Neb. 157 (2 N. W. 378).

34. (1879.) A judge may, on his own motion, call a special term of court for any county of his district for the trial of criminal offenses therein. And having authority to make the order, the fact that he recites therein the authority as derived from the constitution will not invalidate it. *McElvoy v. State*, 9 Neb. 157 (2 N. W. 378).

35. (1880.) The terms of the county courts, as fixed by statute, commence on the first Monday and continue to and include the third Monday of each calendar month. *Ryan v. State Bank*, 10 Neb. 524 (7 N. W. 370).

36. (1892.) The general rule is that a court cannot be held at a time when there is clearly no authority to hold it, and if there was no statutory authority to that effect the district court in those districts having but one judge could not be held in two counties of the same district at the same time, but, under the constitution and statutes of this state, terms of the district court may be held at the same time in different counties of the same judicial district, and, when necessary, the district court sitting in any county may be continued into and held during the term fixed for holding such court in any other county within the district, or, it may be adjourned and held beyond such time. *Tippy v. State*, 35 Neb. 368 (53 N. W. 208).

37. (1899.) By section 25, chapter 19, Compiled Statutes 1897, a judge of the district court is authorized to appoint and hold a special term in any county in his district for the transaction of any business that may properly come before such court. *Nelson v. Farmland Security Co.*, 58 Neb. 604 (79 N. W. 161).

37a. (1906.) The judge of the district court may call a special term for the transaction of the general business of the court if he deem it necessary. *Russell v. State*, 77 Neb. 519 (110 N. W. 380).

38. (1899.) By section 25, chapter 19, Compiled Statutes 1897, a judge of the district court is authorized to appoint and hold a special term of court in any county of his district for the transaction of any judicial business that may properly come before him. *Nelson v. Alling*, 58 Neb. 606 (79 N. W. 162).

Adjournment.

39. (1876.) Where the written order adjourning a term of court, made by the judge in vacation, entitled to name the term, held, that it was intended to apply to the regular term next following the promulgation of the order. *Smith v. State*, 4 Neb. 277.

40. (1876.) It is not error to adjourn the regular term of a court, fixed by law to be holden on the 13th of September in vacation by the written order of the judge until the 13th of December following, at which time the grand jury, summoned for the regular term, were returned and impaneled, an indictment found, trial and conviction had. *Smith v. State*, 4 Neb. 277.

41. (1876.) Under provisions of the statute authorizing the district judge by written order to adjourn court, "if sick or for any other sufficient cause unable to attend," the reasons for such adjournment are not subject to review by the supreme court. *Smith v. State*, 4 Neb. 277.

42. (1899.) Where the record shows an order adjourning to a future day in the term, and judicial proceedings carried on in the interval, it will be presumed, in

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favor of regularity, that there has been a reconvention and an express or implied vacation of the order of adjournment. *Green v. Morse*, 57 Neb. 391 (77 N. W. 925; 73 Am. St. Rep. 761).

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43. (1899.) Notwithstanding an order adjourning court to a subsequent day of the term the court may revoke it and reconvene before the time fixed in the order of adjournment. *Green v. Morse*, 57 Neb. 391 (77 N. W. 925; 73 Am. St. Rep. 761).

44. (1899.) An adjournment of court to a subsequent day in the term is merely an intermission, and neither adjourns the term nor deprives the judges of control of the proceedings. *Green v. Morse*, 57 Neb. 391 (77 N. W. 925; 73 Am. St. Rep. 761).

44*a*. (1906.) The judge of the district court has power for sufficient reason to adjourn a regular term of court to a future time or without day, and this may be done by an order to that effect sent to the clerk of the court before the time fixed for holding the regular term. *Russell v. State*, 77 Neb. 519 (110 N. W. 380).

45. (1906.) Where the record shows an order adjourning a term of the district court to a future day, and judicial proceedings in the interval, it will be presumed, if necessary to support the jurisdiction of the court over such proceedings, that the order of adjournment was vacated, and the court reconvened. *Back v. State*, 75 Neb. 603 (106 N. W. 787).

Continuation of term.

46. (1879.) A cause was tried at the November, 1877, term of the district court, and taken under advisement, and a final decree rendered at the March, 1877, term of said court, and the bill of exceptions was signed on the 4th day of May thereafter. *Held*, On a motion to quash the bill of exceptions, that the trial term continued until a decision was rendered. *Wineland v. Cochran*, 8 Neb. 528.

Holding court on Sunday or holidays.

47. (1899.) No court can be opened, nor any judicial business be transacted, on Sunday, or on any legal holiday, except certain matters specifically designated in the statutes. *Deere, Wells & Co. v. Hodges*, 59 Neb. 288 (80 N. W. 897).

Rules of court in general.

——— Power to make.

48. (1896.) Courts of general jurisdiction possess inherent power to make and enforce needful rules for the transaction of business before them, and in the absence of a clear abuse of such power their discretion in that regard will not be controlled by courts of appellate jurisdiction. *Andres v. Kridler*, 49 Neb. 535 (68 N. W. 938).

——— Effect and conclusiveness.

49. (1899.) If there is room for construction, that given to its rules by a court or a judge thereof will generally be accepted as conclusive. *Hunter v. Union Life Ins. Co.*, 58 Neb. 198 (78 N. W. 516).

50. (1899.) The rules of the supreme court are not necessarily governable in matters before the district courts or the judges thereof. The portion of section 899, code of civil procedure, which made them so was applicable, when enacted, to the courts as then organized and the existing conditions, but the constitutional changes in the organization of the courts and the changes in the conditions have rendered it inapplicable. *Hunter v. Union Life Ins. Co.*, 58 Neb. 198 (78 N. W. 516).

B. Rules of Decisions, Adjudication, Opinions and Records.

Adherence to decisions of English law courts, see *Common Law*, § 4.

Opinions by court commissioners, see *Court Commissioners*, § 1.

Previous decisions as controlling precedents.

——— In general.

51. (1890.) A decision of the supreme court as to property rights is controlling on a subsequent case where all the material facts bearing on the question of ownership are the same. *Whitney v. Preston*, 29 Neb. 243 (45 N. W. 294).

52. (1891.) A construction of a remedial statute, established by a previous case, and long acquiesced in by the bar will not be disturbed, though a different one might have been adopted had it been before the court for the first time. *Phenix Ins. Co. v. Swantkowski*, 31 Neb. 245 (47 N. W. 917).

53. (1896.) Where a line of decisions, although erroneous, has become a rule of property it should be adhered to until changed by statute; but in the absence of complications resulting from property rights it is the undoubted privilege, if not indeed the duty, of courts to re-examine questions, and modify or overrule previous

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decisions shown to be fundamentally wrong. *State v. Hill*, 47 Neb. 456 (66 N. W. 541).

54. (1898.) The judgment below may be affirmed upon a record presenting no proposition of law which has not been settled by repeated decisions. *Stevens v. State*, 56 Neb. 556 (76 N. W. 1055).

55. (1903.) On a question of practice, the many former decisions of the supreme court will be adhered to without critical investigation of the grounds on which they rest. *Palmer v. Mizner*, 70 Neb. 200 (97 N. W. 334).

55*a*. (1908.) The decision of the supreme court upon a former hearing of the same case is controlling only as to the actual point then determined. *Schwanenfeldt v. Chicago, B. & Q. R. Co.*, 80 Neb. 790 (115 N. W. 285).

——— **Ruling in district court as res adjudicata in same case.**

56. (1891.) In a district where there are two judges, a demurrer to an amended petition was overruled by Judge B. and leave given the defendant to answer, which he did. Afterwards the cause came on for trial before Judge A., who sustained an objection to the introduction of any evidence, on the ground that the petition failed to state a cause of action. *Held*, Error. That the ruling of one judge upon a matter directly involved in the case is binding upon the other, unless for cause it is set aside. *Marvin v. Weider*, 31 Neb. 774 (48 N. W. 825). [Overruled. 61 Neb. 841; 69 Neb. 533; 69 Neb. 764; 1 Unof. 6.]

57. (1903.) The overruling of a demurrer does not prevent a finding, after the evidence has been taken, that there is no cause of action. *Sporer v. McDermott*, 69 Neb. 533 (96 N. W. 232).

——— **Effect of overruling former decision.**

58. (1898.) On review the rule stated in an overruled case *held* not to control a judgment following it, though the judgment was rendered before the case was overruled. *Mayer v. Nelson*, 54 Neb. 434 (74 N. W. 841).

——— **Dictum.**

59. (1877.) Dictum or general remarks of a judge, expressed in an opinion, should be understood with reference to the case at bar, and not extended to other classes of cases. *McConnell v. Dewey*, 5 Neb. 385.

60. (1905.) The determination of a matter which is involved in the litigation and discussed at the bar is not to be regarded as mere dictum, even though it is only indirectly involved in the decision of the question upon which the case turns. *Lancaster County v. McDonald*, 73 Neb. 453 (103 N. W. 78).

——— **Decisions of federal courts as precedents for state courts.**

61. (1872.) The construction placed by the United States circuit court upon a federal statute is not binding upon the s. supreme court. Its decision will be respectfully considered, but will not preclude an examination of its soundness. *Franklin v. Kelley*, 2 Neb. 79.

62. (1872.) The United States supreme court and the supreme court of this state are peers. The decisions of the former upon the federal constitution and laws are binding on the latter; the decisions of the latter upon the constitution and laws of Nebraska are binding on the former. The decisions of neither upon questions of general jurisprudence are binding upon the other. *Franklin v. Kelley*, 2 Neb. 79.

63. (1889.) Upon questions involving the construction of a law of congress, the decision of the supreme court of the United States is the supreme law, and by which the state courts are bound. *Bressler v. Wayne County*, 25 Neb. 468 (41 N. W. 356).

64. (1895.) A decision of the United States supreme court that a city may tax intrastate business of telegraph company transacted within its limits is binding on the state courts. *Western Union Telegraph Co. v. City of Fremont*, 43 Neb. 499 (61 N. W. 724; 26 L. R. A. 698).

65. (1896.) The construction placed upon provisions of the federal constitution by the supreme court of the United States must be followed by state courts in all matters to which such provisions are applicable. *State, ex rel. Board of Transportation, v. Sioux City, O. N. & W. R. Co.*, 46 Neb. 682 (65 N. W. 766; 31 L. R. A. 47).

66. (1903.) The supreme court of the United States is the final expositor of federal statutes, and its decisions construing such statutes and determining their force and effect are conclusively binding upon the state courts. *McLucas v. St. Joseph & G. I. R. Co.*, 67 Neb. 612 (97 N. W. 312).

67. (1904.) The state courts are bound by the decisions of the United States su-

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preme court regarding the proper construction of a clause of the federal constitution and its application to the question involved in the litigation. *State v. Insurance Co. of North America*, 71 Neb. 348 (102 N. W. 1022).

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Overruling former decision.

68. (1905.) In order to overrule a former decision deliberately made, the supreme court should be convinced not merely that the case was wrongly decided, but that less injury will result from overruling than from following it. *City of Wahoo v. Nethaway*, 73 Neb. 54 (102 N. W. 86).

68*a*. (1907.) When a former decision of the supreme court has established a rule of property, which has been relied upon for many years as the foundation of real estate titles, the court will not overturn such rule although it cannot assent to the reasoning upon which it is based. *Grandjean v. Beyl*, 78 Neb. 354 (114 N. W. 414).

Syllabus as the law of the opinion.

69. (1891.) Law of a case will not be recapitulated in the syllabus where it has been stated on a former hearing. *Omaha & R. V. R. Co. v. Chollette*, 33 Neb. 143 (49 N. W. 1114).

70. (1892.) There is an unwritten rule in this court that the members thereof are bound only by the points stated in the syllabus of each case. Each judge in the body of an opinion necessarily must be permitted to state his reasons in his own way, without binding the members of the court to assent to all such reasoning, although they may concur in the conclusions reached. *Holliday v. Brown*, 34 Neb. 232 (51 N. W. 839).

Decision in extradition.

71. (1904.) The courts of this state are bound by a decision of a governor of a sister state in extradition proceedings. *Dennison v. Christian*, 72 Neb. 703 (101 N. W. 1045; 117 Am. St. Rep. 817).

Previous decisions in same case as law of the case.

——— In general.

72. The determination of questions presented to the supreme court, in an appellate proceeding, becomes the law of the case, and, ordinarily, will not be re-examined when the cause is again brought up for review. 1888) *O'Brien v. Gaslin*, 24 Neb. 559 (39 N. W. 449); (1896) *Fuller v. Cuningham*, 48 Neb. 857 (67 N. W. 879); (1895) *Ripp v. Hale*, 45 Neb. 567 (64 N. W. 454); (1896) *Coburn v. Watson*, 48 Neb. 257 (67 N. W. 171); (1898) *Omaha Life Ass'n v. Kettenbach*, 55 Neb. 330 (75 N. W. 827); (1899) *Mead v. Tzschuck*, 57 Neb. 615 (78 N. W. 262); (1899) *Richardson Drug Co. v. Teasdall*, 59 Neb. 150 (80 N. W. 488); (1899) *Wittenberg v. Mollyneaux*, 59 Neb. 203 (80 N. W. 824); (1899) *Home Fire Ins. Co. v. Johansen*, 59 Neb. 349 (80 N. W. 1047); (1899) *Hayden v. Frederickson*, 59 Neb. 141 (80 N. W. 494); (1900) *Leavitt v. Bell*, 59 Neb. 595 (81 N. W. 614; (1900) *Motley v. Motley*, 60 Neb. 593 (83 N. W. 830); (1900) *Nebraska Savings & Exchange Bank v. Brewster*, 59 Neb. 535 (81 N. W. 441); (1900) *Todd v. Houghton*, 59 Neb. 538 (81 N. W. 508); (1900) *Barker v. Wheeler*, 60 Neb. 470 (83 N. W. 678; 83 Am. St. Rep. 541); (1900) *School District v. Fiske*, 61 Neb. 3 (84 N. W. 401); (1901) *Barton v. Shull*, 62 Neb. 570 (87 N. W. 322); (1901) *City of Omaha v. Bowman*, 63 Neb. 333 (88 N. W. 521); (1901) *Holt v. Schneider*, 61 Neb. 370 (85 N. W. 280); (1901) *Chicago, B. & Q. R. Co. v. Yost*, 61 Neb. 530 (85 N. W. 561); (1902) *Gadsen v. Thrush*, 63 Neb. 881 (89 N. W. 403); (1903) *Connecticut Trust & Safe Deposit Co. v. Fletcher*, 5 Unof. 1 (96 N. W. 988); (1903) *Merrill v. Van Camp*, 4 Unof. 794 (96 N. W. 617); (1904) *Hamilton Nat. Bank v. American Loan & Trust Co.*, 72 Neb. 81 (100 N. W. 202); (1905) *Ridgley v. United States Fidelity & Guaranty Co.*, 73 Neb. 874 (103 N. W. 669); (1905) *First Nat. Bank of Plattsmouth v. Gibson*, 74 Neb. 236 (105 N. W. 1081); (1905) *New Omaha Thomson-Houston Electric Light Co. v. Rombold*, 73 Neb. 259 (102 N. W. 475; 106 N. W. 213); (1906) *Topping v. Cohn*, 77 Neb. 310 (109 N. W. 151).

73. A previous ruling by the appellate court upon a point distinctly made, may be only authority in other cases, to be followed or affirmed, or to be modified or overruled according to its intrinsic merits, but in the case in which it is made it is more than authority; it is final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves. (1885) *O'Donohue v. Hendrix*, 17 Neb. 287 (22 N. W. 548); (1886) *Leighton v. Stuart*, 19 Neb. 546 (26 N. W. 198); (1886) *Lane v. Starkey*, 20 Neb. 586 (31 N. W. 238); (1886) *Chicago, B. & Q. R. Co. v. Hull*, 24 Neb. 740 (40 N. W. 280).

74. (1885.) A previous ruling by the

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appellate court, upon a point distinctly made, may be only authority in other cases, to be followed or affirmed, or to be modified or overruled, according to its intrinsic merits, but in the case in which it is made it is more than authority, it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves. *Hiatt v. Brooks*, 17 Neb. 33 (22 N. W. 73). [Modified. *City of Hastings v. Foxworthy*, 45 Neb. 676.]

75. (1886.) Matters that have been adjudicated in a former suit will not be considered in a second action. *Nelson v. Bevins*, 19 Neb. 715 (28 N. W. 331).

76. (1897.) A judgment or ruling of the supreme court in a case or point distinctly and finally made will be held to be the law of the case in which made throughout its course of litigation without regard to the number of times it may be brought before the court, or the intrinsic merits of such judgment or ruling. *Meyer v. Shamp*, 51 Neb. 424 (71 N. W. 57).

77. (1899.) When the evidence is substantially the same as on a former appeal, the weight and effect to be given such evidence must be considered as foreclosed by the former decision on that point. *Mead v. Tzschuck*, 57 Neb. 615 (78 N. W. 262).

78. (1899.) Decision on former appeal as to ownership of property *held* conclusive upon the parties and their privies. *Klamp v. Klamp*, 58 Neb. 748 (79 N. W. 735).

79. (1900.) It is a settled rule in the supreme court that a legal principle involved in the trial of a case, when once determined, becomes thereafter the law of the case, binding not only upon the trial court, but the supreme court as well, and will not, ordinarily, be re-examined in a subsequent review of the proceedings of an inferior court had in the further trial of the action. This rule, however, is not applicable to decisions rendered on questions of fact; in such cases, the decision as to the sufficiency of testimony on a particular feature of the case, as disclosed by the record on the first trial, is not binding in a subsequent trial, where the testimony is, or may be presumed to be, materially different, in the investigation of which a reviewing court is to be controlled by the record then before it, uninfluenced by such prior decision. *Missouri P. R. Co. v. Fox*, 60 Neb. 531 (83 N. W. 744).

80. (1900.) When after a deed is held on appeal to be testamentary in character and the case remanded, the pleadings are amended and a reformation of the deed prayed for, the opinion will not be deemed *res adjudicata* as to the alleged mistake in the deed. *Pinkham v. Pinkham*, 60 Neb. 600 (83 N. W. 837).

81. (1901.) Decisions on review become the law of the case and settle conclusively the points adjudicated. *Anheuser-Busch Brewing Ass'n v. Hier*, 61 Neb. 582 (85 N. W. 832).

82. (1901.) The decision of questions presented to the supreme court in reviewing the proceedings of the district court becomes the law of the case and, for the purposes of the litigation, settles conclusively the points adjudicated. *Smith v. Neufeld*, 61 Neb. 699 (85 N. W. 898).

83. (1901.) Where, in a criminal prosecution, instructions given the jury are assigned as error and on appeal such instructions held properly given, and on a subsequent trial the same instructions are given and again assigned as error, the decision of the question on the first appeal will be held to be the law of the case and followed in reviewing the case on the appeal last taken. *Argabright v. State*, 62 Neb. 402 (87 N. W. 146).

84. (1904.) The precise question decided by the supreme court upon appeal or error cannot be relitigated upon a retrial of the same case in the district court. *Supreme Court of Honor v. Tracy*, 72 Neb 742 (101 N. W. 1021).

85. (1905.) When a question in controversy has been once finally decided, it becomes the law of the case, and is binding on the parties and those claiming under or through them in all subsequent stages of the litigation. *Lowe v. Prospect Hill Cemetery Ass'n*, 75 Neb. 85 (106 N. W. 429).

86. (1905.) The decision of a law question by the supreme court upon the first appeal of a cause will ordinarily be adhered to upon a second appeal as the law of the case. No exception to this rule will be made when the question so determined is one of practice, and the parties have been guided by such decision in the second trial of the case. *Williams v. Miles*, 73 Neb. 193 (102 N. W. 482; 105 N. W. 181; 106 N. W. 769).

87. (1905.) It is the settled doctrine in

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this jurisdiction that a legal principle involved in the trial of a case, when once determined, becomes thereafter the law of the case, binding not only upon the trial court, but the supreme court as well, and will not ordinarily be re-examined in a subsequent review of the proceedings of an inferior court had in the further trial of the action. *Porter v. State*, 73 Neb. 792 (103 N. W. 669).

87*a*. (1906.) The determination of questions presented to the supreme court in its review of the proceedings of an inferior tribunal become the law of the case, and ordinarily will not be re-examined in a subsequent review of the proceedings of the inferior tribunal on a second trial or hearing of the cause. *Hargadine v. Omaha B. & T. R. Co.*, 76 Neb. 729 (107 N. W. 864).

88. (1905.) Where the supreme court has in a proper proceeding declared as a matter of law that a judgment of the district court is valid and cannot be collaterally attacked, such holding will ordinarily be treated as the law of the case in all subsequent proceedings involving the determination of that question. *Parrotte v. Dryden*, 73 Neb. 291 (102 N. W. 610).

89. (1905.) An amended answer, in an action to recover for injuries from an electric light company by a lineman who alleged negligence in uninsulated wires, on rehearing after a reversal wherein it is admitted such wires were not insulated, it being denied in the original answer, does not put in issue new facts so as to overthrow the law of the case on the former hearing. *New Omaha Thomson-Houston Electric Light Co. v. Rombold*, 73 Neb. 259 (102 N. W. 475; 106 N. W. 213).

89*a*. (1906.) The supreme court on a second appeal of the same case will not re-examine questions of law presented and determined on the first appeal unless the opinion first expressed is manifestly erroneous. *Brewster v. Meng*, 76 Neb. 560 (107 N. W. 751).

90. (1906.) An appellate court, on a second appeal of a case, will not ordinarily re-examine questions of law presented by the first appeal, but where the case was on the first appeal remanded generally for a new trial and the same questions are presented on the second trial, the appellate court is not bound to follow opinions on questions of law presented on the first appeal and may re-examine and reverse its rulings on such questions, and should do so when the opinion first expressed is manifestly incorrect. *Eccles v. Walker*, 75 Neb. 722 (106 N. W. 977).

——— **Definition and application.**

91. (1901.) "The law of the case" is a rule of expediency which should not be lightly disregarded, but it should be restricted to such questions as have been presented to, and decided by, the supreme court at the former hearing of the same case and those necessarily involved in such decision and should not apply to a mere expression of opinion in regard to matters not actually involved in the decision, nor should it apply to questions referred to by intimation only and not determined. *First Nat. Bank of Hastings v. Farmers & Merchants Bank*, 2 Unof. 104 (95 N. W. 1062).

——— **Divided court.**

92. (1902.) The rule that a prior decision of the supreme court in a given cause is the law of the case in all subsequent proceedings as to matters passed upon or involved in the decision, does not apply to propositions of law upon which the members of the court taking part therein were equally divided. *Baldwin v. Burt*, 2 Unof. 377 (96 N. W. 401).

——— **Matters decided by implication.**

93. (1900.) A question once decided by the supreme court in the trial of a case will be held to be the law of the case during its future course of procedure, and will not be overturned unless manifestly incorrect. This rules applies, not only to points expressly decided, but to all questions presented in the record and necessarily involved in the decision rendered. *State, ex rel. Seth Thomas Clock Co., v. County Commissioners of Cass County*, 60 Neb. 566 (83 N. W. 733).

94. (1901.) The settled rule of the supreme court, that the determination of questions presented to it in review of the proceedings in a case in the district court becomes the law of the case for all subsequent proceedings, applies not only to all points expressly touched upon in the opinion, but to all questions raised by the record and necessarily involved in the decision. *Oldig v. Fisk*, 1 Unof. 124 (95 N. W. 492).

95. (1903.) Matters expressly, or by distinct and necessary implication, adjudicated at a former hearing, will not be

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considered again in the same case. *Edney v. Baum*, 70 Neb. 159 (97 N. W. 252).

96. (1905.) A point necessarily determined by the supreme court upon appeal becomes the law of the case, and ordinarily will not be departed from in the further course of the litigation, unless clearly wrong, so that it cannot be supported upon reason or authority. *First Nat. Bank of Plattsmouth v. Gibson*, 74 Neb. 236 (104 N. W. 174).

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——— Matters not actually litigated.

97. (1900.) The rulings upon the first appeal settle definitely, for the purposes of the litigation, all questions adjudicated; but mere expressions of opinion respecting matters not actually involved in the decision have no binding force. *Wittenberg v. Mollyneaux*, 60 Neb. 583 (83 N. W. 842).

98. (1902.) As it is the settled practice of the supreme court that a judgment will not be reversed for errors not argued in the briefs of counsel, a decision affirming a judgment does not become a precedent as to any question not argued or expressly presented to the court, and left unnoticed in the opinion, although it might have been raised, and, if raised, have been decisive of the case. *Larson v. First Nat. Bank of Pender*, 66 Neb. 595 (92 N. W. 729).

——— Reversing and correcting former holding.

99. (1895.) Where a judgment has been reversed on appeal and the case remanded generally and the same questions are presented on retrial, the appellate court on a second appeal may re-examine and reverse its former rulings. *City of Hastings v. Foxworthy*, 45 Neb. 676 (63 N. W. 955; 34 L. R. A. 321). [Modified. 52 Neb. 642; 55 Neb. 330; 59 Neb. 349.]

100. (1900.) It is not permissible for an appellate court, on a subsequent appeal of a cause, to reconsider and correct an erroneous decision made by it in the same case on a former appeal. *Wittenberg v. Mollyneaux*, 60 Neb. 583 (83 N. W. 842).

——— Question of fact not affected.

101. (1900.) The rule that a question once decided by the supreme court becomes the law of the case applies to questions of law and not of fact, where the conclusion reached is based upon testimony materially different. *State, ex rel. Seth Thomas Clock Co., v. County Commissioners of Cass County*, 60 Neb. 566 (83 N. W. 733).

102. (1901.) Where on review in error proceedings in the supreme court it is held that the evidence on the trial of the case is insufficient to support an allegation in the pleadings, and on retrial of the case the evidence in support of such allegation is substantially the same as in the first trial, the former ruling will be adhered to and followed as the law of the case as to the sufficiency of such evidence. *Bank of Stockham v. Alter*, 61 Neb. 359 (85 N. W. 300).

103. (1901.) The defendant on a former trial was found guilty of murder in the first degree, and on error to the supreme court the evidence was examined and found sufficient to support the verdict. A subsequent trial resulted in a like verdict and on error it is again urged that the evidence is insufficient to support the verdict. The evidence against the defendant in the last trial being substantially the same and fully as strong and convincing, the decision on the former trial has become the law of the case. *Argabright v. State*, 62 Neb. 402 (87 N. W. 146).

104. (1902.) Where the evidence at a new trial is, or may be presumed to be, materially different from that at a trial already reviewed by the supreme court, in a subsequent review it will investigate the record uninfluenced by the former decision, except so far as questions of law were there adjudicated, which apply equally to the evidence at each trial. *State v. Paxton*, 65 Neb. 110 (90 N. W. 983).

105. (1902.) The rule that a decision of the supreme court is the law of the case, not only as to the points expressly considered in the opinion but as to all matters necessarily involved in the judgment rendered, has not the same application where the evidence at successive trials of the same cause is so materially different as to affect the conclusions reached. *State v. Paxton*, 65 Neb. 110 (90 N. W. 983).

106. (1902.) The rule of the "law of the case," does not apply to questions of fact determined by the supreme court between the same litigants in the same cause of action, when there is a material and substantial change in the testimony reviewed at the different hearings. *Phelps County Farmers Mutual Ins. Co. v. Johnston*, 66 Neb. 590 (92 N. W. 576).

Opinions by commissioners.

107. (1893.) The commissioners themselves file no opinions. It is their duty

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to examine records, hear arguments, consider the authorities bearing upon the questions involved, and write opinions conforming to their views. In all these respects they are to act independently of the court, but their opinions have no force or effect until the syllabus of each case is approved by the court and filed by it. *In re Supreme Court Commissioners*, 37 Neb. 655 (56 N. W. 298).

108. (1895.) The fact that opinions are prepared by the commissioners of the supreme court is no indication that such cases have not been examined by the judges. All questions of law, and, so far as practicable, questions of fact, are considered by each of the judges and commissioners; and opinions are invariably submitted for examination and criticism by the entire membership of the court. *Randall v. National Building, Loan & Protective Union*, 43 Neb. 876 (62 N. W. 252).

109. (1903.) Where opinions are prepared by commissioners, they must be permitted, necessarily, to state their reasons in their own way, without binding the court to all that is said *arguendo*, even though it concurs in the conclusions of law and express findings of fact. *Williams v. Miles*, 68 Neb. 479 (96 N. W. 151).

110. (1903.) Opinions expressed by the commissioners on matters not essential to the decision, while properly set forth to advise counsel that their arguments in briefs or at the hearing have been duly considered, do not become necessarily the law of the case, and will not preclude further investigation of such points, should they come before the court once more. *Williams v. Miles*, 68 Neb. 479 (96 N. W. 151).

111. (1903.) Where opinions are prepared by commissioners, they must be permitted, necessarily, to state their reasons in their own way, without binding the court to all that is said *arguendo*, even though it concurs in the conclusions of law and express findings of fact. *Modern Woodmen of America v. Colman*, 68 Neb. 665 (96 N. W. 154).

112. (1904.) An unofficial opinion of a court commissioner is not the opinion of the court. The conclusion reached is approved, and the recommendation adopted. The law of the case is to be derived from the judgment of the court, and the questions necessarily determined thereby. *Hoagland v. Stewart*, 71 Neb. 106 (100 N. W. 133).

113. (1904.) The opinions of the commissioners of the supreme court, designated as "unofficial" have no value as precedent or authority in the sense in which the doctrine of *stare decisis* is applied. The court has not necessarily approved all the propositions of law advanced as indicated either in the syllabi or in the opinions themselves. *Flint v. Chaloupka*, 72 Neb. 34 (99 N. W. 825; 117 Am. St. Rep. 771).

114. (1905.) Opinions prepared by the commissioners of this court and published officially, are in all respects to be regarded as the opinions of the court. It is immaterial whether a commissioner or one of the judges formulates the opinion of the court. *Lancaster County v. McDo[illegible]*, 73 Neb. 453 (103 N. W. 78).

Records.

——— How kept.

115. (1901.) The record of the proceedings of the district court as kept in the journal entries, is the legal and authentic evidence of judgments and orders of the court. *Morrill v. McNeill*, 1 Unof. 651 (91 N. W. 601).

——— Amendment.

116. (1877.) Courts retain authority over their records after the entry of judgment, and possess authority to supply a record which has been lost or destroyed, and in doing so must be governed by the rules of evidence. A court may amend its record to correspond with the facts, and this may be done from the judge's notes, or any other satisfactory evidence. *Garrison v. State*, 6 Neb. 274.

117. (1900.) A court may amend its records at a subsequent term upon satisfactory evidence. *Ackerman v. Ackerman*, 61 Neb. 72 (84 N. W. 598).

——— Correcting.

118. (1895.) The power to correct errors in their own proceedings is inherent in all courts of general jurisdiction, and in the exercise of that discretion they are governed not alone by this solicitude for the rights of litigants but also by considerations of justice to themselves as instruments provided for the impartial administration of the law. *Webber v. Kirkendall*, 44 Neb. 766 (63 N. W. 35).

119. (1896.) A court of record has the inherent authority to amend its records so as to make them conform to the facts. This power extends as well to supplying

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omissions as to correcting mistakes, and in the exercise of the power the court is not confined to an examination of the judge's minutes or other written evidence; it may proceed upon any satisfactory evidence. *School District No. 1 v. Bishop*, 46 Neb. 850 (65 N. W. 902).

120. (1896.) A court has power, even after the term at which judgment was rendered, to correct its record for the purpose of making it disclose truthfully what occurred in the course of its proceedings. *Wachsmuth v. Orient Ins. Co.*, 49 Neb. 590 (68 N. W. 935).

121. (1897.) A trial court, after an appeal has been perfected therefrom, has no power to so correct its records, that, in fact, a modification of the judgment already appealed from shall be effected. *Andresen v. Lederer*, 53 Neb. 128 (73 N. W. 664).

122. (1897.) A court of record has the inherent power to correct its own records, even after appeal, so that such amended record may show correctly the history of the proceedings before the appeal was taken. *Andresen v. Lederer*, 53 Neb. 128 (73 N. W. 664).

——— **Statutes requiring stenographers to furnish copies.**

123. (1896.) Section 49 of an act entitled "An act to amend chapter 13, Revised Statutes of 1866, entitled 'Courts,'" and containing a provision requiring stenographers to furnish a copy of the evidence free of charge in certain cases, passed and approved February 27, 1879, is unconstitutional and void, because said act amends section 5 of an act passed and approved February 19, 1877, without referring in its title to said section or act and without repealing said section 5. *Morgan v. State*, 48 Neb. 798 (67 N. W. 780). [Overruled. *State v. Cornell*, 50 Neb. 526.]

124. (1897.) The act entitled "An act to amend chapter 13 of the Revised Statutes of 1866, entitled 'Courts,'" approved February 27, 1879 (Session Laws, p. 82), was an act complete in itself, and the provisions therein made for stenographic reporters and their compensation were germane to its purposes. *State, ex rel. Carey, v. Cornell*, 50 Neb. 526 (70 N. W. 56).

125. (1903.) The law makes no provision for the certification by the shorthand reporter of the proceedings of the district court, hence a transcript of his notes, although accompanied by a formal certificate, is not admissible as independent evidence. *Jordan v. Howe*, 4 Unof. 667 (95 N. W. 853).

——— **Withdrawal or removal.**

126. (1896.) A trial court should never permit a document introduced in evidence to be withdrawn unless the party so withdrawing it, at the time, leaves with the reporter a concededly correct copy of the document withdrawn; and the furnishing of such copy should be made a condition precedent for leave to withdraw the original document. *Macfarland v. West Side Improvement Ass'n*, 47 Neb. 661 (66 N. W. 637).

127. (1896.) The supreme court will not, as a matter of course, permit a record to be withdrawn for the purpose of amending a bill of exceptions; and especially is this true where it appears that a failure to incorporate into the bill of exceptions all the evidence is due to the laches of the party seeking the amendment. *Macfarland v. West Side Improvement Ass'n*, 47 Neb. 661 (66 N. W. 637).

——— **Waiver of record.**

128. (1891.) To constitute waiver of the record as required by section 444 of code, plaintiff and defendant must agree thereto at the term when final judgment is rendered. *Colonial & United States Mortgage Co. v. Foutch*, 31 Neb. 282 (47 N. W. 929; 10 L. R. A. 803).

III. CONCURRENT AND CONFLICTING JURISDICTION.

Jurisdiction of state courts for death in sister state, see *Death*, § 18.

Jurisdiction of state courts over proceeding in bankruptcy, see *Bankruptcy*, §§ 61-66.

Jurisdiction of state courts over interstate commerce, see *Carriers*, §§ 29, 30.

Exclusiveness of special tribunal.

129. (1892.) Where a statute upon a particular subject has provided a special tribunal for the determination of questions pertaining to such subject, the jurisdiction of such tribunal is exclusive, unless otherwise expressed or clearly implied from the act. *Hendreschke v. Harvard High School*, 35 Neb. 400 (53 N. W. 204).

130. (1900.) Where a right is given by statute and a specific remedy is provided designating the tribunal for the enforcement thereof, the jurisdiction of such tri-

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bunal is exclusive unless the law otherwise provides. *Armstrong v. Mayer*, 60 Neb. 423 (83 N. W. 401).

Jurisdiction of police court in civil actions.

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See, also, *Municipal Corporations*, §§ 146-150.

130*a*. (1897.) Section 8, chapter 25, Session Laws 1897, violates the constitutional rule of the uniformity of jurisdiction and powers, as regards the district, county, and justice's courts of the state. *State, ex rel. Smyth, v. Magney*, 52 Neb. 508 (72 N. W. 1006).

130*b*. (1884.) Under the title of "An act to provide for the organization, government, and powers of cities of the second class having more than ten thousand inhabitants," the legislature cannot invest the police judge with "concurrent and coextensive jurisdiction with county courts of all ordinary civil actions." *Holmberg v. Hauck*, 16 Neb. 337 (20 N. W. 279).

Priority of decision.

131. (1892.) While the rule founded upon comity which subsists between judicial tribunals is that the court which first acquires jurisdiction of the persons and subject-matter of the action will retain the cause until it is finally determined, yet, where the parties, while such suit is pending and undetermined, submit the controversy therein involved, without objection, to another tribunal having jurisdiction of the subject-matter, the judgment pronounced in the latter court is binding upon the parties. *Gregory v. Kenyon*, 34 Neb. 640 (52 N. W. 685).

131*a*. (1906.) Where two courts have concurrent jurisdiction, that which first takes cognizance of the case has the right to retain it to the exclusion of the other; and where property is *in gremio legis*, if it be a court of rightful jurisdiction, no other court can interfere and wrest from it the jurisdiction first obtained. *Terry v. State*, 77 Neb. 612 (110 N. W. 733).

Priority of jurisdiction.

132. (1895.) It is a rule recognized by both state and federal courts that the court which first acquires jurisdiction of the subject of an action will retain such jurisdiction until the final determination of the controversy. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463 (62 N. W. 899).

Judgment of sister state.

133. (1905.) The clause of the constitution of the United States requiring full faith and credit to be given in each state to the public acts, records and judicial proceedings of every other state does not prevent the courts of this state from examining the records of the courts of a sister state to ascertain whether or not that court had jurisdiction of the subject-matter. *Fall v. Fall*, 75 Neb. 120 (106 N. W. 412).

134. (1905.) When the courts of a sister state having jurisdiction of the parties and of their equitable rights in all of the property owned by one or both of them, by its findings and decree determine those rights, such decree must, under the provisions of the federal constitution, be given full faith and credit by the courts of this state. *Fall v. Fall*, 75 Neb. 104 (106 N. W. 412).

State and federal courts.

135. (1875.) All the territory embraced within the boundaries of the state was withdrawn from the jurisdiction of the federal courts by the act admitting the state into the union. *Painter v. Ives*, 4 Neb. 122.

136. (1896.) After a federal court has acquired jurisdiction of the parties and subject-matter of a controversy, a state court may not by injunction or otherwise interfere with the exercise of such jurisdiction. *Prugh v. Portsmouth Savings Bank*, 48 Neb. 414 (67 N. W. 309).

137. (1896.) A state court having no prior jurisdiction of the subject-matter will not, by injunction, restrain a plaintiff in whose favor judgment has been rendered in a federal court from proceeding to the execution of such judgment. *A fortiori*, it will not restrain a United States marshal from selling property levied upon to satisfy such judgment. *Prugh v. Portsmouth Savings Bank*, 48 Neb. 414 (67 N. W. 309).

138. (1896.) As a general rule, a state court will not enjoin parties to an action already in progress in a federal court from further proceeding therein. The exceptions to this rule are based upon the doctrine that in courts of concurrent jurisdiction that which first has obtained jurisdiction of the parties and subject-matter retains it for all purposes, and by all necessary process will protect itself in the exercise

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of that jurisdiction. *Prugh v. Portsmouth Savings Bank*, 48 Neb. 414 (67 N. W. 309).

139. (1900.) The United States circuit court having jurisdiction over a receiver and questions growing out of the administration of the assets of an insolvent bank, the supreme court will not interfere with such jurisdiction or the carrying out of its orders and judgments. *Schaberg v. McDonald*, 60 Neb. 493 (83 N. W. 737).

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IV. PROBATE COURTS.

Terms of county court, see *ante*, § 35.

Probate jurisdiction of supreme court, see *post*, § 170.

Nature of action in adoption proceedings, see *Adoption*, §§ 4, 5.

Authority of county judge to take depositions, see *Depositions*, § 5.

Jurisdiction to assign dower, see *Dower*, § 49.

Of settlement of estates, see *Executors and Administrators*, § 310.

Review of allowances of claims, see *Executors and Administrators*, §§ 147-172.

Jurisdiction to hear application by executor to sell realty, see *Executors and Administrators*, § 206.

Jurisdiction to allow claims against estates, see *Executors and Administrators*, §§ 97-99.

Dismissal of cause in probate court, see *Dismissal and Nonsuit*, §§ 46-49.

Jurisdiction in action to quiet title, see *Quieting Title*, § 43.

Nature and extent of jurisdiction.

In action on covenants, see *Covenants*, §§ 40-43.

140. (1876.) The probate court, under the provisions of sections 7-11 of the act approved March 3, 1873, in relation to powers and jurisdiction of probate courts, has a distinct jurisdiction as to the amounts authorized to be recovered, from that of a justice of the peace; its jurisdiction extends to cases where the amount claimed in the petition or bill of particulars exceeds $100. *Beach v. Cramer*, 5 Neb. 98.

141. (1879.) A county judge has the ordinary powers and jurisdiction of a justice of the peace; and in an action before him, under such jurisdiction, where the plaintiff in his bill of particulars claims the sum of $50, but recovers only $15, he is entitled to costs. *Martin v. Grover*, 9 Neb. 263 (2 N. W. 354).

142. (1881.) County judges have jurisdiction of actions of forcible entry and detainer. *Uhl v. Pence*, 11 Neb. 316 (9 N. W. 41).

143. (1881.) A county court has authority to amerce a sheriff for failing to return an execution issued by such court and delivered to him. *Ghost v. Hill*, 11 Neb. 472 (9 N. W. 642).

144. (1886.) County courts have no jurisdiction to hear and determine actions brought against officers for the penalty imposed by section 34, chapter 28, Compiled Statutes of 1885, for taking illegal fees. *Crow v. Bowen*, 19 Neb. 528 (26 N. W. 251).

144*a*. (1898.) The county court possesses exclusive original jurisdiction in probate matters, and questions relating to the settlement of estates must be adjudicated there in the first instance. *Boales v. Ferguson*, 55 Neb. 565 (76 N. W. 18).

144*b*. (1901.) In probate matters, the county court is a court of general jurisdiction, and, in such matters, its judgments are entitled to the presumptions that attach to other courts of that character. *Beer v. Plant*, 1 Unof. 372 (96 N. W. 348).

145. (1902.) The county courts of this state are courts of general jurisdiction as to all matters of probate, settlements of estates and guardianship. *Bennett v. Bennett*, 65 Neb. 432 (91 N. W. 409).

——— Statutes applicable.

146. (1881.) All provisions of statute applicable to courts of record in general, where no special provision to the contrary exists, must be held to apply to county courts. *Noakes v. Switzer*, 12 Neb. 176 (10 N. W. 536).

Practice in general.

147. (1885.) In term cases the practice to a considerable extent is the same as in the district court. And without doubt the same power exists to control its judgments during the term at which they are rendered. That the district court possesses the power to vacate or modify their judgments at the term at which they are rendered is unquestioned. *Volland v. Wilcox*, 17 Neb. 46 (22 N. W. 71).

147*a*. (1906.) An appeal lies from a final order or judgment of a county court in probate matters to the district court, whether such order or judgment be upon the merits or otherwise. *Weeke v. Wortman*, 77 Neb. 407 (109 N. W. 503).

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Hearing out of term.

148. (1879.) The provisions of the statute requiring the probate (county) judge to continue all cases undisposed of on the third Monday of each month, does not prevent the court from rendering judgment by confession or hearing and deciding cases by agreement at any time during the month. *Hansen v. Bergquist*, 9 Neb. 269 (2 N. W. 858).

149. (1879.) The county court has jurisdiction to try a case that by consent of the parties was continued over the regular term of that court as specified by statute. *Mapstick v. Ramge*, 9 Neb. 390 (2 N. W. 739; 31 Am. Rep. 415).

V. DISTRICT COURTS.

Term of, see *ante*, §§ 32-39.

Authority of district court to punish for contempt, see *Contempt*, §§ 41, 42.

Jurisdiction on apeal from allowance of claims against estates, see *Executors and Administrators*, §§ 158-160.

Jurisdiction to assign dower, see *Dower*, § 49.

Jurisdiction over divorce suits, see *Divorce and Alimony*, § 39.

Jurisdiction of, to dismiss action in another county, see *Dismissal and Nonsuit*, §§ 50, 51.

Jurisdiction of, in prosecution for violating liquor laws, see *Intoxicating Liquors*, §§ 259-260.

Jurisdiction in mandamus, see *Mandamus*, §§ 232-234.

Jurisdiction of district court over trespass, see *Trespass*, §§ 29, 30.

In general.

150. (1902.) The district courts are courts of general legal and equitable jurisdiction, and have power to determine legal or equitable relief according to the allegations and proof. *State, ex rel. Horton, v. Dickinson*, 63 Neb. 869 (89 N. W. 431).

Jurisdiction on appeal.

151. (1883.) Where a district court finds error in a judgment below it should retain the case for trial *de novo* except where the error consists in the lower court assuming wrongful jurisdiction. *Brondberg v. Babott*, 14 Neb. 517 (16 N. W. 845).

151*a*. (1906.) Where a judgment of a county court is reversed by a district court in a proceeding in error, the district court may retain such cause for trial. This rule applies to matters of probate jurisdiction as well as to civil actions. *Pranie v. Lompe*, 77 Neb. 377 (109 N. W. 496).

152. (1898.) Jurisdiction of the district court to review a judgment of an inferior court or board does not attach until a duly authenticated transcript of the record below has been filed. *New Home Sewing-Machine Co. v. Thornburg*, 56 Neb. 636 (77 N. W. 86).

Equity jurisdiction.

153. (1894.) The district courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute. *Cochran v. Cochran*, 42 Neb. 612 (60 N. W. 942); (1907) *Rhoades v. Rhoades*, 78 Neb. 495 (111 N. W. 122).

VI. SUPREME COURT.

Authority to punish for contempt, see *Contempt*, § 43.

Compensation of clerks or reporter of supreme court, see *Clerks of Courts*, §§ 54-56.

Commissioners of, see *Court Commissioners*.

Opinions by commissioners, see *Court Commissioners*, § 1.

Authority of supreme judge to issue writ of habeas corpus, see *Habeas Corpus*, § 38.

Nature of jurisdiction in general.

154. (1889.) The supreme court is intended as a court of review, the principal business being a re-examination of the judgments of the district courts. *Bell v. Templin*. 26 Neb. 249 (41 N. W. 1093).

154*a*. (1888.) Section 27 of chapter 19 of the Compiled Statutes of 1887, makes it the duty of the clerk of the district court to keep a record of the proceedings of the court, under the direction of the judge of such court. The supreme court has no jurisdiction or authority to exercise the functions of the district court in the matter of the preparation of the records of said court, its jurisdiction, except in certain cases, being appellate and not original. *State, ex rel. Wilkins, v. Le Fevre*, 25 Neb. 223 (41 N. W. 184).

Original jurisdiction.

Original jurisdiction in mandamus, see *Mandamus*, §§ 224-231.

To compel charitable institution to render an account, see *Charities*, § 8.

155. (1891.) The supreme court has jurisdiction to entertain proceedings by

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information in the nature of *quo warranto*, instituted for the purpose of determining the rights of persons claiming the office of governor. *State, ex rel. Thayer, v. Boyd*, 31 Neb. 682 (48 N. W. 739).

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156. (1892.) The primary object of the supreme court is to review cases tried in the district courts. It is an appellate tribunal and it is given original jurisdiction in a few limited cases, most of which are extraordinary remedies for the purpose of preventing a failure of justice. *Miller v. Wheeler*, 33 Neb. 765 (51 N. W. 137).

157. (1902.) The superintendent authority of the king's bench over inferior tribunals is, to the extent that it may be exercised by the use of the writ of mandamus, included in, and part of, the original jurisdiction given by the constitution to the supreme court. *State, ex rel. Reynolds, v. Graves*, 66 Neb. 17 (92 N. W. 144.

158. (1894.) The original jurisdiction conferred by the constitution upon the supreme court, when not expressly restricted, is concurrent with that of the district courts of proper counties, and will be entertained in such cases and manner, and upon such terms, as shall be prescribed by said supreme court by its order made in each case before commencement of the action and in accordance with its rules already or hereafter formulated. *In re Petition of Attorney General*, 40 Neb. 402 (58 N. W. 945).

159. (1895.) The supreme court is one of limited jurisdiction both original and appellate. Its original jurisdiction is prescribed and limited by the constitution, and its appellate jurisdiction is prescribed and limited by statute. *Johnson v. Parrotte*, 46 Neb. 51 (64 N. W. 363).

160. (1896.) It is not within the power of the legislature to confer upon the supreme court original jurisdiction over subjects not enumerated in the constitution. *State, ex rel. King, v. Hall*, 47 Neb. 579 (66 N. W. 642).

161. (1896.) The original jurisdiction of the supreme court is by section 2, article VI of the constitution, restricted to cases relating to the revenue, civil cases to which the state is a party, mandamus, *quo warranto*, and *habeas corpus*. The constitution has not conferred upon the supreme court original jurisdiction to award a writ of prohibition as an independent remedy. *State, ex rel. King, v. Hall*, 47 Neb. 579 (66 N. W. 642).

162. (1896.) The original jurisdiction of the supreme court, conferred upon it by the constitution, is confined to "cases relating to the revenue, civil cases in which the state shall be a party, mandamus, *quo warranto*, and *habeas corpus*." *State, ex rel. Dahlman, v. Piper*, 50 Neb. 25 (69 N. W. 378).

163. (1898.) Jurisdiction conferred upon the supreme court in direct terms by the constitution may be exercised, though no rules of procedure have been provided by the legislature. *State, ex rel. Broatch, v. Moores*, 56 Neb. 1 (76 N. W. 530).

164. (1901.) Owing to the numerous cases on the docket, it is the practice of the supreme court not to entertain original jurisdiction and advance cases for hearing in applications for a writ of mandamus brought by private persons for the enforcement of private rights, unless some good reason is made to appear why the application is not in the first instance made to the district court. *Armstrong v. Mayer*, 61 Neb. 335 (86 N. W. 489).

165. (1903.) The designation of cases in which the supreme court has original jurisdiction is a prohibition of it in other cases. *Edney v. Baum*, 70 Neb. 159 (97 N. W. 252).

165*a*. (1908.) The jurisdiction conferred upon the supreme court by the constitution "in all civil cases in which the state shall be a party" is not confined to cases in which the state has a mere pecuniary interest, but may extend to all cases in which the state, through its proper officers, seeks the enforcement of public right or the restraint of public wrong. *State v. Pacific Express Co.*, 80 Neb. 823 (115 N. W. 619).

165*b*. (1908.) A wrong of a nature which affects the rights and interests of people living in almost every city, town and village in the state, as well as persons living in the country, when committed by a public service corporation, is a public wrong. An action to restrain such a wrong by the state is within the jurisdiction of the supreme court. *State v. Pacific Express Co.*, 80 Neb. 823 (115 N. W. 619).

166. (1894.) The supreme court does not have original jurisdiction of an action to cancel levies of taxes upon insurance companies by a city in which such companies are doing business. *Aachen & Munich Fire Ins. Co. v. City of Omaha*, 72 Neb. 112 (100 N. W. 137).

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Contests of elections.

167. (1892.) There is no power in the legislature to constitute the supreme court a board to try contests of election, as the powers and duties of the court are essentially judicial in their nature and cannot be perverted from that purpose. *Miller v. Wheeler*, 33 Neb. 765 (51 N. W. 137).

168. (1892.) In an action to contest the election of certain judges of the district courts, *held*, that the limitation in section 2, article VI of the constitution, of the original jurisdiction of the supreme court to cases relating to the revenue, civil cases in which the state shall be a party, mandamus, *quo warranto*, and *habeas corpus*, was a prohibition upon the power of the court to entertain original jurisdiction in other cases, and that a contest of election is essentially a judicial proceeding. *Miller v. Wheeler*, 33 Neb. 765 (51 N. W. 137).

Jurisdiction of crimes.

169. (1902.) The only authority the supreme court has to take cognizance of crimes, is that given by the constitution in the grant of appellate jurisdiction. *State v. Missouri P. R. Co.*, 64 Neb. 679 (90 N. W. 877).

Probate jurisdiction.

170. (1896.) The supreme court has no original probate jurisdiction, and where a county court makes an order in reference to the disposition of the assets of a decedent's estate, having at the time jurisdiction of the subject-matter and the parties, the supreme court will not pass upon the validity of such order unless presented for review by a direct proceeding. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 48 Neb. 386 (67 N. W. 158).

Writ of prohibition.

171. (1896.) Whether a writ of prohibition may be allowed by the supreme court in aid of its appellate jurisdiction, *quære*. *State, ex rel. King, v. Hall*, 47 Neb. 579 (66 N. W. 642).

VII. FEDERAL COURTS.

Jurisdiction in general.

172. (1875.) The federal courts have no jurisdiction of the crime of larceny, alleged to have been committed on an Indian reservation in the state of Nebraska. *Painter v. Ives*, 4 Neb. 122.

173. (1875.) All the territory embraced within the boundaries of the state was withdrawn from the jurisdiction of the federal courts by the act admitting the state into the Union. *Painter v. Ives*, 4 Neb. 122.

174. (1901.) The judicial power of the United States does not extend to actions brought by individuals or corporations against a state. *State v. Chicago, R. I. & P. R. Co.*, 61 Neb. 545 (85 N. W. 556).

175. (1901.) An injunction issued by the circuit court of the United States cannot lawfully forbid the attorney general from suing for penalties claimed by the state under section 9 of the Maximum Freight Law (Comp. Stat. 1899, ch. 72, art. XII). *State v. Chicago, R. I. & P. R. Co.*, 61 Neb. 545 (85 N. W. 556).

Enjoining enforcement of state laws.

176. (1901.) The circuit court of the United States is without jurisdiction to enjoin a state from the enforcement of its own laws, and neither can it do so indirectly by enjoining the attorney general. *State v. Chicago, R. I. & P. R. Co.*, 62 Neb. 123 (87 N. W. 188).

Jurisdiction over judgment and records of state courts.

177. (1905.) The supreme court of the United States has exclusive final jurisdiction over the subject of the effect to be given in each state to the records and judgments of the courts of sister states. *Hadacheck v. Chicago, B. & Q. R. Co.*, 74 Neb. 385 (104 N. W. 818).

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COVENANTS.

ANALYSIS.

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II. CONSTRUCTION AND OPERATION.
Waiver of covenant, § 3.
What constitutes incumbrance, §§ 4-6.
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See, also, *Deeds*.

Liability of married woman on covenant of warranty, see *Husband and Wife*, § 180.

Set-off of breach of covenant against foreclosure, see *Mortgages*, § 486.

Compelling enforcement of, see *Specific Performance*.

I. NATURE AND VALIDITY.

Nature of covenant.

1. (1878.) A covenant against incumbrances is a present engagement that the grantor has an unincumbered title, and is not in the nature of an indemnity. *Chapman v. Kimball*, 7 Neb. 399.

1a. (1890.) An incumbrance is defined

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to be any right to or interest in land which may subsist in third persons to the diminution of the value of the land and not inconsistent with the passing of the fee in it by the deed of conveyance. *Burr v. Lamaster*, 30 Neb. 688 (46 N. W. 1015; 27 Am. St. Rep. 428; 9 L. R. A. 637).

Agreement for use of property.

2. (1900.) A covenant in a deed for the exchange of hotel property by which the grantee in one deed agrees that for a period named he will not use the property acquired by him for hotel purposes, is not void as being contrary to public policy. *Wittenberg v. Mollyneaux*, 60 Neb. 583 (83 N. W. 842).

II. CONSTRUCTION AND OPERATION.

Waiver of covenant.

3. (1900.) If a party waive a covenant conditionally and the condition is broken, the waiver ceases to be effective for any purpose. *Wittenberg v. Mollyneaux*, 60 Neb. 583 (83 N. W. 842).

What constitutes incumbrance.

4. (1878.) All incumbrances, within the meaning of the covenant against them, is said to be every right to, or interest in, the land, to the diminution in value of the estate, but consistent with the passage of the fee. *Chapman v. Kimball*, 7 Neb. 399.

5. (1890.) An incumbrance is any right to, or interest in, land which may subsist in third persons to the diminution of the value of the land and not inconsistent with the passing of the fee in it by deed of conveyance. *Burr v. Lamaster*, 30 Neb. 688 (46 N. W. 1015; 27 Am. St. Rep. 428; 9 L. R. A. 637).

6. (1903.) An unexpired term or lease, which prevents the grantee in a deed from recovering possession of the land described therein, is an incumbrance. *Brass v. Vandecar*, 70 Neb. 35 (96 N. W. 1035).

Incumbrances included.

7. (1890.) Covenants against incumbrances cover those unknown to purchaser, as well as those known. *Burr v. Lamaster*, 30 Neb. 688 (46 N. W. 1015; 27 Am. St. Rep. 428; 9 L. R. A. 637).

8. (1905.) An incumbrance includes all interest in the land which may subsist in a third person to the diminution of the value of the land, but consistent with the passing of the fee by conveyance; hence, an outstanding lease for a period of years is an incumbrance. *Albin v. Parmele*, 73 Neb. 663 (103 N. W. 304).

Covenants of warranty.

See, also, *post*, §§ 15-24.

9. (1881.) A covenant of warranty runs with the land, and may be availed of by suit in his own name by any one to whom the same shall come by deed. *Davidson v. Cox*, 11 Neb. 250 (9 N. W. 95).

10. (1885.) A covenant of warranty runs with the land and passes with the fee to any subsequent grantee of the same title. *Real v. Hollister*, 17 Neb. 661 (24 N. W. 333).

11. (1897.) Covenants of warranty not broken when made pass with the title, unaffected by the fact that the conveyances are by quitclaim deed. *Walton v. Campbell*, 51 Neb. 788 (71 N. W. 737).

12. (1899.) Covenants of warranty in a deed for the conveyance of real estate, not broken when made, pass with the title, through the subsequent conveyances are by quitclaim deeds. *Troxell v. Stevens*, 57 Neb. 329 (77 N. W. 781).

12*a*. (1901.) Conditions in a printed warranty furnished by a vendor which limit its benefit and operation, should be construed strictly as against such vendor. *Parsons Band Cutter & Self-Feeder Co. v Gadeke*, 1 Unof. 605 (95 N. W. 850).

13. (1902.) A covenant of warranty does not run with the land, but is broken, if at all, when made. *Sears v. Broady*, 66 Neb. 207 (92 N. W. 214).

Covenants of seizin.

14. (1875.) If a grantor, at the time of conveyance, is in exclusive possession under claim of title, the covenant of seizin is not broken, until the purchaser or those claiming under him are evicted by title paramount. *Scott v. Twiss*, 4 Neb. 133.

Covenants running with the land.

See, also, *ante*, §§ 9-13.

——— In general.

15. (1881.) Covenants running with land do not pass to a mortgagee as assignee. *Davidson v. Cox*, 11 Neb. 250 (9 N. W. 95).

16. (1885.) Where a deed of conveyance is denominated "warranty deed" upon its face, but which deed was a form in common use in other states, but not of the form used in this state, and a year later the grantor executed and delivered to the

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grantee a deed of the form and kind used in this state, conveying full covenants of warranty, such second deed is for the purpose of correcting the apparent omission in the first, and the covenants of title run with the land and pass to purchasers of the grantee. *Real v. Hollister*, 17 Neb. 661 (24 N. W. 333).

17. (1890.) A covenant runs with the land when either the liability to perform it or the right to take advantage of it passes to the assignee of the land. *Burr v. Lamaster*, 30 Neb. 688 (46 N. W. 1015; 27 Am. St. Rep. 428; 9 L. R. A. 637).

18. (1898.) The only difference between a personal covenant and one running with the land is that the latter inures to the benefit of subsequent holders. *Hesser v. Johnson*, 57 Neb. 155 (77 N. W. 406).

19. (1902.) A covenant in a deed of conveyance "that they are free from all incumbrances" does not run with the land so as to invest a remote grantee thereof with a right of action against the covenantor. *Estate of Watters v. Bagley*, 3 Unof. 706 (92 N. W. 637).

——— **Covenants broken when made.**

20. (1878.) Where a covenant is broken at the time of the conveyance, it does not run with the land. The obligation is merely personal, and is limited to the parties to the covenant, and confers no right of action on subsequent purchasers of the estate. *Chapman v. Kimball*, 7 Neb. 399.

21. (1880.) When a covenant in a conveyance of real estate is broken the instant it is made, it does not run with the land. The obligation is merely personal, and is limited to the parties to the covenant, and confers no right of action upon subsequent purchasers of the estate. *Davidson v. Cox*, 10 Neb. 150 (4 N. W. 1035).

22. (1895.) A covenant against incumbrances is a personal obligation and does not run with the land where it is broken at the time it is made. *Campbell v. McClure*, 45 Neb. 608 (63 N. W. 920).

23. (1903.) A covenant against incumbrances does not run with the land, but is broken as soon as made where at the time of the conveyance there is an unexpired lease of the premises. *Brass v. Vandecar*, 70 Neb. 35 (96 N. W. 1035).

——— **Use of property.**

24. (1903.) A condition in a deed conveying real estate by which it is provided, "That no malt, spirituous or vinous liquors shall be kept or disposed of on the premises conveyed, and that any violation of this condition, either by the grantee or any person claiming rights under him or her, shall render the conveyance void, and cause the premises to revert to the grantor, his heirs and assigns," is a valid condition subsequent which, until broken, runs with the land. *Jetter v. Lyon*, 70 Neb. 429 (97 N. W. 596).

III. PERFORMANCE OR BREACH.

Breach as grounds for attachment, see *Attachment*, § 8.

Breach in general.

25. (1886.) The covenant for title, or of seizin, is an assurance to the purchaser that the grantor has the very estate, in quantity and quality, which he purports to convey. If he has not such title, his covenant is broken immediately upon its being made. *Real v. Hollister*, 20 Neb. 112 (29 N. W. 189).

Persons liable.

26. (1898.) Where grantees covenanted that the premises should not be used for hotel purposes, and grantor afterward waived the covenant on condition that the maximum rate should be $1 per day and that the waiver should be void upon the charging of a higher rate, the waiver having been made when grantees were contemplating a sale to a stranger, *held*, on violation of the rate agreement, that original grantees became liable on their covenant. *Wittenberg v. Mollyneaux*, 55 Neb. 429 (75 N. W. 835).

Voluntary surrender.

27. (1892.) One who voluntarily surrenders to a third party asserting an adverse title, must in an action against his covenantor for a breach of warranty, establish the validity of the title he has recognized. *Cheney v. Straube*, 35 Neb. 521 (53 N. W. 479).

27*a*. (1884.) If the grantee in a conveyance of land, without the knowledge or consent of his grantor, surrender possession to one claiming under an adverse title, he can not thereafter maintain an action upon the covenants of warranty contained in the deed from his grantor, without alleging and proving that the title to which he surrenders is paramount to the title received form his grantor. *Snyder v. Jennings*, 15 Neb. 372 (19 N. W. 501).

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28. (1895.) A covenantee is not required to resist an action by the holder of the paramount title until actually dispossessed by legal process, but may recover against his covenantor after voluntarily surrendering to the holder of the better title. He at most assumes thereby the burden of establishing the title which he has thus recognized after surrendering to the holder of the better title. *Cheney v. Straube*, 43 Neb. 879 (62 N. W. 234).

29. (1897.) Where a cause has been tried in the district court on the theory that an averment of eviction under a title paramount has been sufficiently established by proof of a yielding to such asserted title by purchase of the adversary interest, the supreme court, while it may accept that theory, will not extend its operation so as to countenance an assumption that the yielding was earlier than the date of the quitclaim deed obtained by purchase of the paramount title. *Walton v. Campbell*, 51 Neb. 788 (71 N. W. 737).

Cancelation of deed not an eviction.

30. (1899.) A decree canceling a deed under which a grantee asserted title, the appointment of appraisers under the act for the relief of occupying claimants (Compiled Statutes, ch. 63) to assess the value of the lasting improvements of the grantee, and the confirmation of the report of the appraisers by the court, alone do not amount to an eviction, where the owner of the paramount title has neither elected to accept the value of the land nor to pay the occupant the value of his improvements, and the physical possession of the latter has not been disturbed. *Troxell v. Stevens*, 57 Neb. 329 (77 N. W. 781).

Judgment in ejectment.

31. (1901.) An adverse judgment in ejectment is not, of itself, in the absence of a disposition thereunder, or yielding thereto, an eviction such as will support an action for breach of a covenant of warranty. *Lundgren v. Kerkow*, 1 Unof. 66 (95 N. W. 501).

Permitting sale of prohibited goods.

32. (1901.) A covenant not to sell a certain class of goods in a building in competition with lessees of a portion thereof is to be broken by permitting other persons, who afterwards went into business therein in connection with the business of the lessors to sell such goods. *Herpolsheimer v. Funke*, 1 Unof. 471 (95 N. W. 688).

Assessment of taxes against premises.

33. (1902.) The covenants in a deed against incumbrances excepting all taxes and assessments and concluding with "which grantee assumes and agrees to pay," in the absence of any evidence that anything on that account was deducted from the purchase price, will not estop the grantee from defending against the payment of illegal and void assessments. Evidence of admissions examined, and *held* not to create an estoppel. *Orr v. City of Omaha*, 2 Unof. 771 (90 N. W. 301).

34. (1895.) A covenant against incumbrances is broken, where at the time of the conveyance, taxes had been assessed against the land, but were not due, and after their maturity the purchaser was obliged to pay them. *Campbell v. McClure*, 45 Neb. 608 (63 N. W. 920).

IV. ACTIONS FOR BREACH.

Accrual of right of action.

See, also, *ante*, §§ 20-23.

35. (1875.) An incumbrance by way of taxes upon land must be first paid, before the vendee can plead the same as a set-off in an action for the recovery of the purchase-money. *Mills v. Saunders*, 4 Neb. 190.

36. (1892.) A cause of action accures to a covenantee on his covenant of warranty, or for quiet enjoyment, upon eviction by the purchaser under a prior mortgage. *Cheney v. Straube*, 35 Neb. 521 (53 N. W. 479).

37. (1901.) A defendant in ejectment may not maintain an action against his grantor upon a covenant of warranty while remaining in possession of the land pending assessment of the value of improvements under the occupying claimants act. *Lundgren v. Kerkow*, 1 Unof. 66 (95 N. W. 501).

37*a*. (1908.) A covenant in a deed that "I hold said premises by good and perfect title," if untrue, is broken when made, and right of action at once accrues thereon although there has been no eviction. *Webb v. Wheeler*, 80 Neb. 438 (114 N. W. 636).

Right of action after buying in outstanding title.

38. (1901.) Where a grantee under a warranty deed conveys the land in turn, and the title fails by reason of the infancy of the one who conveyed to his grantor, and by purchasing the paramount title and conveying the same he satisfies the claims

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of his vendee and those claiming under him, he becomes reinvested with the covenants running with his deed, and entitled to maintain an action of covenant against his grantor. *Pritchett v. Redick*, 62 Neb. 296 (86 N. W. 1091).

What law governs.

39. (1894.) Where land in Iowa was sold and the conveyance executed in Nebraska, and there had been several prior conveyances, each of which contained a covenant of warranty against incumbrance, and of each of which there was the same existing breach, the law of Iowa will govern the rights of the parties in the enforcement of the covenant, in so far as it relates to the question of the covenant running with the land. *Riley v. Burroughs*, 41 Neb. 296 (59 N. W. 929).

Jurisdiction.

40. (1898.) The fact that the land is situated in a state where covenant against incumbrance runs with the land does not affect the question of jurisdiction of the county court, although the nature of the covenant is controlled by the *lex loci rei sitæ*. *Hesser v. Johnson*, 57 Neb. 155 (77 N. W. 406).

40*a*. (1895.) A justice of the peace has jurisdiction of an action for damages for breach of a covenant against incumbrances. *Campbell v. McClure*, 45 Neb. 608 (63 N. W. 920).

41. (1898.) A county court has jurisdiction, within the statutory limit of amount, in actions to recover damages for breach of covenant against incumbrances. *Hesser v. Johnson*, 57 Neb. 155 (77 N. W. 406).

41*a*. (1901.) An action on a covenant against incumbrances in a warranty deed is not an action involving the title to real estate, and when the amount sued for does not exceed $200, a justice of the peace has jurisdiction of such action. *Dafoe v. Keplinger*, 1 Unof. 440 (95 N. W. 674).

42. (1903.) A county court has jurisdiction, within the statutory limit of amount, in actions to recover damages for breach of covenant against incumbrances. *Brass v. Vandecar*, 70 Neb. 35 (96 N. W. 1035).

43. (1904.) A justice of the peace has no jurisdiction of an action to recover damages for a breach of a covenant for quiet enjoyment in a deed conveying real estate, where such breach consists of an eviction by one having a paramount title. *Holmes v. Seaman*, 72 Neb. 304 (101 N. W. 1030).

44. (1904.) A justice of the peace has jurisdiction of an action to recover damages for breach of a covenant for quiet enjoyment, when the damages do not exceed the same and the title to the land is not drawn in question. *Holmes v. Seaman*, 72 Neb. 300 (100 N. W. 417). [Overruled. *Holmes v. Seaman*, 72 Neb. 304.]

Limitations.

45. (1878.) A covenant against incumbrances is a present engagement that the grantor has an unincumbered title, and is not in the nature of a covenant of indemnity. The statute of limitations, therefore, commences to run at once, if an incumbrance existed at the time of the conveyance. *Chapman v. Kimball*, 7 Neb. 399.

46. (1887.) An action for damages for the breach of covenants of warranty of land is an action upon a specialty, within the meaning of section 10, code of civil procedure, and may be brought at any time within five years after the cause accrued. *Kern v. Kloke*, 21 Neb. 529 (32 N. W. 574).

47. (1897.) A covenant against incumbrances in a conveyance of land is, in effect, that the premises then are free from incumbrances; and if any incumbrances exist, the covenant is broken and a cause of action therefor accrues in favor of the convenantee, which will be barred by limitation in five years. *Bellamy v. Chambers*, 50 Neb. 146 (69 N. W. 770).

48. (1901.) An action on a covenant against incumbrances contained in a deed conveying real estate in Colorado is an action on a written contract, within the meaning of section 10 of the limitation law of this state. *Johnson v. Hesser*, 61 Neb. 631 (85 N. W. 894).

49. (1901.) Premises conveyed by warranty deed were at the time in possession of a third party under a verbal agreement of sale with a previous holder of the title. By subsequent litigation with vendee's grantee, a specific enforcement of this agreement was decreed. *Held*, That vendee's title failed at the time of the rendition of this decree, and the statute of limitations did not begin to run against action on the covenant of warranty till then. *Watson v. Heyn*, 62 Neb. 191 (86 N. W. 1064).

50. (1901.) Where a grantee from a

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minor conveys the property by warranty deed, and the title subsequently fails by reason of a disaffirmance by the minor, the covenants in the second deed were not broken until the disaffirmance of the first, and hence the statute of limitations did not begin to run against an action on such covenants until the disaffirmance. *Pritchett v. Redick*, 62 Neb. 296 (86 N. W. 1091).

Parties.

51. (1881.) The action for breach of the covenant should be brought by him who is the owner of the land; and as such the assignee of the covenant at the time it is broken. *Davidson v. Cox*, 11 Neb. 250 (9 N. W. 95).

52. (1887.) An action for the breach of covenants may be maintained by the direct covenantee irrespective of the question whether the covenant upon which it is brought would run with the land. *Kern v. Kloke*, 21 Neb. 529 (32 N. W. 574).

Pleading.

——— In general.

53. (1875.) A petition alleging that a guardian, from whom plaintiff's grantor derived title, "procured the sale of the premises by order of the proper court, as it is said, but as it now appears there is no record of any of the proceedings of such guardian sale, as required by law, and so far as the proper records show nothing appears properly and according to law," is insufficient as an allegation showing a breach of covenant against incumbrances. *Scott v. Twiss*, 4 Neb. 133.

54. (1902.) A petition in an action for breach of a covenant of title and quiet enjoyment, an allegation that an outstanding mortgage was foreclosed and the premises sold, but which fails to allege that the sale was confirmed and a sheriff's deed executed or that plaintiff was disturbed in his possession, fails to state a cause of action. *Merrill v. Suing*, 66 Neb. 404 (92 N. W. 618).

——— Averment of eviction.

55. (1873.) If the petition, in an action for breach of covenants of warranty, does not show when the cause of action accrued, by reason of ouster and dispossession of the premises, the statute of limitations cannot be interposed by a general demurrer. *Mills v. Rice*, 3 Neb. 76.

56. (1873.) In an action for breach of covenants of warranty, it is necessary to allege substantially an eviction by title paramount. *Mills v. Rice*, 3 Neb. 76.

57. (1892.) In an action for the breach of a covenant of warranty by the covenantee after eviction under a paramount title, it is not necessary to set out the facts attending the eviction or particularly describe the adverse title. It is sufficient to allege in general terms an eviction under a title paramount to that of the covenantor. *Cheney v. Straube*, 35 Neb. 521 (53 N. W. 479).

58. (1898.) In an action to recover damages for breach of covenants of warranty of title it is essential to allege in the petition that plaintiff has been evicted by title paramount. *Hampton v. Webster*, 56 Neb. 628 (77 N. W. 50).

58*a*. (1902.) In an action on a warranty deed for a breach of covenants of title and for quiet enjoyment, the plaintiff must allege and prove that he has been turned out of the possession of the granted premises, or some part thereof, or compelled to yield the possession thereof to one having a paramount title. *Merrill v. Suing*, 66 Neb. 404 (92 N. W. 618).

59. (1902.) A petition for an alleged breach of the covenant of general warranty in a deed, must allege an eviction, a surrender or an attorning by reason of a paramount title. *Sears v. Broady*, 66 Neb. 207 (92 N. W. 214).

——— Paramount title.

60. (1884.) If the grantee of a conveyance of land, without the knowledge or consent of his grantor, surrender possession to one claiming under an adverse title, he cannot maintain an action upon the covenant of warranty in the deed, without alleging a title paramount to his own. *Snyder v. Jennings*, 15 Neb. 372 (19 N. W. 501).

——— Allegation of mistake.

61. (1898.) In an action for damages for a breach of the covenant against incumbrances contained in a deed, an answer charging that the deed executed by the grantors does not contain a correct expression of the intention of the parties in regard to the transaction, sufficiently alleges the mutuality of the mistake. *Hotaling v. Tecumseh Nat. Bank*, 55 Neb. 5 (75 N. W. 242).

——— Plea of confession and avoidance.

62. (1901.) In an action to recover damages for breach of a covenant against

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incumbrances, a statement in the answer, to the effect that the plaintiff had retained out of the money due to the defendant a certain sum in settlement and full payment of the incumbrance discharged by the plaintiff, is a plea of confession and avoidance. Such plea is an implied admission of the existence and validity of the incumbrance. *Johnson v. Hesser*, 61 Neb. 631 (85 N. W. 894).

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Necessity of proof of eviction.

63. (1886.) In an action for the breach of covenant for quiet enjoyment, the plaintiff must allege and prove that he has been turned out of the granted premises or of some part thereof, or has yielded the possession thereof to a paramount title. *Real v. Hollister*, 20 Neb. 112 (29 N. W. 189).

64. (1886.) In an action on warranty deed for a breach of the covenant for quiet enjoyment the plaintiff must allege and prove that he has been turned out of the possession of the granted premises, or of some part thereof, or has yielded the possession thereof to the paramount title. *Anderson v. Buchanan*, 20 Neb. 272 (29 N. W. 935).

65. (1897.) To sustain an action on a covenant of warranty, or for quiet enjoyment in favor of a covenantee, it must appear that there has been an eviction or surrender by reason of a paramount title. *Troxell v. Johnson*, 52 Neb. 46 (71 N. W. 968).

66. (1899.) An action cannot be maintained on a covenant of warranty of title, where it appears that there has been no actual eviction or surrender of possession of the granted premises by reason of a paramount title. *Troxell v. Stevens*, 57 Neb. 329 (77 N. W. 781).

67. (1902.) In an action on a warranty deed for a breach of covenants of title and for quiet enjoyment, the plaintiff must allege and prove that he has been turned out of the possession of the granted premises, or some part thereof, or compelled to yield the possession thereof to one having a paramount title. *Merrill v. Suing*, 66 Neb. 404 (92 N. W. 618).

68. (1892.) A cause of action on a covenant of warranty, or for a quiet enjoyment, does not accrue in favor of the covenantee until eviction or surrender by reason of a paramount title. *Cheney v. Straube*, 35 Neb. 521 (53 N. W. 479).

Evidence.

——— Admissibility.

69. (1901.) On the trial of an action grounded on an alleged breach of a covenant against incumbrances a stipulation to the effect that the plaintiff had paid a certain sum to redeem the land from a tax lien, is an admission of the existence and validity of such lien. *Johnson v. Hesser*, 61 Neb. 631 (85 N. W. 894).

70. (1902.) In an action by a grantee of a deed against his grantor to recover for a breach of covenant against incumbrances, parol evidence is inadmissible to show that taxes were, by contemporaneous oral agreement, excepted from the terms of the deed. *Stanisics v. McMurtry*, 64 Neb. 761 (90 N. W. 884).

71. (1904.) In an action to recover damages for a breach of a covenant for quiet enjoyment in a deed conveying real estate, the defendant is not concluded by a recital of consideration in the instrument, but the real consideration may be proved by parol. *Holmes v. Seaman*, 72 Neb. 300 (100 N. W. 417).

——— Sufficiency.

72. (1885.) Where in an action against two defendants charging them with the making and the breach of a joint warranty in the sale and conveyance of real estate, the evidence is sufficient as to one, but insufficient as to the other defendant, the verdict and judgment being against both, and the one against whom the evidence was insufficient made no motion for new trial as to himself alone, the judgment will not be disturbed. *Real v. Hollister*, 17 Neb. 661 (24 N. W. 333).

73. (1885.) Evidence that real estate conveyed was recently purchased from the owner in possession, and soon afterwards sold and conveyed to another, there being no adverse claimant, the title and possession being conceded to be in the grantors of the lost conveyance, is sufficient to warrant a finding that the grantors were in possession of the land at the time of the execution of the conveyance. *Real v. Hollister*, 17 Neb. 661 (24 N. W. 333).

74. (1898.) Evidence in an action for damages for breach of warranty *held* to sustain a finding that the deed, although absolute in form, was intended as an indemnity against contingent liabilities and was in fact a mortgage, and the covenants of

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warranty were inserted by mistake. *Hotaling v. Tecumseh Nat. Bank*, 55 Neb. 5 (75 N. W. 242).

——— Sufficiency of proof of eviction.

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75. (1885.) Evidence that a court of equity has decreed a grantee trustee for another, and required a conveyance to such other person, and set aside such grantee's title, is sufficient proof of eviction to maintain an action for breach of covenant. *Real v. Hollister*, 17 Neb. 661 (24 N. W. 333.)

76. (1894.) Breach of covenant of warranty of title to land and for quiet enjoyment may be established *prima facie* by proof that the covenantee has been evicted or kept out of possession by one in actual possession claiming paramount title. *Heyn v. Ohman*, 42 Neb. 693 (60 N. W. 952).

Damages.

77. (1892.) The measure of damages for the breach of a covenant of warranty, or for quiet enjoyment, is the consideration paid for the land, with interest and the costs and expenses incurred in the suit by which the covenantee is evicted; and if the latter is obliged to purchase an outstanding title in order to protect his own, he may recover the amount paid for such paramount title, not exceeding the consideration paid by him. *Cheney v. Straube*, 35 Neb. 521 (53 N. W. 479).

77*a*. (1892.) A party who was the actual owner of a farm and in possession thereof, traded the same, subject to a mortgage of $800, but the grantee, in consequence of the omission of a deed in the grantor's chain of title on the record, was unable to effect a loan on the farm, in consequence of which the mortgage was foreclosed and the grants evicted. No fraud was charged against the grantor and he afterwards procured a second deed to supply the missing link in his chain of title. *Held*, That damages for the loss of the farm were too remote and could not be recovered against the grantor. *Lamb v. Buker*, 34 Neb. 485 (51 N. W. 285).

78. (1895.) A covenantee who paid taxes to discharge a lien existing when he received a deed containing a covenant against incumbrances may recover the amount of the lien from the covenantor in an action before a justice of the peace, as such an action does not relate to the title to the land. *Campbell v. McClure*, 45 Neb. 608 (63 N. W. 920).

79. (1897.) In an action for breaches of covenants of warranty in a deed for the conveyance of real property, while there may be a recovery for costs and attorneys' fees incurred but not paid in making a defense against an action hostile to the title purported to be conveyed by the warranty deed, this principle should not be extended to cover interest on such attorneys' fees and costs under the proofs made in this case. *Walton v. Campbell*, 51 Neb. 788 (71 N. W. 737).

80. (1903.) When the breach of covenant consists of the existence of an unexpired term or lease, the measure of damages, at least in absence of any special circumstances, will be the value of the use of the premises for the time during which the grantee has been deprived of such use. *Brass v. Vandecar*, 70 Neb. 35 (96 N. W. 1035).

81. (1903.) Where the grantor, who has covenanted against incumbrance, requests the grantee to take proceedings for the purpose of recovering possession, which fail, and agrees to pay the expenses thereof, such expenses, being actually incurred, may be recovered, in addition to the value of the use of the premises. *Brass v. Vandecar*, 70 Neb. 35 (96 N. W. 1035).

82. (1904.) It seems that in an action to recover damages for breach of a covenant for quiet enjoyment, growing out of an exchange of lands, the measure of damages is the value of the property to which the plaintiff was entitled, but which he failed to receive, in the transaction. *Holmes v. Seaman*, 72 Neb. 300 (100 N. W. 417).

83. (1908.) The measure of damages for breach of a covenant of title is the difference between the value of the land at the time of the breach, and the price he contracted to receive. *Webb v. Wheeler*, 80 Neb. 438 (114 N. W. 636).

84. (1908.) When the plaintiff is in possession of the premises and can recover the value of his improvements under the "occupying claimant's act," he cannot recover the value thereof in an action for damages for breach of a covenant of title. *Webb v. Wheeler*, 80 Neb. 438 (114 N. W. 636).

COVERTURES.

See, *Curtesy; Dower; Husband and Wife.*

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CREDITORS.

Rights of, as to chattel mortgage, see *Chattel Mortgages*, V.

Application for appointment of administrator, see *Executors and Administrators.*

Rights of subsequent creditors to attack transfer by debtor, see *Fraudulent Conveyances*, §§ 334-336.

Entitled to attack debtors conveyances as fraudulent, see *Fraudulent Conveyances*, §§ 314-323.

Who may assert invalidity of debtor's conveyances, see *Fraudulent Conveyances*, §§ 311-343.

Right of debtor to prefer one or more creditors, see *Fraudulent Conveyances*, §§ 124-166.

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CREDITORS' SUIT.

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Enforcement of lien of garnishment by creditor's suit, see *Garnishment*, §§ 79, 80.

Effect of notice of *lis pendens* on right of creditor, see *Lis Pendens*, § 10*a*.

Compelling creditor to marshal claims, see *Marshaling Assets and Securities.*

Action for sequestration of property of debtor, see *Sequestration.*

Right to subject trust estate to debts of beneficiary, see *Trusts*, § 136.

Nature and scope of remedy.

1. (1901.) The courts will use their efforts to protect a creditor against the fraudulent acts of his debtor, but as against his poor judgment and unfortunate trades they can afford no relief. *Selz, Schwab & Co. v. Hocknell*, 62 Neb. 101 (86 N. W. 905).

2. (1903.) There are two classes of creditors' bills, one to reach the equitable assets or property of the debtor on which an execution at law cannot be levied; the other in aid of an execution at law, as to set aside an incumbrance or a transfer of property made to defraud creditors. In the first class of cases the creditor must allege and show that he has exhausted his remedy at law, while in the second it is sufficient to show that his claim has been reduced to judgment and docketed in the county where the land lies which he seeks to subject to the payment of his claim. The equity court in such case is merely lending its assistance to the legal tribunal to remove a fraudulent obstruction interposed to the execution of its writ. *State Bank of Ceresco v. Belk*, 68 Neb. 517 (94 N. W. 617).

3. (1907.) A creditor's suit is an action *in rem* and not against the debtor personally, and a discharge by a court of bankruptcy is no bar thereto. *Flint v. Chaloupka*, 78 Neb. 594 (111 N. W. 465).

Adequate remedy at law.

4. (1898.) In absence of special circumstances rendering a levy of execution inadequate, a judgment creditor cannot invoke the aid of equity to subject the land of the debtor to the payment of the judgment. *Morrill v. Skinner*, 57 Neb. 164 (77 N. W. 375).

5. (1903.) The thing offered at an execution sale of real estate being the title which the judgment debtor had at the time the judgment became a lien, a subsequent fraudulent transfer of the property furnishes no ground for a creditors' bill, the remedy by execution being ample. *Newman Grove State Bank v. Linderholm*, 68 Neb. 364 (94 N. W. 616).

6. (1904.) Whenever, on the trial of a creditor's action, it appears that the plaintiff has a remedy at law, the equitable proceedings should be dismissed. *Brumbaugh v. Jones*, 70 Neb. 786 (98 N. W. 54).

Grounds of remedy.

7. (1894.) An action in the nature of a creditors' bill can be maintained in this state upon a judgment of the circuit court of the United States for the district of Nebraska. *First Nat. Bank of Chicago v. Sloman*, 42 Neb. 350 (60 N. W. 589; 42 Am. St. Rep. 707).

8. (1895.) The foundation of every creditors' bill is an unimpeachable judgment, and the plaintiff who exhibits such a bill as a condition precedent to his right to relief is required to plead and prove his ownership of a valid and unsatisfied judgment. *Johnson v. Parrotte*, 46 Neb. 51 (64 N. W. 363).

9. A judgment creditor, after an execution has been issued and returned *nulla bona*, may maintain a suit in equity to make his judgment effective as a lien on the land by removing obstructions calculated to make an execution sale unproductive. (1900) *First Nat. Bank v. Gibson*, 60 Neb. 767 (84 N. W. 259); (1901) *Coffield v. Parmenter*, 2 Unof. 42 (96 N. W. 283); (1902) *Howard v. Raymers*, 64 Neb. 213 (89 N. W. 1004).

10. (1901.) 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

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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. *Glover v. Hargadine-McKittrick Dry Goods Co.*, 62 Neb. 483 (87 N. W. 170).

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11. (1902.) Where a sreditor has obtained an attarhment lien in debtor's lifetime, and subsequently judgment and order of sale of attached real estate is entered against the debtor's executrix, jurisdiction to clear the title of the attached lands of the debtor's fraudulent deeds, does not depend upon insolvency of the debtor's estate. *First Nat. Bank of Madison v. Tompkins*, 3 Unof. 328 (91 N. W. 551).

12. (1903.) Allegations of collusion and fraud on the part of an administratrix and a county judge are sufficient to entitle a creditor to bring an action for an accounting without showing a technical refusal by the administratrix to sue. *McGlave v. Fitzgerald*, 67 Neb. 417 (93 N. W. 692).

——Effect of reversal of judgment after creditor's suit.

13. (1902.) Plaintiff recovered a decree in an action in the nature of a creditors' bill, setting aside an alleged fraudulent conveyance of real estate made by the judgment debtor, and directing a sale of the property to satisfy the judgment. Pending an appeal in the equity action the judgment which formed the basis of the suit was on error proceedings reversed by the supreme court. *Held*, That the decree rendered in the action in the nature of a creditors' bill is without suport for want of a valid judgment as its foundation, and that such decree should be reversed and the action dismissed. *Kudrna v. Ainsworth*, 65 Neb. 711 (91 N. W. 711).

Property or rights which may be subjected.

——In general.

14. (1898.) A creditors' bill may be maintained by a judgment creditor to reach any assets of the debtor subject to the payment of his debts, which cannot be reached by ordinary process of law. *German Nat. Bank v. First Nat. Bank*, 55 Neb. 86 (75 N. W. 531).

15. (1905.) A judgment creditor, with the aid of equity, may reach any property or interest of his debtor not exempt from execution, which with such aid, the said debtor might himself reach. *Weckerly v. Taylor*, 74 Neb. 84 (103 N. W. 1065).

16. (1897.) Property transferred by an insolvent, or a debtor under failing circumstances, under a contract which is void as against public policy, may be subjected to payment of his debts. *Hall v. Hart*, 52 Neb. 4 (71 N. W. 1009).

17. (1898.) Where the debtor's property, subject to the payment of his debts, has been wrongfully converted by a stranger, the creditor may, by suit in the nature of creditors' bill, reach the debtor's cause of action for conversion. *German Nat. Bank v. First Nat. Bank*, 55 Neb. 86 (75 N. W. 531).

——Choses in action or equitable rights.

18. (1871.) A judgment creditor may reach the unpaid purchase-money, for the sale of lands by a creditor's bill. *Filley v. Duncan*, 1 Neb. 134 (93 Am. Dec. 339).

19. (1871.) If an insolvent convert his property into notes, payable to a third party as his assignee, and the transaction is concealed from his creditors, a creditors' bill will lie to reach the fund, and the plaintiff therein will be entitled to it. *Rogers v. Jones*, 1 Neb. 417.

20. (1891.) Where a bill of sale given as security for a debt is not filed as the law directs to make it effective as to creditors, the property covered by it is liable to seizure in satisfaction of a judgment against the seller, while the property remains in his possession. *Conway v. St. Joseph Iron Co.*, 33 Neb. 454 (50 N. W. 326).

21. (1892.) Where an officer of a bank received notes, payable to an individual member of a partnership to secure the latter's private debts, knowing that the notes belonged to the company as proceeds of a sale of the firm business and stock, the notes were properly subjected to the payment of the firm debts in a creditors' bill by the partnership creditors. *Tolerton v. McLain*, 35 Neb. 725 (53 N. W. 667).

——Funds in custody of court.

22. (1887.) While the general rule is that funds in the hands of the clerk of a court are not subject to garnishment in an action at law, yet, in a proper case, a court of equity may subject such funds to the payment of the claims of a creditor. *Weaver v. Cressman*, 21 Neb. 675 (33 N. W. 478). [Overruled. *Anheuser-Busch Brewing Co. v. Hier*, 52 Neb. 424].

22*a*. (1897.) An action in equity will

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not lie to subject to the payment of the claim of a judgment creditor money held by the clerk of a court in his official capacity. *Anheuser-Busch Brewing Ass'n v. Hier*, 52 Neb. 424 (72 N. W. 588).

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——— **Real estate.**

23. (1883.) Lands in this state which have been conveyed to a non-resident of the state, to hinder or defraud creditors, may be subject to the payment of the debts of the actual owner thereof *Keene v. Sallenbach*, 15 Neb. 200 (18 N. W. 75).

24. (1888.) Where property is held by a trustee which cannot be made subject to an execution, an action in the nature of a creditors' bill, and for an accounting, will lie. *Stoll v. Gregg*, 23 Neb. 228 (36 N. W. 495).

25. (1901.) 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. *Cochran v. Cochran*, 62 Neb. 450 (87 N. W. 152).

26. (1902.) Real estate platted into lots and blocks and dedicated for a public cemetery cannot be reached by an equitable proceeding in the nature of a creditors' bill. *First Nat. Bank of Pawnee City v. Hazels*, 63 Neb. 844 (89 N. W. 378; 56 L. R. A. 765).

27. (1902.) An action in the nature of a creditors' bill cannot be maintained to set aside the conveyance of property which is exempt to the defendant as a homestead *Jayne v. Hymer*, 66 Neb. 785 (92 N. W. 1019).

Conditions precedent.

——— **Recovery of judgment.**

28. (1898.) Before one having a general claim against another can maintain a creditors' bill to enforce the same, he must first have reduced it to judgment. *Fairbanks v. Welshans*, 55 Neb. 362; (1901) *Moore v. Omaha Life Ass'n*, 62 Neb. 497 (87 N. W. 321).

29. (1901.) A creditor whose claim has not been reduced to judgment cannot maintain an action against an insolvent corporation for distribution of its assets. *Merchants Nat. Bank of Omaha v. McDonald*, 63 Neb. 363 (88 N. W. 492; 89 N. W. 770).

30. (1903.) In order to maintain an action in the nature of a creditors' bill in aid of execution, to set aside a deed and subject the land described therein to the payment of a judgment, it is necessary to prove by some competent evidence, the existence of a valid judgment. *Hayek v. Pracheil*, 4 Unof., 528 (95 N. W. 35).

31. (1904.) A creditor whose claim has not been reduced to judgment and who has neither a general nor specific lien on his debtor's property, is not entitled to have such property impounded as security for the claim, nor is such creditor entitled to an injunction restraining his debtor from disposing of some or all of his property, and mere insolvency and inability to reach a particular fund by garnishee process are not sufficient to take a case out of the general rule above stated. *Brumbaugh v. Jones*, 70 Neb. 786 (98 N. W. 54).

32. (1905.) A party cannot maintain an action in the nature of a creditors' suit to reach property of his debtor fraudulently conveyed until the claim has been reduced to judgment, and until judgment is obtained by the creditor the statute of limitations will not, under ordinary circumstances, commence to run against such a suit. *Ainsworth v. Roubal*, 74 Neb. 723 (105 N. W. 248).

——— **Exhaustion of legal remedies.**

33. (1888.) A judgment against a defendant subjecting personal property, held by the wife, to the payment of plaintiff's judgment against the husband, though silent as to whether such property is subject to execution, will not be molested. *Stoll v. Gregg*, 23 Neb. 228 (36 N. W. 495).

34. (1891.) In a proceeding to subject to the payment of a judgment property conveyed before judgment was recovered, upon a debt contracted for machinery for a mill, the plaintiff is not obliged to first exhaust his lien on the mill property where prior and superior liens are sufficient to more than absorb the same. *Allis v. Newman*, 33 Neb. 597 (50 N. W. 1048).

35. (1898.) When the legal estates of a judgment debtor have been exhausted, a petition in the nature of a creditors' bill will lie in order to subject to payment of the judgment land in which his estate is equitable only and which could not be reached on execution, or, if reached, could not be sold to advantage because of the

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clouded condition of the title. *Millard v. Parsell*, 57 Neb. 178 (77 N. W. 390).

36. (1900.) The exhaustion of the remedy at law against an indorser on the instrument merged into judgment, and who was not a party to the judgment proceedings, is not essential to the maintenance of an equitable action against the judgment debtors. *Thompson v. La Rue*, 59 Neb. 614 (81 N. W. 612).

37. (1901.) 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. *Cochran v. Cochran*, 62 Neb. 450 (87 N. W. 152).

38. (1901.) In a creditors' suit brought to set aside a fraudulent conveyance, return of execution *nulla bona* is conclusive of the question that the creditor has exhausted his legal remedy, and an answer which alleges that the debtor had property subject to levy upon execution, in the absence of an allegation of fraud or collusion on the part of the sheriff, does not state a defense. *Nebraska Nat. Bank v. Hallowell*, 63 Neb. 309 (88 N. W. 556).

39. (1902.) A creditor will not be required to exhaust the statutory proceedings in aid of execution before resorting to equity, to charge another creditor for chattel property fraudulently obtained and disposed of by the latter. *Chamberlain Banking House v. Turner-Frazer Mercantile Co.*, 66 Neb. 48 (92 N. W. 172).

Enforcing right by attachment.

40. The creditor, if he chooses, may, before reducing his claim to judgment, commence an action aided by attachment and seize the estate fraudulently conveyed by his debtor, and after judgment in the attachment suit he may enforce his lien by an action in the nature of a creditors' bill. This course may be pursued, whether the debtor is a resident of the state or a non-resident. (1883) *Keene v. Sallenbach*, 15 Neb. 200 (18 N. W. 75); (1885) *Kennard, Daniels & Co. v. Hollenbeck*, 17 Neb. 362 (22 N. W. 771); (1885) *Kimbro v. Clark*, 17 Neb. 403 (23 N. W. 788); (1905) *Ainsworth v. Roubal*, 74 Neb. 723 (105 N. W. 248).

Accounting by officer of insolvent corporation.

41. (1902.) It was error, in a creditors' bill, on a judgment against a corporation, to discharge the president of the corporation and the managing officer from an accounting for the assets which the evidence clearly showed he had received. *Benedict v. T. L. V. Land & Cattle Co.*, 66 Neb. 236 (92 N. W. 210).

Defenses.

42. (1898.) Matters which, if available at all, might have been urged in defense to an application for a deficiency judgment cannot be urged in defense of a creditors' suit to enforce such judgment. *Millard v. Parsell*, 57 Neb. 178 (77 N. W. 390).

43. (1907.) A fraudulent grantee cannot plead the subsequent discharge in bankruptcy of his grantor as a defense in a creditor's suit brought more than four months prior to the institution of the bankruptcy proceeding, where the land involved was never brought within the jurisdiction of the bankruptcy court. *Flint v. Chaloupka*, 78 Neb. 594 (111 N. W. 465).

Estoppel.

44. (1885.) Where a merchant sells his entire stock of goods to another, taking time notes in payment which he transfers to a third party, and a creditor of the merchant brings suit against him and attaches the goods in the hands of the purchaser, on the ground of fraud, but which suit he abandoned, and sued on a creditor's suit to subject a judgment, recovered by the transferee of the notes given in payment of the stock of goods against the maker thereof, to the payment of his debt, the defendant in such suit is estopped to set up as a defense a satisfaction of plaintiff's debt by means of his attachment suit. *Sayre v. Thompson*, 18 Neb. 33 (24 N. W. 383).

Creditors entitled to relief.

45. (1874.) An attaching creditor cannot maintain an action, in the nature of a creditor's bill, to have an alleged fraudulent conveyance from his debtor set aside. Such an action can only be maintained by a judgment creditor. *Weil v. Lankins*, 3 Neb. 384.

46. (1901.) A general creditor cannot maintain a creditor's suit. *Merchants Nat. Bank of Omaha v. McDonald*, 63 Neb. 363 (88 N. W. 492; 89 N. W. 770).

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47. (1902.) A trustee in bankruptcy, acting for the creditors of the bankrupt, may maintain an action in the nature of a creditors' bill to set aside a fraudulent conveyance without reducing the claims of the creditors to judgment. In all other things he possesses only such rights and powers as they can exercise for themselves. *Hood v. Blair State Bank*, 3 Unof. 432 (91 N. W. 701).

48. (1904.) Where a creditor has acquired a specific lien by the levy of an attachment, he is entitled to maintain a creditors' bill to remove obstructions to a sale of the premises, without reference to whether the judgment at law has, during the pendency of such creditors' suit, become dormant. *Coulson v. Saltsman*, 71 Neb. 495 (98 N. W. 1055).

Jurisdiction of district court.

49. (1903.) The district court is not deprived of jurisdiction in an action by creditors of an estate against the administratrix thereof and the county judge for an accounting of the estate property because plaintiff might have moved to retax the costs in the county court, or brought an action on the bond of the administratrix, or sued to recover the statutory penalty for taking illegal fees. *McGlave v. Fitzgerald*, 67 Neb. 417 (93 N. W. 692).

50. (1904.) When a creditors' bill is brought to set aside a cloud upon the title of property which has been seized in an attachment suit against a non-resident debtor, the court will look at the entire record in the attachment case to see whether jurisdiction was obtained therein. If from all the affidavits the essential facts to confer jurisdiction appear, the judgment will not be declared void. The defect in one affidavit may be supplied by the other and, if enough appears from all, it is sufficient. *Jones v. Danforth*, 71 Neb. 722 (99 N. W. 495).

Limitations.

51. (1888.) A creditor's suit brought to subject certain lands to the payment of a claim against an insolvent partnership, claiming that the premises are fraudulently held by another, is barred in four years after discovery of the fraud. *Hellman v. Davis*, 24 Neb. 793 (41 N. W. 309).

51*a*. (1905.) Actions for relief on the ground of fraud must be brought within four years from the discovery of the fraud or such facts and circumstances as are indicative thereof, and, if followed up, would lead to its discovery. *Weckerly v. Taylor*, 74 Neb. 84 (103 N. W. 1065).

Parties.

52. (1897.) A judgment creditor whose debtor has recovered in an action of attachment a sum of money from another which money is in the hands of the clerk of the court, should intervene as a party to the attachment in order to apply such funds to his claim. *Anheuser-Busch Brewing Ass'n v. Hier*, 52 Neb. 424 (72 N. W. 588).

53. (1901.) In a creditors' suit, where no receiver has been appointed or asked for, it is not necessary to allege that the suit is brought on behalf of all creditors who desire to join and contribute to the expense. *Nebraska Nat. Bank v. Hallowell*, 63 Neb. 309 (88 N. W. 556).

54. (1903.) To a petition in equity alleging fraudulent transfers of property and seeking to reach the fund conveyed, the debtor who transferred them is a necessary party. *First Nat. Bank of Plattsmouth v. Gibson*, 69 Neb. 21 (94 N. W. 965).

55. (1904.) Under the decedent law of this state, a non-resident who claims a life interest in lands located in this state, by virtue of a will which has never been probated in the courts of this state, is not a necessary party to a suit against the heirs at law of the decedent to subject the land to payment of the claims of creditors. *Coulson v. Saltsman*, 71 Neb. 495 (98 N. W. 1055).

Receivers.

56. (1903.) A plaintiff in a creditors' bill, who has been awarded a sale of lands but appeals from the decree because it refuses him any right against personal property, will not be refused the appointment of a receiver in the action on the ground that the lands have been conveyed by the judgment debtor subject to all its debts and liabilities. *Benedict v. T. L. V. Land & Cattle Co.*, 4 Unof. 471 (94 N. W. 962).

57. (1903.) A plaintiff in a creditors' bill, who has been awarded a sale of lands, but appeals from the decree, because it refuses him any right against personal property, will not be refused a receiver merely because his remedy by sale of the land is suspended by his own appeal. *Benedict v. T. L. V. Land & Cattle Co.*, 4 Unof. 471 (94 N. W. 962).

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Lien acquired by suit.

58. (1901.) The filing of a creditors' bill establishes a lien in favor of the plaintiff on the property or fund sought to be reached; an intervener in a creditor's suit is entitled to a lien from the date of his intervention. *Merchants Nat. Bank of Omaha v. McDonald*, 63 Neb. 363 (88 N. W. 492; 89 N. W. 770).

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59. (1904.) The beginning of a creditor's action gives a specific lien upon the property which it is sought to reach. It is of the nature of an equitable execution, and it is unnecessary to issue a legal execution upon the judgment during the pendency of the creditor's action, in order to prevent the judgment from becoming dormant so far as that specific property is concerned. *Flint v. Chaloupka*, 72 Neb. 34 (99 N. W. 825; 117 Am. St. Rep. 771).

Pleading.

——— Petition.

60. (1887.) Where an action in the nature of a creditor's bill is brought by a non-resident of the state against a non-resident on a judgment rendered in another state, on which an execution had been returned unsatisfied, to reach funds belonging to the debtor in the hands of a clerk of a district court, the petition must show that there is no property of the debtor within the state subject to attachment or garnishment. *Weaver v. Cressman*, 21 Neb. 675 (33 N. W. 478).

60*a*. (1881.) When a petition in equity, filed by judgment creditors of the defendant to subject his "interest" in certain real estate to the payment of the judgment, fails to show that such interest is merely equitable, as would render the title of a purchaser at execution sale uncertain, no case for equitable cognizance is presented, and the action will be dismissed. *Rosenfield v. Chada*, 12 Neb. 25 (10 N. W. 465).

61. (1897.) A creditors' bill to subject to the payment of a judgment against a husband realty conveyed to his wife by a stranger, does not state a cause of action, where plaintiff fails to allege that the debt of the husband existed at the date of the conveyance, or that the latter caused the property to be conveyed to his wife in expectation of becoming indebted. *Lavigne v. Tobin*, 52 Neb. 686 (72 N. W. 1040).

62. (1898.) Petition set out in opinion *held* to be a creditors' bill, and as such not to state a cause of action. *Fairbanks, Morse & Co. v. Welshans & Co.*, 55 Neb. 362 (75 N. W. 865).

63. (1898.) In an equitable action to subject the alleged fraudulently conveyed real property of a judgment defendant to the payment of the judgment against him, there is no sufficient foundation for an ordinary judgment against his transferee as a co-defendant if there is a failure to allege that the title of the said property by such transferee has been conveyed or subjected to a lien whereby the equitable relief sought has been rendered unavailable. *First Nat. Bank of Plattsmouth v. Gibson*, 57 Neb. 246 (77 N. W. 662).

64. (1899.) In a petition in the nature of a creditors' bill to annul a fraudulent conveyance the fact of the asserted fraud must be specifically stated, general allegations not being sufficient. *Kemper v. Renshaw*, 58 Neb. 513 (78 N. W. 1071).

65. (1902.) The allegation that an execution has been returned *nulla bona* is not necessary to render a creditors' bill invulnerable to demurrer. *Howard v. Raymers*, 64 Neb. 213 (89 N. W. 1004).

66. (1902.) Allegations of petition *held* to sufficiently show that plaintiff's judgment is based upon indebtedness contracted before the transfers of the property complained of. *Chamberlain Banking House v. Turner-Frazer Mercantile Co.*, 66 Neb. 48 (92 N. W. 172).

67. (1902.) In order to maintain a creditors' suit against a wife to set aside a conveyance made to her by a third person, plaintiff must allege and prove that the relation of creditor and debtor existed between himself and the husband at the time such conveyance was executed, or that it was executed fraudulently with the expectation on the part of the husband that he would become indebted to the plaintiff, and to prevent, hinder and delay him in the collection of such debt when contracted. *Jayne v. Hymer*, 66 Neb. 785 (92 N. W. 1019).

——— Answer.

68. (1888.) Defenses to a suit by a judgment creditor to subject realty, held in the name of the debtor's brother, to the payment of the judgment debt, that the brother was in fact the true owner, and, also, that the premises was a homestead and occupied as such by the debtor, and a

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prayer to have it so adjudged, are not inconsistent, and it is error to compel an election upon which he will stand. *Stubendorf & Co. v. Hoffman*, 23 Neb. 360 (36 N. W. 581).

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69. (1902.) A married woman held title to certain real estate and a judgment creditor of her husband filed a bill to subject the property to the payment of his judgment. The answer among other allegations contained the following: "Defendant denies every material allegation of the petition." *Held*, That as the plaintiff did not in any manner question the sufficiency of this answer in the district court he could not, on appeal, treat it as insufficient, or as confessing the allegations of the petition. *Doering v. Kohout*, 2 Unof. 436 (89 N. W. 268).

70. (1904.) Answer examined and *held* to state a good defense to the plaintiff's petition. *Baxter v. Avery*, 5 Unof. 316 (98 N. W. 667).

——— Issues and proof.

71. (1885.) Where the payee of a note given as a memorandum to show the amount to be paid by the maker from the proceeds of the sale of property delivered to him by the payee, and upon the maker purchasing real estate with such proceeds, taking title in his wife, the payee of the note by bringing an action in the nature of a creditors' suit to subject the premises to the payment of his judgment, abandons all equities he might have growing out of the original contract, and must prove the fraudulent character of the conveyance as must any other creditor. *Kimbro v. Clark*, 17 Neb. 403 (22 N. W. 788).

72. (1885.) Where after judgment and before the issuance of execution thereon, the defendant removed to another county, and the plaintiffs issued an execution to the original county, which was returned wholly unsatisfied for want of goods or lands, upon a creditors' bill being brought to subject a certain other judgment to the payment of said first named judgment, on the ground that said last named judgment was held in secret trust for the debtor in said first named judgment, and said bill contained an averment "that the said defendant, William H. Thompson, has no property whatever subject to sale on execution," *held*, sufficient. *Sayre v. Thompson*, 18 Neb. 33 (24 N. W. 383).

Evidence.

——— Admissibility.

73. (1884.) Where defendant is charged with the execution of a fraudulent deed, it is proper to allow him to testify to "the facts and circumstances relative to the conveyance." *Union Nat. Bank v. Harrison*, 16 Neb. 635 (21 N. W. 446).

——— Weight and sufficiency.

74. Evidence in a creditors' suit *held* sufficient to sustain a decree for plaintiff. (1894) *Vandecar v. Johnson*, 41 Neb. 577 (59 N. W. 918); (1894) *First Nat. Bank v. Sloman*, 42 Neb. 350 (60 N. W. 589; 47 Am. St. Rep. 707); (1895) *Steinkraus v. Korth*, 44 Neb. 777 (62 N. W. 1110); (1899) *Millard v. Russell*, 57 Neb. 178 (77 N. W. 390); (1899) *Parlin O. & M. Co. v. Ulrich*, 57 Neb. 780 (78 N. W. 275).

75. (1884.) The equities of the case being all with the defendants, the judgment in their favor upheld. *Union Nat. Bank v. Harrison*, 16 Neb. 635 (21 N. W. 446).

76. (1889.) In an action in the nature of a creditors' suit, to reach property for the satisfaction of a judgment, alleged to have been fraudulently conveyed by defendant to a nephew, thence by him to the wife, evidence showing the property was purchased with the wife's separate money will sustain a finding for defendant. *Wood v. O'Hanlon*, 26 Neb. 527 (42 N. W. 733).

77. (1890.) The facts stated at length in the opinion are sufficient to entitle the plaintiff to equitable relief. *Smith v. Shaffer*, 29 Neb. 656 (45 N. W. 936).

78. (1892.) M. and H., doing business at C. under the name of M., sold their business and stock, taking the notes of the purchasers payable to M. M. sold one of the notes to a bank and indorsed the same. He also delivered to the bank other firm notes to secure his private indebtedness. In a creditors' bill by creditors of the firm to subject the latter notes to payment of the firm debts, *held*, that the proof clearly showed that the officer of the bank taking the notes as security for a personal debt of M., a member of the firm, knew that they belonged to the partnership and that the creditors of the firm were entitled to the proceeds of such notes. *Tolerton v. McLain*, 35 Neb. 725 (53 N. W. 667).

79. (1894.) A creditors' bill to restrain a transfer of a certificate of deposit in a bank by a judgment creditor, sustained by

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the evidence. *Rathbun v. Dooley*, 39 Neb. 560 (58 N. W. 136).

80. (1894.) Discussion of evidence tending to show that property was conveyed to, and held by, the wife in fraud of the rights of her husband's creditors. *First Nat. Bank of Chicago v. Sloman*, 42 Neb. 350 (60 N. W. 589; 42 Am. St. Rep. 707).

81. (1894.) The evidence in support of a creditors' bill being sufficient to sustain the finding of the trial court, its judgment must be affirmed when no other question than such sufficiency is presented by the record. *Rathbun v. Dooley*, 39 Neb. 560 (58 N. W. 136).

82. (1895.) In an action to subject to the payment of her husband's debts real property held by the wife, a finding sustained by sufficient evidence that the said property was wholly acquired by means legally and equitably belonging to the wife, justified the district court in dismissing the action in so far as said property was concerned. *Trester v. Pike*, 43 Neb. 779 (62 N. W. 211).

83. (1900.) A judgment was obtained in the county court of the county in which the judgment debtors resided, and a transcript thereof filed in the district court, upon which execution was duly issued and returned *nulla bona*. Action in the nature of a creditors' bill was begun, and the debtors answering alleged and offered proof of ownership of a small tract of real estate of uncertain value in another county subject to execution. Evidence examined, and *held* insufficient to defeat plaintiffs' right of recovery in their equity action. *Thompson v. La Rue*, 59 Neb. 614 (81 N. W. 612).

84. (1902.) Evidence examined, and *held* not sufficient to sustain the judgment. *Westervelt v. Filter*, 2 Unof. 731 (89 N. W. 994).

85. (1902.) Evidence examined, and *held* to support the judgment of the district court discussing the bill. *First Nat. Bank of Plattsmouth v. Petersen*, 3 Unof. 102 (91 N. W. 195).

General judgment as bar to special relief.

86. (1905.) In a creditors' bill asking merely to have the conveyance of land made subject to plaintiff's claim, a judgment for plaintiff will bar a subsequent action by him to have rents and profits previously received by the purchaser, applied to the claim, although the latter relief was not prayed for in the former action. *First Nat. Bank of Plattsmouth v. Gibson*, 74 Neb. 232 (104 N. W. 174).

Dismissal.

87. (1899.) A motion for dismissal of a proceeding to reverse the adjudication in an action by creditors' bill, the decree which determined the amount due the creditor a judgment debt, and annulled conveyances of titles to land as fraudulent, will not be sustained, for the reason that the debt has, subsequent to the decree, been satisfied and released. *Boldt v. First Nat. Bank of West Point*, 59 Neb. 283 (80 N. W. 905).

88. (1902.) Where there was evidence in a creditors' bill showing that one of the defendants had purchased property of considerable value from the debtor, and he defaulted and refused to answer, it was error to dismiss as to him. *Benedict v. T. L. V. Land & Cattle Co.*, 66 Neb. 236 (92 N. W. 210).

89. (1902.) It is error to dismiss a creditors' bill on finding that certain of the defendants were indebted to the judgment debtor for rent, for the reason that plaintiff had an adequate remedy by garnishment, as one of the objects of such a bill is to avoid a multiplicity of suits. *Benedict v. T. L. V. Land & Cattle Co.*, 66 Neb. 236 (92 N. W. 210).

Relief awarded.

90. (1905.) In a creditors' bill asking merely to have the conveyance of land made subject to plaintiff's claim, a judgment for plaintiff will bar a subsequent action by him to have rents and profits previously received by the purchaser, applied to the claim, although the latter relief was not prayed for in the former action. *First Nat. Bank of Plattsmouth v. Gibson*, 74 Neb. 232 (104 N. W. 174).

Lien of judgment.

91. (1904.) Creditors of an insolvent debtor filed a bill against the debtor, joining with him as defendant a bank to whom the debtor was alleged to have been made a fraudulent transfer of chattels, the object of the bill being to cancel the mortgage and subject the fund created by the sale of the chattels to their claims. The decree canceled the mortgage and orderd the bank to pay the fund into court. *Held*, That the decree did not constitute a lien on the real estate of the bank. *Campbell v.*

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Noyes, Norman & Co., 72 Neb. 201 (100 N. W. 205).

Interest on judgment.

92. (1901.) Where the decree in a suit in the nature of a creditors' bill orders a defendant to pay a fund in his hands into court forthwith, interest is chargeable thereon as upon any other judgment, without an express direction to that effect in the decree. *Stuart v. Burcham*, 62 Neb. 84 (86 N. W. 898; 89 Am. St. Rep. 739).

93. (1901.) 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 into court, excepts to such decree and participates in an appeal therefrom by one of the claimants, cannot be heard to claim, after affirmance of the decree, that he was a mere stakeholder and therefore is not chargeable with interest. *Stuart v. Burcham*, 62 Neb. 84 (86 N. W. 893; 89 Am. St. Rep. 739).

Execution and enforcement of judgment.

94. (1901.) Execution is a proper process to enforce a decree directing a defendant to pay money into court. *Stuart v. Burcham*, 62 Neb. 84 (86 N. W. 898; 89 Am. St. Rep. 739).

95. (1902.) A supersedeas bond conditioned to pay costs and abide the result of an appeal, is not sufficient to prevent a successful defendant in a creditors' suit brought to set aside an assignment of a judgment from proceedings to collect the judgment, where no provisions as to the conditions of the bond were made in the order of the district court. *Carson v. Jansen*, 65 Neb. 423 (91 N. W. 398).

Sale of property under decree.

96. (1898.) In a suit to subject realty claimed by a wife to payment of judgments against her husband, where the decree in such suit was for plaintiff, ascertained the amounts due on the judgments, and directed the sheriff to sell the realty as upon execution, it was *held* that a sale under the decree, rather than upon executions, vested title in the purchaser. *Schott v. Machamer*, 54 Neb. 514 (74 N. W. 854).

97. (1901.) Issuance of the order of sale pending a motion for a new trial is no ground of objection to the sale. *Cochran v. Cochran*, 1 Unof. 508 (95 N. W. 778).

98. (1901.) A direction in a decree in a creditor's suit that certain property be "sold as upon execution" is sufficient authority for a sale by the sheriff. *Cochran v. Cochran*, 1 Unof. 508 (95 N. W. 778).

99. (1901.) Technical irregularities in sale proceedings which are not shown to have been and in their nature could not have been prejudicial, are no ground for setting the sale aside. *Cochran v. Cochran*, 1 Unof. 508 (95 N. W. 778).

100. (1902.) Under a prayer for general relief in a creditors' bill, a sale of property not attached may be decreed, where the facts entitling a party to such sale are alleged and proved, although the petition asks specifically only for a sale of attached property. *Columbia Nat. Bank v. Baldwin*, 64 Neb. 732 (90 N. W. 890).

Distribution among creditors.

101. (1901.) Certain judgment creditors consented to a consolidation of their various bills, no order being at the time made or requested determining their respective priorities, and thereafter all shared in the prosecution and expense of such consolidated suit. *Held*, That it does not affirmatively appear that the trial court erred in requiring such creditors to prorate in the proceeds of the suit. *Nebraska Nat. Bank v. Hallowell*, 63 Neb. 309 (88 N. W. 556).

102. (1901.) A creditor who has reduced his claim to judgment and had execution thereon returned unsatisfied who intervenes in such action is entitled to a preference in the payment of his claim. *Merchants Nat. Bank of Omaha v. McDonald*, 63 Neb. 363 (88 N. W. 492; 89 N. W. 770).

103. (1901.) As to judgment creditors who bring individual suits, and prosecute them to judgment on their own account and solely at their own expense, the rule may be regarded as settled that the creditor first in point of time in the commencement of his suit is entitled to priority. *Nebraska Nat. Bank v. Hallowell*, 63 Neb. 309 (88 N. W. 556).

Review.

104. (1884.) Upon the pleadings and proof, in an action in the nature of a creditor's suit the decree of the district court affirmed in part, and modified in part. *Sweet v. Craig*, 15 Neb. 349 (18 N. W. 505).

105. (1889.) In an action in equity, in the nature of a creditor's bill to subject certain property held in the name of a wife to the payment of debts of one who conveyed

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property in fraud of his creditors to her husband, the defense being that the property was the separate estate of the wife derived from her parents, *held*, that there being a conflict of testimony on that point and doubt as to such separate estate, the judgment of the trial court finding against the same would not be set aside. *Hart v. Dogge*, 27 Neb. 256 (42 N. W. 1035). [Rehearing. 29 Neb. 237 (45 N. W. 626).]

106. (1901.) Errors of law in a decree and in the proceedings leading thereto are not reviewable upon objections to confirmation of a sale had thereunder. *Cochran v. Cochran*, 1 Unof. 508 (95 N. W. 778).

CRIMINAL CONVERSATION.

See *Husband and Wife*, §§ 265-273.

CRIMINAL LAW.

ANALYSIS.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.
Nature of crime in general, §§ 1-4.
Power to punish crime, § 5.
Application of common law, §§ 6-8.
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I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

Making cigarettes as criminal offense, see *Cigarettes*.

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Nature of crime in general.

1. (1882.) The test of whether an action is civil or criminal is whether it is punishable by indictment. *Mitchell v. State*, 12 Neb. 538 (11 N. W. 848).

2. (1889.) In order that an attempt to commit a crime may be indictable, it must go so far that it would result in the crime if not frustrated by extraneous circumstances. Mere preparation is not sufficient. *Johnson v. State*, 27 Neb. 687 (43 N. W. 425).

3. (1895.) A crime is a wrong of which the law takes cognizance as injurious to the public, and punishes in a criminal proceeding in the name of the state. *Bohner v. Bohner*, 46 Neb. 204 (64 N. W. 700).

4. (1899.) The state, in a criminal prosecution, may not invoke against the prisoner the doctrine of estoppel. *Bailey v. State*, 57 Neb. 706 (78 N. W. 284; 73 Am. St. Rep. 540).

Power to punish crime.

5. (1875.) The same act may constitute an offense against both the state and a municipal government, and both may punish it without infringing any constitutional right. *City of Brownville v. Cook*, 4 Neb. 101.

Application of common law.

6. (1903.) While there are in this state no common-law crimes, the definition of an act which is forbidden by the statute, but not defined by it, may be ascertained by reference to the common law. *State v. De Wolfe*, 67 Neb. 321 (93 N. W. 746).

7. (1903.) In this state all public offenses are statutory and no person can be

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punished for any act or omission not made penal by the plain import of the written law. *State v. De Wolfe*, 67 Neb. 321 (93 N. W. 746).

8. (1905.) There are no common law crimes in this state. *Lange v. Royal Highlanders*, 75 Neb. 196 (110 N. W. 1110).

Statutory provisions.

9. (1897.) The defining of crimes and the prescribing of punishment therefor is a legislative function. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

10. (1897.) A criminal statute is not void for uncertainty which prescribes as a punishment for doing a certain act the same punishment which is prescribed for doing another named act, when the same criminal code defines the latter act and prescribes its punishment. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

11. (1897.) The legislature of Nebraska, in the enactment of the Ohio criminal code, is presumed to have adopted the construction thereof by the courts of Ohio, but such construction may be rejected for reasons which would require the overruling thereof had it been first adopted in Nebraska. *Morgan v. State*, 51 Neb. 672 (71 N. W. 788).

12. (1898.) In order to punish one as for a crime the offense must be within the plain import of the words of the statute creating or defining the crime. An offense not within the words cannot be adjudged a crime because within the reason or spirit; and this principle cannot be evaded by holding that one performing acts which are denounced as a crime when committed by a particular class of persons is estopped from denying that he is within that class. *Moore v. State*, 53 Neb. 831 (74 N. W. 319).

13. (1898.) When a penal statute is made to apply only to a certain class of persons, the description of the class is so far descriptive of the offense, and that the person charged is within the class is a substantive element of the crime itself. *Moore v. State*, 53 Neb. 831 (74 N. W. 319).

14. (1901.) In adopting the criminal code the legislature intended to provide a rational system of procedure for the trial of persons accused of crime, and to abolish the hypertechnical rules of the common law. *Burlingim v. State*, 61 Neb. 276 (85 N. W. 76).

15. (1901.) A statute which denounces an act as criminal does not cease to be effective because another statute declares the same act to be a crime when done at a particular place or under special circumstances. *Chapman v. State*, 61 Neb. 888 (86 N. W. 907).

16. (1907.) It is no objection to a criminal statute that it does not provide the minimum penalty which may be imposed for its violation. *Siren v. State*, 78 Neb. 778 (111 N. W. 798).

——— Retroactive operation.

17. (1884.) Where a new act is in the very words of a statute which it repeals, and it is clear that the repeal and re-enactment were intended to continue in force the uninterrupted operation of the old statute, they will be so construed. And this will apply to crimes committed before the new act took effect. *State v. Wish*, 15 Neb. 448 (19 N. W. 686).

18. (1884.) A law which makes an action done before its passage, which was innocent when done, criminal, and punishes such action, or that aggravates a crime or makes it greater than when it was committed, or which, in relation to that offense or its consequences alters the situation of the party to his disadvantage, or that changes the punishment and inflicts greater punishment than the law annexed to the crime when committed, is an *ex post facto* law, and in so far as it affects the punishment of the party to his disadvantage is void. *Marion v. State*, 16 Neb. 349 (20 N. W. 289, 396).

19. (1884.) On the 20th day of April, 1883, the plaintiff in error was indicted for the crime of murder, alleged to have been committed on the 15th day of May, 1872, which was before the taking effect of the present criminal code. *Held*, That he must be tried by the law in force at the time of the commission of the alleged offense. *Marion v. State*, 16 Neb. 349 (20 N. W. 289, 396).

20. (1884.) The repeal of a criminal law by an amendatory act which changes the repealed act only by reducing the punishment, where the repeal and re-enactment were intended to continue in force the uninterrupted operation of the old statute, will apply to crimes committed before the new act took effect, and the offender may be punished under the law as amended. *Hair v. State*, 16 Neb. 601 (21 N. W. 464).

Criminal intent.

21. (1883.) "Wilful" or "wilfully" means the commission of an act with free activity

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of the perpetrator's will. *Minkler v. State*, 14 Neb. 181 (15 N. W. 330).

Malice.

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22. (1899.) "Malice" denotes that condition of mind which is manifested by intentionally doing a wrongful act without just cause or excuse, and means any wilful or corrupt intention of the mind. *McVey v. State*, 57 Neb. 471 (77 N. W. 1111).

Degrees of offenses.

23. (1880.) When the court, in affixing the punishment for a given offense, is authorized in its discretion to consider it either as a felony or as a mere misdemeanor, and treat it accordingly, the punishment which the court actually inflicts must determine the grade of that offense, especially when in consequence of such offense it is sought to deprive the offender of civil rights. *Gandy v. State*, 10 Neb. 243 (4 N. W. 1019).

Defenses in general.

24. (1885.) When no confession or admission of guilt has been made by a party on trial for a criminal offense, it is immaterial what inducements may have been held out to him for the purpose of obtaining a confession or admission of guilt. *McLain v. State*, 18 Neb. 154 (24 N. W. 720).

25. (1887.) The fact that a defendant was acting as the agent of another in the commission of an offense will afford no excuse or justification for the act in a prosecution therefor. *Allyn v. State*, 21 Neb. 593 (33 N. W. 212).

26. (1896.) The fact that an accomplice gave state's evidence pursuant to a promise of immunity made by the prosecutor without consent of the court, does not constitute a legal defense to a prosecution against the accomplice. *Whitney v. State*, 53 Neb. 287 (73 N. W. 696).

Alibi.

Instructions as to alibi, see *post*, §§ 628-633.

27. (1898.) "Alibi," as employed to express the defense of the accused person in a criminal action, means the claim of the party charged of presence at the time the crime is pleaded to have been committed at a place other than the one alleged of the crime. *Peyton v. State*, 54 Neb. 188 (74 N. W. 597).

II. CAPACITY TO COMMIT CRIME, AND RESPONSIBILITY FOR CRIME.

In general.

28. (1902.) The generally accepted test of responsibility for crime, is the capacity to understand the nature of the act alleged to be criminal, and the ability to distinguish between right and wrong with respect to such act. *Schwartz v. State*, 65 Neb. 196 (91 N. W. 190); (1904) *Bothwell v. State*, 71 Neb. 747 (99 N. W. 669).

Insanity.

29. (1876.) The degree of mental unsoundness, in order to exempt a person from punishment, must be such as to create an uncontrollable impluse to do the act charged. If it be found insufficient to deprive the accused of ability to distinguish right from wrong, he should be held responsible for the consequences of his act. *Wright v. State*, 4 Neb. 407.

30. (1881.) Where an individual lacks the mental capacity to distinguish right from wrong, in reference to the particular act complained of, the law will not hold him responsible. *Hawe v. State*, 11 Neb. 537 (10 N. W. 452; 38 Am. Rep. 375).

31. (1881.) Where insanity is shown to exist, whether it be general or partial, if there remains a degree of reason sufficient to discern the difference between good and evil at the time the offense was committed, the accused is responsible for his acts. *Hawe v. State*, 11 Neb. 537 (10 N. W. 452; 38 Am. Rep. 375).

32. (1883.) If one charged with crime have the mental capacity to distinguish right from wrong in respect to the particular act charged, he is responsible. *Hart v. State*, 14 Neb. 572 (16 N. W. 905).

33. (1889.) A person, though of weak mind, but with sufficient capacity to distinguish right from wrong in respect to the particular act charged, is accountable for his acts, and the plea of insanity will be unavailing. *Anderson v. State*, 25 Neb. 550 (41 N. W. 357).

34. (1899.) One suffering under a defect of reason to such an extent that he was incapable of distinguishing between right and wrong with respect to a particular act is not amenable to the laws against crime for having committed such act. *Knights v. State*, 58 Neb. 225 (78 N. W. 508; 76 Am. St. Rep. 78).

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——Moral insanity.

35. (1902.) Moral insanity as a criminal defense, is not recognized in this state. One who knows abstractly what is right and what is wrong, must at his peril, choose the right and shun the wrong. He cannot yield to a vicious impluse, and allege mere weakness of will as an excuse. *Schwartz v. State*, 65 Neb. 196 (91 N. W. 190); (1904) *Bothwell v. State*, 71 Neb. 747 (99 N. W. 669).

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Intoxication.

Admissibility of evidence of intoxication of defendant, see *post*, § 244.

Instructions as to intoxication, see *post*, § 627.

36. (1879.) Temporary insanity produced immediately by intoxication does not destroy responsibility where the accused, when sane and responsible, made himself voluntarily drunk. *Schlencker v. State*, 9 Neb. 241 (1 N. W. 857).

37. (1893.) Intoxication is no justification or excuse for crime; but evidence of excessive intoxication, by which the party is wholly deprived of reason, if the intoxication was not indulged in to commit crime, may be submitted to the jury for it to consider whether in fact a crime has been committed, or to determine the degree, where the offense consists of several degrees. *O'Grady v. State*, 36 Neb. 320 (54 N. W. 556).

38. (1898.) Drunkenness, in law, is no excuse for the commission of crime. *Davis v. State*, 54 Neb. 177 (74 N. W. 599).

III. PARTIES TO OFFENSES.

Parties to prosecution, see *Indictment and Information*, §§ 86-107.

Principals.

39. (1878.) Principals in the second degree are those who do not with their own hands commit the act, but are present, aiding and abetting it. *Walrath v. State*, 8 Neb. 80.

40. (1881.) There is no substantial difference between prinicpals in the first and second degrees. The distinction is nominal merely. *Cooney v. Burke*, 11 Neb. 258 (9 N. W. 57).

41. (1903.) Under the criminal code, the law does not distinguish between principals in the first and second degrees. *Jahnke v. State*, 68 Neb. 154 (94 N. W. 158).

——Aiding or abetting.

Aider and abettor to assault, see *Assault and Battery*, § 53.

42. (1894.) All persons who, being present, aid, assist, or abet in the commission of a felony may be prosecuted as principals. *Hill v. State*, 42 Neb. 503 (60 N. W. 916).

43. (1895.) Sections 1 and 2 of the criminal code, so far as they define accessories, are declaratory of the common law. One who is present when the crime is committed, aiding and assisting therein, is notwithstanding these sections, a principal, although his hand was not the instrument through which the crime was perpetrated. *Dixon v. State*, 46 Neb. 298 (64 N. W. 961).

44. (1896.) Section 1 of the criminal code is declaratory merely of the common law rule by which an accessory before the fact is defined as one who aids, abets, or procures the commission of a felony by another in his absence, and does not refer to one who, being present at the commission of a crime, aids or assists therein. *Casey v. State*, 49 Neb. 403 (68 N. W. 643).

45. (1898.) The effect of section 1 of the criminal code is to make the aiding, abetting, or procuring of another to commit a felony a substantive and independent crime. *Oerter v. State*, 57 Neb. 135 (77 N. W. 367).

46. (1903.) One by whose incitement or instigation a felony is committed, when he is neither actually nor constructively present, is an aider, abettor or procurer within the meaning of section 1 of the criminal code. *Lamb v. State*, 69 Neb. 212 (95 N. W. 1050).

47. (1903.) Section 1 of the criminal code, declaring that any person who procures another to commit a felony shall be punished by imprisonment, which was adopted in 1873, is applicable to all acts made felonies by subsequent legislation. *Lamb v. State*, 69 Neb. 212 (95 N. W. 1050).

Accessories before the fact.

Accessory to crime of abortion, see *Abortion*, § 2.

Accessories to crime of embezzlement, see *Embezzlement*,

48. (1894.) Where intent is an element of a crime, one who does not participate in the intent, and is without knowledge of it, cannot be guilty as an accessory before the fact. *Wagner v. State*, 43 Neb. 1 (61 N. W. 85).

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49. (1894.) In misdemeanors there are no accessories. Those whose conduct is such that it would constitute them accessories before the fact, if the principal offense were a felony, are, if it be a misdemeanor, guilty as principals. *Wagner v. State*, 43 Neb. 1 (61 N. W. 85).

49a. (1908.) One who advises others to commit larceny, but who is several miles distant at the time of the commission of the offense, and who takes no part therein, but assists in the disposal of the proceeds after the theft has been fully committed, is not a principal, but an accessory. *Skidmore v. State*, 80 Neb. 698 (115 N. W. 288).

IV. JURISDICTION.

In general.

50. (1897.) Jurisdiction to pronounce a particular sentence is as essential as jurisdiction of the person and subject-matter. *In re [illegible]*, 50 Neb. 481 (70 N. W. 51).

Supreme court.

51. (1902.) The only authority the supreme court has to take cognizance of crimes, is that given by the constitution in the grant of appellate jurisdiction. *State v. Missouri P. R. Co.*, 64 Neb. 679 (90 N. W. 877).

County judge.

52. (1886.) When a defendant is arrested upon a complaint filed with the county judge charging a misdemeanor, and such defendant upon arraignment before such judge pleads guilty to the charge preferred, the county judge has authority, under section 313 of the criminal code, to render judgment of a conviction, within his jusridiction, and enforce the same by imprisonment, as in other cases of a conviction of misdemeanor. *Ex parte Maule*, 19 Neb. 273 (27 N. W. 119).

53. (1898.) The criminal jurisdiction of a county court or county judge is the same as that of a justice of the peace. *In re Chenoweth*, 56 Neb. 688 (77 N. W. 63).

54. (1898.) Section 16, article VI of the constitution, does not invest the county courts of the state with any criminal jurisdiction whatsoever, but authorizes the legislature to define the criminal jurisdiction of such courts within certain limitations. *In re Chenoweth*, 56 Neb. 688 (77 N. W. 63).

Justices of the peace.

55. (1893.) A justice of the peace has no jurisdiction to sit as a trial court in a criminal case where the statute creating the offense provides that the punishment may be both a fine and imprisonment. In such case the justice can proceed only as an examining magistrate. *State v. Yates*, 36 Neb. 287 (54 N. W. 429).

56. (1895.) The jurisdiction of justices of the peace is by section 18, article VI of the constitution, limited to offenses for which the penalty prescribed does not exceed three months' imprisonment in the county jail, or a fine not exceeding $100. *Keeshan v. State*, 46 Neb. 155 (64 N. W. 695).

57. (1895.) The only authority of a justice of the peace under section 17, criminal code, previous to the amendment thereof in 1893, was that of an examining magistrate. *Keeshan v. State*, 46 Neb. 155 (64 N. W. 695).

Police judge.

58. (1877.) The police judge in cities of the first class has no jurisdiction in cases of felony, except to recognize the accused to appear before the district court for trial. *Thompson v. State*, 6 Neb. 102).

Crimes committed on Indian reservations.

59. (1875.) The federal courts have no jurisdiction of the crime of larceny alleged to have been committed on an Indian reservation in the state of Nebraska. *Painter v. Ives*, 4 Neb. 122.

60. (1884.) The courts of this state have jurisdiction and authority to try and punish parties for crimes committed on the Indian reservations within the state. *Marion v. State*, 16 Neb. 349 (20 N. W. 289, 396); (1886) *Marion v. State*, 20 Neb. 233 (29 N. W. 911; 57 Am. Rep. 825).

61. (1886.) The courts of this state have no authority to prosecute and punish one Indian for a crime committed against another on the reservation to which they each belong, so long as they maintain their tribal relations. *Ex parte Cross*, 20 Neb. 417 (30 N. W. 428).

V. VENUE.

A. Place of Bringing Prosecution.

Venue of prosecution for embezzlement, see *Embezzlement*, § 12.

County or district where offense is committed.

62. (1881.) A district court while sitting in one county, has no jurisdiction over crimes committed in any other organized

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county. *Olive v. State*, 11 Neb. 1 (7 N. W. 444).

63. (1881.) Under section 11 of the bill of rights, providing that one accused of crime shall have a trial in the "county or district" in which the offense is alleged to have been committed, the term "district" means the division of the state, from which a jury, for the particular term, may legally be drawn. *Olive v. State*, 11 Neb. 1 (7 N. W. 444).

64. (1894.) By the word "district," as used in section 11, bill of rights, providing place of trial in criminal cases, is not meant "judicial district," but that portion of the territory of the state over which a court may at a particular sitting exercise power in criminal matters. *State, ex rel. Scott, v. Crinklaw*, 40 Neb. 759 (59 N. W. 370).

65. (1894.) The object of the provision in section 11 of the bill of rights, for the trial of criminal prosecutions in the county or district where the crime is allaged to have been committed, was to embody in the fundamental law of the state the rule of the common law by which the accused was entitled to a trial before a jury of the vicinage or neighborhood, in order that he might have the benefit of his good character. *State, ex rel. Scott, v. Crinklaw*, 40 Neb. 759 (59 N. W. 370).

66. (1894.) The word "district," as used in section 11, bill of rights, providing place of trial, may, and generally does, refer to the county where the crime is supposed to have been committed, but also includes any and all territory, by law, attached to such county for judicial purposes. *State, ex rel. Scott, v. Crinklaw*, 40 Neb. 759 (59 N. W. 370).

67. (1894.) The constitutional right to a trial before a jury of the county or district where the crime is alleged to have been committed is a mere personal privilege of the accused, and not conferred upon him from any consideration of public policy. *State, ex rel. Scott, v. Crinklaw*, 40 Neb. 759 (59 N. W. 370).

——— Waiver of right.

68. (1894.) When the defendant in a criminal case makes application for a change of venue under the provisions of the criminal code, he thereby waives the constitutional right to a trial before a jury of the county or district where the crime is alleged to have been committed. *State, ex rel. Scott, v. Crinklaw*, 40 Neb. 759 (59 N. W. 370).

Offenses committed in unorganized territory.

69. (1876.) The act of February 25, 1875, authorizing any judge of the district court to designate the county in his district where an indictment may be found, and persons tried for felony committed in any unorganized county attached to such district, or in any county where no district courts are held, so far as it applies to such unorganized counties, is not unconstitutional; and the court of any county so designated has jurisdiction of the offense. *Dodge v. State*, 4 Neb. 220.

70. (1876.) If the indictment contain an averment of designation under the act authorizing the district judge to designate the county in which to find the same, sufficient appears of record to show that the court had jurisdiction, though no distinct copy of the order of the judge be set forth therein. *Dodge v. State*, 4 Neb. 220. [Overruled. *Aultman v. Martin*, 49 Neb. 103 (68 N. W. 340).]

71. (1881.) A county which has been organized for local government, under the law providing therefor, must be considered as organized for judicial purposes within the meaning of act of February 24, 1879, providing that when a crime is committed "within any unorganized county" the indictment may be found and the trial had in another county. *Olive v. State*, 11 Neb. 1 (7 N. W. 444).

72. (1882.) Unorganized territory attached to a county for "election, judicial, and revenue purposes" is, for such purposes a part of such county, and the district court sitting in that county has jurisdiction over crimes committed in said unorganized territory. *Ex parte Crawford*, 12 Neb. 379 (11 N. W. 494).

73. (1887.) Under chapter 10 of the Revised Statutes of 1866, all unorganized counties were attached to the nearest organized county directly east, for election, judicial, and revenue purposes; therefore, where a murder was alleged to have been committed in the county of Sioux, the party accused of committing the same could not be indicted and tried for the offense in Cheyenne county, it being directly south of Sioux county. *Ex parte Carr*, 22 Neb. 535 (35 N. W. 409).

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74. (1904.) Statutes examined, and *held* that, by law, the territory defined by the legislative act of 1887 as Arthur county is attached to, and is within the jurisdiction of, McPherson county, and that the district court of that county has jurisdiction of crimes committed within such territory. *Robinson v. State*, 71 Neb. 142 (98 N. W. 694).

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B. Change of Venue.

Power of court in general.

75. (1889.) The statute as to change of venue in criminal cases confers upon the district court in the county where the offense was committed power to order a change of venue to an adjoining county, but such power is confined to the jurisdiction of the county where the offense was committed. *Gandy v. State*, 27 Neb. 707 (43 N. W. 747, 44 N. W. 108).

Discretion of court.

76. (1881.) An application by accused for a change of the place of trial, is addressed to the sound discretion of the trial court, and unless abuse thereof is clearly shown, a decision on such application, will not be interfered with. *Olive v. State*, 11 Neb. 1 (7 N. W. 444).

77. (1876.) Applications for change of venue, are addressed to the sound discretion of the court, and its ruling thereon will not be disturbed, where there is no abuse of that discretion. *Smith v. State*, 4 Neb. 277; (1900) *Welsh v. State*, 60 Neb. 101 (82 N. W. 368); (1901) *Argabright v. State*, 62 Neb. 402 (87 N. W. 146); (1902) *Goldsberry v. State*, 66 Neb. 312 (92 N. W. 906); (1903) *Jahnke v. State*, 68 Neb. 154 (94 N. W. 158); (1905) *Sweet v. State*, 75 Neb. 263 (106 N. W. 31).

78. (1905.) If there is such a prejudice in the minds of the people of the county against the defendant, or such a firm conviction of his guilt of the crime charged against him that there is substantial and well-founded reason to believe that he cannot obtain a fair trial in the county, the constitution requires that the venue be changed. The trial court must exercise discretion in determining these facts, but has no discretion to refuse the change of venue when these facts appear. *Lucas v. State*, 75 Neb. 11 (105 N. W. 976).

Application.

79. (1881.) A motion for a change of plan of trial to a particular county is bad, and may be overruled for that reason alone *Olive v. State*, 11 Neb. 1 (7 N. W. 444).

——— Affidavits.

80. (1876.) Counter-affidavits may be filed on application for a change of venue in a criminal prosecution. *Smith v. State*, 4 Neb. 277.

——— Determination.

80*a*. (1884.) In the trial upon an indictment for rape and assault with intent to commit, the trial coming on a few weeks after the charge was made, the accused filed affidavits of leading citizens showing a strong bias and prejudice against him, so that a fair trial could not be had in that county, and the affidavits filed on behalf of the state did not deny these statements in clear and direct language. *Held*, That a change of venue should have been granted. *Richmond v. State*, 16 Neb. 388 (20 N. W. 282).

81. (1901.) It is not error to overrule an application for a change of venue in a criminal trial when from all the evidence introduced in support and in resistance of the application, there is not shown to exist any reasonable ground for the belief that the defendant cannot have a fair and impartial trial in the county from which a change of venue is applied for. *Argabright v. State*, 62 Neb. 402 (87 N. W. 146).

82. (1902.) If from the showing made in support of and against the motion for a change of venue in a criminal case, there is no reasonable ground shown on which to found a belief that the accused cannot have a fair and impartial trial in the county where the offense is alleged to have been committed, it is not error to deny such motion. *Goldsberry v. State*, 66 Neb. 312 (92 N. W. 906); (1905) *Sweet v. State*, 75 Neb. 263 (106 N. W. 31).

83. (1903.) If, upon the showing made in support of and against an application for a change of venue, it does not appear that there exists reasonable grounds on which to found a belief that the defendant cannot have a just trial in the county by a fair, unbiased and impartial jury, the trial court may properly overrule the application. *Jahnke v. State*, 68 Neb. 154 (94 N. W. 158).

Transmission of record.

84. (1877.) On a change of venue in a criminal case, the original indictment must be transmitted to the clerk of the court

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to which the venue is changed. *Preuit v. People*, 5 Neb. 377.

85. (1895.) Upon a change of venue in a criminal cause to an adjoining county, the clerk of the court in which the indictment or information was filed must transmit to the clerk of the court to which the venue is changed a certificate transcript of the proceedings in the case, together with the original indictment or information. *Barr v. State*, 45 Neb. 458 (63 N. W. 856).

Prosecuting attorney.

86. (1889.) Upon the removal of a criminal prosecution from the county in which the offense was committed, to an adjoining county upon change of venue, it is not the duty of the county attorney of the former county to follow the case to the latter county, but it is the duty of the county attorney of such adjoining county to represent the state in the prosecution of the case; and in such case where the county attorney of the adjoining county is under the disability of having appeared in the case as counsel for the accused, it is the duty of the court to appoint an attorney to act as county attorney in the prosecution. *Gandy v. State*, 27 Neb. 707 (43 N. W. 749, 44 N. W. 108).

VI. LIMITATION OF PROSECUTION.

Necessity of pleading statute, see *post*, § 182.

Limitation applicable.

87. (1895.) A prosecution for a misdemeanor, where the penalty fixed by statute is restricted to a fine of not exceeding $100 and to imprisonment not exceeding three months, must be instituted within one year from the time such offense was committed. *Jolly v. State*, 43 Neb. 857 (62 N. W. 300).

Commencement of prosecution.

88. (1898.) The filing of an information in the district court in term time, and not the filing of the complaint with the county judge, *held* the commencement of the prosecution within the meaning of the statute of limitations. *State v. Robertson*, 55 Neb. 41 (75 N. W. 37).

VII. FORMER JEOPARDY.

Plea of former jeopardy, see *post*, §§ 183-189.

Mistrial or conviction for petit larceny as former jeopardy, see *Larceny*, §§ 29, 30.

In general.

89. (1882.) The constitutional inhibition as to jeopardy applies only to criminal proceedings, such offenses as are designated by our statute as felonies and misdemeanors, and does not apply to mere civil actions for the recovery of penalties. *Mitchell v. State*, 12 Neb. 538 (11 N. W. 848).

90. (1892.) The fundamental law of the state as well as that of the United States, forbids that one shall be put twice in jeopardy for the same act. *In re Jones*, 35 Neb. 499 (53 N. W. 468).

91. (1906.) To constitute a former jeopardy, it must appear that the defendant was put upon trial before a court having jurisdiction, upon an indictment or an information sufficient in form and substance to sustain a conviction, and that the jury were impaneled and sworn, and thus charged with his deliverance. *Steinkuhler v. State*, 77 Neb. 331 (109 N. W. 395).

Prosecution in foreign country.

92. (1877.) The rule of constitutional law cannot span country and country in such a way as to cause jeopardy in one country to free the party from trial in another, but as "a sort of merciful dispensation" a court may consider favorably the fact, if it exists, that the accused had been prosecuted and punished for the same offense in a foreign country, when it appears that he was convicted and his punishment was full and complete. *Marshall v. State*, 6 Neb. 120 (29 Am. Rep. 363).

Jurisdiction as element of former jeopardy.

93. (1877.) It is indispensable to the plea of former conviction that the court whose record is relied upon to sustain it, had jurisdiction of the offense. *Thompson v. State*, 6 Neb. 102.

94. (1907.) The judgment of a court having no jurisdiction of the subject-matter does not constitute a bar to the second prosecution based upon the same charge as that upon which the first judgment was pronounced. *Peterson v. State*, 79 Neb. 132 (112 N. W. 306).

Preliminary examination.

95. (1880.) Where a person accused of an offense is arrested and taken before a magistrate for examination and is discharged, such discharge does not bar another examination for the same offense, before the same or another magistrate, upon a new complaint being filed. An examination is not a trial. *In re Garst*, 10 Neb. 78 (4 N. W. 511).

96. (1901.) A plea in abatement,

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grounded on the fact that defendant had two preliminary examinations and that on the first he was held for a lower grade of crime than upon the one which is the basis of the information filed against him, is demurrable. *Thompson v. State*, 61 Neb. 210 (85 N. W. 62; 87 Am. St. Rep. 453).

97. (1902.) A second preliminary hearing may be had where the first has resulted in a discharge of the accused. *Van Buren v. State*, 65 Neb. 223 (91 N. W. 201).

Discharge of jury without verdict.

98. (1884.) The defendants were indicted upon arraignment, pleaded not guilty, and a jury was impaneled to try the cause. The defendants objected to any testimony being given in support of the indictment for the reason that it did not charge the commission of a crime. The objection was sustained and the jury discharged without a verdict and without objection by the defendants; *Held*, That this did not constitute an acquittal which could be plead and maintained as a plea in bar to a subsequent indictment. *State v. Priebnow*, 16 Neb. 131 (19 N. W. 628).

99. (1897.) Prisoner *held* not entitled to a discharge on ground of former jeopardy upon a record showing that after a trial began a member of the jury became sick; that the juror was examined by a commission and found to be insane; and that the jury was discharged. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

100. (1897.) Insanity of a juror *held* to be a calamity authorizing the discharge of a jury. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

101. (1901.) Whether a mistrial resulting from the discharge of a jury because of the illness of one of its members constituted former jeopardy not decided. *Sharp v. State*, 61 Neb. 187 (85 N. W. 38).

Acquittal as to part of counts.

102. (1899.) Where an information, in different counts, charges separate and distinct crimes, and the accused, on the trial, is acquitted on a count charging one crime but is convicted on a count charging another crime, he cannot, on a new trial being granted, be tried for the offense of which he was acquitted at the former trial. *George v. State*, 59 Neb. 163 (80 N. W. 486).

Judgment reversed.

103. (1895.) When the defendant in a criminal prosecution is adjudged guilty of the crime charged, and subsequently procures a reversal of the judgment of conviction on account of error by the trial court, he will be held to have waived his right to object to further prosecution on the ground that he has been once put in jeopardy. *McGinn v. State*, 46 Neb. 427 (65 N. W. 46; 50 Am. St. Rep. 617; 30 L. R. A. 450).

104. (1904.) An ineffectual attempt of the district court to render a judgment on a verdict according to the provisions of the law, does not deprive that court of the power to pronounce a valid judgment against the accused. *McCormick v. State*, 71 Neb. 505 (99 N. W. 237).

——— Confinement under judgment.

105. (1895.) The confinement of a convict from the date of conviction until the date fixed for his execution is not a part of the penalty for a capital offense. *McGinn v. State*, 46 Neb. 427 (65 N. W. 46; 50 Am. St. Rep. 617; 30 L. R. A. 450).

106. (1895.) While the practice of confining persons convicted of capital offenses from the date of sentence until the day of execution has prevailed from time immemorial, such confinement is not a part of the penalty, although a necessary incident thereof, and the power of the court in that regard does not rest upon any positive provision of statute. *McGinn v. State*, 46 Neb. 427 (65 N. W. 46; 50 Am. St. Rep. 617; 30 L. R. A. 450).

107. (1904.) Confinement in the penitentiary under a void or erroneous sentence, because of the failure of the accused to obtain a suspension of his sentence during the pendency of his proceedings in error, is in no sense a part execution of a legal sentence; and by the rendition and execution of a legal judgment, the accused is not twice punished for the same offense. *McCormick v. State*, 71 Neb. 505 (99 N. W. 237).

Identity of offenses.

108. (1877.) A conviction for petit larceny, for stealing goods of the value of $35, by a police court is no bar to an indictment for grand larceny for stealing the same goods. *Thompson v. State*, 6 Neb. 102.

109. (1877.) If the accused is charged in one count, in an indictment, with an offense for which he was convicted in a foreign country, and also in a second count is charged with a different and distinct offense, the plea of *autrefois convict* is bad.

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Marshall v. State, 6 Neb. 120 (29 Am. St. Rep. 363).

110. (1901.) A prosecution for burglary resulting in a mistrial is not a bar to a prosecution for larceny resulting from the burglary. *Sharp v. State*, 61 Neb. 187 (85 N. W. 38).

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111. (1907.) When a plea of former jeopardy is made by reason of *autrefois acquit*, the test to determine the identity of the two offenses is whether the evidence necessary to convict in the second case was admissible under the former charge, related to the same crime, and was sufficient to have warranted a conviction upon the former charge. *Warren v. State*, 79 Neb. 526 (113 N. W. 143).

112. (1907.) An acquittal of the defendant upon the charge of the murder of one Lausten, *held* not to be a bar to a prosecution for the crime of robbery of Lausten committed at or about the time of the killing. *Warren v. State*, 79 Neb. 526 (113 N. W. 143).

VIII. PRELIMINARY COMPLAINT AND EXAMINATION.

Pleading want of preliminary examination, see *post*, §§ 190-193.

Preliminary examination as constituting former jeopardy, see *ante*, §§ 95-97.

Nature and scope.

113. (1898.) The object of a preliminary examination is to ascertain whether the crime charged has been committed, and, if so, whether there is probable cause to believe the accused committed it, and, if so, to insure his appearance in the district court to answer the complaint of the state therefor. *Latimer v. State*, 55 Neb. 609 (76 N. W. 207; 70 Am. St. Rep. 403).

114. (1902.) The preliminary hearing of a person accused of a felony, provided for by the criminal code, is in no sense a trial in which the rights of the accused in respect of his guilt or innocence are adjudicated and determined. *Van Buren v. State*, 65 Neb. 223 (91 N. W. 201).

115. (1902.) The preliminary examination provided for is to ascertain whether the crime charged has been committed and, if so, whether there is probable cause to believe the accused committed it, and if such is found to be the case, to enforce his presence in the district court to answer the charge by either requiring the accused to enter into a recognizance for his appearance in the district court to answer the charge, or in default thereof, committing him to imprisonment to await trial in the district court. *Van Buren v. State*, 65 Neb. 223 (91 N. W. 201).

Jurisdiction.

116. (1900.) It is discretionary with the district court whether it will sit as an examining magistrate, and its ruling in that regard will not be disturbed where no abuse is shown. *State v. Dennison*, 60 Neb. 192 (82 N. W. 628).

117. (1902.) A district judge, within his district, is authorized to exercise the powers of examining magistrates generally, with respect to preliminary hearings of persons accused of the commission of a felony. *Van Buren v. State*, 65 Neb. 223 (91 N. W. 201).

118. (1906.) A county court or county judge has the same powers and jurisdiction in criminal matters as a justice of the peace, and may entertain a complaint, issue a warrant, conduct the preliminary hearing in a case where the offense is beyond his jurisdiction, and may hold the defendant to bail for his appearance in the district court. *Stetter v. State*, 77 Neb. 777 (110 N. W. 761).

119. (1907.) Upon complaint duly made, a judge of the district court may sit as an examining magistrate to try whether a crime has been committed, and whether there is probable cause to believe that the person charged has committed the crime. *Cohoe v. State*, 79 Neb. 811 (113 N. W. 532).

Complaint.

120. (1886.) A complaint charging the commission of a misdemeanor under the criminal law of the state will be held sufficient when collaterally assailed, if it contains sufficient to show a violation of law, and will not be held to be vitiated because it contains surplusage or redundant matter. *Ex parte Maule*, 19 Neb. 273 (27 N. W. 119).

——— Requisites and sufficiency.

121. (1889.) A complaint in writing signed by the complainant and sworn to before the clerk of the district court within his jurisdiction and filed in the office of the justice of the peace, would be sufficient to require him to issue a warrant thereon. *State, ex rel. Bryant, v. Lauver*, 26 Neb. 757 (42 N. W. 762).

122. (1889.) A complaint must be made on oath and before a magistrate, in order to give him jurisdiction to make a prelimi-

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nary examination of one accused of a criminal offense. *White v. State*, 28 Neb. 341 (44 N. W. 443).

——— Amendment or substitution.

123. (1877.) If the original complaint in a case of misdemeanor appealed to the district court be lost, the court may order a new complaint to be substituted covering the same offense as shown by the justice's transcript. *Bays v. State*, 6 Neb. 167.

123*a*. (1908.) Pending an appeal under section 324 of the criminal code from a judgment of a magistrate, the district court may permit the filing of an amended complaint which does not essentially nor materially alter the original charge. *Ruffing v. State*, 80 Neb. 555 (114 N. W. 583).

——— Variance.

124. (1887.) Where it appears that the charge in the complaint was substantially the same as that set forth in an information filed in the district court, the plea of want of preliminary examination will be unavailing. *Cowan v. State*, 22 Neb. 519 (35 N. W. 405).

125. (1896.) Where the charge in the complaint is substantially the same as that in the information, a plea of want of preliminary examination, or of variance, is unavailing. *Hockenberger v. State*, 49 Neb. 706 (68 N. W. 1037); (1903) *Van Syoc v. State*, 69 Neb. 520 (96 N. W. 266).

Warrant.

126. (1907.) When a complaint is filed in the district court and the person charged with crime in said complaint is present in court, the judge may in his discretion call upon the defendant to plead to the complaint, and proceed with the examination without the issuing of a warrant upon the complaint. *Cohoe v. State*, 79 Neb. 811 (113 N. W. 532).

Necessity of preliminary examination.

127. (1889.) An information, filed in the district court by the county attorney, against an accused person for an offense for which said accused person had not had a preliminary examination, as provided by law, confers no jurisdiction upon said district court to try and punish said accused person for such offense, unless in the excepted cases provided for in section 585 of the criminal code. *White v. State*, 28 Neb. 341 (44 N. W. 443). [Overruled. *Coffield v. State*, 44 Neb. 417].

128. (1895.) Accused, unless a fugitive from justice, is entitled to a preliminary examination, in absence of a waiver thereof, before he can be placed upon trial under an information. *Coffield v. State*, 44 Neb. 417 (62 N. W. 875).

129. (1898.) The district court is without jurisdiction to try on information one accused of a felony, except he be a fugitive from justice, unless he has been first accorded the privilege of preliminary examination. *Latimer v. State*, 55 Neb. 609 (76 N. W. 207; 70 Am. St. Rep. 403).

130. (1903.) In a prosecution by information for a felony, in the absence of his waiver of a right to a preliminary examination, a defendant cannot be put upon trial for the crime charged over his objections, until such preliminary hearing is accorded him, and he is held by the examining magistrate to await a trial in the district court. *Jahnke v. State*, 68 Neb. 154 (94 N. W. 158).

131. (1903.) The statute providing for preliminary examinations contemplates that before a person can be proceeded against by information, he must be brought before an examining magistrate, charged with the commission of a crime, and that the magistrate shall proceed to hear the complaint, examine such witnesses as are produced in support thereof or to controvert the same, and then exercise judgment or discretion of a judicial character in determining from the evidence adduced whether the accused should be held to appear for trial in the district court, or should be discharged for want of probable cause, or because it is not made to appear that a crime has been committed. *Jahnke v. State*, 68 Neb. 154 (94 N. W. 158).

——— Waiver.

132. (1895.) It is too late after verdict to raise the objection that a preliminary examination has not been had for the crime charged in the information. Such objection must be raised before going to trial by motion to quash the information or by plea in abatement. *Coffield v. State*, 44 Neb. 417 (62 N. W. 875).

133. (1895.) Accused may waive a preliminary examination when brought before the magistrate, or when called upon to plead to the information. *Coffield v. State*, 44 Neb. 417 (62 N. W. 875).

134. (1896.) Where the record of the proceedings in the examining court disclosed that a complaint was filed which con-

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tained a charge of the crime for which plaintiff in error was tried in the district court, and that he was arraigned thereupon and waived examination, it is sufficient to show fulfillment of the requirements of section 585 of the criminal code in regard to preliminary examination. *Korth v. State*, 46 Neb. 631 (65 N. W. 792).

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135. (1898.) The statute awarding one accused of a crime the right to a preliminary examination was enacted for the benefit of the accused, and since it is a personal privilege it may be waived by accused. *Latimer v. State*, 55 Neb. 609 (75 N. W. 207; 70 Am. St. Rep. 403).

136. (1898.) If the accused, on being arrested and brought before an examining magistrate, voluntarily pleads that he is guilty of the crime charged against him, he thereby waives his right to a preliminary examination. *Latimer v. State*, 55 Neb. 609 (76 N. W. 207; 70 Am. St. Rep. 403).

137. (1901.) The objection that the defendant has not had a preliminary hearing is waived unless raised before he enters a plea. *Dinsmore v. State*, 61 Neb. 418 (85 N. W. 445).

138. (1901.) A preliminary examination may be waived. *Reinoehl v. State*, 62 Neb. 619 (87 N. W. 355).

Sufficiency of examination.

139. (1889.) An examination, made by a magistrate, of a person accused of crime, where the magistrate has not jurisdiction, is not a "preliminary examination therefor, as provided by law," in the sense of those words as used in section 585 of the criminal code. *White v. State*, 28 Neb. 341 (44 N. W. 443).

140. (1903.) *Held*, That a preliminary examination within the meaning of the statute had been accorded the defendant in the case at bar, and that the trial court properly sustained a demurrer to his plea in abatement alleging that no such examination had been had. *Jahnke v. State*, 68 Neb. 154 (94 N. W. 158).

Dismissal of proceedings.

141. (1902.) Where a person who is charged with a felony is brought before an examining magistrate for the purpose of a preliminary hearing, the complainant at such hearing may dismiss or abandon such proceedings, and file a complaint for the same offense before another magistrate having authority to inquire into the charge; and upon such inquiry, the accused may be recognized to appear at the district court to answer such charge, and in default of such recognizance be committed to prison to await trial. *Van Buren v. State*, 65 Neb. 223 (91 N. W. 201).

Weight and sufficiency of evidence.

142. (1900.) Evidence that would justify a committing magistrate in finding that probable cause existed for holding a defendant to appear need not necessarily be sufficient to uphold a verdict of guilty. *Rhea v. State*, 61 Neb. 15 (84 N. W. 414).

143. (1903.) When the quantity or sufficiency of the evidence to justify the holding of a person to answer for a crime in the district court is called in question by a plea in abatement, and it appears that there has been a preliminary hearing in form and substance, and that evidence has been introduced in support of the complaint such as to invoke an honest exercise of judgment or discretion in the weighing of such evidence and in reaching a conclusion as to the order or judgment to be entered, and from which a fair legal deduction may be reached that a crime has been committed, and there is testimony tending to show that the accused committed the offense and he is held to await trial in the district court, a preliminary examination has been had within the meaning of the statute and the plea in abatement would be unavailing. *Jahnke v. State*, 68 Neb. 154 (94 N. W. 158).

Finding.

144. (1882.) An examination before a magistrate can only be instituted by filing a complaint under oath, alleging positively the commission of an offense, and also that there is reason to believe that the accused committed the same. The finding of the justice that there is or is not probable cause that the accused committed the offense charged may be entirely disregarded by the grand jury, as it is in no sense a judgment. *In re Balcom*, 12 Neb. 316 (11 N. W. 312).

145. (1891.) A finding of guilty when made by a magistrate, need not necessarily be formal, but must in some way show cause for the sentence. *Atwood v. Atwater*, 34 Neb. 402 (51 N. W. 1073).

145*a*. (1908.) A complaint was filed before an examining magistrate charging plaintiff in error with maliciously killing and destroying fourteen certain hogs of the value of $120, the personal property of a person

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named in the complaint as the owner thereof. A warrant was issued and plaintiff held to appear at the next term of the district court. He gave the required recognizance, and was discharged from custody. In the docket entry of the examining magistrate a history of the case was given, and it was recited that, "after hearing the testimony of the witnesses, and being fully advised in the premises, the court finds that there is probable cause to believe that the defendant is guilty as charged in the complaint. It is therefore considered by me that the defendant give bond in the sum of $500 for his appearance" at the next term of the district court, etc. *Held*, That this sufficiently showed that the magistrate found that an offense had been committed. *Carson v. State*, 80 Neb. 619 (114 N. W. 938).

Record and return of preliminary examination.

146. (1896.) Where the transcript of the preliminary proceedings has been lost from the files of the district court another transcript may be substituted by order of the court. *Korth v. State*, 46 Neb. 631 (65 N. W. 792).

147. (1898.) Where an accused, on being brought before an examining magistrate, waives a preliminary examination, then the magistrate should recognize him to appear in the district court and enter upon his docket the proceedings that actually occurred, and a duly certified transcript of this record, filed in the office of the clerk of the district court, will invest that court with jurisdiction to try the accused on information for the crime with which he was accused before the examining magistrate. *Latimer v. State*, 55 Neb. 609 (76 N. W. 207; 70 Am. St. Rep. 403).

IX. ARRAIGNMENT AND PLEAS.

Arraignment of defendant in bastardy proceedings, see *Bastards*, §§ 51-53.

Failure to answer in contempt as evidence of guilt, see *Contempt*, §§ 70-73.

Intoxication as defense to larceny, see *Larceny*, §§ 118, 119.

Necessity of arraignment and plea.

Necessity of arraignment in contempt, see *Contempt*, § 52.

148. (1871.) In misdemeanor it is sufficient if the counsel of the prisoner waives the reading of the indictment and enters the plea of not guilty without formal arraignment. *Kruget v. State*, 1 Neb. 365.

149. (1871.) It is error to put a prisoner upon his trial before he has plead to the indictment. *Burley v. State*, 1 Neb. 385.

150. (1887.) Where a defendant is put on trial for a misdemeanor without a plea to the indictment having been entered, it is a mere technical error or irregularity which does not affect any of his substantial rights and affords no ground for reversal of a judgment of conviction. *Allyn v. State*, 21 Neb. 593 (33 N. W. 212).

151. (1898.) A conviction under an amended information charging a felony will not be sustained where the record does not affirmatively disclose that the accused was arraigned, and that he pleaded before trial. *Barker v. State*, 54 Neb. 53 (74 N. W. 427.)

152. (1898.) When it is discovered during the trial on the charge of a felony that there has been no arraignment and plea, the court should not proceed with the trial without arraigning the accused, entering his plea, and causing the jury to be resworn and the witnesses to be re-examined. *Browning v. State*, 54 Neb. 203 (74 N. W. 631).

153. (1898.) A judgment of conviction of felony cannot stand where there was no arraignment of, and plea by, the accused before the trial. *Browning v. State*, 54 Neb. 203 (74 N. W. 631).

154. (1898.) When one is charged with having committed a crime, is arrested, and brought before a magistrate, it is not essential that he should be asked to plead, or plead to the complaint. *Latimer v. State*, 55 Neb. 609 (76 N. W. 207; 70 Am. St. Rep. 403).

Entry on indictment.

155. (1877.) The statute directing the entry of the prisoner's plea on the back of the indictment is not mandatory, but directory merely, and the failure to so enter it is no ground for a reversal of the judgment, when the plea is contained in another part of the record. *Preuit v. People*, 5 Neb. 377.

Plea of guilty.

156. (1903.) A plea of guilty of the acts alleged in an information charging no offense is not a plea of guilt of the crime attempted to be charged, and the sufficiency of the information and the authority and jurisdiction of the court to pronounce sentence of imprisonment may properly be challenged by a motion in arrest of judgment. *Smith v. State*, 68 Neb. 204 (94 N. W. 106).

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Plea to the jurisdiction.

157. (1871.) A plea to the jurisdiction which only alleges conclusions of law, and not facts adverse to the jurisdiction, is not good. *Burley v. State*, 1 Neb. 385.

Pleas in abatement or bar in general.

Necessity of withdrawal of plea of not guilty, see *post*, §§ 196-203.

158. (1880.) A plea in abatement to an indictment must state facts and not mere conclusions of law. *Priest v. State*, 10 Neb. 393 (6 N. W. 468).

159. (1881.) A plea in abatement to an indictment upon the ground that the grand jury were not legally selected and chosen must point out the particular cause of illegality. *Baldwin v. State*, 12 Neb. 61 (10 N. W. 463).

160. (1883.) A plea in abatement may be signed by the prisoner's attorney. If so signed, and verified by the prisoner, it is sufficient. *Bohanan v. State*, 15 Neb. 209 (18 N. W. 129).

161. (1895.) An objection that the offense charged in the indictment differs from that in the complaint should be made by plea in abatement and not by motion to quash. *Whitner v. State*, 46 Neb. 144 (64 N. W. 704).

162. (1897.) In a prosecution for embezzlement, the pendency of a former information in another county, charging accused with the embezzlement of the same property, within that county, is no ground for abatement. *Bartley v. State*, 53 Neb. 310 (73 N. W. 744).

163. (1898.) Matters cannot be presented by a plea in abatement which are triable under a plea of not guilty. *State v. Bailey*, 57 Neb. 204 (77 N. W. 654).

164. (1898.) A plea in abatement may be made when there is a defect in the record which is shown by facts extrinsic thereto. *State v. Bailey*, 57 Neb. 204 (77 N. W 654).

165. (1899.) It is unnecessary to plead facts of which the court will take judicial notice. *George v. State*, 59 Neb. 163 (80 N. W. 486).

166. (1901.) The pendency of a former information for the same offense, in the same court, furnishes no sufficient ground for plea in abatement. *Roby v. State*, 61 Neb. 218 (85 N. W. 61).

167. (1902.) Where a party has had a preliminary hearing, and has been held to answer to the district court, and an information is filed against him in such court, that no warrant has been issued and served on him, based on the offense charged, and that he has never been arrested and brought into court on such charge, is not a good plea in abatement. *Sothman v. State*, 66 Neb. 302 (92 N. W. 303).

168. (1907.) A plea in abatement in a criminal prosecution is proper where there is a defect in the record shown by facts extrinsic thereto. (Criminal code, sec. 441.) *Steiner v. State*, 78 Neb. 147 (110 N. W. 723).

——— **Waiver of defects.**

169. (1898.) A plea in bar is, by our statute, to be deemed a waiver of a plea in abatement and this is held to follow where both pleas are presented by a single pleading. *Bush v. State*, 55 Neb. 195 (75 N. W. 542).

170. (1901.) A plea of "not guilty," whether made by the accused or entered by the court for him when on arraignment he stands mute, is a waiver of all defects in an information that can be reached by a motion to quash. *Trimble v. State*, 61 Neb. 604 (85 N. W. 844).

171. (1901.) 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*, 62 Neb. 619 (87 N. W. 355).

——— **Demurrer or replication to plea.**

172. (1894.) When a plea in bar to an indictment or information is insufficient in form, or when it appears from the face thereof that the facts alleged are not in law a bar to the prosecution, the state may demur; otherwise it should join issue by means of a replication. *Smith v. State*, 42 Neb. 356 (60 N. W. 585).

173. (1894.) By demurring to a plea in bar the state will be held to have admitted all of the facts well pleaded therein. *Smith v. State*, 42 Neb. 356 (60 N. W. 585).

174. (1907.) Where a so-called plea in abatement does not state facts sufficient to constitute such plea, and contains no negation of any element of the offense charged, a demurrer thereto is properly sustained. *Steiner v. State*, 78 Neb. 147 (110 N. W. 723).

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——Trial of issues raised.

175. (1883.) If the plea contain a material averment on which issue is joined, it is error for the court to refuse the prisoner a trial of it. *Bohanan v. State*, 15 Neb. 209 (18 N. W. 129).

176. (1884.) When a plea in bar is interposed to a prosecution upon indictment, which is clearly insufficient, a demurrer may be filed thereto without resorting to the formality of impaneling a jury to try the issue presented by the plea. But if the plea states facts which, if true, would constitute a bar to further prosecution, the truth of the plea must, in the absence of a valid agreement to proceed otherwise, be ascertained by a jury. *State v. Priebnow*, 16 Neb. 131 (19 N. W. 628). [The language, "in the absence of a valid agreement to proceed otherwise," disapproved in *Arnold v. State*, 38 Neb. 752; 57 N. W. 378].

177. (1894.) The prosecuting attorney may interpose a demurrer to a plea in bar offered under section 449 of the cdiminal code by a prisoner indicted for a felony, and have the judgment of the court, whether the facts stated in such plea are sufficient, if true, to prevent the trial of the prisoner for the crime for which he stands indicted and arraigned; but where the plea in bar is good, then the issues raised by it, and the state's reply thereto, must, and can only, be tried by a jury, and it is beyond the power of the state's attorney and prisoner, by agreement, to substitute another tribunal than the one prescribed by statute for the trial of such issues. The law is designed for the protection of the state as well as the prisoner, and its mandates cannot be evaded by contract, nor can a prisoner charged with a felony waive the right to a jury trial of such issues. *Arnold v. State*, 38 Neb. 752 (57 N. W. 378).

178. (1906.) Where a plea in abatement in a criminal prosecution presents questions of law only, it is proper for the trial court to determine such questions without the intervention of a jury. *Stetter v. State*, 77 Neb. 777 (110 N. W. 761).

——Evidence.

179. (1894.) The state cannot deprive the accused of his right to a trial upon a plea in bar by introducing evidence tending to controvert the facts therein alleged in connection with a demurrer to the plea. *Smith v. State*, 42 Neb. 356 (60 N. W. 585).

180. (1903.) Waiving a preliminary examination in a misdemeanor case cures all defects in the warrant upon which a defendant is arrested; and where one of the grounds of a plea in abatement is a defect in the warrant, and the state, by denial, joins issue thereon, it is incumbent upon the defendant, in order to sustain his plea, to show that he has not waived his preliminary examination. *Everson v. State*, 4 Unof. 109 (93 N. W. 394).

181. (1903.) Where a defendant files a plea in abatement to some of the counts in an information, in which he alleges that he has never had a preliminary examination thereon, and the state denies the facts stated in the plea, he must establish such facts by competent evidence or his plea will be overruled. *Everson v. State*, 4 Unof. 109 (93 N. W. 394).

Plea of limitation.

182. (1895.) The defendant in a criminal prosecution may avail himself of the defense of the statute of limitations under a plea of not guilty. *Boughn v. State*, 44 Neb. 889 (62 N. W. 1094).

Plea of former jeopardy.

183. (1897.) A plea of former jeopardy should set out the the record including the indictment and acquittal or conviction and the statements of fact as to the identity of the person acquitted or convicted and the offense of which he was acquitted or convicted. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

184. (1889.) A plea of former acquittal, in which defendant alleged that, at the May, 1887, term of said court, the county attorney of said county presented his information against her for the same offense with which she now stands charged; that she was duly arraigned in said court on said information, and plead not guilty thereto; that thereupon a jury was duly impaneled and sworn in said cause, and the evidence on the part of the state as well as the defense was all introduced and submitted to said jury; that the jury was thereupon instructed by the court, and that thereupon the jury, in charge of a bailiff of said court, retired to deliberate upon their verdict, and that after said jury had been out a space of twenty hours, and no more, without agreeing on a verdict, they were brought into court, when said jury were discharged by the court without agreeing on a verdict,

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and without disagreeing, or any other special cause, there being no special necessity for discharging said jury; that defendant then and there objected and protested; is good as against a general demurrer. *Conklin v. State*, 25 Neb. 784 (41 N. W. 788).

185. (1889.) An indictment was returned into the district court by the grand jury, charging plaintiff in error with four separate violations of the liquor law of the state. He was placed upon trial under three counts in the indictment. Before entering upon the trial he filed his special plea in bar, alleging that the indictment on file consisted of four counts; that upon arraignment he plead not guilty to each of the counts thereof, when he was placed upon trial and the jury empaneled and sworn to try the issue thus joined; that the county attorney, over his objection and protest, then elected to proceed with the trial under but one of the counts of the said indictment; that upon said trial a verdict of not guilty was returned by the jury, when he was discharged by the court. To this plea the county attorney interposed a general demurrer, which was sustained by the district court. *Held*, Error, since the plea was sufficient to present an issue which should have been joined. *Murphy v. State*, 25 Neb. 807 (41 N. W. 792).

186. (1897.) Where the prisoner, after a plea of not guilty and without withdrawing, or requesting to withdraw such plea, filed a plea of "former jeopardy" which was neither signed nor sworn to by the prisoner, such plea in bar was invalid; and the state was under no obligation to demur or reply to it, and that the court was justified in disregarding it and, on its own motion, striking it from the files. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

187. (1897.) An invalid plea in bar on the grounds of former jeopardy, may be treated as a motion to discharge accused. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

188. (1898.) Where the allegations of a plea in bar, liberally and fairly construed, substantially state that the prisoner has previously, by a court having jurisdiction, had a judgment of acquittal, the truth of the averments of the plea must be determined by a jury. *Bush v. State*, 55 Neb. 195 (75 N. W. 542).

189. (1899.) A plea in bar need not be interposed to call to the attention of the court matters of record, which show that the accused was duly acquitted in the same court, in the same case of the identical charge upon which it is proposed to try him again. *George v. State*, 59 Neb. 163 (80 N. W. 486).

Plea of want of preliminary examination.

190. (1887.) Question of want of preliminary examination must be raised by plea in abatement, *Cowan v. State*, 22 Neb. 519 (35 N. W. 405).

191, 192. (1894.) Objection by an accused on the ground that there has been no preliminary examination for the crime charged should be by a plea in abatement. *Hill v. State*, 42 Neb. 503 (60 N. W. 916); (1902) *Reed v. State*, 66 Neb. 184 (92 N. W. 321).

193. (1903.) By the interposition of a plea in abatement after the filing of an information against one accused of a felony the question may properly be determined as to whether a preliminary examination has been had or waived. *Jahnke v. State*, 68 Neb. 154 (94 N. W. 158).

Plea of not guilty.

194. (1896.) A plea of the general issue raises the question of the guilt or innocence of accused, of the principal crime charged, and also of the lesser ones included thereon, and hence the jury should be instructed as to the lesser crimes, although not requested to do so by defendant. *Pjarrou v. State*, 47 Neb. 294 (66 N. W. 422).

——— Joinder with other pleas.

195. (1877.) When a defendant pleads not guilty, he cannot in connection with such plea, by other pleas raise questions in respect to a former conviction. *Marshall v. State*, 6 Neb. 120 (29 Am. Rep. 363).

——— Withdrawal.

196. (1871.) If the defendant plead "not guilty," and afterwards file his motion to quash and plea in abatement and they are determined, and the trial proceeds without a renewal of the plea of "not guilty," the presumption is that it, as first interposed, was not withdrawn. *Burley v. State*, 1 Neb. 385.

197. (1896.) Where a plea to the general issue has been entered and has not been withdrawn, a plea in abatement need not be entertained. *Korth v. State*, 46 Neb. 631 (65 N. W. 792).

198. (1897.) There can never properly be more than one issue before the court in

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a criminal case at one time, and so long as the plea of not guilty remains on the record, a plea in bar is improper, and the state is under no necessity of replying or demurring to such plea, and the court, on its own motion, may disregard it. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

199. (1897.) If a prisoner, after a plea of not guilty, tenders a lawful and proper plea in bar, stating facts which have occurred or come to his knowledge since the entry of his plea of not guilty, and which facts, if true, entitle him to discharge, then it is the duty of the court to permit the prisoner to withdraw his plea of not guilty and file such plea in bar. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

200. (1899.) A plea in bar may be disregarded, if presented while the plea of not guilty remains on the record. *George v. State*, 59 Neb. 163 (80 N. W. 486).

201. (1899.) Whether a defendant is authorized to withdraw a plea of not guilty after the issue raised by it has been, in the orderly course of procedure, unalterably adjudicated, *quaere*. *George v. State*, 59 Neb. 163 (80 N. W. 486).

202. (1399.) Where a court entertains and considers the merits of a plea in bar, without a formal withdrawal of the plea of not guilty, the plea of not guilty will be considered as constructively withdrawn. *George v. State*, 59 Neb. 163 (80 N. W. 486).

203. (1899.) Where a court entertains and considers the merits of a plea in bar, without a formal withdrawal of the plea of not guilty, it is, at most, a mere irregularity, and the action of the court thereon may be the subject of review. *George v State*. 59 Neb. 163 (80 N. W. 486).

X. EVIDENCE.

In prosecution for particular crimes, see particular topics.

Competency of insurance policy in prosecution for arson, see *Arson*, § 3.

Information in extradition as evidence, see *Extradition*, § 10.

Proof of existence of house of prostitution, see *Disorderly Houses*, §§ 2, 3.

Taking depositions, see *Depositions*, § 19.

Variance between preliminary complaint and indictment, see *Indictment and Information*, §§ 80-82.

A. Judicial Notice, Presumptions, and Burden of Proof.

Presumption from possession of stolen property, see *Burglary*, §§ 23-25.

Presumption of violation of liquor laws from possession of liquor, see *Intoxicating Liquors*, §§ 284-290.

Presumption as to larceny, see *Larceny*, § 50.

Judicial notice.

204. (1894.) Courts will not, as a rule, take notice of municipal ordinances, unless required to do so by special charter or general law. *Foley v. State*, 42 Neb. 233 (60 N. W. 574).

205. (1894.) Upon trial of a person for the violation of a city ordinance the police court may take notice of the ordinance; and upon trial *de novo* of an appeal from a judgment of conviction the district court may take notice of whatever facts the lower court could have noticed judicially. *Foley v. State*, 42 Neb. 233 (60 N. W. 574).

206. (1896.) Where a city or village is incorporated by a special act of the territorial legislature, the courts will take judicial notice of such incorporation, in case the legislautre has in said act declared it to be a public law. *Hornberger v. State*, 47 Neb. 40 (66 N. W. 23).

207. (1902.) The courts of this state will take judicial notice that beer is an intoxicant. *Sothman v. State*, 66 Neb. 302 (92 N. W. 303).

208. (1907.) Municipal courts will take judicial notice of the ordinances of the city, and on an appeal therefrom to the district court from a conviction of a violation of a city ordinance the latter court will upon a trial *de novo* take notice of whatever facts the former court was required to notice judicially before the removal of the cause. *Steiner v. State*, 78 Neb. 147 (110 N. W. 723).

Presumptions.

Presumption as to adultery, see *Adultery*, §§ 11-13.

209. (1893.) In the absence of pleadings and proof, it will be presumed that the laws of a sister state are the same as our own. *Bailey v. State*, 36 Neb. 808 (55 N. W. 241).

210. (1895.) Insanity of accused at the time he committed the homicide will not be conclusively presumed from a previous order of the commissioners of insanity finding that he is a fit subject for treatment in an insane asylum. *Pflueger v. State*, 46 Neb. 493 (64 N. W. 1094).

211. (1899.) When a rebuttable pre-

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sumption possessing no inherent probative force is met by opposing evidence, it is entirely destroyed and ceases to be a factor in the trial, unless it be required to turn an evenly balanced scale. *Reynolds v. State*, 58 Neb. 49 (78 N. W. 483).

212. (1902.) When the legislative thought is cast in the mould of the criminal law, it will be presumed, nothing appearing to the contrary, that the remedies contemplated were those generally used in courts exercising criminal jurisdiction. *State v. Missouri P. R. Co.*, 64 Neb. 679 (90 N. W. 877).

——— Innocence.

213. (1877.) In the absence of evidence to the contrary the law presumes everyone innocent. And this legal presumption of innocence is a matter of evidence, to the benefit of which the party accused is entitled. *Garrison v. State*, 6 Neb. 274; (1881) *Olive v. State*, 11 Neb. 1 (7 N. W. 444) (1888) *Long v. State*, 23 Neb. 33 (36 N. W. 310).

214. (1897.) One accused of a crime is presumed to be innocent, and the presumption begins with the accusation and continues until the state has established his guilt beyond a reasonable doubt. *Davis v. State*, 51 Neb. 301 (70 N. W. 984); (1900) *Williams v. State*, 60 Neb. 526 (83 N. W. 681).

——— Identity of persons.

215. (1899.) Identity of name ordinarily affords a presumption of identity of person; and where the name of the victim of a criminal assault is the same in two counts of an information, the law presumes that the reference in both counts is to the same person. *Dunn v. State*, 58 Neb. 807 (79 N. W. 719).

——— Intent.

216. (1883.) It is a presumption of law, applicable in criminal trials, that a person intended to do that which he voluntarily and wilfully did in fact to. *Parrish v. State*, 14 Neb. 60 (15 N. W. 357).

——— Failure of defendant to testify.

217. (1883.) The fact that a prisoner does not testify in his own behalf will not operate to his disadvantage; but if he testify, and fail to controvert in any way what has been said by witnesses against him, concerning a fact within his own personal knowledge, it will be taken as an admission that their testimony is true. *Comstock v. State*, 14 Neb. 205 (15 N. W. 355).

Burden of proof.

Burden of proving drunkenness as defense to larceny, see *Larceny*, §§ 118, 119.

218. (1877.) Where the accused sets up no defense of distinct and independent facts, but relies upon the plea of not guilty, the burden of proof is on the state to satisfy the jury of his guilt. *Garrison v. People*, 6 Neb. 274.

219. (1894.) In criminal prosecutions the burden of proof never shifts, but, as to all defenses which the evidence tends to establish, rests upon the state throughout; hence a conviction can be had only when the jury are satisfied, from a consideration of all the evidence, of the defendant's guilt beyond a reasonable doubt. That rule applies not alone to the case as made by the state, but to any distinct, substantive defense which may be interposed by the accused to justify or excuse the act charged. *Gravely v. State*, 38 Neb. 871 (57 N. W. 751).

220. (1898.) The burden of proof in a criminal action is on the state and does not shift to defendent. *Davis v. State*, 54 Neb. 177 (74 N. W. 599); (1990) *Williams v. State*, 60 Neb. 526 (83 N. W. 681).

221. (1902.) It will not be presumed in any case that the law has been violated: every alleged violation must be established by competent proof. *State, ex rel. Freeman, v. Scheve*, 65 Neb. 853, 876 (93 N. W. 169).

——— Insanity.

222. (1876.) Where in a criminal case the accused relies upon insanity as a defense, the burden of proof is on the prosecution to show sanity. *Wright v. State*, 4 Neb. 407.

223. (1886.) Where in a criminal case the accused relies upon insanity as a defense, and there is testimony tending to prove such insanity, the burden of proof is on the prosecution to show sanity. *Ballard v. State*, 19 Neb. 609 (28 N. W. 271).

224. (1891.) When insanity is relied upon as a defense and testimony has been introduced which rebuts the presumption that the defendant was sane, the burden is upon the state to establish by the evidence beyond a reasonable doubt that the accused was sane at the time of committing the act charged. *Furst v. State*, 31 Neb. 403 (47 N. W. 1116).

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225. (1898.) To cast on the state the burden of proving sanity it is only requisite that there be some evidence tending to prove insanity, and it is not necessary that there must first be evidence sufficient to raise a reasonable doubt. *Snider v. State*, 56 Neb. 309 (76 N. W. 574).

——— Alibi.

226. In a criminal case it is error to instruct that the burden of proof is upon the accused to establish an alibi by a preponderance of the evidence. (1896) *Casey v. State*, 49 Neb. 403 (68 N. W. 643); (1897) *Beck v. State*, 51 Neb. 106 (70 N. W. 498).

227. (1898.) The burden of proof is not on accused to establish an alibi. *Peyton v. State*, 54 Neb. 188 (74 N. W. 597).

B. Facts in Issue and Relevant to Issue, and Res Gestae.

Proof of *corpus delicti* in larceny, see *Larceny*, § 84.

In general.

228. (1881.) A witness for the state who had testified, on his direct examination, to having seen a person he took for one of the prisoners near the place of the murder, on the evening preceding the night of its commission, was asked, on cross-examination, how long he had known him, and answered, "Since he has resided in Plum Creek." He was then asked, "How long has he resided there?" and "Have you known him well since he lived there?" These questions were both excluded on the ground of immateriality. *Held*, Error. *Olive v. State*, 11 Neb. 1 (7 N. W. 444).

229. (1899.) Evidence which does not tend to establish the guilt or innocence of the defendant of the crime charged should be excluded, even though its admission might afford the jury a remote "basis for a guess." *Kastner v. State*, 58 Neb. 767 (79 N. W. 713).

230. (1901.) It is error to exclude evidence the legitimate tendency of which is to put an innocent complexion upon inculpatory circumstances proven by the state; the weight of such evidence is for the jury. *Burlingim v. State*, 61 Neb. 276 (85 N. W. 76).

231. (1901.) The exclusion of testimony relating to a collateral fact and corrobating the defense, is not error where its relation to the main fact is uncertain. *Smith v. State*, 61 Neb. 296 (85 N. W. 49).

232. (1901.) On the trial of a criminal case every hypothesis that implies the defendant's guilt is pertinent, and any evidence fairly tending to sustain such hypothesis is relevant to the issue. *Jerome v. State*, 61 Neb. 459 (85 N. W. 394).

233. (1902.) It is not reversible error to permit a witness to testify in regard to the means which he employed to identify property which he had been instructed to seize for the purpose of being used as evidence in a criminal case. *Russell v. State*, 66 Neb. 497 (92 N. W. 751).

234. (1903.) The word "evidence," in its technical meaning and common acceptation, includes all the means by which any fact in dispute at a judicial trial is established or disproved. *O'Brien v. State*, 69 Neb. 691 (96 N. W. 649).

235. (1905.) One of two persons jointly charged with the commission of a crime cannot, by being accorded a separate trial, prevent the state from introducing evidence, otherwise competent, to prove his guilt, because such evidence also tends to establish the guilt of his codefendant. *Krens v. State*, 75 Neb. 294 (106 N. W. 27).

Attempt to suppress evidence.

236. Evidence is relevant which shows that the accused has threatened or assaulted a witness, has endeavored to prevail on him to abscond, has procured his absence, has endeavored to induce him to testify falsely, or has concealed the whereabouts of such witness from the prosecution; and such conduct on the part of an accused person is an incriminating circumstance to be weighed by the jury in determining the question of his guilt. (1902) *Hubbard v. State*, 65 Neb. 805 (91 N. W. 869); (1904) *Blair v. State*, 72 Neb. 501 (101 N. W. 17); (1904) *Woodruff v. State*, 72 Neb. 815 (101 N. W. 1114).

237. (1907.) Evidence that the defendant in a criminal case has hired or procured a witness for the prosecution to leave the state and not appear at the trial as a witness against him is competent as an incriminating circumstance tending to establish his guilt. *Crowell v. State*, 79 Neb. 784 (113 N. W. 262).

Attempt to escape.

238. (1886.) An escape is not necessarily an admission of guilt. *Mathews v. State*, 19 Neb. 330 (27 N. W. 234).

239. (1902.) An attempt to stifle the prosecution, and to prevent a trial by

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flight beyond the jurisdiction, are circumstances from which unfavorable inferences may be drawn against the defendant in a criminal case. *Hubbard v. State*, 65 Neb. 805 (91 N. W. 869); (1904) *Woodruff v. State*, 72 Neb. 815 (101 N. W. 1114).

240. (1902.) The fact that the defendant in a criminal case stood his ground until an accusation was lodged against him, is not, under all circumstances, evidence of innocence. *Reed v. State*, 66 Neb. 184 (92 N. W. 321).

241. (1903.) An attempt to escape by one under arrest accused of crime is an inculpatory circumstance properly to be considered by a jury and to be given such weight as it seems fairly entitled to, with the other evidence introduced at the trial, in determining the question of the guilt or innocence of the accused. *Williams v. State*, 69 Neb. 402 (95 N. W. 1014).

Motive.

242. (1897.) Where accused was charged with having displaced a rail which caused a wreck of a train on Thursday, and the death of a passenger, and the evidence connecting him with the crime was largely circumstantial, the state may show that accused had a superstition that Thursday was his lucky day, and that anything he attempted on that day would succeed. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

Intent.

243. (1897.) Where the intention of the accused is a material fact, and he takes the stand on his own behalf, he may be asked directly what was his intention with regard to the act complained of. *Cummings v. State*, 50 Neb. 274 (69 N. W. 756).

Intoxication.

244. (1894.) While intoxication is no excuse for an assualt committed when under the influence thereof, it is proper to be considered by the jury for the purpose of determining whether the prisoner was at the time in question capable of entertaining the specific intent charged. *Head v. State*, 43 Neb. 30 (61 N. W. 494).

Threats.

245. (1874.) Threats of the deceased towards the accused, which were made some time after deceased had received wounds of which he died, constitute no part of the *res gestæ*. *Caw v. State*, 3 Neb. 357.

Interest of defendant.

246. (1881.) Interest of prisoner in result of trial may be shown for the purpose of affecting his credibility. *Baldwin v. State*, 12 Neb. 61 (10 N. W. 463).

247. (1895.) Where defendant in a criminal prosecution becomes a witness in his own behalf, his interest in the result of the trial may be shown for the purpose of affecting his credibility. *Basye v. State*, 45 Neb. 261 (63 N. W. 811).

Conduct and appearance of defendant.

248. (1878.) The conduct and appearance of the prisoner about the time of the discovery of the homicide with which he is charged, as well as his declarations concerning it, are admissible in evidence against him. *Clough v. State*, 7 Neb. 320.

249. (1886.) Where a witness, called by a defendant in his defense, is interrogated as to the conduct and presence of the accused up to about the time of the alleged commission of the crime, it is not improper cross-examination for the state's counsel to inquire as to his conduct and presence after that date without being limited to the exact time mentioned in the examination in chief. *Marion v. State*, 20 Neb. 233 (29 N. W. 911; 57 Am. Rep. 825).

250. (1902.) When, before prosecution, and while not under restraint, parties are accused of living together in a state of fornication, and make no denial, or are silent, this may be shown in evidence as an inculpatory circumstance to be weighed and considered by the jury in determining the truth of the charge preferred against them. *Musfelt v. State*, 64 Neb. 445 (90 N. W. 237).

C. Other Offenses and Character of Accused.

Admissibility of proof of attempt to commit similar crime, see *False Pretenses*, §§ 12, 13.

Evidence of good character of defendant in bastardy, see *Bastards*, §§ 73, 74.

Admissibility of proof of other crime in charge of larceny, see *Larceny*, § 54.

Proof of other acts of bribery, see *Bribery*, § 2.

Evidence of other offenses.

251. (1885.) As a general rule, the guilt of the accused, or his participation in the commission of another crime, wholly unconnected with that for which he is put on his trial, cannot be admitted in evidence against him. *Smith v. State*, 17 Neb. 358 (22 N. W. 780).

252. (1887.) Except in cases where it is necessary to show guilty knowledge, it is

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not admissible to prove that at another time and place the accused committed or attempted to commit a crime similar to that with which he stands charged. *Cowan v. State*, 22 Neb. 519 (35 N. W. 405); (1888) *Berghoff v. State*, 25 Neb. 213 (41 N. W. 136); (1898) *Morgan v. State*, 56 Neb. 696 (77 N. W. 64).

253. (1892.) Where the accused was a witness in his own behalf the prosecuting officer, on cross-examination, asked him: "Is it not a fact that you stole a horse in Burnett county, Texas? Don't you know the sheriff has a warrant for you for stealing a horse in that county?" and other similar questions not connected with the crime charged. *Held*, Improper and prejudicial. *Elliott v. State*, 34 Neb. 48 (51 N. W. 315).

254. (1894.) As a general rule, it is incompetent for the state in a criminal prosecution to prove that the prisoner at some other time committed an offense similar to the one with which he stands charged. *Palin v. State*, 38 Neb. 862 (57 N. W. 743).

255. (1898.) On trial of one charged with having procured the indorsement of a draft by false representations, evidence that he previously committed a similar offense is inadmissible. *Morgan v. State*, 56 Neb. 696 (77 N. W. 64).

256. (1899.) Where a person is charged with the commission of a specific crime, testimony may be received of other similar acts, committed about the same time, for the purpose only of establishing the criminal intent of the accused. *Knights v. State*, 58 Neb. 225 (78 N. W. 508; 76 Am. St. Rep. 78).

257. (1902.) The fact that the prosecution offered direct evidence to prove guilty knowledge as to the offense charged does not preclude the state from also offering testimony of collateral offenses closely related in time and circumstances, for the same purpose. *Goldsberry v. State*, 66 Neb. 312 (92 N. W. 906).

258. (1905.) Where the accused in a prosecution for rape, was a witness in his own behalf, and the prosecuting officer on cross-examination asked him, in substance, if he had not at a previous time been guilty of a like offense upon another young girl, naming her, and other like questions, and thereafter called the person named to the witness stand and examined her, for the purpose of not only impeaching the accused but of proving him guilty of such independent offense, *held*, that such conduct was improper and prejudicial, for which the accused should be granted a new trial. *Nicholizack v. State*, 75 Neb. 27 (105 N. W. 895).

259. (1907.) In cases where the guilt of the defendant depends upon the intent, purpose or design with which the act was done, or upon his guilty knowledge thereof, collateral facts in which he bore a part occurring immediately before and leading up to the transaction complained of are admissible for the purpose of establishing such guilty intent. *Clark v. State*, 79 Neb. 473 (113 N. W. 211).

Conviction for other crimes.

260. (1884.) When in a prosecution for murder the defendant on his trial becomes a witness in his own behalf, it is incompetent on cross-examination, for the purpose of affecting his credibility as a witness, to ask him if he had not plead guilty to a penitentiary offense in another state; the entering of a plea of guilty without judgment or sentence not being a conviction within the meaning of section 338 of the civil code of Nebraska. *Marion v. State*, 16 Neb. 349 (20 N. W. 289, 396).

261. (1902.) Cross-examination of an accused by the prosecuting attorney, asking of prior convictions for other crimes, and whether or not he had not served time in the penitentiary is such misconduct as warrants a new trial. *Leo v. State*, 63 Neb. 723 (89 N. W. 303).

Proof and effect of other offenses.

262. (1894.) Where a single crime is charged in an information, and the state on the trial, for the purpose of proving the offense alleged, introduces testimony tending to prove similar, but distinct crimes, the proper practice is for the accused to move the court to require the prosecutor to elect on which transaction he will rely for a conviction. *Palin v. State*, 38 Neb. 862 (57 N. W. 743).

Character of accused.

263. (1893.) Where a person on trial for a crime has not himself put his general character in issue, the state cannot do so on the pretext of impeaching a witness by disproving the statements of the witness. *Carter v. State*, 36 Neb. 481 (54 N. W. 853).

264. (1902.) The general character of the defendant in a criminal case is not

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necessarily involved in the issue; the presumption is that his character is good; but he is not obliged to rely on this presumption; he may buttress it with evidence, and such evidence may be met by the state with opposing proof. *Biester v. State*, 65 Neb. 276 (91 N. W. 416).

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265. (1902.) Any evidence tending to sustain an hypothesis which implies guilt is relevant to the issue in a criminal case and cannot be excluded on the ground that it impeaches defendant's general character. *Russell v. State*, 66 Neb. 497 (92 N. W. 751).

266. (1905.) Evidence of good character is always admissible as a circumstance favorable to the accused, to be considered by the jury in connection with the other evidence bearing upon the question of guilt or innocence, and given such weight as the jury believe it fairly entitled to, and when so considered it may be sufficient to create a reasonable doubt, when, without it, none would exist; but the conclusion of the jury is to be drawn from the whole of the evidence, and when, after giving evidence of good character due weight, the proof still shows the accused to be guilty beyond a reasonable doubt, such evidence of good character is unavailing. *Sweet v. State*, 75 Neb. 263 (106 N. W. 31).

267. (1907.) In a criminal prosecution, the state ordinarily will not be permitted to introduce evidence of the character of the accused, unless he has put his character in issue; but, where counsel for the defendant, by his cross-examination, has made it necessary for a prosecuting witness to give such evidence by way of explanation of his own conduct at the time the offense was alleged to have been committed, he may, under proper restriction, give such evidence on his redirect examination. *Craig v. State*, 78 Neb. 466 (111 N. W. 143).

268. (1907.) Where a person on trial for a crime testifies in his own behalf, he becomes as any other witness, and his credibility should be subjected to the same tests as are legally applied to other witnesses. *Burk v. State*, 79 Neb. 241 (112 N. W. 573).

268*a*. (1907.) Proof of reputation is properly confined to the reputation of the individual in the vicinity in which he lives or in which he had formerly resided. *Younger v. State*, 80 Neb. 201 (114 N. W. 170).

——— Rebuttal of evidence of good character.

269. (1888.) Where accused introduces witnesses to prove his good character, the state may introduce witnesses in rebuttal, although their names are not endorsed on the information. In such case the question of character is collateral to the main issue, and being raised by the defendant the state may call witnesses in rebuttal. *State v. Huckins*, 23 Neb. 309 (36 N. W. 527).

270. (1902.) Where a defendant has offered evidence to show his previous good character as being a peaceful, law-abiding citizen, it is not error on cross-examination to ask the witness if he has known of the defendant's being arrested. *McCormick v. State*, 66 Neb. 337 (92 N. W. 606).

——— Particular acts.

271. (1881.) Where a person accused of crime introduces evidence of his good character or reputation, it is not competent for the prosecution, in reply, to put in evidence particular facts tending to prove it to be bad. But if particular facts be admitted, either with or without objection, the accused has the right to show the circumstances under which they occurred. *Olive v. State*, 11 Neb. 1 (7 N. W. 444); (1894) *Patterson v. State*, 41 Neb. 538 (59 N. W. 917); (1895) *Bayse v. State*, 45 Neb. 261 (63 N. W. 811).

272. (1894.) Character, according to its legal construction, is a fact, and means the estimate in which the individual is held in the community in which he lives; and it is not error on the part of a trial court to exclude the knowledge of a witness, purporting to have been gained by personal acquaintance or dealings with the individual whose character is in question, as only the general reputation of such individual is admissible. *Berneker v. State*, 40 Neb. 810 (59 N. W. 372).

——— Cross-examination of defendant as to credibility.

273. (1904.) The credibility of accused, when a witness in his own behalf, is to be determined and tested by the same principles that are applicable alike to all witnesses who testify in a case. *Ferguson v. State*, 72 Neb. 350 (100 N. W. 800).

274. (1904.) In a criminal action, when an accused takes the witness stand in his own behalf, he is put in the position of an ordinary witness and subject to the rules

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governing the usual cross-examination. *Ferguson v. State*, 72 Neb. 350 (100 N. W. 800).

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275. (1905.) Where an accused testifies in his own behalf he may be cross-examined as any other witness, but matter not brought out on his direct examination and which tends merely to disgrace him before the jury, cannot be brought out. *Razee v. State*, 73 Neb. 732 (103 N. W. 438).

D. Materiality and Competency in General.

Evidence on preliminary examination, see *ante*, §§ 142, 143.

Rules of evidence in general.

276. (1895.) If the evidence offered be legally admissible for any purpose, an objection to such evidence should be overruled. Evidence cannot be excluded because it is not material to every issue in the case. *Carleton v. State*, 43 Neb. 373 (61 N. W. 699).

277. (1901.) The legislature may change the rules of evidence. *State v. Heldenbrand*, 62 Neb. 136 (87 N. W. 25; 89 Am. St. Rep. 493).

278. (1905.) A local custom cannot operate to suspend a criminal statute, nor to overthrow the rules of evidence by which the commission of an offense is proved. *Crockford v. State*, 73 Neb. 1 (102 N. W. 70).

279. (1907.) A wife may testify as to a crime committed against her by her husband, and it is proper for her to state all of the facts relating to the commission of such crime, nothwithstanding her evidence may tend to convict him of another and different offense committed at the same time and in the same transaction. *Miller v. State*, 78 Neb. 645 (111 N. W. 637).

Nature and source of evidence.

280. (1897.) A party is not prejudiced by the refusal of the court to strike out testimony of a witness as to when a certain fact happened because the witness admits that he entered such fact in a book at that time and testifies from the entry rather than from his recollection, when it appears that the entry was correct and the party moving to strike out introduced in evidence the entry made in the book by the witness. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

281. (1904.) When a witness testifies positively to a conversation with an acquaintance over the telephone, an objection to the evidence on the ground that the witness has not sufficiently identified the person with whom the conversation was held should not be sustained, the witness' knowledge of such identity not having been tested by cross-examination or otherwise. The force of the evidence is a question for the jury. *Lillie v. State*, 72 Neb. 228 (100 N. W. 316).

Evidence wrongfully obtained in general.

282. (1878.) Any circumstance tending to establish the prisoner's guilt may be proved, although it was brought to light by an admission of the prisoner, inadmissible, *per se*, as having been obtained by improper influence. *Walrath v. State*, 8 Neb. 80; (1893) *Taylor v. State*, 37 Neb. 788 (56 N. W. 623).

282*a*. (1907.) Where articles are offered in evidence which are pertinent to the issue, the court will not exclude them on account of the manner in which they were obtained. *Younger v. State*, 80 Neb. 201 (114 N. W. 170).

Articles wrongfully taken from accused.

283. (1902.) Evidence showing that a pair of old shoes, worn by defendant at the time he was arrested, was taken from the jail in his absence and without his consent, does not establish a violation of his constitutional right to be secure against unreasonable searches and seizures. *Russell v. State*, 66 Neb. 497 (92 N. W. 751).

E. Best and Secondary and Demonstrative Evidence.

Admissibility of secondary evidence in general.

284. (1878.) When a public officer is called to testify as to payments of money to him in his official capacity by the prisoner, it is proper practice to permit him to refresh his recollection from extracts which he has taken from his own official records, without producing the original. Nor does the fact that the statute permits certified copies from such records to be given in evidence preclude the proof of such payments by the oral testimony of any witness who saw them made. *Clough v. State*, 7 Neb. 320.

285. (1901.) 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*, 62 Neb. 136 (87 N W. 25; 89 Am. St. Rep. 493).

286. (1902.) It is error to permit a

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witness, over a proper objection, to answer a question where such answer involves secondary evidence of the contents of a written instrument, for the admission of which no foundation has been laid, and the conclusion of the witness as to the nature of the instrument. *Sothman v. State*, 66 Neb. 302 (92 N. W. 303).

287. (1903.) What the law requires is the production of original evidence, the best evidence obtainable; secondary evidence being admissible only when for some reason primary evidence cannot be secured. *Donner v. State*, 69 Neb. 56 (95 N. W. 40).

Record or other writing as best evidence.

288. (1899.) It is competent to prove the ownership of a store building by parol evidence when it does not appear that such building is real estate. *Knights v. State*, 58 Neb. 225 (78 N. W. 508; 76 Am. St. Rep. 78).

Preliminaries to admission of secondary evidence.

289. (1887.) Where the record of the indictment against a party accused of committing a crime has been omitted or lost or destroyed, the court will receive secondary evidence as to the essential facts stated in the indictment which conferred jurisdiction on the trial court. *Ex parte Carr*, 22 Neb. 535 (35 N. W. 409).

290. (1897.) Secondary evidence of the contents of an instrument is admissible upon proof that it once existed, and was last seen in the possession of the adverse party, where he under oath on the trial has denied the existence of such instrument. *Whitney v. State*, 53 Neb. 287 (73 N. W. 696).

Experiments and measurements.

291. (1878.) The general rule that, in proving a comparison between a boot of the prisoner and a track claimed by the prosecution to have been made by him at the time the murder was committed, it must be shown that such comparison and measurements were made before the boot was placed upon the track, has no application where the imprint is such that no change could be effected in its appearance by placing the boot upon it. *Clough v. State*, 7 Neb. 320.

292. (1904.) Under some circumstances it is in the discretion of the trial court to permit evidence of experiments to illustrate transactions that have been testified to; and, under the circumstances in this case, the court did not abuse its discretion in permitting such evidence. *Lillie v. State*, 72 Neb. 228 (100 N. W. 316).

293. (1905.) Evidence describing comparisons made between the shoes worn by the accused and footprints found near the place where the crime was committed, without the opinions of the witnesses, is proper and competent as tending to connect the accused with the commission of the offense. *Krens v. State*, 75 Neb. 294 (106 N. W. 27).

Result of trailing by dogs.

294. (1903.) The conduct and behavior of bloodhounds, after being set upon the trail of a fugitive criminal, may not be given in evidence by the state, for the purpose of proving that the scent of the accused and the scent of the person who perpetrated the crime which is being investigated are identical. *Brott v. State*, 70 Neb. 395 (97 N. W. 593; 63 L. R. A. 789).

F. Admissions, Declarations and Hearsay.

Hearsay evidence in prosecution for larceny, see *Larceny*, § 52

Admissions by accused.

295. (1878.) When the prosecutor depends upon the admissions of the prisoner to establish guilt, if they be reconcilable, and none are disproved, they must be taken all together. *Walrath v. State*, 8 Neb. 80.

296. (1885.) The admissions or confessions of an accused on trial for a crime, made to an individual, out of court, without proof *aliunde* that a crime has been committed, will not justify a conviction. *Smith v. State*, 17 Neb. 358 (22 N. W. 780).

297. (1903.) The conduct of the sheriff, who, upon arresting one charged with crime, immediately furnishes him with intoxicating liquors and proceeds to question him for the purpose of obtaining evidence against him, is unjustifiable, and evidence of admissions made under such circumstances should be excluded. *McNutt v. State*, 68 Neb. 207 (94 N. W. 143).

298. (1903.) The admission of evidence of statements made by accused after the sheriff had furnished him with liquor will not be held prejudicial so as to require a reversal if there is uncontradicted evidence that the defendant afterwards, when free from the influence of liquor, and without any undue influence of any kind being brought to bear upon him, made the same admissions to various other persons. *McNutt v. State*, 68 Neb. 207 (94 N. W. 143).

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299. (1905.) The admission in evidence of testimony of a witness as to a statement by defendant as an admission of guilt, such statement appearing to have been made while under fear of bodily harm, and also, denied, by defendant, to have been made as stated by the witness, is error. *Powers v. State*, 75 Neb. 226 (106 N. W. 332).

Declarations by accused.

300. (1878.) The statements of a prisoner to be competent evidence must have been voluntarily made. If made under the obligations of an oath they are not voluntary as a general rule. But when the person, although he be subsequently charged with the offense, appears voluntarily, and gives his testimony before any accusation has been made against him, his statements, although under oath, are admissible. *Clough v. State*, 7 Neb. 320.

301. (1886.) It is not error to allow an officer who arrested a defendant to testify as to statements made by such defendant while in custody, if it be shown that such statements were made voluntarily and without any inducements of hope or fear—being made or offered by such officer or other person. *Ballard v. State*, 19 Neb. 609 (28 N. W. 271).

302. (1887.) A person to whom one intending to commit burglary confides such intention, and procures such person to act as accomplice, is a competent witness to prove the declarations and acts of the party committing the offense, the credibility of such witness being a question for the jury. *State v. Sneff*, 22 Neb. 481 (35 N. W. 219).

303. (1901.) Statements in one's own interest, self-serving in their nature, made soon after the commission of the homicide which such person was charged with having committed, even though made under the apprehension of impending death, the person recovering, are inadmissible as evidence, either as declarations *in extremis* or as a part of the *res gestæ*. *Smith v. State*, 61 Neb. 296 (85 N. W. 49).

304. (1899.) A declaration may be a part of the *res gestæ*. *Smith v. State*, 61 cisely coincident with the main transaction. It is sufficient that there was between the two an immediate casual relation, and that the statement was a spontaneous characterization of the act. *Sullivan v. State*, 58 Neb. 796 (79 N. W. 721).

305. (1901.) In order to render statements made by one charged with crime, admissible as declarations against interest it is not necessary that he be informed that such statements would be used against him. *Coil v. State*, 62 Neb. 15 (86 N. W. 925).

306. (1901.) 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*, 62 Neb. 15 (86 N. W. 925).

——— Competency of witness.

307. (1888.) While the confessions or statements of a third party, not made in the presence of the accused, are inadmissible in any form in a prosecution against a prisoner charged with the offense of aiding and abetting such third party in the commission of a murder, yet it is competent to prove the statements of the accused, made against his interests, in a conversation in which he is informed that a confession has been made by such third party, he being the principal indicted with the accused, but not in custody, and in such case the whole conversation between the witness and accused may be given in evidence. *Long v. State*, 23 Neb. 33 (36 N. W. 310).

308. (1878.) It is not necessary to the competency of a witness called to testify as to what he had heard the prisoner say, that he should have heard all he said on that occasion, if what he heard be sufficient to carry an intelligible idea respecting the commissions of the offense, it may be given in evidence against him. *Clough v. State*, 7 Neb. 320.

Declarations by person injured.

Dying declarations, see *Homicide*, §§ 127*a*-132.

Admissiblity of dying declaration in abortion, see *Abortion*, § 4.

309. (1895.) Where one, in company with another while stealing coal from a railroad car, is shot and in a few hours is found unconscious and on regaining his senses stated, "D had shot him accidentally," such declaration, not being made under fear of impending death, is inadmissible in a prosecution of C. for murder. *Collins v. State*, 46 Neb. 37 (64 N. W. 432).

310. (1895.) Whether the declarations of a person, since deceased, are competent evidence, as being part of the *res gestae* of some transaction occurring in the life of said deceased, in any case, must be determined from the peculiar facts and circum-

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stances surrounding the case on trial and the basis of which case is the past transaction. *Collins v. State*, 46 Neb. 37 (64 N. W. 432).

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311. (1895.) Evidence of the complaints of the injured person in a prosecution for rape is admissible only as corroborative of her testimony, and such complaints are not, except when made *in extremis*, admissible as independent evidence of the offense charged. *State v. Meyers*, 46 Neb. 152 (64 N. W. 697; 37 L. R. A. 423)

312 (1895.) When, by reason of her imbecility, the injured female does not testify as a witness, her declarations relating to the alleged assault are not admissible in evidence, and the fact that she is incompetent to testify on account of imbecility or for other reasons is wholly immaterial. *State v. Meyers*, 46 Neb. 152 (64 N. W. 697; 37 L. R. A. 423)

Declarations by third persons.

313. (1893.) Letters written by third parties in another state to third parties in this, but not in answer to letters written by the accused nor connected therewith, are not admissible in evidence against the accused in a criminal prosecution to prove a material fact in the case. *Bedford v. State*, 36 Neb. 702 (55 N. W. 263).

——Admission of guilt.

314. (1904.) An ordinary written statement of a third person that he committed the crime in question, which is not sworn to, and is not preserved in the form of a deposition, is not competent evidence, and should not be received as a defense to the prosecution. *Mays v. State*, 72 Neb. 723 (101 N. W. 979).

315. (1904.) The testimony of a witness that a third person had stated to him that he was guilty of the crime of which the defendant was accused is hearsay evidence, and therefore not admissible. *Mays v. State*, 72 Neb. 723 (101 N. W. 979).

Hearsay in general.

316. (1903.) Ordinarily hearsay testimony is inadmissible. *Donner v. State*, 69 Neb. 56 (95 N. W. 40).

317. (1903.) A witness is not permitted to state what appears from books or records where it is shown that the books were not kept by the witness nor the entries made by him nor in his presence, such statements being merely hearsay testimony. *Donner v. State*, 69 Neb. 56 (95 N. W. 40).

318. (1906.) Insanity cannot be proved by hearsay or reputation, and it is proper to exclude such evidence. *Reed v. State*, 75 Neb. 509 (106 N. W. 649).

Cross-examination of accused as to contradictory statements.

319. (1895.) Where accused immediately after the killing gave an account thereof different from the one which he gave at the trial, a question on cross-examination, as to when he first told "this story of this transaction as you have told it on the stand," is proper. *Carleton v. State*, 43 Neb. 373 (61 N. W. 699).

G. Acts and Declarations of Conspirators and Co-Defendants.

Admissibility of declarations of conspirators, see *Conspiracy*, §§ 9-11.

Furtherance of common purpose.

320. (1903.) On the trial of a person charged with instigating another to steal cattle, the declarations of the thief while engaged in the perpetration of the crime are admissible in evidence as part of the *res gestae*. *Lamb v. State*, 69 Neb. 212 (95 N. W. 1050).

321. (1903.) When a conspiracy to commit a crime is once shown to exist by the requisite *quantum* of proof, the acts and declarations of each of the conspirators, in furtherance of the common design, are the acts and declarations of all. *Lamb v. State*, 69 Neb. 212 (95 N. W. 1050).

322. (1903.) The acts and declarations of a conspirator, during the pendency of the conspiracy, and in furtherance of the common purpose, are admissible in evidence against his associates. *O'Brien v. State*, 69 Neb. 691 (96 N. W. 649).

After commission of act.

323. (1880.) A confession by A in B's absence that he and B committed a murder is not evidence against B. *Priest v. State*, 10 Neb. 393 (6 N. W. 468).

324. (1907.) When an accomplice has confessed and has gone upon the witness stand and testified to all the details of the crime, it is error to allow a number of other witnesses, who have heard him tell the same story at another time and place, to repeat in detail all that he told as to the occurrence. *O'Hearn v. State*, 79 Neb. 513 (113 N. W. 130).

325. (1907.) A statement made by a person under arrest charged with murder,

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upon a confession by an accomplice being read to him, and on being asked by a police officer if he wanted to make any statement in regard to it, that he would make his statement at the proper time, or that he would stand trial and tell his story then, shows dissent rather than assent to the statement of the accomplice, and does not render it admissible in evidence as a tacit confession. *O'Hearn v. State*, 79 Neb. 513 (113 N. W. 130).

326. (1907.) Statements or confessions made in the presence of one accused of crime, who remains silent, are admissible in evidence, if the time, the place and the circumstances are such as to lead to the inference that the accused by his silence assented to the truth of the same. *O'Hearn v. State*, 79 Neb. 513 (113 N. W. 130).

Preliminary evidence as to conspiracy.

327. (1903.) Before the acts and declarations of a conspirator are entitled to be considered as evidence against his associates, the conspiracy itself must be established, but the order of proof is a matter within the discretion of the trial court. *O'Brien v. State*, 69 Neb. 691 (96 N. W. 649).

H. Documentary Evidence

Certificate of registration of animal.

328. (1894.) A certificate of registration of the pedigree of a hog, purporting to be signed by the Standard Poland-China Record Association, and authenticated with the seal of such association, is inadmissible to prove registration of the hog. *Lamb v. State*, 40 Neb. 312 (58 N. W. 963).

Photographs.

329. (1903.) A photograph, used for the purpose of identifying a person implicated in the theft of cattle, is admissible in evidence without showing when, where or by whom it was taken. *Lamb v. State*, 69 Neb. 212 (95 N. W. 1050).

Account books.

330. (1905.) A charge against a deceased person in a so-called account book, offered in evidence to show that he was alive on the date corresponding to such charge, is not competent evidence unless it is first shown by whom the charge was made, the time when it was entered in the book, that the book itself is such a book of accounts as is admissible in evidence under the statute, and that he personally procured the service charged for at the time the entry was made. *Barker v. State*, 73 Neb. 469 (103 N. W. 71).

Proof of existence or non-existence of record in general.

331. (1896.) The existence of a record may be proved by its production, or an authenticated copy thereof. The non-existence of a record may be proved by the testimony of one who is cognizant of such fact. *Hornberger v. State*, 47 Neb. 40 (66 N. W. 23).

I. Opinion Evidence.

Conclusions in general.

332. (1902.) A non-expert witness may give his opinion in regard to a matter which men in general are capable of comprehending, when, from the nature of the case, it is impossible for him to lay before the jury all the pertinent facts so as to enable them to see the thing he is describing just as he saw it. *Russell v. State*, 66 Neb. 497 (92 N. W. 751).

Mental condition.

333. (1879.) The opinion of a witness, not an expert, is competent evidence upon the question of the prisoner's sanity, where such opinion is formed upon facts within the person knowledge of the witness, and sworn to by him before the jury. *Schlencker v. State*, 9 Neb. 241 (1 N. W. 857); (1883) *Polin v. State*, 14 Neb. 540 (16 N. W. 898).

334. (1893.) The testimony of a witness as to the sanity of one accused of homicide must be strictly limited to such sanity or insanity, and confined to those occasions upon which the witness testifies to having observed the conduct and appearances of the individual whose sanity is the subject of inquiry *Shults v. State*, 37 Neb. 481 (55 N. W. 1080).

335. (1893.) Only such intimate acquaintances of a person accused of crimes as have seen him almost daily for several months preceding the date upon which the alleged crime occurred are competent as non-expert witnesses to testify as to the sanity or insanity of the accused. *Shults v. State*, 37 Neb. 481 (55 N. W. 1080).

336. (1893.) The rule permitting a non-expert witness to testify as to the sanity or insanity of a party whose legal accountability is the sole matter in issue does not allow such witness to testify that at a certain date such party knew the difference between the right and wrong of an act at that time committed by him. *Shults v. State*,

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87 Neb. 481 (55 N. W. 1080); (1906) *Reed v. State*, 75 Neb. 509 (106 N. W. 649).

337 (1895.) A non-expert witness may in a prosecution for murder, the necessary foundation therefor having been laid, be examined as to his opinion regarding the sanity of the accused, and may state whether in his judgment the latter was able to distinguish between right and wrong with respect to the particular crime charged. *Pflueger v. State*, 46 Neb. 493 (64 N. W. 1094).

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338. (1895.) The opinions of non-expert witnesses who have known the accused for fifteen years and who met and observed him almost daily for six weeks or more immediately preceding the commission by him of a homicide, their attention being particularly directed to his mental condition, are admissible as bearing upon the question of his sanity. *Pflueger v. State*, 46 Neb. 493 (64 N. W. 1094).

339. (1896.) A non-expert witness should be permitted to express an opinion as to sanity, only when he has shown sufficient qualifications and has stated the facts and circumstances upon which his opinion is based. *Hoover v. State*, 48 Neb. 184 (66 N. W. 1117); (1904) *Bothwell v. State*, 71 Neb. 747 (99 N. W. 669).

340. (1898) Non-experts may give their opinions as to a person's sanity only after narrating the facts by them observed on which they base their opinions. *Snider v. State*, 56 Neb. 309 (76 N. W. 574).

341. (1906.) The opinions of non-expert witnesses on the question of the insanity of one charged with a criminal offense are entitled to little or no regard, unless supported by good reasons founded on facts which warrant them. From such opinions and the facts stated to support them, it is the province of the jury to draw their conclusions as to the sanity or insanity of the defendant. *Reed v. State*, 75 Neb. 509 (106 N. W. 649).

Identity of footprints.

342. (1878) It is not competent for a witness testifying of a comparison made between one of the prisoner's boots and a bloody footprints found near the place where the homicide was committed, to give his opinion as to whether that boot made the track; but where a witness expresses such opinion and no objection is made until after verdict, it furnishes no ground for a new trial *Clough v. State*, 7 Neb. 320.

343. (1901.) 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. *Russell v. State*, 62 Neb. 512 (87 N. W. 344).

344. (1907.) In a prosecution for the crime of arson, evidence describing the shoes worn by the accused and footprints found near the place where the crime was committed is proper and competent. But it is error to allow the witness making such comparisons to express his opinion that the footprints were made by the accused. *Heidelbaugh v. State*, 79 Neb. 499 (113 N. W. 145).

Subjects of expert testimony.

345. (1897.) In a criminal prosecution, where books of such a character as to render it difficult for the jury to arrive at a correct conclusion as to amounts of items involved are in the court room subject to inspection of accused, an expert accountant who examined the books may be allowed to testify to the result of his examination. *Bartley v. State*, 53 Neb. 310 (73 N. W. 744).

346. (1905.) Matters of common observation and matters upon which jurymen are as capable of forming an opinion as are physicians and surgeons, are not matters for expert medical testimony. But it is not necessarily reversible error to allow a witness to testify to a truism with which all intelligent men are presumed to be acquainted, nor is it in all cases reversible error to allow a witness, over objection, to testify to a proposition of law, or a fact of science or nature which is a matter of common knowledge. *Turley v. State*, 74 Neb. 471 (104 N. W. 934).

346*a*. (1907.) In a prosecution for embezzlement or other crime, where the books, records, papers and entries are voluminous and of such a character as to render it difficult for the jury to arrive at a correct conclusion as to amounts, an expert accountant may be allowed to examine such books, etc., and testify as to the result of his examination, and as to particular entries therein, shown to be in the handwriting of the defendant, when such books are in the court-

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room subject to inspection by the accused, and the particular entries are also introduced in evidence. *Bode v. State*, 80 Neb. 74 (113 N. W. 996).

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Competency of expert.

346*b*. (1889.) In a prosecution for larceny witnesses testifying as to the value of the property stolen, must show that they possess knowledge of such value. *Brooks v. State*, 28 Neb. 389 (44 N. W. 436).

Examination of experts.

347. (1879.) In the examination of an expert witness as to the apearance of the bullet wound of which the deceased died, it is not improper to state a supposed case as a means of showing what, under different conditions, the appearance of a wound made by the same agency might or would have been. *Schlencker v. State*, 9 Neb. 241 (1 N. W. 857).

348. (1889.) Where the opinion of an expert is sought upon the question of the insanity of the accused, the hypothetical questions to such expert must be so framed as to fairly reflect the facts admitted or proved by other witnesses. *Burgo v. State*, 26 Neb. 639 (42 N. W. 701).

J. Testimony of Accomplices and Co-Defendants.

Weight and sufficiency, see *post*, §§ 393-395.

In general.

349. (1876.) When separate trials are awarded to parties jointly indicted, each is a competent witness for the state upon the trial of the other, without being first acquitted or convicted, and without a *nolle prosequi* being first entered upon the indictment. *Carroll v. State*, 5 Neb. 31.

K. Confessions.

Weight and sufficiency, see *post*, §§ 387-392.

Admissibility in general.

350. (1889.) Where a party accused of crime, voluntarily and without inducement of any kind, makes a confession that he committed the offense, and details the facts and circumstances, such confession is admissible in evidence against him, although at the time of making the same he was held in custody. *Anderson v. State*, 25 Neb. 550 (41 N. W. 357).

351. (1891.) The confessions proven on trial *held* to be voluntary, and properly received in evidence. *Shepherd v. State*, 31 Neb. 389 (47 N. W. 1118).

352. (1891.) Where a prisoner, while under arrest and without threat, promise, or expectation of hopes or favor, voluntarily makes a confession, the same may be proven on the trial. *Furst v. State*, 31 Neb. 403 (47 N. W. 1116).

353. (1892.) When the crime charged is fully established by competent testimony, the free and voluntarily confession of the defendant may be proven for the purpose of connecting him with the offense. *Wernecke v. State*, 34 Neb. 14 (51 N. W. 307); (1898) *Chezem v. State*, 56 Neb. 488 (76 N. W. 1056).

354. (1893.) A confession receivable in evidence, only after proof that it was made voluntarily, is restricted to an acknowledgment of the defendant's guilt, and the word does not apply to a statement made by the defendant of facts which tend to establish his guilt. *Taylor v. State*, 37 Neb. 788 (56 N. W. 623).

355. (1895.) A voluntary confession or admission of guilt made by a prisoner out of court is admissible in evidence against him. *Basye v. State*, 45 Neb. 261 (63 N. W. 811); (1901) *Burlingim v. State*, 61 Neb. 276 (85 N. W. 76); (1901) *Hills v. State*, 61 Neb. 589 (85 N. W. 836; 57 L. R. A. 155); (1901) *Coil v. State*, 62 Neb. 15 (86 N. W. 925); (1901) *Reinoehl v. State*, 62 Neb. 619 (87 N. W. 355).

356. (1895.) Voluntary statements in the nature of confessions by one accused of murder are properly admitted in evidence against him. *Pflueger v. State*, 46 Neb. 493 (64 N. W. 1094).

357. (1897.) Confessions freely and voluntarily made by one charged with a crime are competent evidence to be considered by the jury in connection with other evidence in determining whether accused did in fact commit the crime. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

358. (1903.) In a criminal prosecution, only such confessions of the defendant as are shown to have been made voluntarily, without fear of punishment or hope of reward, are admissible in evidence. *State v. Force*, 69 Neb. 162 (95 N. W. 42).

358*a*. (1907.) Voluntary admissions or confessions of the accused tending to establish his guilt may usually be received in evidence against him, and the fact that such admissions contain statements tending also to show the commission of an offense other than the one for which the defendant is on

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trial does not render them inadmissible. *Bode v. State*, 80 Neb. 74 (113 N. W. 996).

Privileged communication.

359. (1901.) A communication to a minister of the gospel, or a priest, is not privileged where it is shown that it was not made in confidence of the relation, or was not to be kept as a secret. *Hills v. State*, 61 Neb. 589 (85 N. W. 836; 57 L. R. A. 155).

Promises or inducements.

360. (1891.) When from the cross-examination of an officer it appears that he held out inducements to the accused to confess, a confession thereafter made to him is not admissible in evidence. *Bubster v. State*, 33 Neb. 663 (50 N. W. 953).

Threats and fear.

361. (1893.) Confessions of the accused in a criminal prosecution are inadmissible where there is reasonable ground for the presumption that they were extorted by threats or induced by means of promises. *May v. State*, 38 Neb. 211 (56 N. W. 804).

362. (1901.) The true test of the admissibility of a confession is whether there is a casual relation between it and any threat or promise with respect to the crime charged, made by a person having authority over either the prosecution or the prisoner. *Strong v. State*, 63 Neb. 440 (88 N. W. 772).

363. (1903.) The father of the accused, shortly after the commission of the alleged crime, pointed a shotgun at his head and said: "James, you are my prisoner; I have a right to arrest you; you shall go to Harrison and tell the sheriff, county attorney and coroner's jury all about the killing of H. R., and you will get clear; but if you don't you will get convicted." Accused consented to the demand of his father, and made a confession to the officers named. *Held*, That evidence of such confession was inadmissible. *State v. Force*, 69 Neb. 162 (95 N. W. 42).

364. (1903.) Further confessions by the accused, subsequent to an extorted confession, will be equally inadmissible, if so related in point of surrounding circumstances and proximity of time as to raise a presumption that the influences resulting in the first confession have not ceased to operate upon his mind. *State v. Force*, 69 Neb. 162 (95 N. W. 42).

Deception.

365. (1886.) A confession obtained by a detective in guise of a friend is admissible in evidence against the accused. *Heidt v. State*, 20 Neb. 492 (30 N. W. 626; 58 Am. Rep. 835).

Preliminary evidence as to voluntary character.

366. (1894.) Before proving a confession the defendant should be permitted to cross-examine the witness as to the circumstances under which the confession was made. *Willis v. State*, 43 Neb. 102 (61 N. W. 254).

367. (1898.) In laying the foundation for evidence of confessions it is sufficient to prove affirmatively all that occurred prior to and at the time of the confessions, provided such proof excludes the hypothesis of inducements of hope or fear. *Snider v. State*, 56 Neb. 309 (76 N. W. 574).

L. Evidence at Preliminary Examination or at Former Trial.

Admissibility of testimony taken on preliminary hearing in bastardy, see *Bastards*, §§ 60-64.

Admissibility in general.

368. (1884.) Where a deceased witness testified upon a former trial of the same party for the same offense, being brought "face to face" with the accused and cross-examined by him, it is competent, upon a subsequent trial, to prove the testimony of such deceased witness, and such proof does not violate the provisions of the constitution of the state which gives to the accused the right to "meet the witnesses against him face to face." *Hair v. State*, 16 Neb. 601 (21 N. W. 464).

369. (1884.) Where a court reporter is sworn as a witness for the purpose of proving the testimony of a deceased witness, and where such reporter testifies that the notes of the testimony of such deceased witness were accurately taken by him at the time the testimony was given, such notes may be used by the reporter in giving the testimony of the deceased witness, for the purpose of refreshing his memory, and if necessary he may read the testimony to the jury. *Hair v. State*, 16 Neb. 601 (21 N. W. 464).

M. Weight and Sufficiency.

Weight in general.

370. (1886.) An escape is not necessarily an admission of guilt. *Mathews v. State*, 19 Neb. 330 (27 N. W. 234).

371. (1896.) Where a witness uses a word having a signification so generally known as to be understood by the jurors, courts will not treat the word as unintelligible merely

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because from motives of decency and propriety lexicographers have ignored it. *Bruce v. State*, 48 Neb. 570 (67 N. W. 454).

372. (1902.) Where the record of a witness' previous conviction of a felony is introduced in evidence, under section 330 of the code of criminal procedure, for the purpose of affecting the credibility of the witness, such record is not conclusive, and the witness may show that he was in fact innocent. *Reed v. State*, 66 Neb. 184 (92 N. W. 321).

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Conclusiveness of answer of witness.

373. (1891.) The answer, on cross-examination, of a party on trial for a crime as to any matter not material to the issue, is conclusive on the party making the inquiry; as the court will not try a collateral question relating to another offense than the one then being tried. *Leahy v. State*, 31 Neb. 566 (48 N. W. 390).

374. (1897.) A litigant who propounds a question to a witness and obtains from him an answer responsive thereto cannot complain that the court erred in refusing on his motion to expunge such answer from the record. *Davis v. State*, 51 Neb. 301 (70 N. W. 921).

375. (1905.) Where the prosecuting attorney, on the cross-examination of the accused in a criminal case, asks him if he has not been guilty of a similar offense upon another person at another time, he is concluded by the answer and cannot call another witness to impeach the accused. *Nicholizack v. State*, 75 Neb. 27 (105 N. W. 895).

Circumstantial evidence.

376. (1882.) To warrant a conviction upon circumstantial evidence, the circumstances when taken together must be of so conclusive a nature as to show beyond a reasonable doubt that the accused, and no other person, committed the offense. *Walbridge v. State*, 13 Neb. 236 (13 N. W. 209); (1892) *Kaiser v. State*, 35 Neb. 704 (53 N. W. 610).

377. (1892.) When a criminal charge is to be proved by circumstantial evidence, the proof ought not only to be consistent with the guilt of the accused, but inconsistent with any other rational conclusion. *Walbridge v. State*, 13 Neb. 236 (13 N. W. 209).

378. (1893.) In order to sustain a conviction for a felony on purely circumstantial evidence the circumstances pointing to the guilt of the accused must be of so conclusive a character as to exclude every other reasonable hypothesis. It is not sufficient that the circumstances when considered together create a probability, although a strong one, of the guilt of the accused. *Dreessen v. State*, 38 Neb. 375 (56 N. W. 1024).

379. (1895.) The law does not require in every case independent evidence of the particular intention. On the contrary the circumstances attending the principal act may be of such a character as to exclude every rational hypothesis except the existence of the specified intent charged. *Krchnavy v. State*, 43 Neb. 337 (61 N. W. 628).

380. (1895.) In criminal cases, as in civil, facts may be established by circumstances as well as by direct evidence, and a verdict of guilty is supported by the evidence when the circumstances proved lead beyond a reasonable doubt to inferences of the facts essential to establish the defendant's guilt. *Dixon v. State*, 46 Neb. 298 (64 N. W. 961).

381. (1897.) The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution, is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of his guilt. *Morgan v. State*, 51 Neb. 672 (71 N. W. 788); (1899) *Kastner v. State*, 58 Neb. 767 (79 N. W. 713).

382. (1897.) It is the province of the jury to determine the circumstances surrounding, and which shed light upon the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed. (*Casey v. State*, 20 Neb. 138.) *Morgan v. State*, 51 Neb. 672 (71 N. W. 788).

383. (1901.) To justify conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proven by competent evidence beyond a reasonable doubt, and, when taken together or as a whole, must be of such a character as to be consistent with each other, and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence. *Smith v. State*, 61 Neb. 296 (85 N. W. 49).

384. (1901.) The intent with which an

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act is done is inferable from the act itself, and from the facts and circumstances surrounding it. *Clary v. State*, 61 Neb. 688 (85 N. W. 897).

Testimony or statements of accused.

385. (1884.) The unsupported testimony of the accused in a criminal case, which the jury do not believe, cannot be said to furnish any hypothesis consistent with the innocence of the accused. *Binfield v. State*, 15 Neb. 484 (19 N. W. 607).

386. (1899.) Circumstances capable of an innocent construction may be interpreted in the light of the defendant's confession, and the fact under investigation be thus given a criminal aspect. *Sullivan v. State*, 58 Neb. 796 (79 N. W. 721).

Confessions.

387. (1876.) The degree of credit, ordinarily to be given to the confession of a prisoner, should be left to the jury, under proper instructions, with reference to the evidence in each particular case. But a confession alone is not sufficient evidence of the *corpus delicti*. There should be other proof that a crime has been committed and the confession admitted only for the purpose of connecting the defendant with the offense. *Dodge v. State*, 4 Neb. 220.

388. (1880.) A confession is not sufficient evidence of the *corpus delicti*. There must be other evidence that a crime has actually been committed, the confession being used to connect the accused with the crime. *Priest v. State*, 10 Neb. 393 (6 N. W. 468).

389. (1891.) The jury is not bound to give every part of a confession the same credence, but they can accept one part as true and reject such portion as they believe from the evidence is untrue. *Furst v. State*, 31 Neb. 403 (47 N. W. 1116).

390. (1893.) Confession or admission of accused is not alone sufficient to convict; but the commission of crime being established by other evidence, confession may be proved to connect accused with offense. *Ashford v. State*, 36 Neb. 38 (53 N. W. 1036); (1899) *Sullivan v. State*, 58 Neb. 796 (79 N. W. 721); (1905) *Blacker v. State*, 74 Neb. 671 (105 N. W. 302).

391. (1897.) The *corpus delicti* is the foundation of every criminal prosecution and the confession of an accused that he committed the crime is not alone sufficient evidence to sustain his conviction therefor. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

392. (1899.) While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is competent evidence of that fact, and may, with slight corroborative circumstances, be sufficient to warrant a conviction. *Sullivan v. State*, 58 Neb. 796 (79 N. W. 721).

Testimony of accomplice.

393. A conviction may rest on the uncorroborated evidence of an accomplice, when, considered with all the testimony, it satisfies the jury beyond a reasonable doubt of the guilt of the accused. (1881) *Olive v. State*, 11 Neb. 1 (7 N. W. 444); (1894) *Lamb v. State*, 40 Neb. 312 (58 N. W. 963); (1896) *Lawhead v. State*, 46 Neb. 607 (65 N. W. 779).

394. (1894.) It is not error to refuse an instruction to the effect that a person accused of a crime cannot be convicted upon the uncorroborated testimony of an accomplice. The weight to be given the testimony of such a witness is for the jury to determine, after a careful examination of the same, in the light of all the other evidence in the case. *Lamb v. State*, 40 Neb. 312 (58 N. W. 963).

395. (1903.) The evidence of an accomplice should be closely scrutinized. If it appears that such witness has wilfully sworn falsely in regard to a material matter upon the trial, his evidence cannot be sufficient, if uncorroborated, to support a verdict of guilty. *Jahnke v. State*, 68 Neb. 181 (104 N. W. 154).

Sufficiency in general.

396. (1878.) Evidence merely showing the accused to have been present at the commission of a felony, without more, is not sufficient to make him a principal therein. *Walrath v. State*, 8 Neb. 80.

397. (1883.) If the proof of guilt be of such moral certainty as convinces the minds of the jury, as reasonable men, beyond all reasonable doubt, it is sufficient. *Parrish v. State*, 14 Neb. 60 (15 N. W. 357).

398. (1883.) A verdict of guilty cannot be sustained where the evidence fails to show that the accused committed the offense charged. *Staman v. State*, 14 Neb. 68 (15 N. W. 227).

399. (1884.) Where there is distinct evidence of each material fact necessary to establish the guilt of the accused legally before the jury, a verdict against him will be

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upheld, although such testimony may be contradicted by other witnesses. *Dutcher v. State*, 16 Neb. 30 (19 N. W. 612).

400. (1885.) In cases of circumstantial evidence it is necessary that all the necessary facts and circumstances essential to the conclusion to prove beyond a reasonable doubt, but it is not necessary that each link in the evidence "relied upon" should be proven beyond a reasonable doubt. Such facts if not proven should be discarded by the jury. *Bradshaw v. State*, 17 Neb. 147 (22 N. W. 361).

401. (1897.) A charge that one made a false book-entry in the account of an individual with a bank is not sustained by proof that the entry was in an account with such individual designated as "township treasurer," and the variance is not less fatal because private money of the individual was included in the account referring to him as treasurer. *Williams v. State*, 51 Neb. 630 (71 N. W. 313).

402. (1897.) It is in a criminal prosecution permissible for the state to introduce evidence of any number of facts and circumstances tending to connect the accused with the crime charged, and if the facts actually proved are sufficient to establish guilt beyond a reasonable doubt he is not entitled to an acquittal because of a failure of proof with respect to one or more of the facts relied upon for a conviction. *Morgan v. State*, 51 Neb. 672 (71 N. W. 788).

403. (1899.) To sustain a criminal conviction it is not enough for the state to show that the prisoner indicted has violated the spirit of the statute, but the evidence must show beyond a reasonable doubt that he has offended against the very letter of the law. *Bailey v. State*, 57 Neb. 706 (78 N. W. 284; 73 Am. St. Rep. 540).

404. (1899.) The state may introduce evidence to prove any number of facts and circumstances tending to connect accused with the crime, and if they are sufficient to establish his guilt beyond a reasonable doubt, he is not entitled to an acquittal because of the failure of proof with respect to one or more of the facts relied upon for a conviction. *Kastner v. State*, 58 Neb. 767 (79 N. W. 713).

405. (1907.) The positive testimony of one apparently credible witness identifying the defendant as the perpetrator of the crime may be sufficient to support a conviction, when the defendant is shown by other witnesses to have been in the vicinity of the commission of the crime at the time it was committed, and there is no explanation of his presence there, and the *corpus delicti* is clearly proved. *Buckley v. State*, 79 Neb. 86 (112 N. W. 283).

Degree of proof in general.

406. (1879.) To warrant a verdict of guilty in a criminal case it is not required that the jury be convinced of the prisoner's guilt "beyond" a moral certainty, but it is enough if they are convinced of his guilt "to" a moral certainty. *St. Louis v. State*, 8 Neb. 405.

407. (1882.) Mere suspicion, however strong, will not authorize a jury to return a verdict of guilty. *Morrison v. State*, 13 Neb. 527 (14 N. W. 475).

408. (1892.) To authorize a jury to find a verdict of guilty in a criminal case the evidence must point to the accused as the party who committed the offense, and mere conjecture or suspicion, however strong, will not warrant a verdict of guilty. *Binkley v. State*, 34 Neb. 757 (52 N. W. 708).

409. (1895.) Where in a criminal case the evidence is circumstantial, the circumstances established, must, to warrant a conviction, be such as to exclude every reasonable hypothesis except that of the defendant's guilt. But this rule merely requires the exclusion of such hypotheses as are based on circumstances established by the evidence. It does not require the jury to acquit because of evidence which, if believed, would establish facts consistent with innocence, but which evidence the jury is justified in disbelieving. *Carleton v. State*, 43 Neb. 373 (61 N. W. 699).

410. (1897.) To warrant a conviction in a criminal prosecution it is not essential that the evidence adduced on the trial should exclude every possible hypothesis but the guilt of the accused. *Johnson v. State*, 53 Neb. 103 (73 N. W. 463).

411. (1900.) A verdict resting upon conjecture cannot be permitted to stand. *Leisenberg v. State*, 60 Neb. 628 (84 N. W. 6).

412. (1905.) In criminal trials, the verdict is not supported by the evidence, unless each element of the crime charged is proved beyond a reasonable doubt. A findin of malice or criminal intent must be derived from the facts proven, and not from conjecture. *Lucas v. State*, 75 Neb. 11 (105 N. W. 976).

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Reasonable doubt.

413. (1888.) The guilt of an accused is proven beyond a reasonable doubt when, upon the entire comparison and consideration of all the evidence, the minds of the jurors are in that condition that they can say, from the evidence, they have and feel an abiding conviction, to a moral certainty, of the truth of the charge. A reasonable doubt does not consist of possible or conjectural doubts, not growing out of the evidence, but is one which, when considering the evidence alone, leads the juror to hesitate, and upon which he would refuse to act in the important concerns of life. It is error to charge a jury that it is a doubt for the having of which the juror can give a reason derived from the testimony. *Carr v. State*, 23 Neb. 749 (37 N. W. 630).

414. (1894.) The rule which requires proof in criminal cases, such as will exclude all reasonable doubt of the guilt of the accused, in order to authorize a conviction, is not limited to prosecutions for felonies, but applies as well to misdemeanors. *Vandeventer v. State*, 38 Neb. 592 (57 N. W. 397).

415. (1896.) Where the jury, from a consideration of all the evidence, entertains a reasonable doubt of the presence of defendant at the commission of the crime charged, he is entitled to an acquittal. *Casey v. State*, 49 Neb. 403 (68 N. W. 643).

416. (1897.) While the jury cannot return a verdict of guilty while a juror entertains a reasonable doubt as to defendant's guilt, they are not obliged to acquit accused because of such doubt. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

417. (1899.) If the jury entertain a reasonable doubt as to the truth of any material allegation of the indictment, the prisoner is entitled to an acquittal. *Atkinson v. State*, 58 Neb. 356 (78 N. W. 621).

418. (1904.) When the evidence relied upon to establish the guilt of the defendant is circumstantial, the facts proved beyond a reasonable doubt must be such as to exclude every reasonable hypothesis inconsistent with the guilt of the defendant. When the minds of reasonable men might fairly differ as to whether there is any reasonable doubt of the defendant's guilt, the responsiblity must be left, where the law places it, with the jury. The evidence in this case, under this rule, supports the verdict and judgment. *Lillie v. State*, 72 Neb. 228 (100 N. W. 316).

419. (1905.) In a criminal case it must be proved beyond a reasonable doubt that the defendant committed the crime charged. If the fact that the crime charged was committed is proved beyond all doubt, it is still not sufficient to prove that the defendant had opportunity to commit it, and may have been the guilty party, but, if the evidence excludes all reasonable doubt, it is sufficient. *Keeler v. State*, 73 Neb. 441 (103 N. W. 64).

Corpus delicti.

420. (1898.) To sustain a conviction for a crime the *corpus delicti* must be proven beyond a reasonable doubt. Rule applied. *Chezem v. State*, 56 Neb. 496 (76 N. W. 1056).

Venue.

421. (1892.) The venue of an offense may be proven like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient. *Weinecke v. State*, 34 Neb. 14 (51 N. W. 307).

422. (1905.) If it appears from the whole evidence, beyond a reasonable doubt, that the crime charged was committed in the county of the trial, the venue is sufficiently proved. *Keeler v. State*, 73 Neb. 441 (103 N. W. 64).

Motive.

423. (1904.) It is not indispensable in criminal trials that a motive be shown for the commission of the crime charged. If the evidence shows beyond a reasonable doubt that the defendant committed the crime, the prosecution does not necessarily fail because the real motive for the act cannot be discovered and shown to the jury. *Lillie v. State*, 72 Neb. 228 (100 N. W. 316).

Insanity.

424. (1876.) In sustaining a defense of insanity, where there is testimony to rebut the legal presumption that the accused was sane, unless the jury are satisfied beyond a reasonable doubt that the act complained of was not produced by mental disease, they must acquit. *Wright v. State*, 4 Neb. 407.

425. (1906.) The opinions of non-expert witnesses on the question of the insanity of one charged with a criminal offense are entitled to little or no regard, unless sup-

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ported by good reasons founded on facts which warrant them. From such opinions and the facts stated to support them, it is the province of the jury to draw their conclusions as to the sanity or insanity of the defendant. *Reed v. State*, 75 Neb. 509 (106 N. W. 649).

Alibi.

Sufficiency of evidence of alibi in bastardy proceedings, see *Bastards*, § 91.

426. (1897.) It is not essential that the proof of an alibi should include the entire period during which the offense might possibly have been committed but will entitle the accused to an acquittal whenever the evidence is sufficient to create in the minds of the jurors a reasonable doubt of his presence at the commission of the offense with which he stands charged. *Henry v. State*, 51 Neb. 149 (70 N. W. 924; 66 Am. St. Rep. 450).

427. (1898.) Where the defense in a criminal action is an alibi, it is sufficient to call for a verdict of acquittal if the jury, from a consideration of all the evidence, have a reasonable doubt of the presence of the accused at the place and time of the alleged crime, whether such doubt be from lack of proof on the part of the state, or from the evidence adduced in behalf of the party charged. *Peyton v. State*, 54 Neb. 188 (74 N. W. 597).

428. (1904.) A defendant, to establish an alibi must not only show he was present at some other place about the time of the alleged crime, but also that he was at such other place such a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he was at such other place. *Mays v. State*, 72 Neb. 723 (101 N. W. 979).

XI. TIME OF TRIAL AND CONTINUANCE.

Denial of continuance as harmless error, see *post*, § 1109.

Disharge of accused for delay.

429. (1894.) The provision of section 391 of the Criminal Code, for the discharge of any person indicted who after having given bail shall not be brought to trial before the end of the third term of court held after the finding of such indictment, is held to exclude the term at which the indictment is found. *Hammond v. State*, 39 Neb. 252 (58 N. W. 92); (1895) *Whitner v. State*, 46 Neb. 144 (64 N. W. 704).

430. (1894.) A defendant in a criminal prosecution who has never been committed to jail, or otherwise detained in custody, is not entitled to be discharged, under the provisions of section 390 of the criminal code, on the ground that he has not been brought to trial before the end of the second term after the finding of the indictment or the filing of the information. *Hammond v. State*, 39 Neb. 252 (58 N. W. 92).

431. (1895.) A defendant in prison in default of bail is not entitled to be discharged under section 389 of the criminal code unless it is shown that neither an information was filed, nor an indictment found, against him during the term at which he was held to appear. *State, ex rel. Conroy, v. Miller*, 43 Neb. 860 (62 N. W. 238).

432. (1896.) An application for a discharge under section 391 of the criminal code should be overruled where it fails to show that three terms of court elapsed after the information against accused was filed, without his being brought to trial, and that the delay was not occasioned by want of time to try the case or upon his request. *Korth v. State*, 46 Neb. 631 (65 N. W. 792).

433. (1897.) An indictment was filed against defendant at the September, 1894, term of the court. There was a February, 1895, term, a May, 1895, term, and a September, 1895, term, at which the latter term he was put on trial and convicted. He was put on trial at the February, 1895, term, and the jury, disagreed and was discharged. *Held*, Construing section 396, criminal code, that the prisoner was not entitled to be discharged because not brought to trial either before the end of the second or the third term of court, in which his case was pending, held after the indictment against him was found. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

434. (1897.) One who has been admitted to bail after a preliminary examination, and who becomes a fugitive, is not, after his return or apprehension, entitled to be discharged because no information was filed against him at the term at which he was recognized to appear, and while he was a fugitive. *Ex parte Trester*, 53 Neb. 148 (73 N. W. 545).

435. (1900.) Where no information or indictment is filed against the defendant in a criminal proceeding, during the term at which he was held to answer, he is entitled

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to be discharged. *Leisenberg v. State*, 60 Neb. 628 (84 N. W. 6).

436. (1901.) 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*, 62 Neb. 626 (87 N. W. 336).

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437. (1901.) Although no information or indictment is filed during the term at which accused is held to answer, yet 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. *Cerny v. State*, 62 Neb. 626 (87 N. W. 336).

Right of accused to continuance in general.

438. (1902.) Every person accused of crime should be afforded reasonable opportunity to marshal his witnesses and prepare for trial, but mere procrastination—delay for delay's sake—should not be tolerated. *Hubbard v. State*, 65 Neb. 805 (91 N. W. 869).

Discretion of court.

439. (1876.) Applications for continuance are addressed to the sound discretion of the court, and its ruling thereon will not be disturbed, where there is no abuse of that discretion. *Smith v. State*, 4 Neb. 277.

440. (1889.) In a prosecution for a misdemeanor the granting or the refusal of an application for continuance is largely within the discretion of the trial court. To enable a court of review to find reversible error in the refusal of such application, it must be shown that there was an abuse of such discretion. *Burrell v. State*, 25 Neb. 581 (41 N. W. 399).

441. (1901.) The granting or refusing of a continuance rests in the sound discretion of the court, and a ruling in that regard will not be disturbed unless an abuse of discretion appears. *Dinsmore v. State*, 61 Neb. 418 (85 N. W. 445).

Grounds for continuance.

442. (1901.) 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. *Reinoehl v. State*, 62 Neb. 619 (87 N. W. 355).

442*a*. (1908.) The right of a defendant to continuance on account of the unforseen and unavoidable absence of his counsel depends largely upon the nature of the case, his diligence, and the inability to procure other counsel in time properly to prepare for the trial, and, unless the discretion of the trial court in refusing the continuance has been abused, a reviewing court will not interfere. *Cate v. State*, 80 Neb. 611 (114 N. W. 942).

——— Local prejudice.

443. (1896.) Statements in the affidavits of a prisoner and his counsel that there exists in the county where the case is to be tried a great deal of excitement, are not sufficient to justify the reversal of an order denying a continuance. *Hoover v. State*, 48 Neb. 184 (66 N. W. 1117).

——— Absence of witnesses.

444. (1887.) Where an information against defendant for forging and uttering a promissory note was filed on October 11, and he was placed on trial October 19, it was error to refuse a continuance when his motion filed prior to the trial was supported by an affidavit in which it was alleged that he could prove by four witnesses, naming them, all non-residents of the state and none of whom were present, that the notes were placed in his hands for the purpose of sale by one B., and that, as requested, he sold the notes simply as an accommodation, and returned all the money to the person for whom the sale was made; the residence of two of the witnesses out of the state was given, so that their depositions might be taken. *Newman v. State*, 22 Neb. 355 (35 N. W. 194).

445. (1890.) Continuance of a criminal case on account of absent witness, should be allowed when the motion is supported by affidavits showing materiality of testimony, probability of obtaining it by the next term, and reasonable diligence in seeking it. *Miller v. State*, 29 Neb. 437 (45 N. W. 451).

446. (1890.) In a prosecution for homicide, an affidavit for continuance for absence of a material witness, which alleges that defendant was taken out of the county

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the day after the killing and confined in a jail in another county until nine days before the trial; that he was without means, and the court assigned counsel to defend him; that letters had been addressed to such witness to places where he had formerly resided, but not answered, and that three days prior to the motion, it was learned that he was in Dakota, makes a sufficient showing of diligence. *Miller v. State*, 29 Neb. 437 (45 N. W. 451).

447. (1890.) In a prosecution for homicide an affidavit for continuance, for absence of a witness, alleging that such witness was an eye witness of the shooting and would testify that defendant did not do the shooting, and that it did not occur where the prosecution claimed it did, but at a point where it would have been impossible for defendant to have done it, shows that such witness is material. *Miller v. State*, 29 Neb. 437 (45 N. W. 451).

448. (1901.) In an application for a continuance, where no reasonable probability exists of procuring the proposed evidence which is that of unknown persons, or where it is shown that due diligence and seasonable effort have not been made to procure such evidence, the application for a continuance is properly overruled. *Tatum v. State*, 61 Neb. 229 (85 N. W. 40).

449. (1902.) The denial of a motion for a continuance in order to secure evidence is not reversible error where it appears that the testimony of the absent witness would be either false or immaterial. *Hubbard v. State*, 65 Neb. 805 (91 N. W. 869).

450. (1902.) The refusal of the district court to suspend for an indefinite time the trial of a criminal case to enable the defendant to procure the attendance of a witness is not, in the absence of a showing of diligence, an abuse of judicial discretion. *Hubbard v. State*, 65 Neb. 805 (91 N. W. 869).

——— **Diligence.**

451. (1902.) An accused person fleeing from justice after arraignment and before trial is not employing the kind of diligence contemplated by the law governing continuances. *Hubbard v. State*, 65 Neb. 805 (91 N. W. 869).

Admission to prevent continuance.

452. (1897.) Whether the prosecution in a criminal case may avoid a continuance sought by the defendant on a showing which entitles him to a postponement of the trial on the ground of an absent witness, by the state admitting merely that the witness, if present, would testify as represented in the application, is not involved in this case, and consequently not decided. *Hans v. State*, 50 Neb. 150 (69 N. W. 838).

453. (1897.) A motion by accused for a continuance on the ground that a witness is absent, may be overruled where the state admits that the witness, if present, would testify as stated in the affidavit in support of the motion. *Fanton v. State*, 50 Neb. 351 (69 N. W. 953; 36 L. R. A. 158).

454. (1897.) Denial of a continuance sought on account of the absence of a witness *held* not ground for reversal, where the party resisting the application admitted that the witness, if present, would testify as stated in the affidavit for the continuance, and the statements of the affidavit were read in evidence by the party making it. *Catron v. State*, 52 Neb. 389 (72 N. W. 354); (1901) *Russell v. State*, 62 Neb. 512 (87 N. W. 344).

455. (1907.) Where the state, in a criminal prosecution offers to admit testimony that an absent witness was alleged would testify to, in a motion for a continuance, it is not error to overrule the motion. *Foster v. State*, 79 Neb. 259 (112 N. W. 656).

Application for continuance.

456. (1893.) A motion for a continuance in a criminal case on the ground that the attorney for the accused had not been notified of the trial a sufficient length of time to properly prepare therefor, but which fails to show want of notice by the accused himself, is insufficient. *May v. State*, 38 Neb. 211 (56 N. W. 804).

——— **Affidavits.**

457. (1877.) An affidavit of the prisoner to the effect that he had been informed that a person absent from the state would swear to certain material facts is not sufficient to warrant a continuance. *Williams v. State*, 6 Neb. 334.

458. (1877.) On motion for a continuance it is not good practice to permit counter-affidavits as to what an absent witness would testify. *Williams v. State*, 6 Neb. 334; (1889) *Gandy v. State*, 27 Neb. 707 (43 N. W. 747, 44 N. W. 108); (1890) *Miller v. State*, 29 Neb. 437 (45 N. W. 451).

459. (1883.) Where an affidavit for a continuance of a case is based upon informa-

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tion derived from others, it should give their names and whereabouts, and also sufficient reason for not procuring their own affidavits to the facts communicated, which should be done if possible. *Comstock v. State*, 14 Neb. 205 (15 N. W. 355).

460. (1883.) The facts stated in an affidavit in support of a motion for a continuance for the purposes of the motion will be taken as true. And where sufficient facts are stated a continuance should be granted. *Hair v. State*, 14 Neb. 503 (16 N. W. 829); (1889) *Gandy v. State*, 27 Neb. 707 (43 N. W. 747, 44 N. W. 108).

461. (1883.) An affidavit for a continuance, on account of absent witnesses, which fails to show that either their personal attendance or testimony will probably be obtained, if time be granted, is insufficient. *Polin v. State*, 14 Neb. 540 (16 N. W. 898).

462. (1889.) An affidavit for continuance in a prosecution for an attempt to kill, that sets out that there are two certain witnesses outside of the state, that will testify to hereditary insanity affliction from which defendant is suffering is wholly insufficient. *Burgo v. State*, 26 Neb. 639 (42 N. W. 701).

463. (1892.) In a prosecution for the larceny of thirty-three horses and also for receiving the same, knowing them to have been stolen, an affidavit for a continuance was filed by the accused, which was overruled. *Held*, That the facts stated in the affidavit were sufficient to entitle the party to a continuance. *Elliott v. State*, 34 Neb. 48 (51 N. W. 315).

464. (1895.) Where a continuance is asked for the purpose of meeting evidence unexpectedly adduced by the other party, it must, among other things, be shown that the party seeking the continuance expects to procure evidence to meet the new features, and the nature of such evidence. *Dixon v. State*, 46 Neb. 298 (64 N. W. 961).

465. (1887.) For the purposes of a decision upon a motion for a continuance, the statement of the affidavit must be taken as true, and cannot even be contradicted by counter affidavits. *Newman v. State*, 22 Neb. 355 (35 N. W. 194).

466. (1892.) In a prosecution for the larceny of thirty-three horses and also for receiving the same, knowing them to have been stolen, an affidavit for a continuance was filed by the accused, which was overruled. *Held*, That the facts stated in the affidavit were sufficient to entitle the party to a continuance. *Elliott v. State*, 34 Neb. 48 (51 N. W. 315).

——— Presence of accused at hearing.

467. (1890.) There is no error in hearing motions to quash the information and for a continuance, and a demurrer to the information and a plea in abatement, in the absence of defendant from the courtroom. *Miller v. State*, 29 Neb. 437 (45 N. W. 451).

Operation and effect.

468. (1883.) When one is indicted for a felony at the October term of the district court and the cause continued on motion of the state, it being a general continuance operated to continue the case to the next general term, and not to a special term that preceeds the general term. *Hair v. State*, 14 Neb. 503 (16 N. W. 829).

XII. TRIAL.

Irregularities at trial as grounds for release, see *Habeas Corpus*, §§ 21-28.

Motion to quash and objections to complaint, see *Indictment and Information*, §§ 108-114.

Conviction in capacity other than that charged, see *Indictment and Information*, §§ 140-142.

Right of trial by jury, see *Jury*, §§ 38-47.

Qualifications and competency of jurors, see *Jury*, §§ 94-277.

Summoning attendance of jurors, see *Jury*, §§ 65-93.

Substitution of jurors, see *Jury*, § 92.

Waiver of right to jury, see *Jury*, § 55.

Oath of jury, see *Jury*, §§ 331, 332.

Examination of witnesses, see *Witnesses*, III.

Cross-examination of witnesses, see *Witnesses*, III, B.

Effect of accusation or conviction for crime on credibility as witness, see *Witnesses*, §§ 348-351.

Credibility of defendant as witness, see *Witnesses*, §§ 363-368.

Competency of spouse to testify against the other, see *Witnesses*, §§ 154-158.

A. Preliminary Proceedings

Separate trial of co-defendants.

469. (1895.) Defendants jointly indicted for a felony, in the discretion of the court, may be separately tried, on motion of either the state or a defendant. Objection to a severance comes too late after the forma-

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tion of the jury. *Metz v. State*, 46 Neb. 547 (65 N. W. 190).

Separate trial of issue of insanity.

470. (1895.) Where insanity did not originate after the commission of the offense, there is no requirement that its existence should be determined by a jury impaneled to determine whether or not the accused is of sound mind. *Walker v. State*, 46 Neb. 25 (64 N. W. 357).

471. (1905.) Under section 6 of chapter 105, laws 1901, it is the duty of the warden, if a convict confined in the penitentiary under sentence of death appears to be insane, to give notice thereof to a judge of the district court for the county in which the penitentiary is situated, and if such notice is given a jury must be summoned "to inquire into such insanity." *Barker v. State*, 75 Neb. 289 (106 N. W. 450).

472. (1905.) Under the law prior to the act of 1901, the district court of the county of the conviction and sentence of death of a person charged with a capital offense had jurisdiction, independent of statute, to investigate the question of the sanity of such convict; but that jurisdiction has by the statute been transferred to the judge of the district court for the county in which the penitentiary is situated. *Barker v. State*, 75 Neb. 289 (106 N. W. 450).

473. (1905.) The jurisdiction of the judge of the district court for Lancaster county to inquire as to the sanity of a convict confined in the penitentiary under sentence of death does not depend upon the giving of the notice by the warden. If it is alleged in a proper application to the judge, under oath, that the convict is insane, and that the warden unjustifiably refuses to give the statutory notice, it is the duty of the judge to make such investigation as will satisfy him whether there are such appearances of insanity as will justify summoning a jury to try the question. *Barker v. State*, 75 Neb. 289 (106 N. W. 450).

474. (1905.) If upon investigation of the application, the judge finds that the convict appears to be insane, a jury should be impaneled to try the question of insanity. *Barker v. State*, 75 Neb. 289 (106 N. W. 450).

475. (1905.) If the judge, upon investigation of sanity of one sentenced to be hanged and confined in the penitentiary, is satisfied that the warden was justified in his refusal to give the notice of the prisoners insanity, and that there are no substantial appearances of insanity, the application will be dismissed. *Barker v. State*, 75 Neb. 289 (106 N. W. 450).

Service of copy of indictment or information.

476. (1892.) Prisoner's right to a copy of the information and to one day to prepare for trial cannot be denied, and applies as well to an amended as to an original information. *Zink v. State*, 34 Neb. 37 (51 N. W. 294).

477. (1898.) In a prosecution for a felony the right of accused to a copy of the amended information as provided for by section 436, criminal code, and one day to prepare for trial, may be waived. *Barker v. State*, 54 Neb. 53 (74 N. W. 427).

478. (1901.) The state is required to furnish the defendant with only one copy of the information. *Bush v. State*, 62 Neb. 128 (86 N. W. 1062).

Indorsement of witnesses on indictment or information.

479. (1888.) The names of witnesses upon which the state relies to prove the charge against one accused of crime should be indorsed on the information at as early a day as practicable after the discovery of such witnesses, and in all cases before the day set for the trial of the case. *Gandy v. State*, 24 Neb. 716 (40 N. W. 302).

480. (1889.) In a criminal prosecution the names of witnesses cannot, against objection, be added to the information without a showing that they were not known earlier and in time to give the accused notice, in season to anticipate their presence before trial. *Gandy v. State*, 27 Neb. 707 (43 N. W. 749, 44 N. W. 108).

481. (1890.) The names of additional witnesses may, in the discretion of the trial court, be indorsed on an information after the filing thereof and before the day of trial. Where the name of a witness is indorsed on the day of trial, but not called and examined, error cannot be based thereon. *Miller v. State*, 29 Neb. 437 (45 N. W. 451).

482. (1892.) In a prosecution for murder the county attorney, on the case being reached for trial, asked leave to indorse the names of additional witnesses on the information, accompanying such request with a showing that it was made at the earliest opportunity after the materiality of their

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testimony was learned by him. The court ordered said names to be indorsed on the information, but offered to continue the case for a week if requested by the defendant, who declined the continuance offered. *Held*, Not an abuse of discretion by the court. *Johnson v. State*, 34 Neb. 257 (51 N. W. 835).

483. (1892.) It is within the discretion of the district court to allow additional names to be indorsed on the information in a criminal prosecution after the case is reached for trial, on the application of the county attorney and a showing of diligence by him, provided a continuance is allowed for sufficient time to enable the defendant to prepare for trial. *Johnson v. State*, 34 Neb. 257 (51 N. W. 835).

484. (1896.) It is within the discretion of the trial court to permit the county attorney to indorse the names of additional witnesses on the information after the filing thereof and before trial. *Rauschkolb v. State*, 46 Neb. 658 (65 N. W. 776; (1896) *Fager v. State*, 49 Neb. 439 (68 N. W. 611); (1901) *Trimble v. State*, 61 Neb. 604 (85 N. W. 844).

485. (1896.) Permitting names of witnesses to be indorsed on the information more than twenty-four hours after their discovery, contrary to a rule of court, is not ground for reversing a judgment of conviction, where accused was not prejudiced. *Barney v. State*, 49 Neb. 515 (68 N. W. 636).

486. (1896.) The accused having made no motion for a postponement of the trial because of the indorsement of additional names on the information, no prejudice will be presumed. *Barney v. State*, 49 Neb. 515 (68 N. W. 636).

487. (1898.) The main purpose of requiring names of witnesses to be indorsed on an information is to inform accused of the identity of the state's witnesses. *Carrall v. State*, 53 Neb. 431 (73 N. W. 939).

488. (1899.) After the trial of a criminal action has commenced, it is error for the court to permit the name of a witness for the state to be indorsed on the information. *Sweenie v. State*, 59 Neb. 269 (80 N. W. 815).

——— Necessity.

489. (1886.) In the trial of a criminal prosecution wherein a defendant is arraigned upon an indictment found by a grand jury, the state is not precluded from the examination of witnesses whose names are not indorsed upon the indictment. *Ballard v. State*, 19 Neb. 609 (28 N. W. 271).

490. (1886.) It is by statute made the duty of the district attorney to indorse on an information the names of the witnesses known to him at the time of filing the same; and at such time before the trial of any case as the court may by rule or otherwise prescribe he shall indorse the names of such other witnesses as shall then be known to him. *Stevens v. State*, 19 Neb. 647 (28 N. W. 304).

491. (1886.) Upon the trial of a criminal case which is being prosecuted on an information, it is error on the part of the court to permit, over the objection of the accused, a witness to be sworn on the part of the state whose name had not been indorsed on the information before the trial. *Parks v. State*, 20 Neb. 515 (31 N. W. 5).

492. (1897.) A witness whose name was not indorsed on the information may be called on rebuttal and give testimony which is obviously and purely rebuttal, or on a subject first brought into the case in the evidence of the defense and which is in rebuttal of and made necessary by such evidence introduced by the defense, but may not give testimony which is not directly and plainly rebuttal or which tends to prove the commission of the crime and might properly have been introduced on the part of the state as of its evidence in chief. *Kelly v. State*, 51 Neb. 572 (71 N. W. 299).

493. (1899.) Testimony purely rebuttal in its nature may be given by a witness whose name is not indorsed upon the information. *McVey v. State*, 57 Neb. 471 (77 N. W. 1111); (1899) *Kastner v. State*, 58 Neb. 767 (79 N. W. 713); (1907) *Clements v. State*, 80 Neb. 313 (114 N. W. 271).

——— Sufficiency.

494. (1895.) The indorsement of the surname and the initials of the Christian or given name of a witness upon an information is a sufficient compliance with the requirements of the statute which requires the names of the state's witnesses to be indorsed upon the information prior to the trial. *Bayse v. State*, 45 Neb. 261 (63 N. W. 811).

495. (1895.) Where the surname and initials of the Christian name of a witness

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appear upon the information it is a sufficient compliance with the statute requiring names of the state's witnesses to be indorsed on the information. *Perry v. State*, 44 Neb. 414 (63 N. W. 26).

496. (1898.) Where a married woman is to be called as a witness in a criminal case her name may be indorsed on the information by writing thereon the abbreviation "Mrs." and her husband's name. *Carrall v. State*, 53 Neb. 431 (73 N. W. 939).

497. (1898.) The law does not recognize other than the one or first Christian name, but where a person as a matter of fact has a second or middle Christian name and is commonly known or identified by the use of such middle Christian designation, if his wife's purposed use as a witness in a criminal cause is evidenced by an indorsement of her husband's surname and the abbreviation "Mrs.," together with the middle Christian appellation of the husband, it is sufficient where it does not appear or there is no complaint that the accused person was misled thereby or lacked information of what person was to be produced as a witness. *Carrall v. State*, 53 Neb. 431 (73 N. W. 939).

498. (1898.) The names "Mrs. Fred Steinburg" and "Mrs. Fred Steenburg," the first indorsed on an information as the name of a witness, and the second appearing in testimony as her name, are *idem sonans*. *Carrall v. State*, 53 Neb. 431 (73 N. W. 939).

499. (1906.) The main purpose of the requirement that the names of the witnesses be indorsed on the information in a criminal action is to convey to the accused the information or knowledge of the identity of the witnesses to be produced on behalf of the state; and, although a witness is designated on the information by the wrong Christian name, if the accused is not misled thereby, and is aware of the identity of the witness, such mistake affords no ground for the exclusion of his evidence. *Reed v. State*, 75 Neb. 509 (106 N. W. 649).

Journal entries.

500. (1877.) Where an indictment for rape has been returned, and after several continuances the defendant enters a plea in abatement on the ground that the trial judge, who had since retired from the bench, failed to sign the journal entries, the succeeding judge has authority to order entries to be made to conform to the facts. *Garrison v. State*, 6 Neb. 274.

B. Course and Conduct of Trial in General.

Proceedure in general.

501. (1886.) A defendant on trial for a criminal offense has no vested right in the manner of procedure established by law at the time of the commission of the alleged crime. It is within the power of the legislature to change the procedure or manner of enforcing a punishment after the commission of the offense, and such a law would not be void as an *ex post facto* law. *Marion v. State*, 20 Neb. 233 (29 N. W. 911; 57 Am. Rep. 825).

502. (1899.) In a criminal case but one issue can properly be before the court at one time. *George v. State*, 59 Neb. 163 (80 N. W. 486).

Appointment of special judge.

503. (1903.) When, in a criminal prosecution before a police judge in a city of the first class, governed by chapter 18 of the laws of 1901, it is shown that the judge is disqualified to act by reason of interest, bias or prejudice, it is not erroneous for the mayor to appoint a justice of the peace of the city to act in place of the judge, as provided by section 117 of that chapter. *Seay v. Shrader*, 69 Neb. 245 (95 N. W. 690).

Presence of judge.

504. (1905.) It is error for the judge to absent himself from the court room, out of the sight and hearing of the parties, during the argument of a case, unless by consent and agreement of the parties interested, which may work a reversal of the judgment rendered in the action. *Powers v. State*, 75 Neb. 226 (106 N. W. 332).

Presence of accused.

Presence at hearing of motion for new trial, see *post*, § 892.

505. (1884.) The voluntary withdrawal of a prisoner from the court room during the progress of his trial, and during the examination of a witness, will not entitle him to a new trial on account of his absence, when it is shown that upon his absence being discovered all further proceedings were suspended until his return, which was but a few minutes, and upon his return the witness was re-examined covering the questions asked during the absence of the prisoner. *Hair v. State*, 16 Neb. 601 (21 N. W. 464).

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506. (1902.) Where a defendant, charged with a misdemeanor, is at liberty, on bail or otherwise, while his case is being tried, and voluntarily absents himself from the court room at the time the jury returns its verdict, his counsel being present, and no objection being made to such absence defendant will be held to have waived his right to be present at such time, and the reception of such verdict by the court in the absence of the defendant under such circumstances, is without error. *Peterson v. State*, 64 Neb. 875 (90 N. W. 964).

Presence of codefendant.

507. (1902.) Where two parties jointly indicted are tried separately, it is not error for the court to require the presence of one of them in the court room during the trial of the other. *Cunningham v. State*, 56 Neb. 691 (77 N. W. 60).

508. (1905.) Where two persons charged jointly with a criminal offense demand and are accorded separate trials, an order of the court refusing the request of the one on trial for the presence of his codefendant in the court room will not be reviewed by the appellate court, in the absence of any showing of prejudice resulting to the rights of the accused by the refusal of such request. *Krens v. State*, 75 Neb. 294 (106 N. W. 27).

Presence of third persons.

509. (1904.) In order to predicate error on the fact that the father of a state's witness was permitted, while she was testifying, to sit near her in the court room, it must affirmatively appear that his presence caused her, in giving her evidence, to deviate from the truth, or color her statements to the prejudice of the accused. *Gould v. State*, 71 Neb. 651 (99 N. W. 541).

Right to inspect brief of evidence of prosecution.

510. (1901.) In the trial of a criminal prosecution the county attorney can not be compelled to produce his private memoranda or brief of evidence for the inspection of the defense. *Dinsmore v. State*, 61 Neb. 418 (85 N. W. 445).

Counsel for prosecution.

511. (1896.) The provision of section 21, chapter 7, Compiled Statutes, for the appointment of a county attorney to act during the absence, sickness, or disability of the public prosecutor and his deputies, is applicable to informations under section 579, criminal code. *Korth v. State*, 46 Neb. 631 (65 N. W. 792).

512. (1896.) The provision of section 21, chapter 7, Compiled Statutes, for the appointment of a county attorney to act during the absence, sickness, or disability of the public prosecutor and his deputies, does not conflict with section 10, article I, of the constitution relating to criminal prosecutions. *Korth v. State*, 46 Neb. 631 (65 N. W. 792).

——Private counsel.

513. (1883.) The county attorney in a criminal prosecution may have the assistance of counsel employed on private account. *Polin v. State*, 14 Neb. 540; (1885) *Bradshaw v. State*, 17 Neb. 147 (22 N. W. 361); (1889) *Gandy v. State*, 27 Neb. 707 (43 N. W. 749; 44 N. W. 108).

514. (1901.) It is proper for the county attorney, under the direction of the district court, to procure an attorney to assist him him in the trial of a person charged with a felony, and such assistant is not required to qualify and give a bond as deputy county attorney. *Bush v. State*, 62 Neb. 128 (86 N. W. 1062).

515. (1904.) An objection to the appearance of private counsel to assist the county attorney in conducting a criminal prosecution, to be available, should be made at a suitable time and in the proper manner, and must be supported by at least some showing that the county attorney did not request or require any assistance, and the court had not appointed such counsel for that purpose. *Blair v. State*, 72 Neb. 501 (101 N. W. 17).

Appointment of counsel for defendant.

Fees of attorney appointed to defend prisoner, see *Attorney and Client*.

516. (1897.) There is no statutory provision for the assignment of counsel for pauper or indigent prisoners in prosecutions for misdemeanors. (Criminal code, sec. 437.) *Durfee v. State*, 53 Neb. 214 (73 N. W. 676).

Appointment of stenographer.

517. (1877.) The refusal of the court to appoint a shorthand reporter to take down the testimony, is not error. This is a matter resting entirely in the discretion of the court. *Preuit v. People*, 5 Neb. 377.

Adjournments pending trial.

518. (1883.) The formal adjournment of court to, and opening of it on Thanksgiving Day, no step in the case being taken on that day, is not cause for a new trial. *Polin v. State*, 14 Neb. 540 (16 N. W. 898).

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519. (1896.) It is error for the court to refuse to postpone trial for a reasonable time to enable defendant to meet testimony of a witness whose name was indorsed on the information after it was filed, where the latter gave material testimony for the state during the examination in chief. *Rauschkolb v. State*, 46 Neb. 658 (65 N. W. 776).

View by jury.

520. (1876.) Whenever the court makes an order that the jury view the place in which any material fact in relation to the trial may have occurred, such view should be made in the presence of the prisoner, unless he waive that privilege. *Carroll v. State*, 5 Neb. 31.

521. (1891.) The right of the accused to accompany the jury when it goes to view the place where the crime was committed may be waived. *Neal v. State*, 32 Neb. 120 (49 N. W. 174).

Remarks and conduct of judge.

522. (1886.) Where a defendant, accused of having committed a felony, files an affidavit for a continuance on the ground that she could not procure certain necessary witnesses in her defense, it is error for the trial judge, in the presence of some of the jurors, to declare the affidavit to be false, and charge to defendant with committing perjury therein, and is ground for a new trial. *Bowman v. State*, 19 Neb. 523 (28 N. W. 1; 56 Am. Rep. 750).

523. (1891.) A statement of the court in ruling in the admissibility of evidence of an alleged confession, "In view of the fact that the jury will ultimately pass upon this question it is perhaps improper for the court to review the evidence, and the court will only announce the conclusion arrived at, and that is that it has not been shown that the statements made to the witness, if any, witness King was produced either by promise or favor or through threats; or in other words, that it was involuntary, but on the contrary that the evidence shows that the statements made to King were voluntary, and the objection to the witness King stating what the defendant had stated to him will be overruled," *held* proper. *Shepherd v. State*, 31 Neb. 389 (47 N. W. 1118).

524. (1904.) No error is found in the request of the court to counsel to desist from the further cross-examination of a witness along lines held by the court to be improper, nor in the manner of making the request. *Woodruff v. State*, 72 Neb. 815 (101 N. W. 1114).

525. (1906.) Remarks by the court in the presence of the jury, reflecting upon the evidence of an expert witness, will not be held prejudicial, if there is no evidence before the jury to render the expert evidence applicable to the issue being tried. *Haddix v. State*, 76 Neb. 369 (107 N. W. 781).

——— Examination of witnesses.

526. (1887.) While it is the right of a trial judge to interrogate witnesses when essential to the administration of justice, yet the practice of so doing, except when absolutely necessary, should be discouraged. The common law rule conferring arbitrary power upon trial judges has been so far modified by the code as to greatly limit this power, and, in case of its abuse, a reviewing court would not hesitate to give a new trial to the injured party. *Fager v. State*, 22 Neb. 332 (35 N. W. 195); (1902) *Leo v. State*, 63 Neb. 723 (89 N. W. 303).

527. (1898.) The right of the trial judge to interrogate witnesses should be very sparingly exercised. *Bartley v. State*, 55 Neb. 294 (75 N. W. 832).

528, 529. (1901.) To prevent a miscarriage of justice the trial judge may, sparingly and discreetly, cross-examine a witness for the accused. *Nightingale v. State*, 62 Neb. 371 (87 N. W. 158).

530. (1902.) The record disclosed an abuse of discretion by the trial judges in the examination of witnesses which was prejudicial to the defendant. *Leo v. State*, 63 Neb. 723 (89 N. W. 303).

Conduct of by-standers.

531. (1895.) When the county attorney finished his closing address to the jury some of the by-standers, without the knowledge or connivance of any one connected with the prosecution, applauded, which was quickly suppressed by the presiding judge, and who administered a rebuke to the persons making the applause. *Held*, That the record failed to disclose that the defendant was prejudiced by the demonstration. *Debney v. State*, 45 Neb. 856 (64 N. W. 446; 34 L. R. A. 851).

Procedure on finding defects in indictment.

532. (1894.) When an information proves upon trial to be defective, the trial judge should inquire as to whether probable cause exists for holding the defendant, and in the exercise of a sound legal discretion may

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then either discharge him from custody or recognize him to answer at the next term of court. *State v. Kendall*, 38 Neb. 817 (57 N. W. 525).

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C. Reception of Evidence.

Examination and cross-examination of witnesses, see *Witnesses*.

In general.

533. (1879.) The mere asking of a question calling for incompetent evidence, but not answered is not ground of error. *St. Louis v. State*, 8 Neb. 405.

Separation and exclusion of witnesses.

534. (1884.) In the trial of criminal cases, it is a matter of discretion on the part of the court whether it will or not order that the witness be examined out of the hearing of each other. *Binfield v. State*, 15 Neb. 484 (19 N. W. 607).

535. (1894.) The trial court may, in its discretion, refuse to exclude the witnesses for the state from the court room during the trial, and such an order, in the absence of an evident abuse of discretion, is not the subject of review on appeal. *Murphey v. State*, 43 Neb. 34 (61 N. W. 491).

536. (1896.) There is no presumption that the district judge, without sufficient justification, required witnesses, though relations of the prisoner, to leave the immediate vicinity of the accused during the progress of the trial; neither does the mere fact that this was done in an unusual manner justify the assumption that thereby prejudice resulted. *Hoover v. State*, 48 Neb. 184 (66 N. W. 1117).

Presence of jury during argument as to admission.

537. (1891.) The preliminary examination before the court to ascertain whether or not a confession of a prisoner offered in evidence is voluntary, is properly conducted in the hearing of the jury. *Shepherd v. State*, 31 Neb. 389 (47 N. W. 1118).

Necessity of calling witnesses.

538. (1901.) A party cannot be prejudiced in a legal sense by the failure of his adversary to produce evidence against him. *Jerome v. State*, 61 Neb. 459 (85 N. W. 394).

539. (1901.) The refusal of the state to call certain witnesses, on a second trial, whose testimony on a former trial had been impeached, there being many other trustworthy witnesses by which the same facts could be proven, *held* not a suppression of evidence nor prejudicial to the rights of the defendant. *Argabright v. State*, 62 Neb. 402 (87 N. W. 146).

Offer of proof.

540. (1883.) Alleged error in the exclusion of evidence is unavailable in the absence of an offer of proof. *Denman v. State*, 15 Neb. 138 (17 N. W. 347); (1886) *Mathews v. State*, 19 Neb. 330 (27 N. W. 234); (1894) *Berneker v. State*, 40 Neb. 810 (59 N. W. 372); (1895) *Ford v. State*, 46 Neb. 390 (64 N. W. 1082); (1901) *Savary v. State*, 62 Neb. 166 (87 N. W. 34).

541. (1901.) An offer to prove should fairly apprise the court of the nature of evidence offered, and unless it does, its rejection is not error. *State v. Moore*, 1 Unof. 213 (95 N. W. 334).

Exclusion of improper evidence.

542. (1897.) The trial court may, on its own motion, refuse to permit a witness to answer a question calling for incompetent, immaterial, or irrelevant evidence. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

Number of witnesses.

543. (1897.) The district court may place a reasonable limit upon the time for the production of evidence. *Morgan v. State*, 51 Neb. 672 (71 N. W. 788).

544. (1897.) An exercise of discretion in placing a reasonable limit upon the time for the production of evidence is not subject to review except in case of an abuse of power on part of the trial court. *Morgan v. State*, 51 Neb. 672 (71 N. W. 788).

545. (1902.) It is permissible for trial courts, in the exercise of a sound discretion, to limit the number of witnesses that may be called to prove facts collateral to the main issue. *Beister v. State*, 65 Neb. 276 (91 N. W. 416).

545*a*. (1907.) Where a number of witnesses have testified to a fact which is not in dispute, the trial court may, in the exercise of a reasonable discretion, limit the number of witnesses testifying in regard to same. *Cate v. State*, 80 Neb. 611 (114 N. W. 942).

Order of proof.

546. (1878.) The order in which the evidence for the prosecution shall be introduced is within the discretion of the judge presiding at the trial. *Clough v. State*, 7 Neb. 320; (1897) *Davis v. State*, 51 Neb. 301 (70 N. W. 984); (1897) *Ream v. State*, 52

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Neb. 727 (73 N. W. 227); (1897) *Whitney v. State*, 53 Neb. 287 (73 N. W. 696); (1900) *Baer v. State*, 59 Neb. 655 (81 N. W. 856).

547. (1895.) The order in which a party shall introduce his proof is, to a great extent, discretionary with the trial judge, and the action of the court in that regard will not be cause for reversal when no abuse of discretion is shown. *Basye v. State*, 45 Neb. 261 (63 N. W. 811).

548. (1898.) The order of introducing testimony in a criminal case rests largely in the discretion of the trial court, and an abuse of discretion in that regard is sufficient ground for reversal. *Argabright v. State*, 56 Neb. 363 (76 N. W. 876).

Rebuttal evidence.

549. (1894.) As a rule, the party holding the affirmative will not be permitted to prove again in rebuttal facts shown in making out his case in chief; but it is within the discretion of the court to permit the introduction, in closing, of evidence not strictly rebutting. *Murphey v. State*, 43 Neb. 34 (61 N. W. 491).

550. (1894.) In the trial of a criminal case it is competent for the state in rebuttal to show that a witness who testified for the defendant was intoxicated at the time of the happening of the events about which such witness has testified. *Hill v. State*, 42 Neb. 503, reaffirmed. *Willis v. State*, 43 Neb. 102 (61 N. W. 254).

551. (1896.) Evidence contradictory of the statements of a prosecuting witness may be met by statements in rebuttal though the names of the witnesses giving the rebutting testimony are not indorsed on the information. *Fager v. State*, 49 Neb. 439 (68 N. W. 611).

552. (1899.) The state may introduce rebutting evidence to meet any pertinent issue raised by the accused in making out his case. *Kastner v. State*, 58 Neb. 767 (79 N. W. 713).

553. (1901.) On the trial of a criminal case the state is under no legal obligation to produce evidence in rebuttal. *Jerome v. State*, 61 Neb. 459 (85 N. W. 394).

Reopening case for further evidence.

554. (1878.) It is not error to permit the prosecutor to reopen his case, and introduce further evidence in chief, even after the examination of witnesses for the defense has commenced. *Clough v. State*, 7 Neb. 320.

555. (1897.) An order in a criminal case permitting the state to withdraw its rest, for the purpose of introducing further testimony, will not be disturbed where an abuse of discretion on the part of the trial court has not been shown. *Hans v. State*, 50 Neb. 150 (69 N. W. 838).

556. (1904.) It is within the sound discretion of the trial court to permit a party, in furtherance of justice, to reopen his case and introduce other and further evidence at any time before the close of the trial; and where it is made to appear that there has been no abuse of discretion, and the substantial rights of the opposite party have been in no manner prejudiced by such a course, error cannot be predicated thereon. *Blair v. State*, 72 Neb. 501 (101 N. W. 17).

Repetition of testimony.

557. (1906.) If it appears to the court that a juror, for any cause, has failed to hear the evidence given by a witness, the witness should be required to repeat his evidence or such part thereof as the juror has failed to hear. But, unless it clearly appears that the evidence or some part of it has not been heard by all the jurors, the court is not required, on its own motion, to cause the evidence to be repeated. *Haddix v. State*, 76 Neb. 369 (107 N. W. 781).

D. Objections to Evidence and Motions to Strike Out.

Time for objection.

558. (1872.) The rule, that in a capital case the accused does not waive a right by not insisting upon it, entitled him to have proof which is prejudicial to his case, and is not legally admissible, withdrawn from the jury, although he does not object to it when offered. *Rakes v. People*, 2 Neb. 157.

559. (1878.) Objection to evidence on the ground that the witness had refreshed his memory by reference to a memorandum, must be made when the testimony is first offered, and a motion to strike it out after the witness has completed his testimony is too late. *Clough v. State*, 7 Neb. 320.

560. (1899.) A party cannot reserve his objection to a question calling for incompetent testimony until the answer of the witness has been received. *Dunn v. State*, 58 Neb. 807 (79 N. W. 719).

Sufficiency of objection.

561. (1878.) An objection to the admission of testimony must state the grounds on which it is claimed to be inadmissible. *Clough v. State*, 7 Neb. 320.

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Argument as to admissibility of evidence.

562. (1881.) The refusal of a court to hear argument of counsel as to the admissibility of evidence is not, *per se*, error. *Olive v. State*, 11 Neb. 1 (7 N. W. 444).

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Motion to strike out.

563. (1894.) Where the state called a witness to prove a confession made by accused, if the defendant's counsel neglect to cross-examine the witness before he answers as to the circumstances under which the confession was made and the answer is responsive to the inquiry, error cannot be predicated on the refusal of the trial court to strike out the answer of the witness. *Willis v. State*, 43 Neb. 102 (61 N. W. 254).

563*a*. (1907.) The fact that a witness testifies to matters on his cross-examination which are somewhat inconsistent with his direct evidence does not warrant the court in rejecting his testimony altogether, for it is the province of the jury to determine the matter of the credibility of the witnesses, and the weight which should be given to their evidence. *Steele v. State*, 80 Neb. 9 (113 N. W. 798).

563*b*. (1907.) It is not error to refuse an instruction removing certain evidence from the consideration of the jury at the close of the trial, where the evidence was received without objection at the time of its admission, and no motion then made to strike it out. *Younger v. State*, 80 Neb. 201 (114 N. W. 170).

E. Arguments and Conduct of Counsel.

Ground for new trial, see *post*, § 867.

Harmless error, see *post*, §§ 1140, 1141.

In general.

564. (1888.) The constitutional right of impartial trial should be carefully protected, and conduct of attorneys and all others which prevents such trial, should not be permitted. *Carr v. State*, 23 Neb. 749 (37 N. W. 630).

565. (1895.) A prosecuting attorney, with proper sense of his duty, stands, of course, not entirely in the attitude of counsel in a civil action. It is his duty to enforce the criminal law. It is not his duty to procure a wrong determination of questions of criminal law or to urge a wrongful conviction. *Dixon v. State*, 46 Neb. 298 (64 N. W. 961).

566. (1905.) Prosecuting attorney is a semi-judicial officer. The state for whom he prosecutes does not desire the conviction of an innocent person, and it is as much his duty to see to it that such conviction shall not take place as it is his duty to use his utmost endeavors to fairly convict the guilty. *Nicholizack v. State*, 75 Neb. 27 (105 N. W. 895).

567. (1907.) A person accused of crime can be convicted only by legitimate evidence establishing his guilt beyond a reasonable doubt. The trial court should not allow the prosecuting attorney to use any other means to secure a conviction. *Clark v. State*, 79 Neb. 482 (113 N. W. 804).

Opening statement.

568. (1901.) 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. *Russell v. State*, 62 Neb. 512 (87 N. W. 344).

Stifling evidence.

569. (1888.) A prosecuting attorney endeavoring to dissuade witnesses from testifying, is guilty of misconduct. *Gandy v. State*, 24 Neb. 716 (40 N. W. 302).

Presentation of evidence.

570. (1902.) Where a police officer was a witness in behalf of the prosecution, the assistant prosecutor, after an objection to a question propounded, stated: "I want to show that he [the witness] has known him [the accused] a long time, and had him under observation for other jobs." *Held*, Prejudicial. *Leo v. State*, 63 Neb. 723 (89 N. W. 303).

Right of argument.

571. (1875.) If an attorney for a prisoner voluntarily waives his right to argue the case to the jury, he cannot, after they have retired to consider their verdict, insist as a matter of right to have the jury recalled for the purpose of hearing such argument. *Palmer v. People*, 4 Neb. 68.

Limiting time of argument.

572. (1883.) When the court after limiting the argument of counsel, in a criminal case, to two and a half hours extends it one half hour, it is not error, when it does not appear that more time was needed, or no objection made to the order. *Hart v. State*, 14 Neb. 572 (16 N. W. 905).

573. (1895.) It is within the discretion of the trial court to limit the time for arguments to the jury, and an order so limiting time ppresents no question for review, unless it is made to appear that the argu-

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ments were thereby unduly restricted and that the time allotted to the complaining party was consumed. *Dixon v. State*, 46 Neb. 298 (64 N. W. 961).

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Argument.

574. (1885.) It is not error on the part of the court to allow counsel for the state, in summing up to the jury, to comment upon the presumption of guilt arising from the possession, by the accused, of recently stolen goods, without explanation of such possession, even where counsel fail to state the law with technical accuracy. *McLain v. State*, 18 Neb. 154 (24 N. W. 720).

575. (1895.) Alleged misconduct of the attorney for the state by use of improper language during his argument to the jury, *held*, when viewed in connection with the evidence and all facts and circumstances of the case, not prejudicial to the rights of the defendant. *McMahon v. State*, 46 Neb. 166 (64 N. W. 694).

576. (1901.) Misconduct of counsel for the state in the argument of the case, 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 and prejudice the rights of the defendant. *Argabright v. State*, 62 Neb. 402 (87 N. W. 146).

577. (1992.) Argument of prosecutor in a murder case held not misconduct of counsel sufficient to warrant a reversal. *Rhea v. State*, 63 Neb. 461 (88 N. W. 789).

578. (1902.) It is highly improper for the prosecuting attorney in a criminal case to declare to the jury his personal belief in defendant's guilt, unless such belief is given as a deduction from the evidence. *Reed v. State*, 66 Neb. 184 (92 N. W. 321).

579. (1902.) There is no rule of law that limits counsel in debate to mere articulation. He may use any appropriate vehicle of thought to carry his conceptions of truth to the jury. *Russell v. State*, 66 Neb. 497 (92 N. W. 751).

580. (1905.) Misconduct of the county attorney in the argument of a case will work a reversal, where it is reasonably apparent that such misconduct worked prejudice to the defendant. *Power v. State*, 75 Neb. 226 (106 N. W. 332).

——— Private counsel.

581. (1899.) Whether the court might properly permit private counsel in a criminal case to make an argument to the jury on behalf of the state when such counsel did not appear in his professional character until the evidence was closed, *quære*, *Knights v. State*, 58 Neb. 225 (78 N. W. 508; 76 Am. St. Rep. 78).

——— Appeal for conviction.

582. (1902.) While considerable allowance is made for professional enthusiasm in the argument of a criminal case, it is never permissible to ground an appeal for conviction upon facts not given in evidence at the trial. *Reed v. State*, 66 Neb. 184 (92 N. W. 321).

583. (1903.) An appeal for conviction based altogether upon the evidence, however fervent it may be, is not an abuse of the privilege of advocacy. *Parker v. State*, 67 Neb. 555 (93 N. W. 1037).

——— Comments on failure of accused to testify.

584. (1903.) The prohibition contained in section 473 of the criminal code against referring to, or commenting upon, the failure of an accused person to testify, was intended as a restraint upon the prosecuting attorney and, to some extent, upon the court as well. *Lamb v. State*, 69 Neb. 212 (95 N. W. 1050).

——— Comments on evidence or witnesses.

585. (1883.) It is not error for counsel in arguing, in the presence of the jury, the competency of a witness, based on testimony given of her admissions, to make a fair reference thereto, to say it is "false," and that the witness will deny it. *Polin v. State*, 14 Neb. 540 (16 N. W. 898).

586. (1886.) If a person accused of crime testifies in his own behalf he is to be treated as any other witness, and if he fails to deny a material fact which has been testified against him, the district attorney may comment upon such omission in his argument to the jury. *Heidt v. State*, 20 Neb. 492 (30 N. W. 626; 58 Am. Rep. 835).

587. (1894.) On the trial of a criminal cause the county attorney made a portion of his closing address to the jury while the trial judge was absent from the court room, and in said address said prosecutor, over the objection of the accused, misquoted the testimony in a material matter, to which counsel for the prisoner at the time objected, but, owing to the said absence of the judge, no ruling was had thereon. *Held*, Such error as demanded a reversal. *Palin v. State*, 38 Neb. 862 (57 N. W. 743).

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588. (1901.) Strictures by counsel of a witness for the defense held to be of a character warranted by the evidence, and that such argument was not misconduct upon which prejudicial error could be predicated. *Tatum v. State*, 61 Neb. 229 (85 N. W. 40).

589. (1905.) Where the woman, with whom a defendant is accused of having committed adultery, is called as a witness in the prosecution therefor and refuses to testify as to the relations between herself and the accused, comments by the prosecutor on such refusal to testify, and charging it as an admission of guilt, is such misconduct as amounts to prejudicial error. *Powers v. State*, 75 Neb. 226 (106 N. W. 332).

——— **Comment on instructions.**

590. (1889.) It is not error for attorney to read instructions and comment on them to the jury while making his closing argument. *Burrell v. State*, 25 Neb. 581 (41 N. W. 399).

——— **Comments on character or conduct of accused.**

591. (1884.) Where the testimony showed that the plaintiff was a herder on the plains, carried two revolvers and a knife, and made a display of them, and his companion carried four revolvers, *held*, that it was not error for the district attorney to speak of him to the jury as "Billy the Kid or Jesse James sort of a cowboy," as the testimony warranted the language. *Simmerman v. State*, 16 Neb. 615 (21 N. W. 387).

592. (1901.) Counsel for the state in argument to the jury may criticise the conduct of the defendant as disclosed by the evidence, though such defendant was not a witness in his own behalf. *Dinsmore v. State*, 61 Neb. 418 (85 N. W. 445).

Correction of objectionable matter.

593. (1896.) Where the only objection by accused to the misconduct of the county attorney was that he made statements unwarranted by the evidence, an instruction directing the jury to disregard such statements left no ground for complaint. *Hoover v. State*, 48 Neb. 184 (66 N. W. 1117).

F. Province of Court and Jury in General.

Questions of law or fact.

594. (1883.) In criminal trials jurors are not judges of the law. While jurors have the power to disregard the law as given by the judge, they have neither a legal nor moral right to do so. *Parrish v. State*, 14 Neb. 60 (15 N. W. 357).

595. (1902.) In a trial for a felony the presiding judge is without authority to determine the issue or any of the questions of fact involved in the issue. That power belongs exclusively to the jury, regardless of the state of the evidence. They must be fully satisfied of the existence of every fact constituting an element of the crime charged, and it can not be assumed that they are so satisfied because they ought to be. *Goldsberry v. State*, 66 Neb. 312 (92 N. W. 906).

595*a*. (1907.) The question as to whether the acts charged, if committed, were maliciously done was one of fact for the jury to decide from all the evidence upon that part of the case. *Carson v. State*, 80 Neb. 619 (114 N. W. 938).

——— **Intent.**

596. (1894.) The test as to the intent is one of logic rather than one of law; and while the jury are at liberty, if the circumstances warrant, to infer the intention from the act, they are under no legal obligation to do so. *Krchnavy v. State*, 43 Neb. 337 (61 N. W. 628).

597. (1898.) If the defendant solemnly admit facts establishing his guilt, he is not entitled to have the jury pass on the issue of his actual intent to violate the law. *Ignorantia legis neminem excusat. Pisar v. State*, 56 Neb. 455 (76 N. W. 869).

——— **Uncontroverted evidence.**

598. (1886.) Where the defendant in a criminal case has pleaded not guilty, the jury, in order to convict him of the offense charged, must find from the evidence that he is guilty, and the court has no authority to say to them that certain allegations are uncontradicted, and therefore may be by the jury considered as proved. *Heldt v. State*, 20 Neb. 492 (30 N. W. 626; 58 Am. Rep. 835).

——— **Effect of admitted facts.**

599. (1898.) In a criminal case, if the defendant on the trial stipulate that certain facts exist, the court may properly assume those facts as established and instruct the jury as to their legal effect. *Pisar v. State*, 56 Neb. 455 (76 N. W. 869).

——— **Weight and sufficiency of evidence.**

600. (1877.) Where evidence of good character is before the jury it is their duty

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to give it such weight as they think it is entitled to. It is the province of the jury to weigh the evidence and determine the facts, and they should be left as free and untrammelled to give such weight to the evidence of good character as they are in relation to other facts. *Garrison v. State*, 6 Neb. 274.

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601. (1891.) After a confession is given in evidence it is for the jury to determine from all the facts and circumstances proven on the trial, in connection with the confession, whether it was voluntary and what credit should be given it. *Shepherd v. State*, 31 Neb. 389 (47 N. W. 1118).

602. (1894.) The jury must determine the weight of evidence adduced, and its estimate thereof will not be interfered with, unless it is clearly wrong. *Whitman v. State*, 42 Neb. 841 (60 N. W. 1025).

603. (1895.) The credibility of witnesses and the weight to be given their testimony are questions for the jury. *Carleton v. State*, 43 Neb. 373 (61 N. W. 699).

604. (1896.) The effect of the evidence and the inferences deducible therefrom are for the jury. *Williams v. State*, 46 Neb. 704 (65 N. W. 783).

605. (1897.) The jurors are, under our practice, judges of the probative force of the evidence. *Henry v. State*, 51 Neb. 149 (70 N. W. 924; 66 Am. St. Rep. 450).

Direction of verdict.

606. (1887.) Where testimony is such as would warrant jury in finding guilt, it is error for court to direct verdict of acquittal. *State v. Sneff*, 22 Neb. 481 (35 N. W. 219).

607. (1896.) It is not error to refuse to direct a verdict for a defendant in a criminal prosecution, at the close of the testimony for the state, where the evidence before the jury would warrant a conviction. *Hornberger v. State*, 47 Neb. 40 (66 N. W. 23).

608. (1900.) When an information in a criminal cause fails to state a crime, it is not proper to direct a verdict of not guilty, but the jury should be discharged. *State v. Dennison*, 60 Neb. 157 (82 N. W. 383).

Instructions invading province of jury.

609. (1896.) It is error to give an instruction infringing on the province of the jury. *Haskins v. State*, 46 Neb. 888 (65 N. W. 894).

——— Assumption as to facts.

610. It is not, in a criminal prosecution, error for the trial court to assume the existence of facts asserted by the accused on the trial, or treated by him as proved. (1894) *Hill v. State*, 42 Neb. 503 (60 N. W. 916; (1897) *Morgan v. State*, 51 Neb. 672 (71 N. W. 788).

611. (1895.) It is error to give an instruction which assumes a controverted material fact upon which there is a conflict of testimony. *Metz v. State*, 46 Neb. 547 (64 N. W. 190).

612. (1900.) It is not error to assume in an instruction the existence of a collateral fact established by uncontroverted evidence, which tends to prove one of the constituent elements of a crime. *Welsh v. State*, 60 Neb. 101 (82 N. W. 368).

G. Necessity, Requisites and Sufficiency of Instructions.

Harmless error, see *post*, §§ 1129-1139.

Issues and theories of case.

613. (1895.) It is the duty of the court to present the issues to the jury whether requested or not, and a charge which, by the omission of certain elements, has the effect of withdrawing from the jury an essential issue of the case is erroneous. *Dolan v. State*, 44 Neb. 643 (62 N. W. 1090).

614. (1896.) In criminal cases it is the duty of the court to present the issues to the jury whether requested or not, and a charge which, by the omission of certain elements, has the effect of withdrawing from the jury an essential issue is erroneous, but is not cause for reversal unless prejudicial to accused. *Pjarrou v. State*, 47 Neb. 294 (66 N. W. 422).

615. (1899.) There is not an assumption of any fact in an instruction plainly professing to be a mere statement of the material averments of the information. *Knights v. State*, 58 Neb. 225 (78 N. W. 508; 76 Am. St. Rep. 78).

616. (1903.) An instruction which informs the jury that the material facts charged in the information must be established by the evidence beyond a reasonable doubt, is unobjectionable, if supplemented by other instructions clearly indicating what facts are material. *Lamb v. State*, 69 Neb. 212 (95 N. W. 1050).

Law of the case in general.

617. (1877.) The charge of the court to the jury should be a clear and explicit statement of the law applicable to the facts in the case, and should cover all the ques-

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tions involved in the issue. *Milton v. State*, 6 Neb. 136.

618. (1883.) It is not essential to the ends of justice that the judge, in charging a jury, should rehearse the sayings of law writers as to the policy of the law in the punishment of criminals. *Parrish v. State*, 14 Neb. 60 (15 N. W. 357).

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619. (1886.) The charge of the court to a trial jury should be a clear and explicit statement of the law applicable to the facts in the case. *Ballard v. State*, 19 Neb. 609 (28 N. W. 271).

620. (1886.) Although the law in force at the time of the commission of the alleged offense provided that juries should be the judges of the law, but which law was repealed before the trial, it was competent for the legislature to make such change, and no error for the trial court to refuse to instruct the jury in the language of the prior law. *Marion v. State*, 20 Neb. 233 (29 N. W. 911; 57 Am. Rep. 825).

621. (1901.) Where, in the trial of a person charged as an accessory before the fact, the evidence tends to prove the commission of the crime in two or more counties, the court should, in plain terms, charge the jury that there should be an acquittal, if no accessorial act was committed in the county in which the information was filed. *Burlingim v. State*, 61 Neb. 276 (85 N. W. 76).

621*a*. (1907.) It is not error for the court to refuse to give an instruction requested by the defendant which does not contain a full and correct statement of the law applicable to the facts of the case as shown by the evidence. *Clements v. State*, 80 Neb. 313 (114 N. W. 271).

Cautionary instruction in general.

622. (1901.) In a criminal prosecution the trial court may, in its discretion, give a cautionary instruction. *Dinsmore v. State*, 61 Neb. 418 (85 N. W. 445).

Elements and incidents of defense in general.

623. (1897.) It is error in a criminal prosecution for the trial court to discredit a particular defense by advising the jury that it is one "easily fabricated, that it has occasionally been successfully fabricated, and that the temptation to resort to it as a spurious defense is very great, especially in cases of importance." *Henry v. State*, 51 Neb. 149 (70 N. W. 924; 66 Am. St. Rep. 450).

Insanity.

624. (1881.) An instruction in a trial for malicious shooting, that "the law requires something more than occasional oddity or hypochondria to exempt the perpetrator of an offense from its punishment," is not erroneous. *Hawe v. State*, 11 Neb. 537 (10 N. W. 452; 38 Am. Rep. 375).

625. (1891.) Instructions as to the criminal responsibility of parties laboring under insanity and insane delusions, examined, considered, and *held* to be correctly given. *Thurman v. State*, 32 Neb. 224 (49 N. W. 338).

626. (1899.) It is prejudicially erroneous to inform the jury in a criminal case, where the defense is insanity, that want of capacity on the part of the prisoner to understand the nature of the act in question, at the time of its commission, is necessary to render him irresponsible. *Knights v. State*, 58 Neb. 225 (78 N. W. 508; 76 Am. St. Rep. 78).

Intoxication.

627. (1898.) On trial of accused for robbery where the evidence tends to show that he was intoxicated when the crime was committed, there being no evidence that he premeditated the commission of the crime and then became intoxicated, it was *held* error to charge the jury that no state of mind resulting from drunkenness, short of actual insanity or loss of reason, was any excuse for a criminal act. *Latimer v. State*, 55 Neb. 609 (76 N. W. 207; 70 Am. St. Rep. 403).

Alibi.

Necessity for request, see *post*, § 789.

628. (1885.) Instructions on questions of alibi examined, and *held* proper. *McLain v. State*, 18 Neb. 154 (24 N. W. 720).

629. (1896.) An alibi is a legitimate defense to a criminal charge and should not be disparaged by the trial court, the weight or sufficiency of the evidence for that purpose being a question for the consideration of the jury. *Casey v. State*, 49 Neb. 403 (68 N. W. 643).

630. (1896.) It is error to instruct that the accused in a criminal prosecution is required to prove an alibi. *Casey v. State*, 49 Neb. 403 (68 N. W. 643).

631. (1898.) It is improper to instruct a jury that under the defense of alibi it must appear that the distance was so great as to preclude the possibility that accused

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could have been at the scene of the crime. *Peyton v. State*, 54 Neb. 188 (74 N. W. 597).

632. (1898.) Where an alibi and its effect were correctly stated in an instruction, no harm will be presumed from the fact that in referring to it the court descriptively said that an alibi is a part of the defense. *McVey v. State*, 57 Neb. 471 (77 N. W. 1111).

633. (1901.) An instruction in which the court said to the jury that the evidence tended to show that the defendant was, when the crime was being committed, at such a distant and different place that he could not have participated in its commission, and that they should acquit unless the evidence satisfied them beyond a reasonable doubt that he was present when the crime was committed, *held* not error. *Nightingale v. State*, 62 Neb. 371 (87 N. W. 158).

Motive and intent.

634. (1878.) When the evidence fails to show some motive on the part of the accused to commit the crime charged, this is a circumstance in favor of his innocence which the jury should consider together with all the other evidence, in making up their verdict. But it is not error for the court to refuse to charge the jury that the absence of such motive "ought to operate strongly" in favor of the accused, this being a matter for the jury alone to determine. *Clough v. State*, 7 Neb. 320.

635. (1895.) It is proper to instruct that "malice" in its legal sense, denotes that condition of mind which is manifested by the intentionally doing of a wrongful act without just cause or excuse. It means any wilfull or corrupt intention of the mind. *Housh v. State*, 43 Neb. 163 (61 N. W. 571).

636. (1895.) Where the offense consists of an act with a specific intent, it may not be error to instruct that the accused is presumed to have intended the natural and proximate consequences of his voluntary act. *Krchnavy v. State*, 43 Neb. 337 (61 N. W. 628).

Self-defense.

637. (1906.) Self-defense is extended to the defense of the person and of the domicile, and an instruction which correctly defines the elements of such defense is a sufficient charge on that subject. *Reed v. State*, 75 Neb. 509 (106 N. W. 649).

Presumptions and burden of proof.

638. (1892.) An instruction that "If you find the defendants tendered a reasonable doubt" is erroneous, as it in effect shifts the burden of proof onto the accused. The true rule is that if upon all the evidence the jury entertain a reasonable doubt of the guilt of the accused they should acquit. *Burger v. State*, 34 Neb. 397 (51 N. W. 1027).

639. (1896.) An instruction in a criminal case is erroneous which has the effect to shift the burden of proof from the state to the accused. *Haskins v. State*, 46 Neb. 888 (65 N. W. 894).

640. (1898.) An instruction in a criminal case, in effect, that every one is presumed sane, but if there is evidence tending to rebut the presumption and sufficient to raise a reasonable doubt on the issue of insanity, then the burden is upon the state to show sanity beyond a reasonable doubt, shifts the burden of proof and is therefore erroneous. *Snider v. State*, 56 Neb. 309 (76 N. W. 574).

641. (1899.) In a criminal prosecution it is reversible error to instruct the jury upon the question of insanity that the burden of proof shifts from the prisoner to the state during the progress of the trial. *Knights v. State*, 58 Neb. 225 (78 N. W. 508; 76 Am. St. Rep. 78).

642. (1899.) The court in its charge may properly say that when the presumption of sanity encounters opposing proof the burden is upon the state to satisfy the jury, by evidence beyond a reasonable doubt, that the accused was sane at the time he committed the alleged criminal act. *Knights v. State*, 58 Neb. 225 (78 N. W. 508; 76 Am. St. Rep. 78).

643. (1901.) An instruction in a criminal prosecution which casts the burden of proof on a defendant to establish his defense by a preponderance of the evidence, is erroneous. *Howell v. State*, 61 Neb. 391 (85 N. W. 289).

644. (1902.) An instruction which in substance informs the jury that they cannot convict unless all the material averments of the information are established by the evidence beyond a reasonable doubt, does not, by implication, authorize a conviction without presumption or proof of defendant's sanity. *Schwartz v. State*, 65 Neb 196 (91 N. W. 190).

644*a*. (1908.) An instruction which requires a defendant to prove beyond a reasonable doubt his innocence of a graver crime before he can be found guilty of a less heinous offense imposes an unwarranted burden upon the defendant and is

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erroneous. *Kennison v. State*, 80 Neb. 688 (115 N. W. 289).

644*b*. (1908.) In a criminal prosecution the burden is upon the state to establish every element of the crime charged beyond a reasonable doubt; and an instruction which shifts the burden of proof to the defendant, and informs the jury that the evidence must show beyond a reasonable doubt that the defendant in doing the act complained of acted in good faith, and was not actuated by improper motives, is erroneous. *Chamberlain v. State*, 80 Neb. 812 (115 N. W. 555).

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——Presumption of innocence.

645. (1874.) An instruction in these words, "the accused is presumed innocent until the contrary be proved, and if the evidence satisfies you, beyond a reasonable doubt, that he is not guilty of the charge alleged against him in the indictment, it is your duty to acquit," is erroneous. *Caw v. State*, 3 Neb. 357).

646. (1878.) It is not error for the court, in speaking of the legal presumption of innocence, to say to the jury that, unless this presumption is overthrown by "sufficient evidence," the defendant must be acquitted. The use of the term "sufficient evidence," could not have led the jury to understand that they were at liberty to convict on a mere preponderance of evidence, especially when, in a subsequent part of the charge, they were told that "the proof must be such as to satisfy them beyond a reasonable doubt" of the existence of all the facts necessary to constitute his guilt. *Clough v. State*, 7 Neb. 320.

647. (1881.) An instruction that, until proven guilty, accused should be considered legally innocent and that his case should "receive the same impartial consideration as if they were really so," is erroneous since it tends to lead the jury to believe that the judge believes accused to be guilty. *Olive v. State*, 11 Neb. 1 (7 N. W. 444).

648. (1894.) In a criminal prosecution the court instructed the jury, in substance, that the law presumed the accused innocent of the crime charged, and that such presumption continued until his guilt should be established by competent evidence beyond a reasonable doubt. *Held*, Sufficient to apprise the jury that their verdict must be based upon the evidence in the case alone, and that it was not error to refuse an instruction that "the information in this case is of itself a mere accusation or charge against the defendant, and is not, of itself, any evidence of the defendant's guilt; and no juror in this case should permit himself to be, to any extent, influenced against the defendant because or on account of the information in this case; that your personal opinion as to facts not proven cannot properly be considered as the basis of your verdict. You may believe as men that certain facts exist, but as jurors you can only act upon evidence introduced upon the trial, and from that alone you must form your verdict, unaided, unassisted, and uninfluenced by any opinion or presumption not formed upon the testimony." *Palin v. State*, 38 Neb. 862 (57 N. W. 743).

649. (1897.) The court charged the jury that: "The law raises no presumption against the defendant. On the contrary, the presumption of law is in favor of his innocence. This presumption of innocence continues through the trial until every material allegation in the information is established by the evidence to the exclusion of all reasonable doubt." *Held*, Equivalent to the rule that the presumption of innocence is a matter of evidence, to the benefit of which accused is entitled. *Bartley v. State*, 53 Neb. 310 (73 N. W. 744).

650. (1898.) Instruction examined, and held not to state that the presumption of innocence exists in favor of the accused when no evidence has been introduced. *McVey v. State*, 55 Neb. 777 (76 N. W. 438).

651. (1899.) Where the jury was instructed that the presumption of innocence continues with accused until his guilt is established by the evidence beyond a reasonable doubt, *held* not prejudicially erroneous to refuse to further instruct that such presumption is a matter of evidence. *McVey v. State*, 57 Neb. 471 (77 N. W. 1111).

652. (1903.) An instruction, in which the jury are told that the presumption of innocence continues until the material allegations of the information are established by the evidence "to the exclusion of all reasonable doubt," is entirely accurate. *Edwards v. State*, 69 Neb. 386 (95 N. W. 1038).

653. (1903.) An instruction which in substance advises the jury that the presumption of innocence remains with the accused till by competent evidence the state establishes guilt beyond a reasonable doubt, is not subject to the objection that the burden of proof is thereby shifted to the defend-

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ant. *Van Syoc v. State*, 69 Neb. 520 (96 N. W. 266).

Character of defendant.

Necessity for request, see *post*, § 790.

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654. (1881.) An instruction that "Every man is presumed in law to have a good character until the contrary is proved. The indictment is this case having been found and the prisoners put on trial, their characters thereby have a stain or imputation cast upon the original presumption. To remove this stain or imputation, and restore their characters to its former presumption, they have introduced witnesses to prove their good character * * *," is erroneous. *Olive v. State*, 11 Neb. 1 (7 N. W. 444).

655. (1888.) The jury alone are the judges of the weight of evidence. Therefore an instruction that, "evidence of good character is entitled to great weight when the evidence against the accused is weak or doubtful, but is entitled to very little weight when the proof is strong," was *held* to be erroneous. *Long v. State*, 23 Neb. 33 (36 N. W. 310).

656. (1892.) Previous good character of the accused in a criminal prosecution is a fact which he is entitled to have submitted for the consideration of the jury precisely as any other circumstance favorable to him, without any disparagement by the court, hence it is error to instruct that "good character is a circumstance of great weight in doubtful cases and of less weight in less doubtful cases." *Johnson v. State*, 34 Neb. 257 (51 N. W. 835).

657. (1898.) Previous good character of accused is a fact which he is entitled to have submitted to the jury, precisely as any other circumstance favorable to him, without any disparagement by the court. *Latimer v. State*, 55 Neb. 609 (76 N. W. 207; 70 Am. St. Rep. 403).

658. (1902.) An instruction as to the effect of evidence of defendants previous good character stating that if the proof shows that defendant is guilty the former good character "would not be a defense," is not erroneous. *McCormick v. State*, 66 Neb. 337 (92 N. W. 606).

659. (1904.) In criminal trials, the previous good character of the defendant has great weight as tending to show the improbability of guilt. The weight to be given such evidence is for the jury to determine. The court is not required to tell the jury that, if the other evidence is sufficient to satisfy the jury of the defendant's guilt, they must still consider whether previous good character, when weighed with all other facts and circumstances in the case, raises a reasonable doubt of guilt. *Lillie v. State*, 72 Neb. 228 (100 N. W. 316).

660. (1905.) It is not error to refuse an instruction concerning evidence of the previous good character of the accused, when the instruction calls attention especially to such evidence and to no other, and tells the jury that it may be relied on to raise a doubt of the guilt of the accused sufficient to acquit him, which, without such proof, would not have existed. *Sweet v. State*, 75 Neb. 263 (106 N. W. 31).

Elements of offense.

661. (1895.) It is the duty of the court to instruct the jury on the law of the case, whether requested so to do or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the consideration of the jury an essential issue or element of the case is erroneous; but when the jury is instructed generally upon the law, and when the instructions given do not have the effect above stated, then error cannot be predicated upon the failure of the court to charge upon some particular phase of the case, such as the purpose for which certain evidence was admitted, unless a proper instruction was requested by the party complaining. *Carleton v. State*, 43 Neb. 373 (61 N. W. 699).

662. (1895.) An instruction by which it is sought to cover the whole case, and upon which, if met by the evidence, the jury is instructed to find in a certain way, should include all the elements necessarily involved in the case and within the evidence. *McAleer v. State*, 46 Neb. 116 (64 N. W. 358).

663. (1898.) An instruction purporting to cover the whole case is erroneous, which fails to include all the elements necessarily involved in the issues and within the evidence. *Bergeron v. State*, 53 Neb. 752 (74 N. W. 253).

664. (1902.) It is error for the court to instruct the jury that they may convict the defendant without finding a specific fact which constitutes one of the essential ingredients of the offense charged. *Goldsberry v. State*, 66 Neb. 312 (92 N. W. 906).

665. (1905.) It is the duty of the trial

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judge, particularly in criminal actions, to instruct the jury as to the rules of law governing the disposition of the cause, whether he is requested to do so or not; and if a charge to a jury, by omission to instruct on certain points, in effect withdraws from their consideration an essential issue of the case, it is erroneous. *Young v. State*, 74 Neb. 346 (104 N. W. 867).

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666. (1906.) It is not error for the court to refuse to give an instruction relating to the matter of a crime for which the defendant is not on trial. *Steinkuhler v. State*, 77 Neb. 331 (109 N. W. 395.)

Degrees of crime.

Necessity for request, see *post*, §§ 791, 792.

667. (1895.) Where an information contained two counts charging different degrees of the crime, and there was no evidence to support the first count, it is error to submit to the jury the question of guilt or innocence under that count although defendant was not convicted on that count. *Botsch v. State*, 43 Neb. 501 (61 N W. 730).

668. (1895.) It was not error to submit to the jury the question of defendant's guilt of a higher grade of offense than that for which conviction is had, where there is evidence to sustain the higher grade. *Whitner v. State*, 46 Neb. 144 (64 N. W. 704).

669. (1901.) The court in charging the jury, is only required to state the law applicable to the facts proved and those which the evidence tends to prove. So, where it is conclusively shown that the defendant either committed the crime charged or is entirely innocent, the failure to instruct with respect to other crimes, or inferior degrees of the crime, embraced within the facts alleged in the information, is not error. *Strong v. State*, 63 Neb. 440 (88 N. W. 772).

670. (1906.) On the trial of one charged with a heinous crime, where the charge set forth in the information or indictment fully embraces all of the ingredients of a lesser offense, it is proper for the trial court to define the lesser offense and instruct the jury that, where the evidence requires it, they may convict of such offense. *McConnell v. State*, 77 Neb. 773 (110 N. W. 666).

Punishment.

671. (1895.) A refusal to instruct as to the statutory penalty, or to permit that question to be argued, is not error, where the jury is not required to fix the punishment. *Ford v. State*, 46 Neb. 390 (64 N. W. 1082).

672. (1903.) Where the jury are not required to fix the punishment, the trial court is under no obligation to tell them what penalty is annexed by law to the crime charged in the information. *Edwards v. State*, 69 Neb. 386 (95 N. W. 1038).

Statement of evidence.

673. (1896.) In a trial for murder, the defense being insanity, the court must impartially recite the material evidence offered by both parties, where it undertakes to detail in an instruction what evidence the jury may consider in determining whether accused knew the killing was wrong. *Williams v. State*, 46 Neb. 704 (65 N. W. 783).

674. (1896.) It is prejudicial error for the court in a murder case, the defense of which is insanity, to group together in an instruction the important material facts put in evidence by the state as to the prisoner's sanity and omit all mention of the evidence produced by the prisoner tending to traverse that of the state. *Williams v. State*, 46 Neb. 704 (65 N. W. 783).

Determination of sufficiency of evidence.

675. (1892.) An instruction in a criminal case that "you should be satisfied of the truth of the material allegations contained in the particular count of the information," without stating from what the jury was to be satisfied or the degree of proof required to convict, is erroneous. *Elliott v. State*, 34 Neb. 48 (51 N. W. 315).

676. (1897.) It is not prejudicial error for a court in its charge to say to the jury that the evidence before them is both direct and circumstantial. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

677. (1897.) An instruction that the acts constituting a crime may be proved by circumstances and any other competent evidence, *held* proper when preceded by a direction that the jury must be governed by what had appeared in evidence. *Mills v. State*, 53 Neb. 263 (73 N. W. 761).

678. (1899.) In a criminal prosecution direct and circumstantial evidence adduced on the trial should be weighed in reaching a verdict, and it is not error in such case to so instruct the jury. *Kastner v. State*, 58 Neb. 767 (79 N. W. 713).

679. (1901.) 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*, 62 Neb. 166 (87 N. W. 34).

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680. (1901.) An instruction laying down the proposition that false testimony, whether given corruptly or through mistake, should not influence the decision, is abstractly correct, and was, in this case, properly given. *Strong v. State*, 63 Neb. 440 (88 N. W. 772).

681. (1902.) A request for an instruction to the effect that defendants should be acquitted if there is evidence supporting any theory of their innocence is rightly refused. *Reed v. State*, 66 Neb. 184 (92 N. W. 321).

Reasonable doubt.

682. (1879.) It is not error to charge the jury that "absolute, unequivocal, mathematical certainty of proof is not required" on a criminal trial. *St. Louis v. State*, 8 Neb. 405.

683. (1883.) An instruction in which it is said that: "The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of ordinarily prudent men with a conviction on which they would act in their most important concerns or affairs in life," sustained. *Polin v. State*, 14 Neb. 540 (16 N. W. 898); (1896) *Lawhead v. State*, 46 Neb. 607 (65 N. W. 779).

684. (1886.) An instruction that persons sometimes say they are morally certain of the existence of a fact or facts, but have not the evidence to prove it, this is the condition of mind one is in when convinced beyond a reasonable doubt, is erroneous. *Heldt v. State*, 20 Neb. 492 (30 Neb. 626; 58 Am. Rep. 835.

685. (1887.) An instruction that reasonable doubt "is a doubt for having which the jury can give a reason, based upon testimony," is erroneous and calculated to mislead. *Cowan v. State*, 22 Neb. 519 (35 N. W. 405).

686. (1888.) An instruction that "The jury was not required to be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish defendant's guilt. It is sufficient if, taking the testimony altogether, the jury are satisfied beyond a reasonable doubt that the state has proved each material fact charged, and that the defendant is guilty," is correct. *Jameson v. State*, 25 Neb. 185 (41 N. W. 138).

687. (1891.) Instruction to the jury that "a reasonable doubt is an actual, substantial doubt, arising from the evidence, or want of evidence, in the case," *held*, not error. *Langford v. State*, 32 Neb. 782 (49 N. W. 766).

688. (1892.) An instruction "On the question of reasonable doubt the court instructs the jury that the term 'reasonable doubt,' as used in these instructions, means a doubt which has some good reason for it arising out of the evidence in the case; such a doubt as you are able to find a reason in the evidence for," etc., *held*, erroneous, and cause for reversal of the judgment. *Childs v. State*, 34 Neb. 236 (51 N. W. 837).

689. (1894.) In a murder trial the court instructed the jury: "The court further instructs the jury, as a matter of law, that the doubt which the juror is allowed to retain on his own mind, and under which he should frame his verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt, and a juror is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to possible states of facts differing from that established from the evidence. You are not at liberty to disbelieve as jurors, if from the evidence you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered. The jury are instructed that if, after a careful and impartial consideration of all the evidence in the case, they can say they feel an abiding conviction of the guilt of the defendant, and are fully satisfied to a moral certainty of the truth of the charge made against him, then the jury are satisfied beyond a reasonable doubt." *Held*, That the instruction was correct in every respect. *Willis v. State*, 43 Neb. 102 (61 N. W. 254); (1901) *Nightingale v. State*, 62 Neb. 371 (87 N. W. 158).

690. (1894.) In a murder trial the court instructed the jury: "A doubt to justify an acquittal must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that were the same kind of doubt interposed in the graver transactions of life it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty." *Held*, That the instruction was correct. *Willis v. State*, 43 Neb. 102 (61 N. W. 254).

691. (1895.) Where a charge distinctly states that to warrant a conviction the state must make out the whole case beyond a

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reasonable doubt, it is not necessary to repeat in every instruction the degree of proof required. *Carleton v. State*, 43 Neb. 373 (61 N. W. 699); (1897) *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

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692. (1895.) Instructions as to reasonable doubt, set out in opinion, *held* not erroneous. *Carleton v. State*, 43 Neb. 373 (61 N. W. 699); (1897) *Davis v. State*, 51 Neb. 301 (70 N. W. 984); (1897) *Whitney v. State*, 53 Neb. 287 (73 N. W. 696); (1904) *Bothwell v. State*, 71 Neb. 747 (99 N. W. 669).

693. (1895.) An instruction, in a prosecution for murder, on the question of reasonable doubt is not erroneous because it includes a statement that "mathematical certainty is not required." *Collins v. State*, 46 Neb. 37 (64 N. W. 432).

694. (1896.) In a criminal case it is not erroneous to direct the jury that its oath imposes upon it no obligation to doubt, where no doubt would have existed if no oath had been administered. *Barney v. State*, 49 Neb. 515 (68 N. W. 636); (1897) *Catron v. State*, 52 Neb. 389 (72 N. W. 354).

695. (1897.) An instruction defining a reasonable doubt held not to deny accused the benefit of a reasonable doubt arising from the lack of evidence in the case, and that it was not error to state in such instruction: "You are not at liberty to disbelieve as jurors if from all the evidence you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered." *Bartley v. State*, 53 Neb. 310 (73 N. W. 744).

696. (1898.) A portion of an instruction, worded as follows: "You are not at liberty to disbelieve as jurors if you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered,"—*held* not objectionable and erroneous when read and construed with the further portions of the same instruction and the other paragraphs of the charge in that the first sentence did not read, "You are not at liberty to disbelieve as jurors if from the evidence you believe as men," instead of as it did with the omission of the reference to the evidence. *Carrall v. State*, 53 Neb. 431 (73 N. W. 939).

697. (1898.) An instruction in a criminal prosecution is not erroneous which defines a reasonable doubt as being such a doubt as arises from a candid and impartial consideration of all the evidence in the case, and which would cause a reasonable and prudent man to pause and hesitate in the graver transactions of life, and that a juror is satisfied beyond a reasonable doubt if from a consideration of the entire evidence he has an abiding conviction of the truth of the charge. *Maxfield v. State*, 54 Neb. 44 (74 N. W. 401).

698. (1899.) In a felony case it is reversible error for a court to charge the jury that it may find the defendant guilty if it entertain a reasonable doubt of the truth of each or all of the material allegations of the indictment. *Atkinson v. State*, 58 Neb. 356 (78 N. W. 621).

699. (1899.) After a jury in a criminal case has been once informed that there can be no conviction without proof beyond a reasonable doubt, and that their conclusion should be based on the evidence, the failure to reiterate such statements in other paragraphs of the charge is not error. *Dunn v. State*, 58 Neb. 807 (79 N. W. 719).

700. (1900.) The definition of a reasonable doubt contained in the instructions did not permit the jury to enter the field of conjecture, but confined them to the consideration of the evidence adduced on the trial. *McArthur v. State*, 60 Neb. 390 (83 N. W. 196).

701. (1900.) It is not error for the court in a criminal case to charge the jury, *inter alia*, "You are not at liberty to disbelieve as jurors if from all 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." *Leisenberg v. State*, 60 Neb. 628 (84 N. W. 6); (1901) *Savary v. State*, 62 Neb. 166 (87 N. W. 34); (1902) *Reed v. State*, 66 Neb. 184 (92 N. W. 321).

702. (1901.) An instruction that if there was any one single fact proved which is inconsistent with the guilt of the defendant, this is sufficient to raise a reasonable doubt, as properly refused in a murder case. *Smith v. State*, 61 Neb. 296 (85 N. W. 49).

703. (1903.) The instruction on the subject of reasonable doubt, considered by this court in several cases, and found in Good and Corcoran, Instructions to Juries, section 146, at page 261, is, perhaps, less intelligible that the phrase defined, but yet plain enough to be within the comprehension of ordinary men. *Edwards v. State*, 69 Neb. 386 (95 N. W. 1038).

704. (1904.) An instruction that: "A

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doubt produced by an undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt. And the juror is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to a possible state of facts differing from those established by the evidence. You are not at liberty to disbelieve as jurors if, from all the evidence, you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered"—is not to be commended in all cases. *Lillie v. State*, 72 Neb. 228 (100 N. W. 316); (1904) *Mays v. State*, 72 Neb. 723 (101 N. W. 979); (1905) *Junod v. State*, 73 Neb. 208 (102 N. W. 462); (1905) *Keeler v. State*, 73 Neb. 441 (103 N. W. 64).

705. (1906.) Where, in a criminal prosecution, the court has instructed the jury that the state must prove all of the material averments of the information, naming them, beyond a reasonable doubt, it is not error to afterwards instruct that the burden of proof to establish one of such material averments is on the state, without again qualifying such statement by the words "beyond a reasonable doubt." *Steinkuhler v. State*, 77 Neb. 331 (109 N. W. 395).

706. (1907.) An instruction defining a reasonable doubt is not rendered prejudicial to the defendant by the use of the word "fully," as, for example, "If the jury are fully satisfied to a moral certainty of the truth of the charges made against the defendant, then they are satisfied beyond a reasonable doubt." Such an instruction is more favorable to the defendant than to the state. *Wheeler v. State*, 79 Neb. 491 (113 N. W. 253).

706*a*. (1907.) An instruction that "a doubt produced by an undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt; and the juror is not allowed to create sources or materials of doubt by resorting to trival or fanciful suppositions and remote conjectures as to a possible state of facts differing from those established by the evidence. You are not at liberty to disbelieve as jurors, if, from all the evidence, you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered"—is not to be commended in all cases, but we cannot reverse a judgment of conviction solely for the giving of this instruction. *Clements v. State*, 80 Neb. 313 (114 N. W. 271).

Weight of evidence.

707. (1893.) It is reversible error to instruct the jury in a criminal case that "evidence of good character is entitled to great weight when the evidence against the accused is weak or doubtful, but is entitled to very little weight when the proof is strong," as it invades the province of the jury. *Vincent v. State*, 37 Neb. 672 (56 N. W. 320).

Circumstantial evidence.

708. (1884.) The propriety of instructing a jury that in cases of circumstantial evidence it is not necessary for the jury to be satisfied beyond a reasonable doubt of "each link in the chain of circumstances relied on to establish defendant's guilt," doubted. *Marion v. State*, 16 Neb. 349 (20 N. W. 289, 396).

709. (1888.) In criminal prosecutions the jury must be satisfied of defendant's guilt beyond a reasonable doubt from the evidence. They must not go outside of the evidence. Hence an instruction that the evidence includes not only the sworn testimony of the witnesses who have testified, but all the circumstances surrounding the tragedy, was erroneous. *Long v. State*, 23 Neb. 33 (36 N. W. 310).

710. (1897.) The court, in an instruction, stated to the jury that there had been offered in the case both direct and circumstantial evidence. He then defined these two kinds of evidence and stated that the circumstantial evidence which had been received was legal and competent, and then said: "And if it is of such a character as to exclude every reasonable theory, supposition, or hypothesis other than that of the defendant's guilt, then, and in that event, it should be given the same weight by you as direct evidence." *Held*, (1) That the last clause of the instruction quoted was erroneous; (2) but when considered in connection with the remainder of the instruction, that it was error without prejudice; (3) that it was not an unconditional instruction to the jury to give the same weight to circumstantial evidence as direct evidence. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

711. (1901.) Instructions to the jury examined, and *held* to embody the rule of law that circumstantial evidence, to justify a conviction, must be of such a character as to exclude every reasonable hypothesis save

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that of the guilt of the accused. *Tatum v. State*, 61 Neb. 229 (85 N. W. 40).

712. (1901.) An instruction as to the force and effect of circumstantial evidence, copied in the opinion, *held* to have been properly given. *Smith v. State*, 61 Neb. 296 (85 N. W. 49).

713. (1903.) The court in effect charged, (1) that circumstantial evidence, to warrant a conviction, must be of such a character as to exclude every reasonable hypothesis excepting only the one implying defendant's guilt; (2) that every incriminating circumstance which may be considered as evidence of guilt must be proved to a moral certainty or beyond a reasonable doubt. *Held*, To be a correct statement of the law and to include every material feature of the instructions upon that point requested and refused. *Lamb v. State*, 69 Neb. 212 (95 N. W. 1050).

Testimony of accomplices.

714. (1881.) An instruction to the effect that while it is unsafe to convict upon the testimony of an accomplice alone, the jury were at liberty to do so if, on due consideration, they deemed it sufficient, *held*, not erroneous. *Olive v. State*, 11 Neb. 1 (7 N. W. 444).

Credibility and interest of witnesses.

Necessity for request, see *post*, § 793.

715. (1877.) Where informers, detectives, or other persons employed to hunt up testimony against the accused, are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested. *Preuit v. People*, 5 Neb. 377; (1899) *Kastner v. State*, 58 Neb. 767 (79 N. W. 713).

716. (1879.) It is not error to charge the jury in effect that in determining the weight of evidence upon any given point in the case, they are not required to give equal weight to the testimony of each witness, but only such weight as, under all the circumstances, they believe him entitled to. *St. Louis v. State*, 8 Neb. 405.

717. (1888.) It is the duty of a trial court to submit to the jury, by way of proper instructions, such principles of law as may be applicable to the case on trial as it appears from the evidence, and also such principles as should be applied to witnesses who are interested in the result, or whose testimony should be weighed with special care and caution as accomplices. But it is not proper to discuss the policy of using such witnesses. This should be left to counsel in the argument. *Long v. State*, 23 Neb. 33 (36 N. W. 310).

718. (1892.) An instruction as to credibility of witnesses, and commenting on the evidence, set out in the opinion, *held* erroneous. *Elliott v. State*, 34 Neb. 48 (51 N. W. 315).

719. (1897.) The charge of the court on the subject of the weight of evidence and the credibility of witnesses set out in the opinion and *held* not prejudicially erroneous. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

720. (1901.) 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*, 62 Neb. 166 (87 N. W. 34).

721. (1902.) In an instruction in a criminal prosecution relating to the credibility of witnesses and the weight to be attached to the testimony of each, it is not error to charge that the jury should consider the relationship, if any is shown, of any witness to the defendant. *Van Buren v. State*, 63 Neb. 453 (88 N. W. 671).

722. (1902.) In a criminal prosecution, where the state relies upon the evidence of detectives employed for the purpose of procuring testimony against the accused, it is reversible error to instruct the jury that they should give to the testimony of such detectives "the same consideration as to any other testimony in the case, giving it such weight as, considering the nature of the same, their opportunities for knowing the facts of which they testify and their appearance and demeanor upon the witness stand and all the other elements which go to their credibility, including their interest and bias, and to give their testimony such weight as under all circumstances the same is, in your judgment, entitled to receive." *Fruide v. State*, 66 Neb. 244 (92 N. W. 320).

723. (1903.) An instruction cautioning the jury as to the weight that should be given to the evidence of detectives examined, and *held*, that it did not invade the province of the jury and was properly given. *Everson v. State*, 4 Unof. 109 (93 N. W. 394).

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724. (1907.) It is error for the court to give undue prominence to the fact of defendant's interest in the result of the prosecution by repeatedly calling the attention of the jury thereto, and informing them that they must consider that fact in determining the weight and credibility of his evidence. *Burk v. State*, 79 Neb. 241 (112 N. W. 573).

724*a*. (1907.) The introduction of evidence tending to impeach a witness does not require the court to instruct the jury to totally disregard his evidence, and it is proper to refuse such instruction. *Clements v. State*, 30 Neb. 313 (114 N. W. 271).

724*b*. (1907.) It is not error for the court to refuse to instruct the jury that they should carefully scrutinize evidence of the prosecuting attorney because of the natural and unavoidable tendency of persons in his position to hear and remember only such matters as are favorable to the state. *Clements v. State*, 80 Neb. 313 (114 N. W. 271).

Credibility of testimony of defendant.

725. (1884.) An instruction "The evidence of the defendant is not to be disregarded because he is on trial for a crime—a defendant in a criminal prosecution is ordinarily entitled to the same credit as a party in an important civil suit," is properly refused. *Murphy v. State*, 15 Neb. 383 (19 N. W. 489).

726. When the defendant in a criminal case testifies in his own behalf, it is not error to charge the jury that in weighing his testimony they might consider his interest in the result of the trial. (1879) *St. Louis v. State*, 8 Neb. 405; (1891) *Davis v. State*, 31 Neb. 247 (47 N. W. 854); (1892) *Johnson v. State*, 34 Neb. 257 (51 N. W. 835); (1895) *Housh v. State*, 43 Neb. 163 (61 N. W. 571); (1899) *Philamalee v. State*, 58 Neb. 320 (78 N. W. 625).

727. (1891.) Where a person on trial for a crime testifies in his own behalf, the court may instruct the jury that in weighing his testimony they may consider his interest in the result of the suit. The court, however, cannot, by repeating its statement in that regard, give it undue weight or say aught calculated to disparage the testimony of the accused. *Clark v. State*, 32 Neb. 246 (49 N. W. 367).

728. (1895.) It is not error to charge the jury that in weighing the testimony of defendant they should fully and fairly consider whether it is true and made in good faith, the terms "true" and "made in good faith" being, in such case, synonymous, and therefore not implying that the testimony should be rejected, though true, if not made in good faith. *Carleton v. State*, 43 Neb. 373 (61 N. W. 699).

729. (1903.) It is not error to instruct the jury that they must give the testimony of the defendant in a criminal case "only such weight" as they think it deserves. *Palmer v. State*, 70 Neb. 136 (97 N. W. 235).

730. (1904.) The law makes a defendant in a criminal trial a competent witness in his own belief, and the court should in no manner disparage his evidence. Therefore, an instruction, otherwise correctly stating the rules by which the jury should determine the weight to be given to the evidence of the accused, and which concludes with the words, "You are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true and made in good faith, or only for the purpose of avoiding conviction," is prejudicial to the defendant's rights. *Donner v. State*, 72 Neb. 263 (100 N. W. 305; 117 Am. St. Rep. 789).

Failure of accused to testify.

Necessity of request, see *post*, § 794.

731. (1897.) Where, in a criminal prosecution, a defendant does not testify in his own behalf, it is not reversible error for the trial court to mention such neglect or omission in its instructions, when followed in the same connection with the direction that "nothing must be taken against him because he had not so testified." *Ferguson v. State*, 52 Neb. 432 (72 N. W. 590; 66 Am. St. Rep. 512).

732. (1904.) It is not error to instruct the jury that the defendant is under no obligations to testify in her own behalf, and that the statute expressly declares that her neglect to testify shall not create any presumption against her. *Lillie v. State*, 72 Neb. 228 (100 N. W. 316).

Failure of accused to deny testimony.

733. (1906.) If a defendant in a criminal case is a witness in his own behalf, it is error to instruct the jury that, "if the defendant by his own testimony has not denied in any way any material fact proved in the case within his personal knowledge, such testimony or material fact proved, if not denied by the defendant, is admitted by the defendant to be true." *Russell v. State*, 77 Neb. 519 (110 N. W. 380).

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Effect of admissions made to avoid continuance.

734. (1902.) Where the prosecution, to avoid a continuance, admits that the absent witness will testify as alleged in the affidavit for continuance and such affidavit is admitted in evidence in lieu of the testimony of the absent witness, it is not error to charge the jury that the state does not admit the truth of the matter alleged in the affidavit, but only that the witness would testify as therein alleged, and that such evidence should be weighed and considered the same as the testimony of other witnesses in the case. *McCormick v. State*, 66 Neb. 337 (92 N. W. 606).

Influence of argument or statements of counsel.

735. (1897.) Where a party has improperly stated to the jury a fact concerning which there is no evidence, he cannot, as a matter of right, demand that the trial court instruct the jury that improper or unjustifiable comments made by opposing counsel with reference to such facts must not be considered. *Catron v. State*, 52 Neb. 389 (72 N. W. 354).

Form of verdict.

736. (1902.) An instruction submitting blank forms of verdict, *held* not to submit a count of the information which by a prior instruction was withdrawn from consideration. *Rhea v. State*, 63 Neb. 461 (88 N. W. 789).

Recommendations to mercy.

737. (1901.) It is not error to instruct the jury that questions of mercy are for the executive. *Dinsmore v. State*, 61 Neb. 418 (85 N. W. 445).

Application of instructions to the evidence.

738. (1874.) Instructions asked for by the accused, which were predicated on the assumption that there was testimony from which the jury might find that the accused was first assaulted by the deceased, and in danger of being seriously beaten by him, there being nothing in the evidence to warrant such assumption, was properly refused. *Caw v. State*, 3 Neb. 357.

739. (1876.) Instructions to jury should be given with reference to the evidence in each particular case. *Smith v. State*, 5 Neb. 181; (1886) *Marion v. State*, 20 Neb. 233 (29 N. W. 911; 57 Am. St. Rep. 825).

740. (1877.) Instructions given to a jury should be applicable to the case as made by the testimony, and if they are not, and have a tendency to mislead, the judgment will be reversed. *Williams v. State*, 6 Neb. 334; (1891) *Clark v. State*, 32 Neb. 246 (49 N. W. 367); (1904) *Blair v. State*, 72 Neb. 368 (100 N. W. 808).

741. (1878.) Instructions to the jury must be based upon and be applicable to the evidence; and it is error to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred. *Wolrath v. State*, 8 Neb. 80.

742. (1881.) Instructions relative to insanity of prisoner are properly refused, there being no evidence concerning it. *Wells v. State*, 11 Neb. 409 (9 N. W. 552).

743. (1879.) It is not error to refuse an instruction, although correct as an abstract proposition, which is not applicable to the evidence before the jury. *St. Louis v. State*, 8 Neb. 405; (1883) *Parrish v. State*, 14 Neb. 60 (15 N. W. 357); (1885) *Bradshaw v. State*, 17 Neb. 147 (22 N. W. 361); (1896) *Wells v. State*, 47 Neb. 74 (66 N. W. 29); (1900) *Cardwell v. State*, 60 Neb. 480 (83 N. W. 665); (1901) *Spaulding v. State*, 61 Neb. 289 (85 N. W. 80); (1902) *Rhea v. State*, 63 Neb. 461 (88 N. W. 789); (1905) *Connolly v. State*, 74 Neb. 340 (104 N. W. 754).

744. (1896.) The giving of an instruction which submits to the jury the existence or non-existence of a fact material to the issues in the case on trial, when no evidence has been introduced which would support a finding of its existence, is error for which the judgment may be reversed. *Morearty v. State*, 46 Neb. 652 (65 N. W. 684).

745. (1896.) An instruction which recites material evidence that is not before the jury in such a way as to imply that the judge trying the case understands that such evidence is in the record, is erroneous. *Williams v. State*, 46 Neb. 704 (65 N. W. 781).

746. (1898.) It is not error to refuse an instruction which has the effect to withdraw from the consideration of the jury competent material evidence in the case. *Chezem v. State*, 56 Neb. 496 (76 N. W. 1056).

747. (1903.) There being no evidence tending to prove that defendant was present when the alleged crime was committed, it was not error to refuse to instruct on the assumption that he was present. *Lamb v. State*, 69 Neb. 212 (95 N. W. 1050).

Undue prominence of particular matters.

748. (1886.) If testimony is given from which a material fact may be inferred, it is

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the duty of the court to submit the question of such inference to the jury by proper instructions. And such instruction would not be open to the objection that the court gave undue prominence to that item of the testimony. *Marion v. State*, 20 Neb. 233 (29 N. W. 911; 57 Am. St. Rep. 825).

749. (1907.) It is proper for the court to charge the jury that procuring a witness to leave the state is a circumstance which may be considered by them, with all of the other evidence in the case, in determining the guilt or innocence of the accused. *Crowell v. State*, 79 Neb. 784 (113 N. W. 262).

Oral instructions.

750. (1895.) Under the provisions of sections 52 to 56, chapter 19, Compiled Statutes, the giving of oral instructions in either civil or criminal cases, without a waiver of the statutory requirement that they be given in writing, is reversible error. An oral instruction, over proper objections, having been given in this case in disregard of the above statutory provisions, the judgment of the district court is reversed. *Ehrlich v. State*, 44 Neb. 810 (63 N. W. 35).

751. (1903.) Oral directions to the jury relative to the reception of a verdict *held* not to be violative of the rule requiring all instructions to be in writing; nor to be evidence of coercion of the jury. *Williams v. State*, 69 Neb. 402 (95 N. W. 1014).

Form and language in general.

752. (1888.) While it is doubtless advisable and perhaps better to use the statutory language descriptive of a crime in an instruction, yet where words are used which convey the same meaning and import, and which cannot be misconstrued by the jury, the instruction may not be thereby rendered erroneous. *Long v. State*, 23 Neb. 33 (36 N. W. 310).

753. (1895.) While it is the better practice in a criminal case for the trial court to charge the jury in concise and informal language what facts are essential to warrant a conviction, the defendant cannot complain if the court charges the jury in the language of the information that all the allegations thereof are material, no technical or ambiguous language being used. *Dixon v. State*, 46 Neb. 298 (64 N. W. 961).

754. (1897.) An instruction in a criminal prosecution that if the jury should find the facts essential to establish guilt they should acquit, but if such facts had not been proven they should convict, is erroneous and ground for reversal, though it may be apparent to the appellate court that the trial court unintentionally transposed the words "convict" and "acquit." *Cummings v. State*, 50 Neb. 274 (69 N. W. 756).

755. (1898.) Text-books on instructions should be used with caution. *Snider v. State*, 56 Neb. 309 (76 N. W. 574).

756. (1899.) An instruction which, in substance, informs the jury that a conviction on either count of an information would be warranted only by proof beyond a reasonable doubt of the essential elements of the crime charged in such count; and that there might be a conviction on one count and an acquittal on the other, is not erroneous or assuming defendant's guilt as to the second count. *Dunn v. State*, 58 Neb. 807 (79 N. W. 719).

757. (1902.) An instruction otherwise unobjectionable, which omitted the conjunction "and" between the words "fairly" and "truthfully," *held* not prejudicially erroneous because of such apparent error. *McCormick v. State*, 66 Neb. 337 (92 N. W. 606).

758. (1903.) The word "evidence," when used in an instruction, is understood to include all the means employed at the trial to ascertain the truth respecting the matters in dispute. *Lamb v. State*, 69 Neb. 212 (95 N. W. 1050).

Appeal to sympathy or prejudice.

759. (1876.) A correct instruction of the law, applicable in a trial for murder, is not objectionable because it contains the words, "you will allow no false sympathy to sway you from a proper discharge of your duty." *Smith v. State*, 4 Neb. 277.

760. (1901.) It is not erroneous to designate the defendant in such a case in an instruction as the "prisoner." *Dinsmore v. State*, 61 Neb. 418 (85 N. W. 445).

Argumentative instructions.

761. (1895.) A judgment will not be reversed because an instruction was somewhat argumentative in its nature, when the argument consisted simply of stating a reason for a rule of law, there being no comment upon the facts and no appeal in any manner to the jury. *Carleton v. State*, 43 Neb. 373 (61 N. W. 699).

Misleading or confusing instructions.

762 (1881.) An instruction which tends to mislead or even confuse a jury, is erroneous. *Olive v. State*, 11 Neb. 1 (7 N. W. 444).

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Necessity of covering whole case in single instruction.

763. (1901.) It is not required that all phases of the case be covered by one instruction. An instruction referring only to murder in the first degree may be given without objection when other instructions properly advise the jury as to the lesser degrees of the crime charged in the information and also the defense interposed by the plea of not guilty. *Savary v. State*, 62 Neb. 166 (87 N. W. 34).

764. (1904.) The fact that a single clause of an instruction is incomplete is not sufficient ground for a reversal, if, when the whole paragraph is read and construed together, its meaning is clear and certain, and it appears from the record that the jury could not have been misled thereby. *Blair v. State*, 72 Neb. 501 (101 N. W. 17).

Quoting statutes.

765. (1897.) While it is proper in a criminal case in defining a crime in an instruction to use the language of the statute descriptive of such crime, yet, if the import of the language used in the instruction is the same as the statute, an instruction will not be held erroneous because the language employed by the court is different from the language of the statute. *Long v. State*, 23 Neb. 33, followed. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

766. (1897.) An instruction quoting portions of the statute under which the prosecution was instituted, *held* not improper or misleading. *Mills v. State*, 53 Neb. 263 (73 N. W. 761).

Repetition.

767. (1881.) Court should not multiply instructions, with changed phraseology, on a single proposition of law. One clear, pointed statement to the jury of each proposition advanced is sufficient. *Olive v. State*, 11 Neb. 1 (7 N. W. 444).

768. (1883.) Instructions ought to be as few as practicable, in view of the evidence, couched in plain, simple language; and where they are, and conform to the principles and policy of the law, it is enough. *Parrish v. State*, 14 Neb. 60 (15 N. W. 357).

769 (1894.) Undue prominence should not be given to a particular proposition by frequent repetition thereof in charging the jury, but a violation of that rule in a criminal prosecution is not of itself reversible error when it is apparent that there was no controversy respecting the proposition stated. *Hill v. State*, 42 Neb. 503 (60 N. W. 916).

770. (1895.) The repetition of a proposition of law in an instruction is not reversible error unless it appears that the repetition might operate to the prejudice of accused by misleading the jury. *Carleton v. State*, 43 Neb. 373 (61 N. W. 699).

771. (1895.) In a criminal case the repetition of a proposition is not reversible error where it does not prejudice the rights of the accused. *Dixon v. State*, 46 Neb. 298 (64 N. W. 961).

772. (1904.) The repetition of an instruction is not reversible error, unless its effect is to mislead the jury. *Robinson v. State*, 71 Neb. 142 (98 N. W. 694).

Reference to matters in previous instruction.

773. (1901.) When a point arising in a criminal trial has been covered in an instruction to the jury, it is not error to refer to such instruction as answering an inquiry submitted by the jury during their deliberations, in place of giving another instruction on the same point, although another instruction might properly have been given. *Savary v. State*, 62 Neb. 166 (87 N. W. 34).

Reason for instruction.

774. (1886.) A correct instruction given, or any instruction given on request of a defendant on trial, will not be held to be erroneous because an improper reason for the instruction is given. *Marion v. State*, 20 Neb. 233 (29 N. W. 911; 57 Am. Rep. 825).

Construction and effect of charge as a whole.

775. (1879.) The true meaning and effect of instructions are not to be determined by the selection of detached parts thereof, but by considering all that is said on each particular subject or branch of the case. *St. Louis v. State*, 8 Neb. 405; (1884) *Murphy v. State*, 15 Neb. 383 (19 N. W. 489); (1902) *Rhea v. State*, 63 Neb. 461 (88 N. W. 789).

776. (1895.) The charge is to be taken together, and when the instructions taken as a whole, without conflict or confusion, state the law, error cannot be predicated upon the fact that any one of them was in itself, and unexplained, incomplete and calculated to mislead. *Carleton v. State*, 43 Neb. 373 (61 N. W. 699); (1897) *Bartley v. State*, 53 Neb. 310 (73 N. W. 744); (1898)

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Bartley v. State, 55 Neb. 294 (75 N. W. 832); (1905) *Junod v. State*, 73 Neb. 208 (102 N. W. 462); (1907) *Bode v. State*, 80 Neb. 74 (113 N. W. 996); (1907) *Clements v. State*, 80 Neb. 313 (114 N. W. 271); (1908) *Cate v. State*, 80 Neb. 611 (114 N. W. 942).

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777. (1895.) Instructions given to a jury should be construed together; and if, when so considered as a whole, they properly state the law, it is sufficient. *Debney v. State*, 45 Neb. 856 (64 N.W. 446; 34 L. R. A. 851); (1895) *Ford v. State*, 46 Neb. 390 (64 N. W. 1082); (1897) *Hans v. State*, 50 Neb. 150 (69 N. W. 838); (1897) *Davis v. State*, 51 Neb. 301 (70 N. W. 984); (1897) *Mills v. State*, 53 Neb. 263 (73 N. W. 761); (1899) *Philamalee v. State*, 58 Neb. 320 (78 N. W. 625); (1901) *Clary v. State*, 61 Neb. 688 (85 N. W. 897).

778. (1899.) Instructions should be considered as an entirety, and where they correctly state the law no criticism will be available which counts upon the fact that one instruction covers but a part of the entire ground. *McVey v. State*, 57 Neb. 471 (77 N. W. 1111).

779. (1899.) Two paragraphs of a charge to the jury, one immediately following the other, will be considered together, and treated as one, when they relate to a particular phase of the case, and each is plainly complemental of the other. *Dunn v. State*, 58 Neb. 807 (79 N. W. 719).

780. (1905.) An instruction is not prejudicially erroneous because it states some of the elements of the crime charged and omits others, when the other elements are correctly stated and defined in other instructions. Instructions must not contain conflicting statements, and when read and construed together must correctly state the law. *Higbee v. State*, 74 Neb. 331 (104 N. W. 748).

781. (1906.) It is not the true method of construing instructions to select detached portions thereof and consider them as independent of the whole of the charge to the jury. The correct rule of construction is that all that is said in the entire charge upon any one question shall be construed together, and if, when so construed, it is not inconsistent as a whole, and states the law correctly, no valid assignment of error can be predicated thereon. *Reed v. State*, 75 Neb. 509 (106 N. W. 649).

782. (1907.) Error cannot be successfully assigned for the giving of an instruction because it fails to cover all of the questions of law arising in a criminal prosecution if the instructions, when considered as a whole, fairly and correctly state the law applicable to the facts of the case as disclosed by the evidence. *Clark v. State*, 79 Neb. 473 (113 N. W. 211).

Error cured by withdrawal or giving other instructions.

783. (1901.) An instruction whereby the whole case is attempted to be covered, but which omits an essential element, is erroneous, and is not cured by another instruction which covers the point. *Dobson v. State*, 61 Neb. 584 (85 N. W. 843).

784. (1905.) An instruction which recites some of the essential elements of the crime charged and omits others, and tells the jury that the things recited in the instruction would constitute the crime, is erroneous and prejudicial, even though there was another instruction which contradicts it and correctly states the other things necessary to be shown to constitute guilt. *Higbee v. State*, 74 Neb. 331 (104 N. W. 748).

H. Request for Instructions.

Instruction on alibi in larceny, see *Larceny*, § 126.

Necessity in general.

785. (1882.) Before error can be predicated upon the failure of the judge to charge the jury upon a given point, he must be requested to do so. *Gettinger v. State*, 13 Neb. 308 (14 N. W. 403).

786. Mere non-direction by the trial court affords no ground for the reversal of a judgment unless proper instructions have been asked and refused. (1894) *Hill v. State*, 42 Neb. 503 (60 N. W. 916); *Housh v. State*, 43 Neb. 163 (61 N. W. 571); (1897) *Johnson v. State*, 53 Neb. 103 (73 N. W. 463); (1897) *Mills v. State*, 53 Neb. 263 (73 N. W. 761); (1898) *Reynolds v. State*, 53 Neb. 761 (74 N. W. 330); (1898) *Maxfield v State*, 54 Neb. 44 (74 N. W. 401).

787. (1895.) A statement made by the court in ruling upon certain evidence, that an instruction would be given as to the purpose for which such evidence might be considered by the jury, does not excuse a party from properly requesting such instruction at the proper time. *Carleton v. State*, 43 Neb. 373 (61 N. W. 699).

787*a*. (1908.) Under the proofs in this case, held it was not error for the court to omit to instruct as to the defense of insan-

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ity, no instruction having been requested by defendant on that point. *Cate v. State*, 80 Neb. 611 (114 N. W. 942).

——— Effect of attempt to escape.

788. (1903.) When no proper instruction has been requested, it is not prejudicial error for a trial court not to specially instruct the jury as to the law applicable to evidence tending to prove an attempt to escape by a prisoner accused of a crime. *Williams v. State*, 69 Neb. 402 (95 N. W. 1014).

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——— Alibi.

789. (1897.) It is not reversible error to fail to instruct on the subject of an alibi, where no request to charge upon that feature of the case has been tendered. *Ferguson v. State*, 52 Neb. 432 (72 N. W. 590; 66 Am. St. Rep. 512); (1907) *Heidelbaugh v. State*, 79 Neb. 499 (113 N. W. 145).

——— Character of defendant.

790. (1903.) Non-instruction alone on the question of evidence of good character, in the absence of a proffered instruction correctly stating the law, is not reversible error. *Sweet v. State*, 75 Neb. 263 (106 N. W. 31).

——— Degrees of crime.

791. (1891.) It is not error for the court to neglect to instruct that they could find defendant guilty of a lesser offense than the one charged in the indictment, in the absence of a request therefor. *Thurman v. State*, 32 Neb. 224 (49 N. W. 338).

792. (1895.) In a prosecution for a felony error cannot be predicated upon the failure of the trial court to define a lesser offense included in the crime charged, unless requested so to do. *Barr v. State*, 45 Neb. 458 (63 N. W. 856).

——— Weight of testimony of detectives.

793. (1901.) Where no cautionary instruction has been requested with reference to the consideration of the testimony of witnesses employed as detectives, a defendant can not predicate error because of a failure to instruct the jury on that point. *Kerr v. State*, 63 Neb. 115 (88 N. W. 240).

——— Effect of failure of accused to testify.

794. (1895.) The omission of the trial court to instruct the jury that the failure of defendant to testify creates no presumption against him, is not a ground for reversal, where defendant did not request such an instruction. *Metz v. State*, 46 Neb. 547 (65 N. W. 190).

Further or more specific instructions.

795. (1894.) Where in a criminal case the trial court has correctly charged upon all of the questions presented at the trial, the fact that a single proposition might have been stated with greater precision in a single paragraph is no ground for reversal, particularly where the instructions given are a substantial compliance with the requests presented by the prisoner. *Hill v. State*, 42 Neb. 503 (60 N. W. 916).

796. (1896.) An assignment that an instruction in a criminal case was not sufficiently explicit may be overruled in the appellate court where accused failed to request an instruction more explicit than that given. *Pjarrou v. State*, 47 Neb. 294 (66 N. W. 422).

797. (1897.) A party cannot predicate error upon a vague instruction unless he has requested a proper one. *Ferguson v. State*, 52 Neb. 432 (72 N. W. 590; 66 Am. St. Rep. 512).

798. (1898.) A party cannot usually be heard to complain of the failure of the court to instruct upon a particular feature of the case where he has not requested a proper instruction upon the subject. *Chezem v. State*, 56 Neb. 496 (76 N. W. 1056); (1899) *Philamalee v. State*, 58 Neb. 320 (78 N. W. 625); (1903) *Martin v. State*, 67 Neb. 36 (93 N. W. 161).

799. (1901.) Before a party can complain of an instruction because not sufficiently specific, he must request an instruction covering the point. *Dinsmore v. State*, 61 Neb. 418 (85 N. W. 445); (1902) *Musfelt v. State*, 64 Neb. 445 (90 N. W. 237).

Instructions already given.

800. (1876.) It is not error to refuse to give correct instructions, if the court has already charged the jury substantially as asked. *Curry v. State*, 4 Neb. 545; (1878) *Curry v. State*, 5 Neb. 412; (1878) *Clough v. State*, 7 Neb. 320; (1879) *St. Louis v. State*, 8 Neb. 405; (1884) *Binfield v. State*, 15 Neb. 484 (19 N. W. 607); (1884) *Marion v. State*, 16 Neb. 349 (20 N. W. 289, 396); (1885) *Bradshaw v. State*, 17 Neb. 147 (22 N. W. 361); (1886) *Marion v. State*, 20 Neb. 233 (29 N. W. 911; 57 Am. Rep. 825); (1888) *Carr v. State*, 23 Neb. 749 (37 N. W. 630); (1891) *Shepherd v. State*, 31 Neb. 389 (47 N. W. 1118); (1892) *Waidley v. State*,

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34 Neb. 250 (51 N. W. 830); (1896) *Korth v. State*, 46 Neb. 631 (65 N. W. 792); (1895) *Ford v. State*, 46 Neb. 390 (64 N. W. 1082); (1896) *Bush v. State*, 47 Neb. 642 (66 N. W. 638); (1897) *Davis v. State*, 51 Neb. 301 (70 N. W. 984); (1897) *Whitney v. State*, 53 Neb. 287 (73 N. W. 696); (1898) *Carrall v. State*, 53 Neb. 431 (73 N. W. 939); (1900) *Cardwell v. State*, 60 Neb. 480 (83 N. W. 665); (1901) *Spaulding v. State*, 61 Neb. 289 (85 N. W. 80); (1901) *Coil v. State*, 62 Neb. 15 (86 N. W. 925); (1901) *Argabright v. State*, 62 Neb. 402 (87 N. W. 146); (1902) *Rhea v. State*, 63 Neb. 461 (88 N. W. 789); (1902) *McCormick v. State*, 66 Neb. 337 (92 N. W. 740); (1903) *Palmer v. State*, 70 Neb. 136 (97 N. W. 235); (1905) *Keeler v. State*, 73 Neb. 441 (103 N. W. 64); (1907) *Wheeler v. State*, 79 Neb. 491 (113 N. W. 253).

801. (1883.) Where the instructions given to the jury are as favorable for the prisoner as those requested, a refusal is not error. *Comstock v. State*, 14 Neb. 205 (15 N. W. 355); (1899) *Kastner v. State*, 58 Neb. 767 (79 N. W. 713).

802. (1890.) No prejudicial error was committed in refusing the defendant's request on the presumption of innocence as the law on that subject had already been correctly stated in the instructions given. *Miller v. State*, 29 Neb. 437 (45 N. W. 451).

803. (1896.) Instructions, in a prosecution for larceny, on the weight as evidence of the testimony of certain detectives employed by the state, properly refused having been already given. *Lawhead v. State*, 46 Neb. 607 (65 N. W. 779).

804. (1903.) When the trial court gives an accurate, pertinent and intelligible instruction covering a particular point, it is not bound, at counsel's request, to give another instruction expressing the same idea in more perspicuous phrase. *O'Brien v. State*, 69 Neb. 691 (96 N. W. 649).

805. (1905.) It is not error to refuse to give instructions requested by the defendant on the law of self-defense, if the court has already by instructions given on his own motion properly submitted that question to the jury. *Connolly v. State*, 74 Neb. 340 (104 N. W. 754).

806. (1906.) Where the court on his own motion has correctly instructed the jury on all the issues presented by the record and evidence in a criminal case, it is not error to refuse to give the instructions requested by the defendant. *Reed v. State*, 75 Neb. 509 (106 N. W. 649).

Request by prosecuting attorney.

807. (1895.) A prosecuting attorney has the same right as counsel in a civil action to request instructions, and instructions given at the request of counsel are entitled to the same weight as instructions given by the court of its own motion. *Dixon v. State*, 46 Neb. 298 (64 N. W. 961).

Refusal of request.

808. (1878.) When instructions are refused, because substantially the same as those already given, it is not error, under our system of instructing juries, for the court to fail to give the reason for such refusal. *Clough v. State*, 7 Neb. 320.

Modification by court.

809. (1895.) It is error for the district court to modify an instruction requested, by interlineation or erasure, and thus give such an instruction. (Comp. Stats., ch. 19, sec. 53.) *Tracey v. State*, 46 Neb. 361 (64 N. W. 1069).

809*a*. (1907.) Where an instruction tendered by the defendant contains a statement not warranted by the evidence, it is not error for the court to modify the instruction by striking out such unwarranted statement, and give it as thus modified. *Bridges v. State*, 30 Neb. 91 (113 N. W. 1048).

I. Custody, Conduct and Deliberations of Jury.

In general.

810. (1884.) The fact that a man was seen to enter, through a window, a room in which a jury had been sent to deliberate, without proof that the jury were still in the room, will not invalidate a verdict subsequently returned by the jury, where it is shown by the testimony of the jurors that no person, other than the jurors and bailiff, entered the room in which the jury were actually confined during their deliberations. *Hair v. State*, 16 Neb. 601 (21 N. W. 464).

811. (1901.) *Held*, That the record discloses that the jury were in the custody of the sheriff during the entire progress of the trial. *Bush v. State*, 62 Neb. 128 (86 N. W. 1062).

812. (1907.) The fact that the officer in charge of a jury, in taking them to their boarding place, conducted them along the street where the crime was alleged to have been committed, was not such misconduct on the part of the jury as to require a reversal of the judgment. *Crowell v. State*, 79 Neb. 784 (113 N. W. 262).

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Officer in charge.

813. (1903.) A deputy sheriff was a material witness for the state in a criminal prosecution for larceny; he also had charge of the jury during its deliberations. *Held*, That the fact of his having been called as a witness would not, of itself, disqualify him from serving in the latter mentioned capacity. *Van Syoc v. State*, 69 Neb. 520 (96 N. W. 266).

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Separation.

814. (1871.) It is not error in a case of misdemeanor for the court, having instructed the jury, as is usual, not to hold conversation with any person, to permit the jurors to separate for their meals. *Kruget v. State*, 1 Neb. 365.

815. (1874.) Separation of jury is permitted under proper admonishment by the court. *Caw v. State*, 3 Neb. 357.

816. (1874.) Where the jury in a prosecution for murder separates, but do not leave the court room, and affidavits are filed showing that conversations had with spectators had no relation to the case on trial, the verdict will not be disturbed. *Caw v. State*, 3 Neb. 357.

817. (1878.) The court may, even in a capital case, permit the jury to separate during the adjournments of court, up to the final submission of the case to them. But when permitted to separate they should be admonished by the court as to their duty. *Walrath v. State*, 8 Neb. 80.

818. (1879.) By section 484 of the criminal code, the jury may, even in a capital case, in the discretion of the presiding judge, be permitted to separate during the trial up to the time the case is finally submitted to them. *St. Louis v State*, 8 Neb. 405.

819. (1901.) Separation of one of the jurors from the remainder of the jury while they were at meals, where he held no communication with any other person regarding the case, is not ground for new trial. *Spaulding v. State*, 61 Neb. 289 (85 N. W. 80).

Misconduct of jurors.

820. (1895.) A verdict should not be set aside because a juror, before the jury was sworn, was found with liquor in his possession, it not being established that he was intoxicated, or that after his acceptance as a juror he partook thereof. *Carleton v. State*, 43 Neb. 373 (61 N. W. 699).

821. (1907.) It is not such misconduct of a juror as will call for a reversal of the case for a juror to state to his fellow jurors, during their deliberations upon the verdict, that he knew about the facts and had personal knowledge of the facts before he was selected as a juror, where he does not disclose to his fellow jurors the facts that were within his personal knowledge. *Fedders v. State*, 79 Neb. 651 (113 N. W. 127).

Presence of bailiff in jury room.

822. (1888.) Presence of the bailiff in the jury room in a criminal case while the jury are deliberating, will vitiate verdict. *Gandy v. State*, 24 Neb. 716 (40 N. W. 302).

823. (1901.) An officer who is a material witness in a case is guilty of prejudicial misconduct when he remains in the jury room during their deliberations on their verdict. *Cooney v. State*, 61 Neb. 342 (85 N. W. 281).

Taking papers or articles to jury room.

824. (1888.) Where one of the jurors takes a copy of the Compiled Statutes into the jury room and reads therefrom the sections bearing on the crime charged, it is misconduct which will vitiate the verdict. *Harris v. State*, 24 Neb. 803 (40 N. W. 317).

825. (1902.) The modern practice, both in civil and criminal cases, is to send to the jury room all instruments, articles and documents, except depositions, which have been received in evidence, and which will, in the opinion of the trial judge, aid the jury in their deliberations. *Russell v. State*, 66 Neb. 497 (92 N. W. 751).

Reading minutes of testimony.

826. (1888.) On a trial for felony, the jury, after having been sent out to consider of their verdict, returned into court, announced that they had not been able to agree, and requested to have the testimony of the principal witness for the prosecution read to them from the reporter's notes, which being agreed to in open court by the attorneys on either side, was accordingly done. *Held*, That while the practice would not be encouraged, a conviction would not be reversed for that cause. *Jamison v. State*, 25 Neb. 185 (41 N. W. 138).

827. (1894.) On a trial for felony, the jury, after having been sent out to consider of their verdict, returned into court and requested to have the testimony of two of the witnesses for the prosecution read to them. By direction of the trial judge, the court reporter read from his notes the evidence

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requested by the jury. The prisoner was present in court in charge of the sheriff; his counsel was not present and had no notice of the transaction. *Held*, Reversible error. *Bartell v. State*, 40 Neb. 232 (58 N. W. 716).

Consideration of irrelevant matters.

828. (1902.) The discussion by the jury of irrelevant matters upon which counsel for defendant based an appeal for acquittal, does not constitute misconduct within the meaning of section 490, criminal code. *Russell v. State*, 66 Neb. 497 (92 N. W. 751).

Application of personal knowledge of juror.

829. (1893.) A juror is not permitted to state to fellow jurors, while considering verdict, facts within his personal knowledge; but should make the same known during the trial and testify as a witness. *Richards v. State*, 36 Neb. 17 (53 N. W. 1027).

Mistake of jurors.

830. (1881.) The prisoner was indicted and convicted of the crime of horse-stealing. A motion was made to set aside the verdict and for a new trial, one of the grounds being the mistake of certain of the jurors, as shown by their affidavit, which was in substance that they supposed the offense to amount only to petit larceny if the value of the animal stolen were returned by them as being less than thirty-five dollars; that "they did not intend to convict the said defendant of a felony, but that they intended to convict him of petit larceny only," and that they "were of the opinion that the said defendant was not guilty of a greater crime than petit larceny." *Held*, that this mistake of the jurors furnished no ground for setting the verdict aside since the jury have nothing to do with fixing the punishment. *Wells v. State*, 11 Neb. 409 (9 N. W. 552).

Urging or coercing verdict.

831. (1902.) The ancient practice of keeping the jury out while deliberating, without food, drink, fire, light or opportunity for sleep, was never in vogue in this state. The rule is that a verdict cannot stand which is the result of any species of coercion. *Russell v. State*, 66 Neb. 497 (92 N. W. 751; 60 L. R. A. 424).

832. (1902.) The length of time a jury shall be kept together in consultation, is a matter over which the trial court has a large discretionary power; but the verdict must in every case represent intellectual conviction and not mere lack of physical endurance. *Russell v. State*, 66 Neb. 497; (92 N. W. 751; 60 L. R. A. 424).

833. (1902.) The fact that a jury has been kept together an unusually long time without reasonable opportunity for sleep, will not violate the verdict if it is shown that the agreement was deliberate and voluntary and not due to fatigue or exhaustion. *Russell v. State*, 66 Neb. 497 (92 N. W. 751).

834. (1903.) The time which jurors shall be kept together before they are finally discharged because of their inability to agree on a verdict rests largely in the discretion of the trial court, but this is a legal discretion, and if legal rules and principles governing are transgressed, the action cannot be upheld. *Jahnke v. State*, 68 Neb. 154 (94 N. W. 158).

835. (1903.) Where the jury, after being kept together for an unusual length of time, have returned a verdict of guilty, and there is nothing in the record inconsistent with the view that it was agreed to voluntarily by all the jurors solely from a consideration of the evidence and the instructions of the court unaffected by anything in the nature of coercion, the verdict will not be disturbed. *Jahnke v. State*, 68 Neb. 154 (94 N. W. 158).

835*a*. (1907.) The case was submitted to the jury on Friday. The next day it was announced that there was a chance for an agreement. The judge then told the jury that he would soon leave and would not be back until Monday evening, and authorized them to separate only in the event they reached a verdict Monday evening. Three hours later, and before the adjournment of the court, the jury returned its verdict. *Held*, That the verdict should not be set aside. *Gebhardt v. State*, 80 Neb. 363 (114 N. W. 290).

Discharge.

836. (1885.) Where a jury in a criminal case is discharged for any of the causes mentioned in section 485 of the criminal code, the record must show the necessity for such discharge. *State v. Schuchardt*, 18 Neb. 454 (25 N. W. 722).

837. (1885.) The authority of a judge of the district court in the trial of a criminal case to discharge the jury in the event of disagreement, without the consent of the prisoner, can only be exercised after the jury have been in consultation for so long a time that there is no reasonable proba-

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bility that they will agree. *State v. Shuchardt*, 18 Neb. 454 (25 N. W. 722).

838. (1885.) Where a cause was submitted to the jury at 7 o'clock P. M. and the jury at 6 A. M. next day reported to the judge that they were unable to agree, and were discharged by him without the consent of the prisoner, or notice to him or his attorney, *held*, that the discharge of the jury was unauthorized, and the prisoner was entitled to be released. *State v. Shuchardt*, 18 Neb. 454 (25 N. W. 722).

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J. Verdict.

Conviction of lesser degree than that charged, see *Indictment and Information*, §§ 133-142.

Returning verdict to disagree as contempt, see *Contempt*, § 13.

Finding of value of stolen property, see *Larceny*, §§ 127-135.

Necessity in general.

839. (1892.) While in a civil action the failure of the court to find the facts upon which the judgment is predicated is ground of error, but does not render the judgment void, yet in a criminal prosecution, where the accused has pleaded "not guilty," there must be a finding or verdict of guilty to sustain a sentence. *Atwood v. Atwater*, 34 Neb. 402 (51 N. W. 1073).

Statement of inability to agree.

840. (1880.) A jury should not be permitted to return, in place of a verdict, a statement that they had agreed to disagree, and if they do so they are liable to fine and imprisonment for contempt. *Greene v. State*, 10 Neb. 102 (4 N. W. 422).

Rendition and reception.

841. (1880.) The verdict must be affirmed in open court, and where the jury return during an adjournment, and their verdict is received and they are discharged, it is a privy verdict and of no force or effect. *Longfellow v. State*, 10 Neb. 105 (4 N. W. 420).

Signature.

842. (1878.) The foreman of the jury not having affixed his official character to his signature when the verdict was brought into court, it was not error to permit him to do so in open court and in the presence of the jury before they were discharged. *Clough v. State*, 7 Neb. 320.

843. (1905.) If the record shows that T. Blankenbeckler was a member of the jury, and the verdict is signed "T. P. Blankenbeckler, Foreman," it will be presumed that the person so signing was the same person designated as T. Blankenbeckler in impaneling the jury. *Keeler v. State*, 73 Neb. 441 (103 N. W. 64).

Sufficiency in general.

844. (1877.) A verdict in these words; "We, the jury, selected, impaneled and sworn in the above entitled cause, do find the defendant, William M. Preuit, guilty of murder in the first degree," is sufficient, without adding "in manner and form," etc. *Preuit v. People*, 5 Neb. 377.

845. (1899.) A verdict omitting a finding as to an essential element of the crime charged will not support a sentence, and a judgment rendered on such a verdict is void. *Holmes v. State*, 58 Neb. 297 (78 N. W. 641).

846. (1905.) Verdicts in criminal cases should be certain and import a definite meaning free from ambiguity. If the meaning of the verdict in the light of the whole record is clear, beyond any reasonable doubt, it is sufficient. *Keeler v. State*, 73 Neb. 441 (103 N. W. 64).

846*a*. (1907.) Where the state in a criminal prosecution elects to proceed upon one of several counts contained in the information, and by the instructions of the court the jury are told, in effect, that their verdict must respond to the charge contained in that count, a verdict of guilty, as charged in the information, is sufficient. *Bridges v. State*, 80 Neb. 91 (113 N. W. 1048).

Designation of parties.

847. (1877.) A verdict must designate the defendant as the guilty party. *Williams v. State*, 6 Neb. 334.

Assessment of punishment.

848. (1874.) Provisions of the criminal code of 1866, that the jury, in all cases where the punishment shall be by confinement in the penitentiary, shall fix the term of imprisonment, are not affected by the enactment of the criminal code of 1873, where an offense is committed and an indictment laid under the former code. *Caw v. State*, 3 Neb. 357.

Several counts.

849. (1876.) Upon the trial of an indictment two counts for larceny and two counts for receiving stolen property the jury returned a verdict of guilty on the larceny counts, and not guilty on the others,

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and also found "the property described in the indictment to be of the value of one hundred and fifteen dollars." *Held*, In the absence of any evidence upon the counts for receiving stolen property, that the valuation would apply on the property mentioned in the larceny counts. *Thompson v. State*, 4 Neb. 524.

850. (1886.) Where distinct offenses are charged in separate counts of an indictment, the jury must either return a general verdict of not guilty or respond to each charge in their finding. *Casey v. State*, 20 Neb. 138 (29 N. W. 264). [Overruled. *Ford v. State*, 79 Neb. 309, 112 N. W. 606.]

851. (1892.) A verdict of conviction under one of two counts, each charging a separate offense, and of acquittal under the other, is not reversible, though the evidence would have warranted a conviction under both. *Weinecke v. State*, 34 Neb. 14 (51 N. W. 307).

852. (1895.) A verdict of guilty, responsive separately to each of two counts of an information, both counts charging one crime, should be treated, in entering judgment, as though both elements of the crime had been embraced in a single count. *Griffen v. State*, 46 Neb. 282 (64 N. W. 966).

853. (1897.) A general verdict of guilty against a defendant on an indictment consisting of two or more counts which charge a single offense, is sufficient without specifying the count on which the jury find him guilty. *Hurlburt v. State*, 52 Neb. 428 (72 N. W. 471).

854. (1907.) Where several counts are included in the same information, a conviction on one count may be sustained, although the jury ignore the others, and a judgment upon one of several counts, with no verdict as to the others, operates as an acquittal on the other counts. *Ford v. State*, 79 Neb. 309 (112 N. W. 606).

Motion to quash.

855. (1894.) Filing a motion to quash a verdict more than three days after rendition thereof is equivalant to amending a motion for a new trial at that time, which cannot be done. *Willis v. State*, 43 Neb. 102 (61 N. W. 254).

XIII. MOTION FOR NEW TRIAL, AND IN ARREST.

Necessity of motion for new trial in *habeas corpus*, see *Habeas Corpus*, §§ 53-55.

Necessity of motion to present question for review, see *post*, §§ 977-988.

Jurisdiction to grant new trial.

856. (1889.) The supreme court has no jurisdiction as a court of equity, in an action instituted originally before it, to vacate a judgment and grant a new trial in a criminal prosecution. Such jurisdiction is not conferred by section 2 of article VI of the constitution, which gives the supreme court original jurisdiction in "civil cases in which the state shall be a party," said clauses referring only to civil actions, distinguished from criminal causes. *Paulson v. State*, 25 Neb. 344 (41 N. W. 249).

857. (1893.) The supreme court has no original jurisdiction or authority to vacate a judgment and grant a new trial in a cause tried and determined in a district court. The jurisdiction of the supreme court to grant a new trial in such case is appellate only. *Vincent v. State*, 37 Neb. 672 (56 N. W. 320).

858. (1897.) A judge of the district court, within his own judicial district, has jurisdiction to and may hear and determine a motion for new trial in a case wherein the judge of another district presided during the trial, but, before the hearing of the motion for new trial, has ceased to preside. *Lauder v. State*, 50 Neb. 140 (69 N. W. 776).

859. (1904.) A court of equity will not interfere for the purpose of granting a new trial in a criminal case on the ground of newly discovered evidence. *Hubbard v. State*, 72 Neb. 62 (100 N. W. 153).

Power to grant in general.

860. (1876.) At common law courts had no power to grant new trials in cases of felony, and it was held that they had no power to revise or correct their judgments in such cases. Consequently if the sentence of a prisoner was so defective as to invalidate the judgment, he was discharged. But this doctrine is now overruled. *Dodge v. State*, 4 Neb. 220.

861. (1904.) The authority and jurisdiction of the district courts to grant new trials in criminal cases are derived from the statute, to which resort must be had in determining the extent of their powers regarding the subject. *Hubbard v. State*, 72 Neb. 62 (100 N. W. 153).

Discretion of court.

862. (1878.) The granting of a new trial in a criminal case is within the exclusive discretion of the trial court; and if that court, on application duly made, refuse to

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act upon it, it will be compelled to do so, unless such action could advantage the prisoner only by overriding a well established rule of criminal procedure. *Clough v. State*, 7 Neb. 351.

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Disqualification of juror.

863. (1878.) Before a motion for a new trial can be properly granted on the ground of a previous expression of opinion by a juror, unfavorable to the accused, it must appear by the affidavits of both the prisoner and his counsel that neither of them had any knowledge before the verdict was rendered of the expression of such opinion. *Clough v. State*, 7 Neb. 320.

864. (1894.) Ordinarily, the discretion of the trial judge in overruling a motion for a new trial will not be disturbed when the sole grounds for said motion are admissions of a juror as to his knowledge of the character of the accused, when such admissions have no reference to the facts tried, especially when upon his *voir dire* examination such juror had answered that he had no bias or prejudice which would prevent impartial action on his part. *Lamb v. State*, 41 Neb. 356 (59 N. W. 895).

Rulings on plea in abatement.

865. (1883.) The ruling of the court on a plea in abatement is not ground for a motion for a new trial. *Bohanan v. State*, 15 Neb. 209 (18 N. W. 129).

Absence of witness.

866. (1897.) A new trial should not be allowed on account of the absence of a witness who, on a subsequent day of the trial, attends and testifies for the complaining party. *Morgan v. State*, 51 Neb. 672 (71 N. W. 788).

Misconduct of counsel.

867. (1894.) It is the duty of the presiding judge, whether so requested or not, to protect the court by an enforcement of the rules essential to an orderly and impartial administration of the law; and should an attorney persist in attempting to influence the jury by reference to facts not in evidence, or appeals to prejudice unwarranted by the proofs, the court should not hesitate, on motion, to set aside a verdict in his favor, although no objection may have been interposed when the offense was committed. *Hill v. State*, 42 Neb. 503 (60 N. W. 916).

Newly discovered evidence.

868. (1879.) It is a general rule, applicable in capital as well as in other cases, that a new trial will not be granted on the ground of newly discovered evidence where such evidence would be cumulative merely. *St. Louis v. State*, 8 Neb. 405.

869. (1879.) In an application for a new trial on the ground of newly discovered evidence the statute expressly requires the applicant to show that the newly discovered evidence could not with reasonable diligence have been discovered and produced at the trial. *St. Louis v. State*, 8 Neb. 405; (1897) *Mills v. State*, 53 Neb. 263 (73 N. W. 761); (1905) *Turley v. State*, 74 Neb. 471 (104 N. W. 934).

870. (1882.) A new trial will not be granted on the ground of newly discovered evidence, when such evidence, if produced, could have no greater effect than to discredit a party as a witness in his own behalf; or discredit some of the witnesses on the opposite side. *Ogden v. State*, 13 Neb. 436 (14 N. W. 165).

871. (1886.) Newly discovered evidence of distinct and independent facts of a different character, though it may tend to establish the same ground of defense, is not cumulative within the rule. *Casey v. State*, 20 Neb. 138 (29 N. W. 264).

872. (1893.) A motion for a new trial should be granted on the ground of newly discovered evidence tending to impeach a witness by showing declarations contradicting his testimony, where such evidence is of so controlling a character that it would probably change the verdict. *Bailey v. State*, 36 Neb. 808 (55 N. W. 241).

873. (1893.) In a prosecution for adultery the only evidence of defendant's marriage was that of the complaining witness, the woman alleged to be defendant's wife. The marriage relied upon was by words of consent without the presence of a solemnizing officer or of witnesses. A new trial was asked on the grounds of newly discovered evidence, the affidavits removing every question of negligence in procuring the evidence. The newly discovered evidence alleged consisted of the declaration of the complaining witness contradicting her testimony as to the marriage. *Held*, That under these circumstances the motion should have been sustained. *Bailey v. State*, 36 Neb. 808 (55 N. W. 241).

874. (1897.) The denial of a motion for a new trial upon the ground of newly discovered evidence will not be held erroneous when it appears that the newly discovered

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evidence is cumulative and would not probably change the result already reached. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

875. (1898.) A new trial should not be granted a party on the ground of newly discovered evidence, unless he makes it appear that the newly discovered evidence is material for him, and that he could not by the exercise of reasonable diligence have discovered and produced it at the trial. *Cunningham v. State*, 56 Neb. 691 (77 N. W. 60).

876. (1904.) The provisions of sections 490-492 of the criminal code, regarding the granting of new trials in criminal cases on the ground of newly discovered evidence, are the exclusive source of power of the district court to grant such new trials. *Hubbard v. State*, 72 Neb. 62 (100 N. W. 153).

877. (1904.) In capital cases a new trial should not be allowed on account of newly discovered evidence unless its introduction on the trial might have been beneficial to the defendant, and might have led to a different result. *Lillie v. State*, 72 Neb. 228 (100 N. W. 316.)

877*a*. (1907.) Newly discovered evidence which is doubtful in its character, and is merely cumulative, is not a sufficient ground for a new trial. *Clements v. State*, 80 Neb. 313 (114 N. W. 271).

Application for new trial.

878. (1876.) In criminal, as well as in civil cases, all the reasons known to exist for setting aside the verdict, and granting a new trial, should be set forth in the motion therefor. *Dodge v. State*, 4 Neb. 220.

879. (1892.) Under section 491 of the criminal code, as amended in 1881, in assigning the grounds for a new trial it is sufficient to assign the same in the language of the statute and without further or other particularity. *McNamee v. State*, 34 Neb. 288 (51 N. W. 821).

——— Time for making.

880. (1886.) The grounds upon which a new trial may be granted in a criminal case are prescribed by statute and the motion therefor must be filed at the term at which the verdict is rendered, and, except for newly discovered evidence, within three days after the verdict was rendered, unless unavoidably prevented. *Bradshaw v. State*, 19 Neb. 644 (28 N. W. 323); (1887) *Ex parte Holmes*, 21 Neb. 324 (32 N. W. 69); (1891) *Davis v. State*, 31 Neb. 240 (47 N. W. 851).

881. (1886.) A motion for a new trial on the ground of newly discovered evidence, in a criminal case, filed more than two years after judgment was rendered was properly overruled aed dismissed. *Bradshaw v. State*, 19 Neb. 644 (28 N. W. 323).

882. (1887.) The filing of a motion for a new trial at a term of the district court subsequent to the term at which a defendant was tried and convicted, and six months after he had been imprisoned in the penitentiary for the purpose of serving out his sentence, would confer no authority upon such district court to set aside the verdict and judgment and grant a new trial. And in such case, where the motion was sustained and a new trial granted, the order being void, the warden of the penitentiary would have no authority to surrender the prisoner to the sheriff of the county in which such conviction was had. *Ex parte Holmes*, 21 Neb. 324 (32 N. W. 69).

883. (1904.) The provisions of section 318 of the code, authorizing the granting of new trials in civil actions at a subsequent term to that at which the judgment was rendered, on the ground of newly discovered evidence, are not applicable to the granting of new trials in criminal cases. *Hubbard v. State*, 72 Neb. 62 (100 N. W. 153).

884. (1904.) The district court possesses no inherent or common law power to grant new trials in criminal cases, on the ground of newly discovered evidence, at a subsequent term to that at which a verdict of guilty was found. *Hubbard v. State*, 72 Neb. 62 (100 N. W. 153).

——— Affidavits.

885. (1880.) On the hearing of a motion for a new trial one of the attorneys for the accused made an affidavit that the verdict was received by the judge during an adjournment of the court, which was not denied. The contents of the affidavit were stated to the court, and the affidavit itself handed to the district attorney for examination, but it was not filed until after the hearing. *Held*, the objection, if any, must be made to its introduction as evidence; and if not so made is waived. *Longfellow v. State*, 10 Neb. 105 (4 N. W. 420).

——— Statements, affidavits and testimony of jurors.

886. (1900.) The affidavit of jurors relating to the arguments or statements made by them while deliberating upon their ver-

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dict may not be received to impeach the verdict. *Welsh v. State*, 60 Neb. 101 (82 N. W. 368).

887. (1901.) The verdict of a jury cannot be impeached by one of the jurors on the ground that he misunderstood the evidence of one of the witnesses. *Coil v. State*, 62 Neb. 15 (86 N. W. 925).

888. (1901.) 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, cannot be received to impeach their verdict returned in open court, and assented to by them in the poll of the jury. *Coil v. State*, 62 Neb. 15 (86 N. W. 925).

889. (1901.) A juror cannot be heard to impeach his own verdict by showing that he reasoned from false premises or adopted an illegitimate method in reaching a conclusion. *Savary v. State*, 62 Neb. 166 (87 N. W. 34).

890. (1901.) Statements of a juror after trial as to the manner of arriving at a verdict during the deliberations of the jury cannot be testified to by others for the purpose of vitiating the verdict. Such testimony is incompetent as hearsay. *Savary v. State*, 62 Neb. 166 (87 N. W. 34).

891. (1901.) A statement made by a juror after trial, and when not under oath, tending to impeach his verdict is insufficient to rebut and overcome the presumption arising from the record that the verdict returned under oath and assented to by the jury was the result of the deliberation of the jury on the evidence in the case. *Savary v. State*, 62 Neb. 166 (87 N. W. 34).

——— Presence of accused at hearing.

892. (1897.) One convicted of a felony who was represented by counsel cannot, as a matter of right, insist on being present in court when his motion for a new trial is filed, argued, or decided. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

——— Determination.

893. (1886.) Motion for new trial alleged facts and reasons therefor not shown by the record, and which were supported by affidavits. Counter-affidavits were filed in which all the allegations in the motion for a new trial were disproved. *Held*, That the denial of the motion by the district court was correct. *Marion v State*, 20 Neb. 233 (29 N. W. 911; 57 Am. Rep. 825).

894. (1895.) Where an affidaivt in support of a motion for a new trial avers that certain jurors, while the jury was deliberating, stated to the others that a certain witness for the defense, was an unchaste woman and unworthy of belief, and such averment was not denied by the state, the trial court is not obliged to take the statements as true. *Tracey v. State*, 46 Neb. 361 (64 N. W. 1069).

895. (1895.) Whether there had been misconduct of the jury was a question of fact for the district judge; and in trying such issue the district judge had a right to weigh and consider, as against the statements in the impeaching affidavit, the presumption of law that the jurors had obeyed their oaths. *Tracey v. State*, 46 Neb. 361 (64 N. W. 1069).

896. (1895.) It is not error to refuse a new trial on the ground of newly discovered evidence when the statements in the affidavit upon which it is based are contradicted by the sworn evidence of the proposed witness. *Housh v. State*, 43 Neb. 163 (61 N. W. 571).

897. (1901.) 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, and exception to the ruling of the court thereon, *held* without merit, since from the record and the affidavits it appears that no mistake had been made. *Coil v. State*, 62 Neb. 15 (86 N. W. 925).

898. (1902.) A motion for a new trial is properly dealt with as an entirety. If it cannot be sustained in the form in which it is presented, it is not error to overrule it. *Reed v. State*, 66 Neb. 184 (92 N. W. 321).

Conviction under separate counts.

899. (1899.) Where an information, in different counts, charges separate and distinct crimes, and the accused, on the trial, is acquitted on a count charging another crime, a new trial can be granted only on the count upon which a conviction was had on the former trial. *George v. State*, 59 Neb. 163 (80 N. W. 486).

900. (1899.) Where a crime consisting of several degrees is charged in different counts of an information, the allowance of a new trial goes to the whole case. *George v. State*, 59 Neb. 163 (80 N. W. 486).

Joint application.

901. (1884.) A motion for a new trial is indivisible, and when made jointly by two or more parties, if it cannot be allowed as to all, it must be overruled as to all. *Dutcher v. State*, 16 Neb. 30 (19 N. W. 612).

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Grounds for arrest of judgment.

902. (1876.) Want of jurisdiction and insufficiency of the indictment, are the only grounds for arrest of judgment, under the criminal code. *Dodge v. State*, 4 Neb. 220.

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903. (1900.) If at a subsequent term of the court to the one at which defendant was held to answer, 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*, 60 Neb. 628 (84 N. W. 6).

XIV. JUDGMENT, SENTENCE AND FINAL COMMITMENT.

Commitment for non-payment of fines, see *Fines*, §§ 1-5.

Conviction as accessory under indictment charging defendants as principals, see *Indictment and Information*, § 141*a*.

Excessive sentence as grounds for writ of *habeas corpus*, see *Habeas Corpus*, § 20.

Release from void sentence, see *Habeas Corpus*, §§ 14-16.

Excessive sentence for kidnapping, see *Kidnapping*, § 5.

Commutation of sentence, see *Pardon*, § 5.

Excessiveness of sentence for larceny, see *Larceny*, §§ 139-141.

Discretion of court in fixing sentence, see *post*, § 1074

Reduction of sentence by appellate court, see *post*, §§ 1147-1149.

Jurisdiction.

903*a*. (1897.) Jurisdiction to pronounce a particular sentence is as essential as jurisdiction of the person and subject matter. *In re McVey*, 50 Neb. 481 (70 N. W. 51).

904. (1901.) A judge may receive, at chambers, a plea of guilt and pass sentence on one charged with a felony in a county of the district other than that in which the prosecution was instituted. *McCarty v. Hopkins*, 61 Neb. 550 (85 N. W. 540).

Formalities in pronouncing sentence.

905. (1895.) The district court in pronouncing sentence on a felon has no authority to coerce an answer from a prisoner to any question whatever; but what inquiries the court shall make of such a prisoner, aside from the inquiries provided by statute, or whether any, is a matter resting entirely in its discretion. *Tracey v. State*, 46 Neb. 361 (64 N. W. 1069).

906. (1895.) A district court, when called upon to pronounce judgment against a person convicted of a felony, is not limited to the sole question whether the person so convicted has anything to say why judgment should not be pronounced against him. *Tracey v. State*, 46 Neb. 361 (64 N. W. 1069).

907. (1902.) Section 495 of the criminal code, providing that, before sentence is pronounced in a criminal case, defendant must be informed of the verdict of the jury, and asked whether he has anything to say why judgment should not be pronounced against him, is mandatory, so that where, after a verdict of guilty, sentence has been pronounced without complying with the provisions of said section 495, the judgment will be reversed, and cause remanded for judgment and sentence in conformity with the statute. *McCormick v. State*, 66 Neb. 337 (92 N. W. 606).

Sentence on conviction on different counts.

908. (1889.) In a prosecution under an indictment containing a number of counts for offenses punishable by fine, the sentence should not be for one solid fine but a separate fine for each count on which defendant is found guilty, so that in case the supreme court finds that the evidence is not sufficient as to certain counts there need be a reversal only as to such counts. *Burrell v. State*, 25 Neb. 581 (41 N. W. 399).

909. (1889.) Where several distinct offenses of same kind are joined in same indictment, separate sentence should be passed on each count upon which defendant is found guilty. *Burrell v. State*, 25 Neb. 581 (41 N. W. 399).

910. (1893.) Where a person has been convicted at the same term of court of several distinct offenses, each punishable by imprisonment in the penitentiary, whether charged in separate informations or in separate counts of the same information, the court may impose a separate sentence for each offense of which the prisoner has been found guilty. *In re Walsh*, 37 Neb. 454 (55 N. W. 1075).

911. (1893.) Where cumulative sentences are imposed on an accused the judgment should not fix the day on which each successive term of imprisonment should begin, but should simply direct that each successive term should commence at the expiration of the one imposed by the previous sentence. *In re Walsh*, 37 Neb. 454 (55 N. W. 1075).

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912. (1893.) If the same offense is charged in different counts of an information, and there is a conviction on each count, but a single sentence should be pronounced upon all the counts for the one entire offense. *In re Walsh*, 37 Neb. 454 (55 N. W. 1075).

913. (1893.) To an information containing two counts, one charging the petitioner with the forgery of a certain bank check, and the other with the uttering of the same instrument, a general plea of guilty was entered. Thereupon the court sentenced him upon the first count to imprisonment in the penitentiary for the period of one year from the 9th day of May, 1892, and upon the other count a like imprisonment was imposed for the term of one year from May 9, 1893. By good conduct the petitioner saved two months of his first sentence, and having served out the term under such sentence, he applied for his release on *habeas corpus*. *Held*, That the second sentence was illegal and void, and that he was entitled to be discharged from further imprisonment. *In re Walsh*, 37 Neb. 454 (55 N. W. 1075).

914. (1898.) If a single offense is charged in different counts of an information, and there is a conviction on each count, but one sentence can be imposed. *Barker v. State*, 54 Neb. 53 (74 N. W. 427).

Setting aside sentence.

915. (1892.) Where one charged with burglary enters a plea of guilty, and the court sentences him to the state reformatory and he is committed therein, the court cannot, at the subsequent term, vacate the sentence and enter a new one, committing the accused to a term in the penitentiary. *In re Jones*, 35 Neb. 499 (53 N. W. 468).

Entry of judgment.

916. (1877.) The failure of the court to act does not authorize the entry of a *nunc pro tunc* order or judgment. If no order or judgment was in fact rendered, the court cannot treat such defects as a clerical error. *Garrison v. State*, 6 Neb. 274.

Conclusiveness and effect of judgment.

917. (1877.) A judgment of an inferior court in a criminal action is conclusive, unless appealed from, or reversed on proceedings in error. *Ex parte Fisher*, 6 Neb. 309.

918. (1898.) If the court has jurisdiction of the person of the accused and of the crime charged and does not exceed its lawful authority in passing sentence, its judgment is not void, whatever errors may have occurred during the trial. *In re Ream*, 54 Neb. 667 (75 N. W. 24).

Commitment.

919. (1888.) A mittimus entitled, "The State of Nebraska, ... county," is not void, and, even if defective, the court or judge, upon *habeas corpus*, should not, for that cause alone, discharge the prisoner, but cause a new one to be issued in proper form. *State, ex rel. Esher, v. Banks*, 24 Neb. 322 (28 N. W. 830).

Stay of execution.

920. (1907.) The sentence is not vacated by a stay thereof to examine the sanity of the accused. The execution thereof is suspended until the day named in the order of stay. *State v. Barker*, 79 Neb. 361 (112 N. W. 1143).

921. (1907.) Upon the hearing of an application under section 551 of the criminal code, the judge may stay execution of sentence, when such stay is absolutely necessary in order that the investigation required by statute shall be had. The necessity for such stay is to be determined by the judge before whom the application is pending, in the exercise of a sound legal discretion. *State v. Barker*, 79 Neb. 361 (112 N. W. 1143).

Inquiry into sanity of convict.

922. (1905.) Under section 6 of chapter 105, laws 1901, it is the duty of the warden, if a convict confined in the penitentiary under sentence of death appears to be insane, to give notice thereof to a judge of the district court for the county in which the penitentiary is situated, and if such notice is given a jury must be summoned "to inquire into such insanity." *Barker v. State*, 75 Neb. 289 (106 N. W. 450).

923. (1905.) Under the law prior to the act of 1901, the district court of the county of the conviction and sentence of death of a person charged with a capital offense had jurisdiction, independent of statute, to investigate the question of the sanity of such convict; but that jurisdiction has by the statute been transferred to the judge of the district court for the county in which the penitentiary is situated. *Barker v. State*, 75 Neb. 289 (106 N. W. 450).

924. (1905.) The jurisdiction of the judge of the district court for Lancaster county to inquire as to the sanity of a convict confined in the penitentiary under sentence of death

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does not depend upon the giving of the notice by the warden. If it is alleged in a proper application to the judge, under oath, that the convict is insane, and that the warden unjustifiably refuses to give the statutory notice, it is the duty of the judge to make such investigation as will satisfy him whether there are such appearances of insanity as will justify summoning a jury to try the question. *Barker v. State*, 75 Neb. 289 (106 N. W. 450).

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925. (1905.) If upon investigation of the application, the judge finds that the convict appears to be insane, a jury should be impaneled to try the question of insanity. *Barker v. State*, 75 Neb. 289 (106 N. W. 450).

926. (1905.) If the judge, upon investigation of sanity of one sentenced to be hanged and confined in the penitentiary, is satisfied that the warden was justified in his refusal to give the notice of the prisoner's insanity, and that there are no substantial appearances of insanity, the application will be dismissed. *Barker v. State*, 75 Neb. 289 (106 N. W. 450).

927. (1907.) Inquiry as to the sanity of a convict is left largely to the discretion of the district judges. *State v. Barker*, 79 Neb. 361 (112 N. W. 1143).

XV. APPEAL AND ERROR.

Appeal in extradition, see *Extradition*, §§ 11-12.

Appeal in contempt proceedings, see *Contempt*, §§ 82-89.

Right of state to appeal from writ of *habeas corpus*, see *Habeas Corpus*, § 47.

Time to appeal from commitment for failure to pay fine, see *Fines*, § 4.

A. Form of Remedy, Jurisdiction and Right of Review.

Form of remedy.

928. (1902.) Section 24 of the Bill of Rights, declaring that the right to be heard in all civil cases in the court of last resort by appeal, error or otherwise shall not be denied, is satisfied by any one of the proceedings specified. The remedy is in the alternative. *Sothman v. State*, 66 Neb. 302 (92 N. W. 303).

928*a*. (1908.) Under the provisions of chapter 162, laws 1907, providing for appeals to the supreme court, only judgments and sentences upon convictions for felonies and misdemeanors under the criminal code may be brought to this court by petition in error. All other cases must come here by appeal, and notice must be given, either as specified in section 3 of the act, or under the provisions of supreme court rules 33 to 37, inclusive. *Brandt v. State*, 80 Neb. 843 (115 N. W. 327).

Decisions reviewable.

929. (1880.) Where in a criminal prosecution, the jury returned, after remaining out for several hours, with a statement that they agreed to disagree and the court, in the absence of the accused, discharged the jury, the overruling of a motion, by the accused, to discharge the jury is not such an order as can be reviewed on error before final judgment. *Green v. State*, 10 Neb. 102 (4 N. W. 422).

930. (1893.) The rulings of the district court in a criminal case cannot be reviewed by the supreme court prior to the rendition of a final judgment in the prosecution. *Gartner v. State*, 36 Neb. 280 (54 N. W. 516).

931. (1893.) An order of the district court overruling a plea in abatement to an indictment is not a final order within the meaning of the statute, and a petition in error cannot be prosecuted therefrom previous to the prisoner's conviction. *Gartner v. State*, 36 Neb. 280 (54 N. W. 516).

931*a*. (1908.) The right of appeal given by section 324 of the criminal code applies to cases prosecuted for the violation of village ordinances pursuant to the provisions of section 52, article I, chapter 14, Compiled Statutes 1907. *Ruffing v. State*, 80 Neb. 555 (114 N. W. 583).

931*b*. (1908.) Where a defendant is prosecuted before a justice of the peace by complaint and warrant for the violation of a village ordinance, and the acts charged are misdemeanors under the laws of the state, such defendant has no right of appeal under section 1006 of the code from a judgment finding him guilty. *Ruffing v. State*, 80 Neb. 555 (114 N. W. 583).

Right of prosecution to review.

932. (1882.) A prosecuting attorney presenting a bill of exceptions to the supreme court under the provisions of section 483 of the criminal code, must obtain leave of court to file the same. *State v. Page*, 12 Neb. 355 (11 N. W. 459).

933. (1883.) A bill of exceptions and petition in error on behalf of the estate in a case where, in the district court, upon an appeal from a conviction of a misdemeanor before a county judge, the case was dis-

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missed, filed in the supreme court without leave of court obtained by the district attorney, will be dismissed. *State v. Halphrey*, 14 Neb. 578 (16 N. W. 823).

Right of complainant to review.

934. (1881.) The right of appeal under section 324 of the criminal code is restricted to the defendant, and does not apply to a complainant against whom a judgment for costs has been rendered. *State, ex rel. McGraw v. Ensign*, 11 Neb. 529 (10 N. W. 449); (1896) *O'Chander v. Hansen*, 48 Neb. 485 (67 N. W. 604).

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B. Presentation and Reservation in Lower Court of Grounds of Review.

Offer of proof on exclusion of evidence, see *ante*, §§ 540-541.

Necessity of presentation in general.

935. (1894.) The constitutionality of a law will not be determined upon review where the question was not presented below. *Pill v. State*, 43 Neb. 23 (61 N. W. 96). 96).

Necessity of objection.

——— Preliminary proceedings.

936. (1902.) The objection that the issue in a criminal case was not formally made up before trial must be first raised in the district court. *Reed v. State*, 66 Neb. 184 (92 N. W. 321).

——— Indictment or information.

937. (1876.) If a party fails to object in the court below, to an indictment containing two counts for larceny, and two counts for receiving stolen property on the ground that they refer to separate and distinct offenses, such objection, after a verdict of guilty on the larceny counts, will not be considered in the appellate court. *Thompson v. State*, 4 Neb. 524.

938. (1891.) Defects in the verification of an information not raised until after verdict are waived. *Davis v. State*, 31 Neb. 247 (47 N. W. 854).

——— Disqualification of juror.

939. (1878.) Where a juror, on his *voir dire* examination, in answer to questions put to him by the district attorney, stated that he did not think he had formed or expressed an opinion as to the prisoner's guilt, but at the same time admitted that he had "talked with the neighbors about the case," and that he had "explained to some (of his neighbors) since it occurred," who did not know about it; and the juror was accepted without examination, or objection, on the part of the prisoner, it makes a case for the application of the rule, that if a prisoner neglect to avail himself, before the trial, of any of the means which the law provides for ascertaining whether a juror is prejudiced, he will not be entitled to a new trial on that ground. *Clough v. State*, 7 Neb. 320.

940. (1882.) Objection that a juror was not a resident of the county is waived if not made on *voir dire* examination. *Hickey v. State*, 12 Neb. 490 (11 N. W. 744).

941. (1894.) A party who chooses to accept a juror shown by his examination to be disqualified on account of an opinion formed from a knowledge of the facts involved cannot afterward allege the prejudice of such juror as ground for a new trial. *Murphey v. State*, 43 Neb. 34 (61 N. W. 491).

942. (1901.) An objection that a veniremen is not a qualified juryman is unavailing unless specially raised in the trial court. *Russell v. State*, 62 Neb. 512 (87 N. W. 344).

——— Rulings on evidence.

943. (1878.) When the defendant in a criminal trial permits illegal testimony to go to the jury without objection, its illegality is thereby waived, and a new trial will not be granted because of its admission. *Clough v. State*, 7 Neb. 351.

944. (1879.) In the supreme court the examination of questions relating to the evidence is confined to such as were distinctly raised and passed upon in the court whose record is under review. *Schlencker v. State*, 9 Neb. 241 (1 N. W. 857); (1894) *Hill v. State*, 42 Neb. 503 (60 N. W. 916); (1895) *Collins v. State*, 46 Neb. 37 (64 N. W. 432).

945. (1895.) Rulings not objected to in admitting evidence will be disregarded on review. *Thompson v. State*, 44 Neb. 366 (62 N. W. 1060).

946. (1895.) An objection relating to the materiality or relevancy of testimony should be made when the testimony is offered. *Ford v. State*, 46 Neb. 390 (64 N. W. 1082).

947. (1904.) If, in a criminal trial, evidence is received that is not from its nature necessarily injurious to the defendant, and the receiving of such evidence is not objected to when the same is offered, nor complained of in the petition in error in the supreme court, the error, if any, will be considered to be without prejudice. *Lillie v. State*, 72 Neb. 228 (100 N. W. 316).

948. (1906.) Where a question is so

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formed as to bring out the inference that an accused was formerly accused of larceny, it cannot be made grounds for reversal for misconduct of counsel unless that objection was raised on the trial. *Barber v. State*, 75 Neb. 543 (106 N. W. 423).

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——— Instructions.

949. (1876.) Since by statute in this state the charge of the court to the jury is required to be in writing, filed with the clerk and made a part of the record, it is appears that a charge given in a case of felony had a tendency to prejudice the accused, under any state of facts, the appellate court will correct the error by granting a new trial, even though no objection was taken to such charge in the court below. *Thompson v. State*, 4 Neb. 524.

950. (1895.) Judgment will not be reversed for failure to number the paragraphs of the charge, and mark instructions "given," unless objected to on that ground when given. *Jolly v. State*, 43 Neb. 857 (62 N. W. 300).

——— Misconduct of counsel.

951. (1885.) Where it is alleged that an attorney, in the argument of a cause on trial to a jury, made misstatements of the evidence and went outside of the record in his statements of the facts proved on the trial, the attention of the court should be called to the language and conduct of the attorney by the proper objection, and a ruling had thereon by the court. *Bradshaw v. State*, 17 Neb. 147 (22 N. W. 361); (1886) *McLain v. State*, 18 Neb. 154 (24 N. W. 720).

952. (1894.) Abuse of privilege by counsel in addressing the jury, to be available on appeal, must be excepted to at the time. *Hill v. State*, 42 Neb. 503 (60 N. W. 916).

953. (1897.) Where there was no objection made or exception taken to a ruling on an objection, in respect to alleged improper statements of opposing counsel to the jury in the trial court, there can be no prejudicial error predicated in the supreme court upon the impropriety of such statements. *Catron v. State*, 52 Neb. 389 (72 N. W. 354).

954. (1902.) A party desiring to take advantage of the misconduct of opposing counsel in the argument of a case, should seasonably object to the remarks complained of and then enter an exception, if the court rule adversely or refuse to make a ruling. *Reed v. State*, 66 Neb. 184 (92 N. W. 321).

955. (1903.) Ordinarily a party who did not promptly object to an argument alleged as misconduct will be held to have waived his right to complain. *Parker v. State*, 67 Neb. 555 (93 N. W. 1037).

956. (1903.) Where the misconduct of counsel is so flagrant, and of such a character that neither a complete retraction nor any admonition or rebuke from the court can entirely destroy its sinister influence, a new trial should be awarded, regardless of the want of an objection and exception. *Parker v. State*, 67 Neb. 555 (93 N. W. 1037).

957. (1905.) Alleged improper statements of counsel, made while arguing a case to the jury, to be available on error, must have been objected to at the time they were made and the ruling of the court invoked thereon. *Connolly v. State*, 74 Neb. 340 (104 N. W. 754).

958. (1907.) It is only in the most flagrant cases of the use of improper language by a prosecuting attorney, even in the prosecution of capital offenses that defendant's counsel can apparently acquiesce in the language used by remaining silent until the trial is finished, and then cause the trial and verdict to be set aside by complaining of statements to which he seemed at the time to consent. *Clark v. State*, 79 Neb. 482 (113 N. W. 804).

——— Misconduct of jury.

959. (1883.) A separation of the jury, before the taking of testimony is closed in a criminal trial, known to the prisoner or his counsel at the time it occurred, but not disclosed to the judge until after verdict, is not cause for a new trial. *Polin v. State*, 14 Neb. 540 (16 N. W. 898).

Sufficiency of objection.

960. (1902.) An objection that evidence is incompetent, irrelevant and immaterial, does not raise the question of a sufficient foundation laid for the admission of such testimony. *McCormick v. State*, 66 Neb. 337 (92 N. W. 606).

Necessity of ruling by trial court.

961. (1896.) An assignment of error for the overruling of a motion for a continuance will not be considered by the supreme court when the record fails to disclose that such motion was passed upon by the trial court. *Bush v. State*, 47 Neb. 642 (66 N. W. 638).

Necessity of exception.

962. (1878.) The taking and preserving of exceptions in criminal cases are governed by the rules established in such matters in civil cases. *Clough v. State*, 7 Neb. 320.

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963. (1879.) In a capital case the want of an exception will not necessarily deprive the prisoner of his right to a new trial for errors of the court prejudicial to him. *Schlencker v. State*, 9 Neb. 300 (2 N. W. 710).

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964. (1884.) In order to obtain a review of the proceedings of the district court during a trial there must be an adverse ruling by such court and an exception thereto. *Hair v. State*, 16 Neb. 601 (21 N. W. 464).

965. (1899.) In the absence of an exception a ruling made by the district court during the progress of the trial cannot be reviewed. *Reynolds v. State*, 58 Neb. 49 (78 N. W. 483).

——— **Rulings on evidence.**

966. (1878.) When a deposition taken on behalf of the defendant in a criminal case as to his good character is suppressed, and no exception taken, the correctness of the ruling cannot be questioned on error in the supreme court. *Clough v. State*, 7 Neb. 320.

967. (1884.) Generally, the supreme court will not consider an objection to the admissibility of testimony unless the objection was made at the trial, and the ruling of the trial court thereon excepted to. *Dutcher v. State*, 16 Neb. 30 (19 N. W. 612).

968. (1887.) Where it is claimed that improper testimony was allowed to be given to a jury in the trial of a cause, it must appear by the bill of exceptions that objection thereto was made, upon which there was an adverse ruling, and to which exception was taken at the time. Otherwise it cannot be reviewed in the supreme court. *Fager v. State*, 22 Neb. 332 (35 N. W. 195).

——— **Instructions.**

969. (1876.) The provisions of the act of 1875 directing the charge of the court to the jury to be written in consecutively numbered paragraphs, is a right which the supreme court will regard as waived, when the charge is not excepted to, or where exception is taken to a particular clause only. *Smith v. State*, 4 Neb. 277.

970. (1876.) In cases of felony, where the instructions are properly preserved and are legitimate before the supreme court, and it is apparent that a radical error was committed, which in any view of the case must have been prejudicial to the prisoner, it is the plain duty of the supreme court to correct it, even though there was a failure to except. *Curry v. State*, 4 Neb. 545.

971. (1881.) Erroneous instruction must be excepted to and brought to attention of court in motion for new trial. *Baldwin v. State*, 12 Neb. 61 (10 N. W. 463).

972. (1886.) The giving or refusal of instructions must be excepted to in order to obtain a review in the supreme court. *Heldt v. State*, 20 Neb. 492 (30 N. W. 626; 58 Am. St. Rep. 835); (1894) *Wax v. State*, 43 Neb. 18 (61 N. W. 117); (1895) *Carleton v. State*, 43 Neb. 373 (61 N. W. 699); (1895) *Gravely v. State*, 45 Neb. 878 (64 N. W. 452); (1896) *Bush v. State*, 47 Neb. 642 (66 N. W. 638).

973. (1897.) Objection to an instruction on the ground that it contains two or more distinct propositions will not be noticed when made for the first time in the supreme court. *Morgan v. State*, 51 Neb. 672 (71 N. W. 788).

974. (1899.) The failure of the trial court to number consecutively the instructions is not reversible error if no exception was specifically taken on that point at the time they were given. *Kastner v. State*, 58 Neb. 767 (79 N. W. 713).

Sufficiency of exception.

975. (1876.) Each specific portion of a charge, deemed erroneous, must be pointed out and excepted to. A general exception is unavailing, although the rule will not be as rigidly adhered to in criminal as in civil cases, where it is apparent that the charge given was not applicable, and tended to mislead the jury. *Dodge v. State*, 4 Neb. 220. [Overruled. *Aultman v. Martin*, 49 Neb. 103].

976. (1877.) Exceptions to instructions to be available must be taken at the time the instructions claimed to be erroneous are given; exceptions cannot be taken before. *Garrison v. State*, 6 Neb. 274.

Necessity of motion for new trial.

977. (1891.) Error of trial court not excepted to, nor assigned on the motion for new trial, in the court below, will not be considered as reversible error on review. *Thurman v. State*, 32 Neb. 224 (49 N. W. 338).

978. (1894.) In order to secure a review of alleged errors occurring at the trial, such errors must be pointed out in a motion for a new trial, addressed to the district court, and a ruling obtained thereon. *Dillon v. State*, 39 Neb. 92 (57 N. W. 986); (1895) *Wilson v. State*, 43 Neb. 745 (62 N. W. 209).

979. (1895.) To be available on review, alleged errors occurring at the trial must be pointed out in the motion for a new trial and specifically assigned in the petition in error.

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Madsen v. State, 44 Neb. 631 (62 N. W. 1081).

980. (1897.) Refusal, before trial to require the state to elect as to which count of the information it would rely upon, *held* reviewable without being assigned as error in the motion for a new trial. *Hans v. State*, 50 Neb. 150 (69 N. W. 838).

——— **Disqualification of jurors.**

981. (1895.) Alleged errors in overruling challenges to jurors for cause will not be reviewed by the appellate court where they were not called to the attention of the trial court in the motion for a new trial. *Ford v. State*, 46 Neb. 390 (64 N. W. 1082).

——— **Rulings on evidence.**

982. (1878.) When the error complained of concerns the admission or rejection of testimony on the trial, the record must show that the alleged error was specifically assigned in the motion for a new trial. And it is not enough merely to allege—"For errors in the ruling of the court in allowing evidence objected and excepted to by the defendant." *Walrath v. State*, 8 Neb. 80.

——— **Instructions.**

983. (1881.) Erroneous instructions must be excepted to and brought to the attention of the trial court in the motion for a new trial to be available in a reviewing court, unless the error is so vital in its nature as not to justify the conviction of the accused. *Baldwin v. State*, 12 Neb. 61 (10 N. W. 463).

984. (1891.) To entitle defendant to a review of alleged errors in the giving of instructions and the admission of evidence, there must have been a motion for a new trial, pointing out the errors complained of. *Davis v. State*, 31 Neb. 240 (47 N. W. 851); (1894) *Wanzer v. State*, 41 Neb. 238 (59 N. W. 909); (1898) *Lackey v. State*, 56 Neb. 298 (76 N. W. 561); (1899) *Sullivan v. State*, 58 Neb. 796 (79 N. W. 721).

985. (1895). To entitle a party to a review of instructions the giving of them must be assigned for error in the motion for a new trial and petition in error. *Jolly v. State*, 43 Neb. 857 (62 N. W. 300).

——— **Misconduct of counsel.**

986. (1878.) If it be assigned for error that "the prosecuting attorneys improperly conducted themselves in the argument of the case to the jury," to the prejudice of the prisoner, the record must show that the particular matter complained of was brought to the attention of the court below, and was made one of the grounds of complaint in the motion for a new trial. *Walrath v. State*, 8 Neb. 80.

——— **Misconduct of juror.**

987. (1901.) The alleged misconduct of a juror, to be available on review, must be presented by the record and assigned for error in the motion for a new trial. *Bush v. State*, 62 Neb. 128 (86 N. W. 1062).

——— **Verdict.**

988. (1899.) The question of the effectiveness of a verdict which lacks a finding of an essential element of the crime charged, will be examined and determined in an error proceeding to the supreme court although not of the assignment of the motion for a new trial. *Holmes v. State*, 58 Neb. 297 (78 N. W. 641).

Necessity of exception to ruling on motion for new trial.

989. (1894.) Rulings on evidence and sufficiency of testimony to support a finding will not be considered on error in absence of an exception to the order below overruling a motion for a new trial. *Tuomey v. Willman*, 43 Neb. 28 (61 N. W. 126).

C. Proceedings for Transfer of Cause.

Time for taking proceedings.

990. (1879.) Proceedings in error in a criminal case must be instituted in the supreme court within one year after the rendition of the judgment. *Kountz v. State*, 8 Neb. 294.

991. (1905.) The supreme court has no jurisdiction to review the proceedings and final judgment of the district court in a criminal case, unless proceedings in error are instituted therein within six months after the rendition of such judgment. *Kock v. State*, 73 Neb. 354 (102 N. W. 768).

992. (1905.) The fact that one convicted of a crime has been imprisoned in the penitentiary does not show a disability that will extend the limitations for appealing to the supreme court. *Kock v. State*, 73 Neb. 354 (102 N. W. 768).

Recognizance.

993. (1894.) A recognizance for an appeal in a criminal case is not required to be signed by the defendant and his sureties; but if so signed, it is not for that reason alone invalid. If otherwise properly taken and certified, the signatures of the recognizors may be disregarded as surplusage. *Shupe v. State*, 40 Neb. 524 (59 N. W. 100).

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994. (1894.) A recognizance executed under section 324 of the criminal code, for the purpose of prosecuting an appeal by one who has been convicted of a misdemeanor, conditioned that he "shall be and personally appear at the next term of the district court in and for Saunders county, on the first day of the term thereof, and abide the judgment of the court, and not depart the court without leave, then this recognizance to be void, otherwise to remain in full force and effect," sufficiently complies with the requirements of the statute and is a binding obligation. *Shupe v. State*, 40 Neb. 524 (59 N. W. 100).

995. (1897.) On appeal from a police magistrate a recognizance failing to designate the court wherein the prisoner is to appear is invalid and confers no jurisdiction on the appellate court to try the case. *Kazda v. State*, 52 Neb. 499 (72 N. W. 853).

996. (1904.) To render an appeal to the district court effective in a misdemeanor case, where conviction has been had in an inferior court, the defendant must enter into a recognizance, and with sureties, to be fixed and approved by the court or magistrate trying the case, as is provided by section 324 of the criminal code. A recognizance entered into by the defendant alone is insufficient to perfect a valid appeal. *Zobel v. State*, 72 Neb. 427 (100 N. W. 947).

D. Record and Proceedings Not in Record. Matters to be included in record.

997. (1871.) In a criminal case for felony, in which the indictment or other proceedings are had at a called term of the court, the record should show the request made by the county commissioners to the judge for the term, the order of the judge thereon, and the due publication of notice of the holding of the court. *Burley v. State*, 1 Neb. 385.

998. (1871.) It is not necessary that the record should show affirmatively that every step was taken to convene the court at a called term, in order to support the proceedings had thereat, providing enough appears to establish the facts. *Burley v. State*, 1 Neb. 385.

999. (1871.) Record in criminal cases for felony should show that a venire for summoning the juries has been issued to the sheriff and been by him executed, or that the court, by its order, directed the summoning of the juries, and that the prisoner was present at and during the trial, and at the rendition of the verdict. *Burley v. State*, 1 Neb. 385.

1000. (1885.) Where an objection to argument of counsel is overruled, and exception taken the question may be reviewed in the supreme court upon the language, objection, ruling and exception being made a part of the record by the proper bill of exceptions. *Bradshaw v. State*, 17 Neb. 147 (22 N. W. 361); (1885) *McLain v. State*, 18 Neb. 154 (24 N. W. 720).

1001. (1895.) An assignment that the trial court erred in overruling a motion to strike from the files a certain paper cannot be considered upon review where neither such motion, nor the grounds thereof, appear in the record. *Barr v. State*, 45 Neb. 458 (63 N. W. 856).

1002. (1895.) Mere statements made by a counsel in the course of an argument, even though contained in a bill of exceptions, cannot be considered as evidence of the fact so stated. *Grossman v. State*, 46 Neb. 21 (64 N. W. 354).

1003. (1901.) Error cannot be successfully predicated upon a ruling where the record is contradictory as to what the ruling was. *Dinsmore v. State*, 61 Neb. 418 (85 N. W. 445).

1004. (1901.) An assignment of error for the overruling of a motion for a continuance is unavailing where such application is not included in a transcript. *Russell v. State*, 62 Neb. 512 (87 N. W. 344).

1005. (1903.) An exception by the defendant to a ruling of the trial court on a challenge for cause in a felony case, is not properly presented for consideration on review, where the juror is afterwards excused, and the record does not show the exhaustion of all his peremptory challenges, and that the proposed juror to whom the exception relates was excused by him in the exercise of his right of peremptory challenges. *Jahnke v. State*, 68 Neb. 154 (94 N. W. 158).

1006. (1907.) The supreme court will not consider affidavits made after the trial to determine the question of whether or not a juror had made statements during the deliberations of the jury upon the verdict that were at variance with his *voir dire* examination, when such *voir dire* examination is not in the record, unless it is shown that the complaining party was prevented, without fault on his part, from having such examination taken and preserved in the record. *Feddern v. State*, 79 Neb. 651 (113 N. W. 127).

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——— Complaint or information.

1007. (1895.) An objection on the ground that a particular charge of an information was not included in the complaint upon which an accused was held to answer by the examining magistrate, will not be noticed by this court on petition in error to noticed by the supreme court on petition in error to review a judgment of conviction where such preliminary complaint is not set out or made part of the record. *Wright v. State*, 45 Neb. 44 (63 N. W. 147).

1008. (1900.) Refusal to allow county attorney to file an amended information in a criminal cause cannot be reviewed where the amended information is not in the record. *State v. Dennison*, 60 Neb. 192 (82 N. W. 628).

——— Evidence.

1009. (1874.) In the absence of a record showing the whole of the testimony submitted to the jury, the appellate court will presume that the verdict was abundantly supported by the evidence. *Caw v. State*, 3 Neb. 357.

1010. (1876.) Instructions asked for by a prisoner with reference to an alleged confession, made by him and admitted in evidence, *held* properly refused, there being nothing in the record showing the nature of the confession, to whom made, its extent, or whether corroborated or not. *Dodge v. State*, 4 Neb. 220.

1011. (1893.) Assignments of error involving rulings on the admission of testimony cannot be considered unless the rulings and testimony have been preserved by a bill of exceptions. *Vincent v. State*, 37 Neb. 672 (56 N. W. 320).

1012. (1896.) Assignments of error based upon the existence of facts in respect to which there is no evidence in the record will be disregarded in the supreme court. *McCall v. State*, 47 Neb. 660 (66 N. W. 635).

1013. (1897.) Error in the refusal to give a proffered instruction must affirmatively appear from an inspection of the entire record; and if a case is presented on a transcript unaccompanied by a bill of exceptions, and there may have been a possible state of facts disclosed by the evidence which would have warranted such refusal, the assignment of error must be overruled. *Lauder v. State*, 50 Neb. 140 (69 N. W. 776).

1014. (1897.) Where the bill of exceptions reveals that material evidence introduced on the trial has been omitted, the supreme court cannot review an order denying a motion to direct a verdict, when to do so would require an examination of the proofs. *Hans v. State*, 50 Neb. 150 (69 N. W. 838).

1015. (1897.) An order overruling a motion for appointment of counsel to defend a prisoner cannot be reviewed in the supreme court where the evidence on the hearing was not preserved by a bill of exceptions. *Durfee v. State*, 53 Neb. 214 (73 N. W. 676).

1016. (1903.) When the evidence upon which the trial court decided an issue of fact is not preserved in the record, it will be presumed that the decision is right. *Hoy v. State*, 69 Neb. 516 (96 N. W. 228).

1017. (1907.) Ordinarily, where the bill of exceptions shows upon its face that it is incomplete and does not contain all of the testimony, the supreme court will refuse to consider it; but in a capital case the court will carefully examine the whole record and determine for itself the sufficiency of the evidence contained in the record to sustain the conviction. *Clark v. State*, 79 Neb. 473 (113 N. W. 211).

——— Presentation of question to trial court.

1018. (1905.) Objections to the instructions of the district court will not be regarded unless the record affirmatively shows that they were excepted to and called to the attention of that court by a motion for a new trial. Rule relaxed in cases of capital punishment. *Barker v. State*, 73 Neb. 469 (103 N. W. 71).

1018*a*. (1908.) In order to obtain a review of instructions given to a trial jury by the court, it is necessary that the record show that exceptions were taken to the instructions of which complaint is made. *Carson v. State*, 80 Neb. 619 (114 N. W. 938).

——— Arguments of counsel.

1019. (1878.) Arguments of counsel on questions raised during the trial, and the remarks of the court in deciding them, serve no useful purpose in a bill of exceptions, and should be omitted. *Clough v. State*, 7 Neb. 320.

1020. (1905.) The alleged improper statements of counsel, together with the objection thereto and the rulings of the court thereon, must be preserved in the bill

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of exceptions. *Connolly v. State*, 74 Neb. 340 (104 N. W. 754).

Sufficiency of record.

1021. (1898.) The transcript in this case shows, with sufficient clearness, that an information was filed against the accused in the court below during the term at which he was required to appear, and that the trial was had upon an amended information presented at a subsequent term of the court. *Barker v. State*, 54 Neb. 53 (74 N. W. 427).

Necessity of bill of exceptions to bring matters into record.

1022. (1878.) When papers are stricken from the files they cease to be a part of the case for any purpose, unless brought into the record by order of the court, which may be done by bill of exceptions. *Clough v. State*, 7 Neb. 351.

——— Affidavits.

1023. (1887.) Affidavits used in the hearing of a matter in the trial court must be embodied in a bill of exceptions to be available as evidence in the supreme court. *Richards v. State*, 22 Neb. 145 (34 N. W. 346); (1895) *Wright v. State*, 45 Neb. 44 (63 N. W. 147); (1896) *Korth v. State*, 46 Neb. 631 (65 N. W. 792).

1024. (1894.) An affidavit which it is claimed was used in the hearing of motion for a new trial, but the record does not disclose whether it was used or presented at the hearing of the motion, cannot be considered for any purpose in the supreme court unless presented by bill of exceptions and thus made a part of the record in the case. *Berneker v. State*, 40 Neb. 810 (59 N. W. 372).

1025. (1897.) Affidavits for a continuance must be embodied in a bill of exceptions to be considered in the appellate court. *Hans v. State*, 50 Neb. 150 (69 N. W. 838).

1026. (1901.) Affidavits on an application for a continuance not made a part of the bill of exceptions and found only in the transcript of the record are not properly presented. *Kerr v. State*, 63 Neb. 115 (88 N. W. 240).

1027. (1901.) Affidavits on an application for a motion for a new trial, not made a part of the bill of exceptions, will not be considered. *Kerr v. State*, 63 Neb. 115 (88 N. W. 240).

1028. (1903.) Affidavits offered in support of one of the grounds presented in a motion for a new trial cannot be considered in the supreme court when the same are not preserved in a bill of exceptions. *Martin v. State*, 67 Neb. 36 (93 N. W. 161).

1029. (1903.) Affidavits used on the trial of an issue of fact, do not become part of the record by being certified to the supreme court by the clerk of the district court. The law, and not the clerk, determines what shall constitute the record. *Hoy v. State*, 69 Neb. 516 (96 N. W. 228).

——— Evidence.

1030. (1893.) The evidence embraced in a stipulation of facts between parties to a case tried in the district court must be embodied in the bill of exceptions. Otherwise it will not be examined by the supreme court. *Perry v. State*, 37 Neb. 623 (56 N. W. 315).

1031. (1901.) The evidence relative to the impaneling of a jury must be incorporated in the bill of exceptions and designated in the certificate to make the rulings of the court in denying a challenge for cause the subject of review. *Dinsmore v. State*, 61 Neb. 418 (85 N. W. 445).

1032. (1901.) Evidence adduced on the hearing of a motion for a new trial, to be available on review, must be incorporated in a bill of exceptions. *Holt v. State*, 62 Neb. 134 (86 N. W. 1073).

Expenses of transcript.

1033. (1878.) A person convicted of felony can require from the court reporter a copy of the testimony taken at the trial only at his own expense. And the reporter, if he so choose, may require his fees therefor to be paid in advance. The fact of the prisoner being without the means of making payment does not change the rule. *State, ex rel. Rustmeyer, v. Moore*, 8 Neb. 22. [Modified by statute. Laws 1879, p. 93, sec. 49. Modifying statute unconstitutional. *Morgan v. State*, 48 Neb. 798. Overruled. *State v. Cornell*, 50 Neb. 526.]

Authentication and certification.

1034. (1894.) The law makes no provision for the certification by the shorthand reporter of the proceedings of the district court, hence a transcript of his notes, although accompanied by a formal certificate, is not admissible as independent evidence. *Smith v. State*, 42 Neb. 356 (60 N. W. 585).

1035. (1894.) A bill of exceptions must be certified by the clerk as being a part of the record or as being the original bill. *Wax v. State*, 43 Neb. 18 (61 N. W. 117).

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1036. (1897.) A certificate "that the foregoing is all the evidence offered by either party on the trial of the cause" is not sufficient to embrace the *voir dire* examination of a juror, or the evidence adduced on the hearing of a challenge to the whole panel or array of jurors. *Durfee v. State*, 53 Neb. 214 (73 N. W. 676); (1901) *Coil v. State*, 62 Neb. 15 (86 N. W. 925).

1037. (1901.) Whether the trial court erred in overruling a challenge for cause, on the ground that a juror had been summoned and served as such within two years prior thereto, not interposed until after the juror had been passed for cause, and when the right to peremptory challenges was being exercised, not determined, because purported bill of exceptions is not properly authenticated. *Coil v. State*, 62 Neb. 15 (86 N. W. 925).

Conclusiveness and effect.

1038. (1895.) The transcript of the record filed in the supreme court imports absolute verity. If incorrect, or it fails to speak the truth, the correction must be made in the trial court and not in the supreme court. *Ford v. State*, 46 Neb. 390 (64 N. W. 1082).

1039. (1897.) The record of the trial court, when properly authenticated, imports absolute verity. If such record is partial or incorrect, the remedy is by means of an appropriate proceeding to secure a correction thereof in the lower court. *Morgan v. State*, 51 Neb. 672 (71 N. W. 788).

Amendment and correction.

1040. (1903.) Where a record of the trial court filed in the supreme court is found to be incorrect, the remedy is by appropriate proceedings to secure a correction thereof in the lower court. *Reno v. State*, 69 Neb. 391 (95 N. W. 1042).

1041. (1903.) Serving notice of a motion to have the record corrected, and of the hearing thereof in the district court, on the attorney of the defendant who was prosecuting the error proceedings, *held* sufficient. *Reno v. State*, 69 Neb. 391 (95 N. W. 1042).

Questions presented for review.

1042. (1889.) Where a case is presented in the supreme court upon transcript alone, without bill of exceptions, it will be presumed that the proceedings below were regular and the instructions correct, unless the latter contain statements of the law which could not be correct in any possible case made by the proof under the pleadings. *Willis v. State*, 27 Neb. 93 (42 N. W. 920).

1043. (1895.) A ruling below on motion to compel an election as to whether the case in which it was filed or another case involving the same offense should be dismissed cannot be reviewed in the supreme court in absence of a showing that two such cases were in fact pending. *Lindsay v. State*, 46 Neb. 177 (64 N. W. 716).

1044. (1901.) In proceedings under section 515 of the criminal code, the supreme court will confine itself to the record as in other cases. *State v. Moore*, 1 Unof. 213 (95 N. W. 334).

E. Assignments of Error, and Briefs.

Necessity of assignments.

1045. (1887.) The supreme court will consider only such questions as are presented to it by assignments of error. *Fager v. State*, 22 Neb. 332 (35 N. W. 195).

1046. (1897.) A question discussed in the brief of counsel, but not raised by any assignment in the petition in error, will not be considered. *Raker v. State*, 50 Neb. 202 (69 N. W. 749).

1047. (1900.) Errors which have not been specifically assigned will not be considered. *Baer v. State*, 59 Neb. 655 (81 N. W. 856).

1048. (1902.) Rulings of the trial court not alleged as error in the petition in error will not be reviewed. *Reed v. State*, 66 Neb. 184 (92 N. W. 321).

Sufficiency of assignments.

1049. (1894.) An assignment of error as to the giving or refusing *en masse* of certain instructions will be considered no further than to ascertain that any one of such instructions was properly given or refused. *Berneker v. State*, 40 Neb. 810 (59 N. W. 372); (1894) *Wax v. State*, 43 Neb. 18 (61 N. W. 117); (1895) *Thompson v. State*, 44 Neb. 366 (62 N. W. 1060); (1901) *Bush v. State*, 62 Neb. 128 (86 N. W. 1062).

1050. (1894.) An assignment of error in the following terms: "The court erred in admitting evidence of defendant's receiving property at dates subsequent to the receiving on which and for which he was convicted," *held*, to be too indefinite, in that it is too general and failed to designate any particular or specific portion of the testimony of which complaint is made. *Berneker v. State*, 40 Neb. 810 (59 N. W. 372).

1051. (1894.) An assignment in a peti-

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tion in error of "error of law occurring at the trial" is insufficient to present for review the rulings of the trial court on the admission or exclusion of testimony. *Wanzer v. State*, 41 Neb. 238 (59 N. W. 909); (1900) *Hawkins v. State*, 60 Neb. 380 (83 N. W. 198).

1052. (1897.) An assignment in a petition in error that the court erred in denying the motion for a new trial is too indefinite to be available where several distinct grounds are stated in the motion. *Hans v. State*, 50 Neb. 150 (69 N. W. 838).

1053. (1900.) An assignment in a petition in error should specifically indicate the ruling of which complaint is made. *Hawkins v. State*, 60 Neb. 380 (83 N. W. 198).

1054. (1900.) Instructions should be assigned specifically in the petition in error. *Hawkins v. State*, 60 Neb. 380 (83 N. W. 198).

Briefs.

1055. (1895.) A conviction in a criminal case will ordinarily be reversed whenever the attorney general, after an examination of the record, declines to file a brief on the ground that the judgment is not supported by the evidence. *George v. State*, 44 Neb. 757 (62 N. W. 1094).

F. Hearing.

In general.

1056. (1882.) Where the proof fails to show that the accused committed the crime, or that he aided in its commission, but at most merely shows a strong suspicion, it is the duty of the attorney for the state to call the attention of the court to that fact. *Morrison v. State*, 13 Neb. 527 (14 N. W. 475).

Order of hearing.

1057. (1905.) Criminal cases take precedence in the hearing of causes, in order that the party, if innocent, may be discharged. *Kock v. State*, 73 Neb. 354 (102 N. W. 768).

G. Review.

Scope and extent in general.

1058. (1895.) Mere statements made by a counsel in the course of an argument, even though contained in a bill of exceptions, cannot be considered as evidence of the facts so stated. *Grossman v. State*, 46 Neb. 21 (64 N. W. 354).

1059. (1905.) Assignments of error which involve questions (such as the right of the state to prosecute by information) that have been often determined by the supreme court, and have by repeated decisions been declared to be the settled law of this state, will not be further considered or discussed. *Barker v. State*, 73 Neb. 469 (103 N. W. 71).

Parties entitled to allege error.

1060. (1889.) Objections were predicated on certain testimony of an expert, but it appeared from the record that the testimony objected to had been first drawn out on cross-examination by the attorneys for the prisoner. *Held*, That the objections could not be considered. *Reynolds v. State*, 27 Neb. 90 (42 N. W. 903; 20 Am. St. Rep. 659).

1061. (1899.) One requesting an instruction on a specific point cannot complain that the court, on its own motion, gave an instruction on the same subject. *Smith v. State*, 58 Neb. 531 (78 N. W. 1059).

Judicial notice.

1062. (1907.) In the supreme court, where appeals from a conviction of a violation of a city ordinance, are not triable *de novo*, judicial notice will not be taken of whatever facts the lower court was required to notice judicially, and hence such matters must be included in and made a part of the record, or the correctness of the rulings with respect thereto will be presumed. *Steiner v. State*, 78 Neb. 147 (110 N. W. 723).

Presumptions.

1063. (1874.) Where the jury separates during the trial of a criminal prosecution, in the absence of a showing on the record, it will be presumed that the court properly admonished as provides for by section 484 criminal code (Comp. Stats.). *Caw v. State*, 3 Neb. 357; (1879) *St. Louis v. State*, 8 Neb. 405.

1064. (1877.) Where the record does not show that defendant was present when the jury viewed the scene of the alleged crime, but does show that he was present in court on the day of the view, it will be presumed that he continued in presence of the jury during the viewing, provided nothing in the record contradicts that theory. *Fillion v. State*, 5 Neb. 351.

1065. (1878.) The record shows that on the 31st of January the court adjourned until the following morning at 9 o'clock. There was no formal entry, in the record of the case, of the opening of the court on the 1st day of February, but it did appear that on "Friday, February 2, 1877, court met at

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9 o'clock A. M., pursuant to adjournment." It was objected to the record that it showed there was a failure of the court to meet according to the adjournment of the 31st of January, and that consequently the term must be considered as having lapsed. *Held*, That by the entry of February 2, reciting that the court convened on that day, "pursuant to adjournment," it was sufficiently shown that the court must have been in session of the 1st day of February. *Held, further*, That to make such objection available it must be shown, affirmatively, that there was a failure of the court to meet, or its continuance in legal session will be presumed so long as business is transacted as of that term, up to the time appointed for the next regular term. *Clough v. State*, 7 Neb. 320.

1066. (1882.) The presence of a prisoner at his trial being once shown by the record will be presumed to have continued to the end unless the contrary be made to appear. *Folden v. State*, 13 Neb. 328 (14 N. W. 412); (1897) *Bolln v. State*, 51 Neb. 581 (71 N. W. 444).

1067. (1894.) The indorsement of the name of a witness on the copy of the information contained in the transcript of the case raises the presumption that such indorsement was made at the proper time, and in the absence of proof to the contrary such presumption will prevail. *Berneker v. State*, 40 Neb. 810 (59 N. W. 372).

1068. (1898.) The absence of jurisdiction of the district court will not be presumed, but must affirmatively appear from the face of the record. *Barker v. State*, 54 Neb. 53 (74 N. W. 427).

1069. (1903.) In the absence of competent evidence to the contrary, the presumption will be indulged in that the trial court ruled correctly on a motion for a new trial, where the ground relied on is required to be supported by evidence. *Martin v. State*, 67 Neb. 36 (93 N. W. 161).

1070. (1903.) Where the evidence has not been preserved by a bill of exceptions, the presumption is that instructions to the jury which refer to the testimony are based upon and supported by the evidence in the case. *Von Haller v. State*, 76 Neb. 161 (107 N. W. 233).

1071. (1907.) In a proceeding in error, where the record does not contain a copy of the warrant of commitment, it will be presumed that such warrant conforms to all of the requirements of the law. *Leiby v. State*, 79 Neb. 485 (113 N. W. 125).

1072. (1907.) Where the record in a criminal prosecution discloses that the defendant was present during the trial, but is silent as to whether he was present when the verdict was received, it will be presumed that the verdict was properly received and that the defendant was present in court at the time. *Feddern v. State*, 79 Neb. 651 (113 N. W. 127).

Discretion of lower court.

1073. (1876.) Where there is no abuse of the discretion vested in the district court, in excusing persons from serving on juries, its action in that regard will not be reviewed in the supreme court. *Dodge v. State*, 4 Neb. 220.

1074. (1877.) Within the limits fixed by the statute, the term of imprisonment to which a party convicted of crime may be sentenced, rests entirely with the judge of the court before whom the case was tried, and the judgment will not be set aside because it seems to be severe. *Geiger v. State*, 6 Neb. 545; (1882) *Morrison v. State*, 13 Neb. 527 (14 N. W. 481); (1892) *Weinecke v. State*, 34 Neb. 14 (51 N. W. 307); (1895) *Wright v. State*, 45 Neb. 44 (63 N. W. 147); (1905) *Keeler v. State*, 73 Neb. 441 (103 N. W. 64).

1075. (1896.) The question of whether the state will be required to elect between the several counts, if a motion is made by defendant that it be so required, will rest in the sound discretion of the trial court, and unless it appears that there has been an abuse of such discretion in overruling the motion, it will not be available as error. *Korth v. State*, 46 Neb. 631 (65 N. W. 792).

1076. (1897.) A witness may be cross-examined as to his interest or bias, but the extent of the examination rests largely in the discretion of the trial court. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

1077. (1901.) The ruling of a trial court in deciding a challenge for cause will not be disturbed unless an abuse of discretion is shown. *Dinsmore v. State*, 61 Neb. 418 (85 N. W. 445); (1901) *Coil v. State*, 62 Neb. 15 (86 N. W. 925).

1078. (1905.) The determination of the trial court upon an application of the accused for change of venue will not be disturbed, unless it appears from the record that its conclusion is wrong. Its discretion in the matter is a legal and not an arbitrary

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one. *Lucas v. State*, 75 Neb. 11 (105 N. W. 976).

Questions of fact, verdict and findings.

1079. (1875.) A verdict without evidence to support it, should be set aside; but if the evidence is conflicting and the issues fairly submitted to the jury, the verdict should not be disturbed. *Palmer v. People*, 4 Neb. 68.

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1080. (1879.) In criminal cases all questions of fact are to be settled by the jury, and unless the want of sufficient evidence to support their finding be very clear it will not be disturbed. *Schlenckcr v. State*, 9 Neb. 241 (1 N. W. 857); (1880) *Monroe v. State*, 10 Neb. 448 (7 N. W. 285); (1904) *Henry v. State*, 72 Neb. 252 (100 N. W. 295).

1081. (1880.) A party cannot be convicted of a felony upon a mere suspicion. The law requires the testimony to exclude all reasonable doubt, and while to a great extent the weight of the testimony and degree of credibility to be given to the witnesses must be left to the jury, the court, where the verdict is unsupported by evidence or is clearly wrong, will set it aside and grant a new trial. *Priest v. State*, 10 Neb. 393 (6 N. W. 468).

1082. (1884.) Where the testimony is conflicting, and it is fairly submitted to a jury, a new trial will not be granted if the testimony is sufficient to sustain the verdict. *Murphy v. State*, 15 Neb. 383 (19 N. W. 489); (1900) *Cardwell v. State*, 60 Neb. 480 (83 N. W. 665); (1902) *Van Buren v. State*, 63 Neb. 453 (88 N. W. 671); (1902) *Musfelt v. State*, 64 Neb. 445 (90 N. W. 237); (1903) *Parker v. State*, 67 Neb. 555 (93 N. W. 1037).

1083. (1886.) Questions of fact are for the trial jury to determine, and when the testimony is conflicting a verdict of guilty in a prosecution for a misdemeanor will not be set aside if there is evidence sufficient to sustain it, notwithstanding it may be contradicted by the testimony on the part of the defense. *Seling v. State*, 18 Neb. 548 (26 N. W. 254).

1084. (1894.) It is only when there is a total failure of proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty. *Wanzer v. State*, 41 Neb. 238 (59 N. W. 909).

1085. Where the evidence by which it is sought to impeach a verdict on account of the prejudice of a single juror, subsequently discovered, is conflicting, an order denying a new trial will not as a rule be disturbed on appeal. (1894) *Hill v. State*, 42 Neb. 503 (60 N. W. 916); (1895) *Murphey v. State*, 43 Neb. 34 (61 N. W. 491).

1086. (1895.) Where a new trial is asked for on the ground of misconduct of parties, jurors, or witnesses, and the evidence is conflicting as to the existence of such misconduct, the finding of the trial court will not be disturbed. *Carleton v. State*, 43 Neb. 373 (61 N. W. 699).

1087. (1895.) Facts determined upon consideration by the district court of contradictory affidavits will be presumed by the supreme court to have been fully established by the proofs. *Grossman v. State*, 46 Neb. 21 (64 N. W. 354).

1088. (1895.) Where the evidence as to the alleged misconduct of jurors is conflicting, the finding of the trial court thereupon will not be disturbed. *McMahon v. State*, 46 Neb. 166 (64 N. W. 694).

1089. (1895.) A ruling of the district court upon a question of fact presented by motion supported by affidavits will not be disturbed in the supreme court unless such ruling is clearly without support of sufficient evidence. *Lindsay v. State*, 46 Neb. 177 (64 N. W. 716).

1090. (1895.) While the district court might properly set aside the verdict of guilty on the mere showing that the prosecuting attorney, notwithstanding the instructions of the court forbidding conversation with jurors, had talked with one of them, yet where, upon a full disclosure of what was in fact said, and that it had no relation whatever to the subject matter of the trial in progress, the district court overruled a motion for a new trial, such motion will not be disturbed in the supreme court. *Lindsay v. State*, 46 Neb. 177 (64 N. W. 716).

1091. (1899.) A finding assailed as not sustained by sufficient evidence will not be disturbed unless clearly wrong. *Ward v. State*, 58 Neb. 719 (79 N. W. 725).

1092. (1902.) The finding of the trial court in deciding a challenge for cause will not be set aside by the appellate court, unless manifest error appears. *Rhea v. State*, 63 Neb. 461 (88 N. W. 789).

1093. (1904.) In criminal trials the

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question of the qualification of a juryman is one of fact for the determination of the trial court, and, unless it appears to be against the weight of the evidence, it will not be overruled by the supreme court. *Lillie v. State*, 72 Neb. 228 (100 N. W. 316).

1094. (1905.) When two or more defendants are tried together for the same offense, and different penalties are inflicted, and it appears from the evidence that the defendant receiving the least punishment is at least equally guilty, it may become necessary for the supreme court to determine from the evidence, as an original question, whether the punishment of the defendants or some of them should be reduced. *Keeler v. State*, 73 Neb. 441 (103 N. W. 64).

1095. (1906.) Where, by a supplemental motion for a new trial, the competency of a juror, on account of an alleged bodily infirmity, amounting to a disability, is put in issue, and is determined as a matter of fact upon competent evidence introduced before the trial court, the finding of the fact on that question will not be set aside by a court of review, unless it is unsupported by the evidence and is clearly wrong. *Reed v. State*, 75 Neb. 509 (106 N. W. 649).

1096. (1907.) Where evidence is conflicting the jury are the judges of its weight, and their verdict will not be molested, in such a case, unless it appears to be clearly wrong. *Craig v. State*, 78 Neb. 466 (111 N. W. 143).

1097. (1907.) Where the question as to the alleged misconduct of an attorney in his argument to the jury has been submitted to and decided by the trial court on conflicting evidence, such decision will not be disturbed unless it is unsupported by the testimony and is clearly wrong. *Clark v. State*, 79 Neb. 473 (113 N. W. 211).

1098. (1907.) A judgment of conviction in a criminal case will not be set aside because of conflicting evidence, where the evidence of the state, if believed by the jury, is sufficient to sustain the verdict. *Wheeler v. State*, 79 Neb. 491 (113 N. W. 253).

1098*a*. (1907.) Where the question as to the alleged misconduct of the county attorney in conducting the prosecution has been submitted to and decided by the trial court on conflicting evidence, such decision will not be disturbed unless it is unsupported by the testimony and is clearly wrong. *Harris v. State*, 80 Neb. 195 (114 N. W. 168).

1098*b*. (1907). A judgment in a misdemeanor case rendered upon conflicting evidence will not be reversed simply because the appellate court receives a different impression of the evidence than did the jury and trial court, but such judgment will be upheld, unless it is clearly wrong. *Gebhardt v. State*, 80 Neb. 363 (114 N. W. 290).

1098*c*. (1908.) Upon the trial there was a sharp conflict between the testimony of the witnesses for the state and those on behalf of the defense. If the jury believed the witnesses produced by the state there was sufficient evidence to sustain a verdict finding the accused guilty. They being the sole judges of the weight of the evidence, their finding cannot be molested. *Carson v. State*, 80 Neb. 619 (114 N. W. 938).

Harmless error.

1099. (1882.) An immaterial error, or one which could not have prejudiced the prisoner, is not a ground for a new trial *Folden v. State*, 13 Neb. 328 (14 N. W. 412).

1100. (1893.) Where it is apparent that the plaintiff in error has not been prejudiced by the ruling complained of, the judgment will be affirmed, and the supreme court will not examine the record for the purpose of determining wheather or not such ruling is technically correct. *May v. State*, 38 Neb. 211 (56 N. W. 804).

1101. (1897.) Denial of a jury trial upon an issue of fact tendered by a plea in abatement *held* not reversible error, where the record fails to disclose that the prisoner was prejudiced. *Bolin v. State*, 51 Neb. 581 (71 N. W. 444).

1102. (1899.) A ruling, if erroneous, cannot be availed of if so seasonably retracted that by such ruling no prejudice could result to the party complaining of it. *McVey v. State*, 57 Neb. 471 (77 N. W. 1111).

1103. (1899.) An erroneous conviction will not be affirmed on the ground that "outraged Justice has laid her avenging lash on the back of one who honestly deserves the scourge." *Reynolds v. State*, 58 Neb. 49 (78 N. W. 483).

——— Burden of showing prejudice.

1104. (1895.) To secure the reversal of a judgment in an error proceeding to the supreme court it is not enough to establish that the district court erred, but it must appear from the record that such error may have caused or contributed to the judgment under review and thus have prejudiced the complaining party. *Tracey v. State*, 46 Neb. 361 (64 N. W. 1069).

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1105. (1897.) The burden is on the party complaining of the refusal of an instruction not only to show that he was probably prejudiced by such refusal, but that the entire instruction is correct as a proposition of law and applicable to the facts in evidence in the case. *Davis v. State*, 51 Neb. 201 (70 N. W. 984).

1106. (1901.) Errors will not be presumed but must be affirmatively shown from the record. *Coil v. State*, 62 Neb. 15 (86 N. W. 925).

1107. (1902.) Under the rule that error must affirmatively appear, the burden is on the complaining party to show that an assertion of personal belief by counsel for the opposing party was not given as a deduction from the evidence. *Reed v. State*, 66 Neb. 184 (92 N. W. 321).

——— **Ruling as to indictment.**

1108. (1897.) Error cannot be predicated upon the overruling of a demurrer to a count in the information, where a *nolle prosequi* is subsequently entered to such count. *Bartley v. State*, 53 Neb. 310 (73 N. W. 744).

——— **Denial of continuance.**

1109. (1905.) The defendant in a criminal trial is not prejudiced by the denial of his application for continuance upon the ground of absence of material witnesses, if the matters to be proved by the evidence of the absent witnesses are conclusively established upon the trial by other witnesses and are not controverted by the state. *Lucas v. State*, 75 Neb. 11 (105 N. W. 976).

——— **Ruling on challenge of juror.**

1110. (1883.) Although there may be error in overruling a challenge to a juror for cause, yet if the prisoner be not compelled to exhaust his peremptory challenges to exclude him from the panel, it is error without prejudice. *Bohanan v. State*, 15 Neb. 209 (18 N. W. 129).

1111. (1889.) The overruling of a challenge to an incompetent juror in a criminal case is not cured by a subsequent peremptory challenge of such juror by defendant, where he has exhausted his peremptory challenges. *Thurman v. State*, 27 Neb. 628 (43 N. W. 404.)

1112. (1894.) Where the trial court overruled defendant's challenge for cause to a juror, and the record is silent as to the manner in which the juror was dimissed, and does not show that the defendant was compelled to exhaust his peremptory challenges to exclude him from the jury, and the record does disclose that the party challenged was not one of the jurors who tried the case, *held*, that, so far as indicated by the record, there was no prejudicial error in overruling the challenge to the juror. *Blenkiron v. State*, 40 Neb. 11 (58 N. W. 587).

1113. (1897.) A party by failing to exercise his right of peremptory challenge will be held to have waived any objection on account of a juror's disqualification then known to exist. *Morgan v. State*, 51 Neb. 672 (71 N. W. 788).

1114. (1897.) Error cannot be predicated upon the overruling of a challenge to a juror for cause, where the record fails to disclose that the complaining party exhausted his peremptory challenges. *Bartley v. State*, 53 Neb. 310 (73 N. W. 744).

1115. (1899.) A ruling on a challenge for cause will not be disturbed on review unless clearly wrong. *Ward v. State*, 58 Neb. 719 (79 N. W. 725).

——— **Admission or exclusion of evidence.**

1116. (1878.) To make the admission of immaterial testimony ground for a new trial, it must at least have tended to prejudice the accused. *Clough v. State*, 7 Neb. 320.

1117. (1879.) If a witness for the prosecution in answer to a proper question give immaterial testimony prejudicial to the prisoner, which on objection is promptly excluded from the consideration of the jury, this is not ground for reversing the judgment. *St. Louis v. State*, 8 Neb. 405.

1118. (1886.) Where an objection to a question is sustained and the testimony excluded, if the witness is afterwards recalled and fully examined upon the matters presented by the former interrogatories the ruling of the court in sustaining the objection, even if erroneous, will not be sufficient cause for reversing a judgment unless it should affirmatively appear that the prisoner was prejudiced thereby. *Ballard v. State*, 19 Neb. 609 (28 N. W. 271); (1901) *Coil v. State*, 62 Neb. 15 (86 N. W. 925).

1119. (1891.) The admission of testimony of witnesses whose names had not been indorsed on the information is not prejudicial where they only testified to facts admitted by defendant in his testimony. *Langford v. State*, 32 Neb. 782 (49 N. W. 766).

1120. (1893.) In a criminal prosecution, evidence which on its face is clearly incom-

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petent and prejudicial to the accused should not be introduced, and if the prosecution, without a promise to prove other facts to render it competent, is permitted to introduce such evidence and it is thus placed before the jury, an order of the court afterwards made to strike it out does not wholly cure the wrong and may be cause for reversing the judgment. *Bedford v. State*, 36 Neb. 702 (55 N. W. 263).

1121. (1894.) The admission of incompetent testimony to prove a fact is harmless error, where such fact is established by other evidence. *Lamb v. State*, 40 Neb. 312 (58 N. W. 963); (1895) *Ford v. State*, 46 Neb. 390 (64 N. W. 1082); (1897) *Kelly v. State*, 51 Neb. 572 (71 N. W. 299).

1122. (1897.) A case will not be reversed because of the limitation placed by the court upon the cross-examination of a witness as to his interest or bias, unless it appears from the record that the party against whom the witness was called was probably prejudiced by such limitation. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

1123. (1897.) Error cannot be predicated on the admission of testimony, where the fact sought to be established by it is subsequently admitted during the trial upon the record by the parties. *Whitney v. State*, 53 Neb. 287 (73 N. W. 696).

1124. (1898.) Admission of immaterial testimony is not ground for reversal where it did not prejudice the rights of the party complaining. *Carrall v. State*, 53 Neb. 431 (73 N. W. 939).

1125. (1901.) Overruling objections to an improper question to witnesses of defendant is not reversible error, when the answer was not prejudicial. *Nightingale v. State*, 62 Neb. 371 (87 N. W. 158).

1126. (1902.) Where a witness has testified in rebuttal that the defendant had been arrested prior to the time of the charge for which he was being tried, and such evidence is stricken out on motion of the defendant, he cannot predicate error thereon. *McCormick v. State*, 66 Neb. 337 (92 N. W. 740).

1127. (1903.) Error in sustaining an objection to a question is without prejudice, if the same question is afterwards asked and answered. *Edwards v. State*, 69 Neb. 386 (95 N. W. 1038); (1906) *Reed v. State*, 75 Neb. 509 (106 N. W. 649).

1128. (1907.) Where a defendant voluntarily testified as a witness in his own behalf, and the facts testified to by him, as well as sufficient other competent evidence, clearly show that he is guilty of the crime charged, a verdict of guilty will not be set aside on account of errors in the admission of evidence. *O'Hearn v. State*, 79 Neb. 513 (113 N. W. 130).

——— Instructions.

1129. (1874.) An erroneous instruction given on a point entirely outside of the case as made by the evidence furnishes no grounds for a reversal of a judgment otherwise correct. *Caw v. State*, 3 Neb. 357.

1130. (1883.) Although it may be found that detached portions of a charge are not technically correct, yet if, taking the whole charge together, the law was fairly given, and no prejudice done to the accused, the judgment will not be disturbed. *Parrish v. State*, 14 Neb. 60 (15 N. W. 357).

1131. (1886.) If one of the paragraphs in the charge of the court to the jury misstates the law upon a material point, such error will not be cured by another paragraph which states the law correctly, because the jury would be left in doubt as to which paragraph was correct. *Ballard v. State*, 19 Neb. 609 (28 N. W. 271); (1895) *Barr v. State*, 45 Neb. 458 (63 N. W. 856); (1895) *Metz v. State*, 46 Neb. 547 (65 N. W. 190); (1897) *Raker v. State*, 50 Neb. 202 (69 N. W. 749); (1897) *Henry v. State*, 51 Neb. 149 (70 N. W. 924; 66 Am. St. Rep. 450); (1897) *Beck v. State*, 51 Neb. 106 (70 N. W. 498); (1898) *Bergeron v. State*, 53 Neb. 752 (74 N. W. 253); (1899) *Sweenie v. State*, 59 Neb. 269 (80 N. W. 815); (1901) *Thompson v. State*, 61 Neb. 210 (85 N. W. 62; 87 Am. St. Rep. 453); (1901) *Howell v. State*, 61 Neb. 391 (85 N. W. 289).

1132. (1895.) The giving of an instruction that a misdemeanor prosecution was not barred until 18 months, instead of one year, is error without prejudice, where the undisputed evidence discloses that the act charged was committed less than a year prior to the filing of the complaint. *Jolly v. State*, 43 Neb. 857 (62 N. W. 300).

1133. (1895.) It is not reversible error to give an erroneous instruction where it could not have prejudiced the complaining party. *Debney v. State*, 45 Neb. 856 (64 N. W. 446; 34 L. R. A. 851); (1896) *Hornberger v. State*, 47 Neb. 40 (66 N. W. 23); (1897) *Ferguson v. State*, 52 Neb. 432 (72 N. W. 590; 66 Am. St. Rep. 512); (1897)

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Whitney v. State, 53 Neb. 287 (73 N. W. 696); (1900) *McArthur v. State*, 60 Neb. 390 (83 N. W. 196).

1134. (1896.) Although there was a failure to instruct as to certain points, so that they were in effect withdrawn from the consideration of the jury, yet if it is clear that the jury have formed the right conclusion and no prejudice has resulted from the omission, it is not error which calls for a reversal of the judgment. *Pjarrou v. State*, 47 Neb. 294 (66 N. W. 422).

1135. (1896.) Where the evidence fails to show an offense of a less degree than that charged, the failure to give an instruction defining the lesser offense is not prejudicial error. *Fager v. State*, 49 Neb 439 (68 N. W. 611).

1136. (1897.) In an instruction the trial court used this language: "And if the jury find from the evidence that all the incriminating circumstances upon which the prosecution relies for a conviction will as well apply to some other person or persons as to the defendant, or if such facts and circumstances are reconcilable with any reasonable theory or hypothesis other than the guilt of the defendant, or if such facts and circumstances, together with the direct evidence offered in this case, do not satisfy the minds of the jury beyond any reasonable doubt of the guilt of defendant then you should, by your verdict, acquit him." *Held*, That the use of the expression "incriminating circumstances," if error, was without prejudice to the prisoner. *Davis v. State*, 51 Neb. 301 (70 N. W. 984).

1137. (1902.) The giving of an instruction which is an inaccurate sttaement of the law, is not reversible error, where it is immediately withdrawn and a proper instruction substituted. *Reed v. State*, 66 Neb. 184 (92 N. W. 321).

1138. (1903.) An instruction to the jury excepted to by the defendant examined, and, although incorrect in the way framed, held to be neither confusing nor prejudicial to the defendant. *Martin v. State*, 67 Neb. 36 (93 N. W. 161).

1139. (1907.) In a prosecution for murder in the first degree, if the evidence establishes conclusively that the defendant is either guilty of the crime charged or is entirely innocent, a failure to instruct the jury in regard to inferior degrees of the crime charged in the information is not prejudicial error. *Clark v. State*, 79 Neb. 482 (113 N. W. 804).

——— Arguments and conduct of counsel.

1140. (1896.) Where counsel for the state referred in an argument to the jury to facts not in evidence, and upon objection that the statements were unwarranted by the evidence the district court instructed the jury to disregard such statements, there was left no ground for complaint, for the reason that the court, when appealed to, granted all relief prayed for. *Hoover v. State*, 48 Neb. 184 (66 N. W. 1117); (1901) *Argabright v. State*, 62 Neb. 402 (87 N. W. 146).

1141. (1902.) Where a defendant in a criminal case was asked on cross-examination whether he did not serve a term in a reformatory institution, and an objection to the question was sustained and the jury directed to disregard it, *held*, that the incident was too trivial to exert any influence in the decision of the case. *Reed v. State*, 66 Neb. 184 (92 N. W. 321).

Errors waived in appellate court.

1142. (1901.) Rulings not argued are deemed waived. *Russell v. State*, 62 Neb. 512 (87 N. W. 344).

1142*a*. (1907.) General assignments of error for the admission or rejection of evidence will not be discussed unless specifically called to the attention of the court by brief or oral argument where no manifest error appears. *Harris v. State*, 80 Neb. 195 (114 N. W. 168).

Subsequent appeals.

1143. (1886.) A question having been decided in a previous ruling becomes the law of the case when before the court on a second hearing. *Marion v. State*, 20 Neb. 233 (29 N. W. 911; 57 Am. Rep. 825).

1144. (1901.) Where, in a criminal prosecution, instructions given the jury are assigned as error and on appeal such instructions held properly given, and on a subsequent trial the same instructions are given and again assigned as error, the decision of the question on the first appeal will be held to be the law of the case and followed in reviewing the case on the appeal last taken. *Argabright v. State*, 62 Neb. 402 (87 N. W. 146).

1145. (1901.) The defendant on a former trial was found guilty of murder in the first degree, and on error to the supreme court the evidence was examined and found sufficient to support the verdict. A subsequent trial resulted in a like verdict and on error it is again urged that the evidence is in-

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sufficient to support the verdict. The evidence against the defendant in the last trial being substantially the same and fully as strong and convincing, the decision on the former trial has become the law of the case. *Argabright v. State*, 62 Neb. 402 (87 N. W. 146).

1146. (1907.) If, upon a second appeal to the supreme court, the same state of facts substantially is presented as upon the former appeal, the former decision upon the sufficiency of the evidence settles the law of the case and is conclusive. *Lucas v. State*, 78 Neb. 454 (110 N. W. 145).

H. Determination and Disposition of Cause.

Reduction of sentence.

1147. (1889.) Under the provisions of the act approved March 31, 1887, it is made the duty of the supreme court in all criminal cases pending therein on error, where the sentence is excessive, to reduce the same and render such sentence against the person convicted, as is warranted by the evidence. *Anderson v. State*, 26 Neb. 387 (41 N. W. 951).

1148. (1889.) The act of reducing a sentence under the statute of 1887, and rendering such a one as is warranted by the evidence, is in no sense a commutation nor the exercise of clemency. That is an act of grace to be exercised or not by the executive alone, in his discretion. But the reduction of a sentence and the imposition of a new one based upon the testimony, is a right which every one convicted of a crime and upon whom a sentence higher than is warranted by the testimony has been imposed may demand under the act referred to. *Anderson v. State*, 26 Neb. 387 (41 N. W. 951).

1149. (1896.) A sentence should not be reduced in an error proceeding because of apparent undue severity. *Barney v. State*, 49 Neb. 515 (68 N. W. 636). [Overruled. *Palmer v. State*, 70 Neb. 136.]

1150. (1903.) Section 509*a* of the criminal code, which provides that the supreme court may reduce an excessive sentence and pronounce such sentence as is, in the opinion of the court, warranted by the evidence in the record before it, is not violative of the provision of the constitution which forbids the exercise by the judiciary of any power properly belonging to the executive branch of the government. *Palmer v. State*, 70 Neb. 136 (97 N. W. 235).

Reversal.

1151. (1882.) Where a judgment against a person for horse stealing was reversed, a judgment of conviction against one accused of concealing him should also be reversed, regardless of errors therein. *Ray v. State*, 13 Neb. 55 (13 N. W. 2).

1152. (1889.) Where a judgment of conviction, rendered in the district court against one charged with larceny, is reversed in the supreme court on the ground that there had been no preliminary examination as required by law, such accused is not necessarily discharged thereby, but proceedings against him may be commenced anew by making complaint under oath without releasing him from custody. *White v. State*, 28 Neb. 341 (44 N. W. 443).

1153. (1898.) A conviction will ordinarily be reversed where the attorney general declines to file a brief on the ground that the evidence is insufficient to sustain the judgment. *Lorenz v. State*, 53 Neb. 463 (73 N. W. 935).

——— Directing judgment in lower court.

1154. Where there is found no error in the record, except an irregularity in entering judgment upon the verdict, a cause will be remanded to the district court with instructions to enter judgment on the verdict in the manner prescribed by law. (1875) *Dodge v. People*, 4 Neb. 220; (1895) *Griffen v. State*, 46 Neb. 282 (64 N. W. 966); (1896) *Hornberger v. State*, 47 Neb. 40 (66 N. W. 23).

1155. (1904.) Where a prisoner has been found guilty on a criminal charge, and the only error that appears on the record is the failure of the court to pronounce a legal judgment against him, it is the proper practice, and the supreme court has the power, after setting aside the void or erroneous judgment, to remand the case and the accused, if sentence has not been suspended, to the district court, with instructions to render judgment on the verdict in the manner provided by law. *McCormick v. State*, 71 Neb. 505 (99 N. W. 237).

XVI. PUNISHMENT AND PREVENTION OF CRIME.

Discretion of court in fixing sentence, see *ante*, § 1877.

Reduction of term by good conduct, see *Prisons*, §§ 15, 16.

Reprieve by governor.

1156. (1902.) Where a governor reprieves or respites a prisoner under death sentence, he may designate in the warrant of reprieve the day that the sentence shall

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be executed. *In re Rhea*, 64 Neb. 885 (97 N. W. 1119).

Term of imprisonment.

1157. (1892.) Under section 518 of the criminal code the term of imprisonment of one sentenced to the penitentiary dates from the sentence and not from the delivery of the prisoner to the warden of the penitentiary. *In re Fuller*, 34 Neb. 581 (52 N. W. 577).

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Imprisonment in addition to fine.

1158. (1884.) A justice of the peace, in a proper case, may impose a fine not to exceed $100, or sentence to imprisonment not to exceed three months, but cannot, as a punishment for the same offense, impose both fine and imprisonment. *In re Stewart*, 16 Neb. 193 (20 N. W. 255).

CRIMINAL LIBEL.

See *Libel and Slander*, V.

CROPS.

ANALYSIS.

Nature of property, § 1.
Subject to execution, § 2.
Rights of execution purchaser to crops, §§ 3-5.
Effect of sale of lands, § 6.
Liability for destroying crops, § 7.
Rights of co-tenant, § 8.
Right to, as between tenant and receiver, § 9.

CROSS-REFERENCES.

Description of, in mortgage, see *Chattel Mortgages*, 59-61.

Crops not planted as subject to mortgage, see *Chattel Mortgages*, §§ 5-7.

Rights of purchaser at judicial sale, see *Judicial Sales*, §§ 519-523.

Rights to crops on leased premises, see *Landlord and Tenant*, §§ 145-149.

Liability of railroads for destruction of, by fires, see *Railroads*, §§ 375-413.

Destruction of, by railroad from construction of road, see *Railroads*, §§ 73-78.

Rights as between vendor and vendee, see *Vendor and Purchaser*, § 179.

Nature of property.

1. (1882.) Growing or standing cultivated crops have always, for most purposes, been deemed personal property; not so with growing wild grass and other natural products of the soil. *Keith v. Tilford*, 12 Neb. 271 (11 N. W. 315).

Subject to execution.

2. (1901.) Growing crops are subject to levy and sale irrespective of their stage of growth. *Johns v. Kamarad*, 2 Unof. 157 (96 N. W. 118).

Rights of execution purchaser to crops.

3. (1902.) A purchaser of land at execution sale is entitled to all crops planted thereon after confirmation. *Jaques v. Dawes*, 3 Unof. 752 (92 N. W. 570).

4. (1894.) A judgment debtor harvested a crop of wild grass from land after it had been sold on execution against him but before the confirmation of the sale. In an action of replevin brought by the purchaser of the real estate at the execution sale for said grass, *held*, that as the grass was severed from the realty before the confirmation of the sale, the title to the grass did not pass to the purchaser of the land. *Yeazel v. White*, 40 Neb. 432 (58 N. W. 1020; 24 L. R. A. 449).

5. (1902.) Annual crops growing on the land do not pass to the purchaser at judicial sale; and for the purpose of saving the debtor's rights thereto, these annual crops will be regarded as personalty. *Aldrich v. Bank of Ohiowa*, 64 Neb. 276 (89 N. W. 772; 97 Am. St. Rep. 643; 57 L. R. A. 920).

Effect of sale of land.

6. (1905.) Where, by the terms of a lease, rent is reserved in a share of the crops, the landlord and tenant are tenants in common of the growing crops, and in such case a purchaser of the real estate from the landlord during the term of the lease, in the absence of an agreement to the contrary, is not entitled to a portion of the crop belonging to the landlord which had been severed from the realty prior to the time he acquired title to the land upon which the crop was grown. *Wendt v. Stewart*, 74 Neb. 855 (105 N. W. 550).

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Liability for destroying crops.

7. (1888.) One who negligently causes the destruction of growing crops is liable to the owner for their value. *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138 (40 N. W. 498; 13 Am. St. Rep. 482).

7a. (1907.) The measure of damages for the destruction of a growing crop is the value of the crop at the time of its destruction. *Berard v. Atchison & N. R. Co.*, 79 Neb. 830 (113 N. W. 537).

Rights of co-tenant.

8. (1894.) Where there is a contract between the owner of the land and another person whereby such other person is to cultivate the land and harvest the hay for a share thereof, but where the relation of landlord and tenant is not created, and there is no specific agreement as to the possession of the land, the parties become tenants in common of the grass and hay, and if one of the parties to such contract seize the whole crop either before or after severance, and dispose of it in denial of the other's rights, the other may maintain trover for his share. *Reed v. McRill*, 41 Neb. 206 (59 N. W. 775).

Rights to, as between tenant and receiver.

9. (1902.) Where an appeal is taken from an order of confirmation and a supersedeas granted and a receiver of the mortgaged premises is appointed pending such appeal, a tenant of the mortgagor is entitled to the crops, growing on the mortgaged premises at the time of such appointment, as against such receiver, whether such crops are mature or not. *Cassell v. Ashley*, 3 Unof. 787 (92 N. W. 1035).

CROSS-COMPLAINT.

See *Pleading*, §§ 156-163.

CROSS-EXAMINATION.

See *Witnesses*, III, B.

CROSSINGS.

Duty of railroad to construct public crossing, see *Railroads*, §§ 95-100.

Duty of railroad to build private crossing, see *Railroads*, §§ 102-106.

Injuries at railroad crossing, see *Railroads*, §§ 216-330.

Of street railroads and steam roads, see *Street Railroads*, § 11.

CRUELTY.

Grounds for divorce, see *Divorce*, §§ 10-18.

Sufficiency of proof of, see *Divorce*, §§ 90-97.

Punishment of child by parent, see *Parent and Child*, §§ 15, 16.

CULVERTS.

Construction of, in highways, see *Highways*, §§ 158-161.

By railroads, see *Railroads*, §§ 79-82.

CURTESY.

ANALYSIS.

Definition of curtesy, § 1.
Right in general, §§ 2-3.
Right of curtesy in equities of wife, § 4.
Estate of curtesy subject to execution or mortgage, § 5.
Bar or forfeiture of right, §§ 6-8.
Right of lessee of wife, § 9.

CROSS-REFERENCE.

See, also, *Dower*.

Definition of curtesy.

1. (1879.) An estate by curtesy at common law is defined to be that estate to which a husband is entitled upon the death of his wife, in the lands and tenements of which she was seized in possession, in fee simple or in fee tail during the coverture; provided they have had issue born alive and possibly capable of inheriting her estate. *Forbes v. Sweesy*, 8 Neb. 520.

Rights in general.

2. (1879.) To entitle the husband to an estate by the curtesy the wife must have been seized in fact as well as in deed, and not merely a seizin in law. *Forbes v. Sweesy*, 8 Neb. 520.

2a. (1907.) Under our statute the husband is not entitled to an estate by the curtesy in lands of his deceased wife held by her under a contract of purchase. The estate of the wife to which the estate of curtesy may attach must be at the least a

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freehold. *Granjean v. Beyl*, 78 Neb. 349 (110 N. W. 1108).

3. (1903.) A surviving husband of a woman who died prior to the amendment of the statute of descent, in 1887, took a life estate in the property of the wife as tenant by the curtesy. *Withnell v. Withnell*, 69 Neb. 605 (96 N. W. 221).

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Right of curtesy in equities of wife.

4. (1898.) A surviving husband, whose wife died in 1877, was not entitled to an estate of curtesy in lands in which she had a mere equitable estate at the time of her death. *Hall v. Crabb*, 56 Neb. 392 (76 N. W. 865).

Estate of curtesy subject to execution or mortgage.

5. (1892.) The life estate of a husband as tenant by the curtesy is subject to seizure and sale on execution against him. A tenant by the curtesy may likewise convey his title by deed or mortgage. *Deming v. Miles*, 35 Neb. 739 (53 N. W. 665; 37 Am. St. Rep. 464).

Bar or forfeiture of right.

6. (1888.) Where a will provides for the disposition of the testator's property among his children, and expressly provides that the share of one particular daughter shall be held in trust for her, and all control and interest therein shall be forever kept from her husband, such husband, upon the death of the wife, takes no estate in the wife's property as tenant by curtesy. *McCollough v. Valentine*, 24 Neb. 215 (38 N. W. 854).

7. (1892.) The fact that a husband was the grantor in a deed to his wife will not bar his right to an estate by curtesy, since such right is not limited by conveyance. *Deming v. Miles*, 35 Neb. 739 (53 N. W. 665; 37 Am. St. Rep. 464).

8. (1905.) The right by curtesy is distinguishable from the right by dower in this: that it may be defeated by the deed of the wife and without the consent of the husband. *Hiskett v. Bozarth*, 75 Neb. 70 (105 N. W. 990).

Right of lessee of wife.

9. (1879.) A lessee of a wife, claiming under a lease of her separate estate and made during her coverture, is, after her death, entitled to possession of the premises until the end of the term as against purchasers at execution sale of the husband's curtesy. *Forbes v. Sweesy*, 8 Neb. 520.

CUSTODIA LEGIS.

Custodian of property, see *Clerks of Courts*, §§ 34-46.

As subject to attachment, see *Attachment*, §§ 68-73.

As subject to creditors' suit, see *Creditors' Suit*, § 22.

Property in, not subject to garnishment, see *Garnishment*, §§ 25-34.

CUSTODY.

Of child, see *Divorce and Alimony*, §§ 211-215; *Guardian and Ward; Parent and Child*, §§ 1-14.

Of property paid into court, see *Clerks of Courts*, §§ 34-46.

Of insane person, see *Insane Persons*, §§ 8-20.

Of jury in criminal prosecution, see *Criminal Law*, XII, F.

Of property levied on, see *Attachment*, § 169; *Execution*, IV.

CUSTOMS AND USAGES.

ANALYSIS.

Custom contrary to statutes, § 1.
Effect and operation of criminal statute and proceedings, § 2.
Necessity of knowledge of custom, §§ 3-5.
Must be lawful and reasonable, § 6.
Pleading and proof of, § 7.
Evidence, § 8.
Admissibility to interpret contract, §§ 9-12.
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CROSS-REFERENCES.

Expert evidence as to custom, see *Evidence*, § 566.

As to authority of agent, see *Principal and Agent*, §§ 173-175.

Custom contrary to statute.

1. (1897.) A custom or usage repugnant to the commands of a statute will not prevail against such statute. *Bolln v. State*, 51 Neb. 581 (71 N. W. 444).

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Effect and operation of criminal statute and proceedings.

2. (1905.) A local custom cannot operate to suspend a criminal statute, nor to overthrow the rules of evidence by which the commission of an offense is proved. *Crockford v. State*, 73 Neb. 1 (102 N. W. 70).

Necessity of knowledge of custom.

3. (1896.) Proof of knowledge is required to give effect to a custom, unless it is so widely and generally known, and so well established, as that knowledge thereof may well be presumed. *Union Stock Yards Co. v. Westcott*, 47 Neb. 300 (66 N. W. 419).

4. (1897.) Proof of knowledge is required to give effect to a custom not widely and generally known. *Frey v. Curtis*, 52 Neb. 406 (72 N. W. 478).

5. (1903.) One not shown to have knowledge of a trade usage confined to a particular business, which is not shown to be of such a general and notorious character that he must have been presumed to have contracted with reference to it, is not bound by such usage. *Bixby v. Bruce*, 69 Neb. 78 (95 N. W. 34).

Must be lawful and reasonable.

6. (1893.) A custom, to be binding, must be lawful and reasonable. *Dern v. Kellogg*, 54 Neb. 560 (74 N. W. 844).

Pleading and proof of.

7. (1898.) A custom, special to a particular class of business operations, to be availed of, must be pleaded, and, if put in issue, proved. *First Nat. Bank of Hastings v. Farmers & Merchants Bank*, 56 Neb. 149 (76 N. W. 430); (1899) *First Nat. Bank of Hastings v. Omaha Nat. Bank*, 59 Neb. 192 (80 N. W. 891).

Evidence.

8. (1899.) In an action by an indorsee of a check for its value, the transactions taking place in the manner customary with banking companies, *held* to be a valid indorsement. *First Nat. Bank of Hastings v. Omaha Nat. Bank*, 59 Neb. 192 (80 N W. 891).

Admissibility to interpret contract.

9. (1894.) Parties to contracts are bound thereby and evidence of customs and usages cannot be received as a substitute. *American Building & Loan Ass'n v. Mordock*, 39 Neb. 413 (58 N. W. 107).

10. (1897.) The business usage of a particular individual is not admissible to interpret a contract between that individual and another in the absence of proof of knowledge by the latter of such usage. *Gamble v. Stauber Mfg. Co.*, 50 Neb. 463 (69 N. W. 960).

11. (1897.) Custom or usage in trade or business may be shown for the purpose of interpreting a contract or controlling its execution, although not for the purpose of changing its intrinsic character, provided it be known to the party sought to be charged, or is so well settled and so uniformly acted upon as to warrant the presumption that it was known to both contracting parties and that they contracted with reference to it. *McKee v. Wild*, 52 Neb. 9 (71 N. W. 958).

12. (1892.) Where a foreign corporation owning a ranch in Wyoming appoints one as its manager with power limited to the hiring and paying of necessary help, and the payment of current expenses, in an action of replevin by the principal against a purchaser of cattle from such ranch manager it was error to receive evidence on the part of the defendants to prove that, at the time they purchased the cattle from A., it was the custom or usage of managers of cattle companies doing business in Wyoming to sell the cattle from the ranches of such companies, in the absence of any evidence that the plaintiff company had knowledge of such usage. *Milwaukee & Wyoming Investment Co. v. Johnston*, 35 Neb. 554 (53 N. W. 475).

Waiver of error of admission of evidence.

13. (1888.) Where both parties call witnesses to establish usage, neither can assign error in the admission of such testimony. *Howell & Co. v. Graff-Murray Co.*, 25 Neb. 130 (41 N. W. 142).

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DAMAGES.

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New trial because of smallness of verdict, see *New Trial*, §§ 35-37.

Damages in replevin, see *Replevin*, V.

I. NATURE AND GROUNDS.

In general.

1. (1894.) The law awards damages, for personal injuries resulting from negligence, as compensation for pecuniary loss, pain and suffering, and not as a punishment of the negligent party. *Fremont, E. & M. V. R. Co. v. Leslie*, 41 Neb. 159 (59 N. W. 559).

General and special damages.

2. (1894.) General damages are such as the jury may give when the judge cannot point out any measure by which they are to

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be ascertained except the opinion and judgment of a reasonable man. Special damages are such as by competent evidence are directly traceable to defendant's failure to discharge his contract obligations, or such duties as are imposed upon him by law. *Bank of Commerce v. Goos*, 39 Neb. 437 (58 N. W. 84; 23 L. R. A. 190).

Failure to comply with statutes.

3. (1894.) Proof of a defective compliance with laws of congress as to acquiring a railroad right of way across the public domain, without more, cannot be made a ground for the recovery of damages as against the party whose duty it was to properly secure such right. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374 (59 N. W. 838); 44 Neb. 463 (62 N. W. 899).

II. NOMINAL DAMAGES.

In general.

4. (1894.) Where a breach, by defendant, of an actually existing contract between plaintiff and defendant is proven, plaintiff is entitled to at least nominal damages. *Mollyneaux v. Wittenberg*, 39 Neb. 547 (58 N. W. 205).

5. (1900.) Failure to award nominal damages is not reversible error where it does not affect a substantial right or entitle plaintiff to costs. *Heater v. Pearce*, 59 Neb. 583 (81 N. W. 615).

III. GROUNDS AND SUBJECT OF COMPENSATORY DAMAGES.

Consequence of being ejected from train as element, see *Carriers*, § 359.

Injury to business or credit by wrongful attachment as element, see *Attachment*, §§ 463-469.

Pain and loss of time as element for ejecting passenger, see *Carriers*, § 356.

Damages recoverable from carrier for loss of goods, see *Carriers*, § 94.

Mental suffering of beneficiary as element of, for wrongful death, see *Death*, § 56.

In general.

6. (1902.) In an action for damages, whether upon contract or for tort, compensatory damages can alone be recovered, and only such as are the probable, direct and approximate consequences of the wrong complained of, and such as may fairly be supposed to have been within the contemplation of the accused party at the time the cause of action arose. *Karbach v. Fogel*, 63 Neb. 601 (88 N. W. 659).

Rental value.

7. (1898.) In estimating the value of real estate, its rental value may be taken into consideration. *Chicago, R. I. & P. R. Co. v. Sturey*, 55 Neb. 137 (75 N. W. 557).

What is market value.

8. (1898.) Market value is not what property is worth solely for the purpose for which it is devoted, but the highest price it will bring for any and all uses to which it is adapted, and for which it is available. *Maul v. Drexel*, 55 Neb. 446 (76 N. W. 163).

Proximate consequences.

9. (1881.) In an action against a city to recover for damages caused by a defective sidewalk, plaintiff could only recover for those damages which were directly traceable to the injury and negligence complained of as the probable cause, and damages caused by the negligence of the plaintiff in the employment of medical aid were not chargeable to the city. *City of Crete v. Childs*, 11 Neb. 252 (9 N. W. 55).

10. (1895.) The wrong done and injury sustained must bear toward each other the relation of cause and effect, and the damages must be the natural and proximate consequence of the act complained of. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463 (62 N. W. 899).

Remote and consequential.

11. (1901.) In an action for negligence of an officer of a bank, remote and consequential damages can not be recovered. *Fiala v. Ainsworth*, 63 Neb. 1 (88 N. W. 135; 93 Am. St. Rep, 420).

Past and prospective damages.

12. (1904.) Where an obstruction causing the overflow of water and consequent damage to adjacent lands is of such a character that, unless interefered with by the hand of man, it will continue indefinitely. the damages, past and prospective, are recoverable in one action, and successive actions therefor can not be maintained. *Gartner v. Chicago, R. I. & P. R. Co.*, 71 Neb. 444 (98 N. W. 1052).

Expense of replacing property.

13. (1899.) In an action for damages for destroying an advertising sign on a building in Omaha, railroad fare of a workman sent from Chicago to replace the sign cannot be allowed as an element of damages,

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in the absence of evidence that there was no available competent person nearer. *Shiverick v. Gunning*, 59 Neb. 73 (80 N. W. 264).

Expenses incurred. www.libtool.com.cn

14. (1893.) There can be no recovery for expenses incurred in efforts to cure an injury, unless it be shown that the expense so incurred was reasonably necessary. *Hewitt v. Eisenbart*, 36 Neb. 794 (55 N. W 252).

14*a*. (1897.) In an action *ex delicto* where expenses incurred by reason of the tort are recoverable, it is not essential that the plaintiff should have actually paid the money. It is sufficient if he has incurred a legal obligation to do so. *Minneapolis Threshing Machine Co. v. Regier*, 51 Neb. 402 (70 N. W. 934).

Loss of profits.

15. (1879.) Where one causes a loss to a crop of wheat by breach of his contract to cut the same when ripe, the measure of damages is the value of the crop. *Kelley v. Peterson*, 9 Neb. 76 (2 N. W. 346).

16. (1890.) Where one contracts to furnish a heating apparatus in complete working order, to a specified degree of temperature, for a newly erected building, and the owner of the building rescinds the contract and refuses to allow the furnace to be placed in the building, the measure of damage recoverable by the seller is the amount of the profits that would have been realized under the contract. *Hale v. Hess*, 30 Neb. 42 (46 N. W. 261).

17. (1894.) In an action by an agent against a manufacturer for breach of a contract granting the former the exclusive right to sell manufactured articles in a specified territory, the measure of damages is the profit which he shows he was prevented from realizing. *Russell v. Horn, Brannen & Forsyth Mfg. Co.*, 41 Neb. 567 (59 N. W. 901).

18. (1896.) The general rule is that the party injured by breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach. *Western Union Telegraph Co. v. Wilhelm*, 48 Neb. 918 (67 N. W. 870).

19. (1898.) In an action for personal injuries, where there is no evidence of emancipation, recovery should not be permitted for loss of earning power during plaintiff's minority. *Swift v. Holoubek*, 55 Neb. 228 (75 N. W. 584).

20. (1898.) A party injured by breach of contract may recover for gains prevented, provided they are within the established rules permitting consequential damages, and provided they can be proved to a reasonable degree of certainty. *Wittenberg v. Mollyneaux*, 55 Neb. 429 (75 N. W. 835).

21. (1900.) A party may recover for gains prevented as well as for losses sustained, when such damages are not only certain, but are the natural and probable result of the wrong complained of. *Wittenberg v. Mollyneaux*, 60 Neb. 583 (83 N. W. 842).

22. (1902.) In an action brought by plaintiff to recover damages for a breach of contract, whereby he was to receive as compensation for caring for a flock of sheep, one-half of the increase and one-half of the wool clip, *held*, that plaintiff was entitled to recover for such profits or advantages, the direct and immediate fruits of his contract as were lost by such breach of contract on the part of the defendant. *Schrandt v. Young*, 2 Unof. 546 (89 N. W. 607).

23. (1904.) Instructions examined, and held to not permit a recovery for loss of earnings during plaintiff's minority. *City of South Omaha v. Sutliffe*, 72 Neb. 746 (101 N. W. 997).

24. (1904.) In an action for breach of a contract to perform services, plaintiff can recover the excess he is obliged to pay to another for the services, only from the date of the breach to the date when the action was commenced and not to the date when the contract would have expired. *Brown v. Cowles*, 72 Neb. 896 (101 N. W. 1020).

Duty to reduce loss.

25. (1879.) On becoming aware that one contracting to cut grain would not perform his contract the other should make all reasonable effort to reduce the loss. *Kelly v. Peterson*, 9 Neb. 76 (2 N. W. 346).

26. (1881.) If plaintiff himself is in inexcusable default, he cannot recover for defendant's breach of a contract. *Reynolds v. Burlington & M. P. R. Co.*, 11 Neb. 186 (7 N. W. 737).

27. (1884.) In addition to the general measure of damages, the law, in some cases, imposes upon a party injured from another's breach of contract or tort the active duty of making reasonable exertions to ren-

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der the injury as light as possible. Where this duty exists, the labor or expense which its performance involves is chargeable to the party liable for the injury thus mitigated. *Long & Smith v. Clapp*, 15 Neb. 417 (19 N. W. 467).

28. (1393.) If through negligence a party permits the damage to him from the breach of a contract to unnecessarily enhance, the increased loss falls upon him. He should use all reasonable means to reduce the loss. *Loomer v. Thomas*, 38 Neb. 277 (56 N. W. 973).

29. (1895.) It is the duty of a party suffering damages from breach of a contract to exert himself to lighten damages, and he cannot recover damages which would have been avoided had he performed such duty. *Uhlig v. Barnum*, 43 Neb. 584 (61 N. W. 749).

30. (1895.) One whose chattels are injured by the negligence of another cannot, by voluntarily abandoning what remains, charge that other with the total value of the chattels; and where there was evidence tending to show that the destruction was not total and that the plaintiff had so voluntarily abandoned what remained, it was error to instruct the jury that the measure of damages was the market value of the chattels before the injury. *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb. 848 (63 N. W. 51; 28 L. R. A. 824).

Interest.

31. (1888.) Where property is destroyed by the negligence of another the owner will be entitled to interest on the value of such property from the time of its destruction. *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138 (40 N. W. 948).

32. (1896.) Where the rendition of judgment on a verdict for the plaintiff in an action of contract or tort is delayed during the pendency of a motion for a new trial on behalf of defendant, it is not error to render judgment for the amount of the verdict and interest from its date to the date of rendition of judgment. *Fremont, E. & M. V. R. Co. v. Root*, 49 Neb. 900 (69 N. W. 397).

32*a*. (1899.) Where the amount to be recovered is unliquidated interest will not be allowed. *Wittenberg v. Mollyneaux*, 59 Neb. 203 (80 N. W. 834). [Overruled. *Parkins v. Missouri P. R. Co.*, 76 Neb. 242 (107 N. W. 260).]

32*b*. (1906.) Interest will be allowed on the recovery of damages when the damages are capable of being definitely ascertained. *Parkins v. Missouri P. R. Co.*, 76 Neb. 242 (107 N. W. 260).

33. (1896.) Where property is destroyed by the negligence of another, the owner is entitled to interest on its value from the time of its destruction. *Union P. R. Co v. Ray*, 46 Neb. 750 (65 N. W. 773).

IV. LIQUIDATED DAMAGES AND PENALTIES.

In general.

34. (1896.) An agreement to convey land providing for a forfeiture held to be a provision for liquidated damages upon a default of the promisor. *Lorius v. Abbott*, 49 Neb. 214 (68 N. W. 486).

Construction of stipulation.

35. (1890.) In construing a contract to determine whether or not a provision therein for the payment of a stipulated sum in case of default by one of the parties is to be considered as a penalty or liquidated damages, the court will consider the subject matter, the language employed, and the intention of the parties. If the construction is doubtful, the agreement will be considered a penalty merely. If damages result from the performance or omission of acts, which damages are certain or can be ascertained by evidence, the stipulated sum is considered as a penalty; but where the acts or omissions occasioning damages are not susceptible of measurement by a pecuniary standard, the sum stipulated ordinarily will be regarded as liquidated damages. *Brennan v. Clark*, 29 Neb. 385 (45 N. W. 472).

36. (1894.) The courts, in determining whether a sum fixed by a contract to be paid for its violation is liquidated damages or a penalty, will take into consideration the subject matter of the contract, the consideration on which it is based, the intention of the parties, and the language of the contract; but these facts, nor any of them, nor all of them, will not necessarily control the court's construction. *Gillilan v. Rollins*, 41 Neb. 540 (59 N. W. 893).

Certainty as to amount.

37. (1890.) A provision in a building contract that the contractor shall pay a stipulated sum per day after a certain date if he failed to complete the building at the time designated is in the nature of penalty and not liquidated damages. *Brennan v. Clark*, 29 Neb. 385 (45 N. W. 472).

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Stipulation as to amount.

38. (1894.) When parties to a contract stipulate that in case of a violation thereof the party making default shall pay to the other a stipulated sum, the courts will take the sum so fixed as the innocent party's measure of damages only when it appears that to do so will no more than compensate his losses. *Gillilan v. Rollins*, 41 Neb. 540 (59 N. W. 893).

38*a*. (1891.) A provision in an executory contract to sell and deliver 3,500 sheep at a stipulated price per hundred pounds, that the party making default shall forfeit to the other party $1,000, is in the nature of a penalty when the actual damages by reason of such default may be readily determined. *Squires v. Elwood*, 33 Neb. 126 (49 N. W. 939).

39. (1894.) When parties to a contract stipulate that in case of the violation thereof the party making default shall pay to the other a stipulated sum, if the taking as the measure of damages the sum fixed in the contract to be paid for its breach will more than compensate the innocent party, the court will regard such sum as a penalty. *Gillilan v. Rollins*, 41 Neb. 540 (59 N. W. 893).

40. (1901.) When parties to a contract stipulate that in case of a violation thereof the party making default shall pay to the other a stipulated sum as liquidated damages, the courts will take the sum so fixed as the innocent party's measure of damages, only, when it appears that to do so will no more than compensate his loss. *Lee v. Carroll Normal School Co.*, 1 Unof. 681 (96 N. W. 65).

41. (1901.) If the measure of damages fixed in the contract, to be paid for its breach, will more than compensate the innocent party, the court will regard such sum as a penalty. *Lee v. Carroll Normal School Co.*, 1 Unof. 681 (96 N. W. 65).

V. EXEMPLARY DAMAGES.

Right to exemplary damages.

42. (1881.) Exemplary or punitive damages are not recoverable in this state. *Riewe v. McCormick*, 11 Neb. 261 (9 N. W. 88).

43. (1886.) Punitive damages are not given in this state in any class of cases between private parties. *Boldt v. Budwig*, 19 Neb. 739 (28 N. W. 280).

44. (1901.) No recovery can be had of punitive or exemplary damages. In theory, at least, the damages recoverable are the pecuniary equivalent of the injury. *Mangold v. Oft*, 63 Neb. 397 (88 N. W. 507).

45. (1894.) It is not the policy of the law to punish a party for violating his contract, but to compel him to make good to others the losses they have sustained by his default. *Gillilan v. Rollins*, 41 Neb. 540 (59 N. W. 893).

46. (1896.) The law awards damages to a person injured through negligence of another, not as punishment, but as compensation for pecuniary loss and for pain and suffering. *Fremont, E. & M. V. R. Co. v. French*, 48 Neb. 638 (67 N. W. 472).

VI. MEASURE OF DAMAGES.

Measure in attachment, see *Attachment*, §§ 426, 427.

Measure for wrongful attachment, see *Attachment*, §§ 463-469.

For conversion of mortgaged chattels, see *Chattel Mortgages*, § 184.

Measure of damage for fraud, see *Fraud*, §§ 104-109.

Damage recoverable for wrongful appointment of receiver, see *Receivers*, §§ 126-130.

Measure of damage for fraud in sale of land, see *Vendor and Purchaser*, §§ 432-447.

A. Personal Injuries.

For assault and battery, see *Assault and Battery*, §§ 28-36.

Ejecting passengers from train or cars, see *Carriers*, §§ 356-360.

Measure of, for loss of wife's services, see *Husband and Wife*, § 235.

Damage for criminal conversation, see *Husband and Wife*, §§ 271, 272.

Measure of, in libel and slander, see *Libel and Slander*, §§ 107-111.

Measure and element of damages for wrongful injunction, see *Injunction*, §§ 180-196.

Alienation of affection as element of damage for libel or slander, see *Libel and Slander*, § 111.

Measure of, in action against liquor dealer, see *Intoxicating Liquors*, §§ 441-452.

Bodily pain and suffering.

47. (1907.) In an action to recover for a personal injury suffered on account of the alleged negligence of the defendant, the instructions should limit the recovery for future pain and suffering to such as are

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reasonably certain to result from the injury. *Nixon v. Omaha & C. B. Street R. Co.*, 79 Neb. 550 (113 N. W. 117).

47a. (1889.) Wherein an action for damages by reason of a personal injury, the court instructed the jury, among other things, that in case they found for the plaintiff in the action they could take into consideration bodily pain and suffering, loss of time and reduction of plaintiff's ability to earn money in her business and calling; the instruction was sustained as being applicable to the evidence produced on the trial *Chicago, B. & Q. R. Co. v. Starmer*, 26 Neb. 630 (42 N. W. 706).

Future injuries.

48. (1898.) Where medical experts had testified to results which would in their opinion follow from personal injuries and with reference to other results which they believe might follow, *held* not erroneous to instruct the jury that the party injured was entitled to recover damages for such injuries as the jury believed from the evidence such party might labor under in the future as the result of the injuries. *Omaha Street R. Co v. Emminger*, 57 Neb. 240 (77 N. W. 675).

49. (1902.) In an action for personal injuries, compensation can be recovered only for such future damages as are shown with reasonable certainty to be a consequence thereof. *Chicago, R. I. & P. R. Co. v. McDowell*, 66 Neb. 170 (92 N. W. 121).

Social standing.

50. (1904.) Under the issues involved in this case, *held* not error to omit from a general instruction on the measure of damages any reference to the social standing of plaintiff's mother. *City of South Omaha v. Sutliffe*, 72 Neb. 746 (101 N. W. 997).

Medical services and expense.

51. (1894.) Where an injured party, by reason of the injury which is the foundation of the action, has incurred necessary expenses for medical attendance, nursing, etc., and has become liable or indebted for the payment of such expenses, the reasonable and fair valuation of such services may be recovered, although not yet paid by the party injured. *City of Friend v. Ingersoll*, 39 Neb. 717 (58 N. W. 281).

52. (1897.) In an action for personal injuries, plaintiff may recover the reasonable value of medical services rendered, not to exceed the expense incurred therefor. *Golder v. Lund*, 50 Neb. 867 (70 N. W. 379.

53. (1898.) When a party is liable for services rendered by a surgeon he may recover the reasonable value of such services where they were necessitated by the injuries for the compensation of which he has brought his action, notwithstanding the fact that he has not actually compensated such surgeon. *Omaha Street R. Co. v. Emminger*, 57 Neb. 240 (77 N. W. 675).

54. (1903.) In an action for personal injuries by a married woman, she is not entitled to recover the value of medical services rendered, in the absence of proof that she has paid for such medical services, or that she is the owner of a separate estate which might become liable therefor. *Pomerene Co. v. White*, 70 Neb. 177 (98 N. W. 1040).

55. (1881.) A plaintiff who was injured by a defective sidewalk can recover only for the damages directly traceable to the injury, and damages caused by negligence of plaintiff in the employment of medical aid not chargeable to the city. *City of Crete v. Childs*, 11 Neb. 252 (9 N. W. 55).

Mental suffering.

56. (1893.) In an action for personal injuries, mental suffering and anxiety caused by a physical injury are elements of damage whether or not the injury was due to the wilful act of defendant. *American Water-Works Co. v. Dougherty*, 37 Neb. 373 (55 N. W. 1051).

57. (1894.) Compensation for mental suffering is an element of damage in actions for trespass to property where the wrongful act was inspired by fraud or malice. *Murray v. Mace*, 41 Neb. 60 (59 N. W. 387; 43 Am. St. Rep. 664).

58. (1894.) Where a married woman is injured by the negligence of another, two causes of action arise, one for the wife for physical and mental suffering, loss of earning capacity, etc., and the other for the husband for loss of his wife's services and society and for reasonable expenses by him incurred. *Omaha & R. V. R. Co. v. Chollette*, 41 Neb. 578 (59 N. W. 921).

59. (1895.) Mental and bodily suffering is incapable of measurement by any fixed and arbitrary rule, but must from its nature depend largely upon the judgment of the jury, governed by the circumstances of each particular case. *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448 (62 N. W. 887).

60. (1902.) In an action for damages

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in which injury to the feelings is alleged as an element of damages, the jury can not act capriciously, and allow damages for imaginary injuries, not warranted by the evidence. An instruction which fails to properly warn the jury in that regard, and will admit of the construction that the jury is not to be governed by the evidence in estimating such damages, is erroneous. *Hoover v. Haynes*, 65 Neb. 557, 564 (93 N. W. 732).

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B. Injuries to Property.

Damages for trespassing animals, see *Animals*, § 104.

Measure of, for changing street grade, see *Municipal Corporations*, §§ 371-379.

For destroying crops, see *Crops*, § 7

Interest on award in eminent domain, see *Eminent Domain*, §§ 223-225.

Measure and amount for taking property under eminent domain, see *Eminent Domain*, §§ 86-137.

Element of, for property taken under condemnation proceedings, see *Eminent Domain*, §§ 68-85.

For overflow of land by reason of construction of railroads, see *Railroads*, §§ 131-146.

Measure of, for spread of fire by railroads, see *Railroads*, §§ 385-390.

Measure of, for conversion of property, see *Trover and Conversion*, §§ 98-120.

Damage for flooding lands, see *Water and Watercourses*, §§ 132, 133.

Measure of, and assessment for erecting dam in streams, see *Water and Watercourses*, §§ 168, 169.

Injury to personal property.

61. (1888.) Where growing crops are destroyed through the negligence of another the owner may recover from the party at fault the value of such crops. *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138 (40 N. W. 948).

62. (1895.) Where chattels are injured by the negligence of another, but not wholly destroyed, the measure of damages is the difference btwen th value of the chattels immediately before the injury and immediately thereafter. *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb. 848 (63 N. W. 51; 28 L. R. A. 824).

62*a*. (1906.) In an action for damage to merchandise, the original cost of the goods is not a proper basis for the computation of damages. In such case, the measure of damages is the difference between the value of the goods immediately before and immediately after the injury. *City of McCook v. McAdams*, 76 Neb. 1 (106 N. W. 988).

63. (1894.) Where the wrong consists in the taking or destruction of personal property without fraud, malice, or other aggravating circumstances, the measure of damage is compensation for the plaintiff's loss, which is ordinarily the value of the property with such incidental damage as may be shown to be the natural and proximate result of the act charged. *Murray v. Mace*, 41 Neb. 60 (59 N. W. 387; 43 Am. St. Rep. 664).

Destroying trees by fire.

64. (1896.) In an action for negligently setting out fire destroying trees on the land of the plaintiff the measure of damages is damages suffered by such trees. In ascertaining such damages the inquiry should be not alone as to the value of the trees before their injury, but should be as to the difference in value before and after the fire. *Kansas City & O. R. Co. v. Rogers*, 48 Neb. 653 (67 N. W. 602).

64*a*. (1906.) The measure of damages to growing trees, having no value for purposes of transplanting, is the value of the trees with reference to the land in the situation in which they stood prior to the damage, less their value for practical purposes afterwards. *Union P. R. Co. v. Murphy*, 76 Neb. 545 (107 N. W. 757).

Delay of enforcing execution by obtaining injunction.

65. (1902.) Where the collection of a judgment is enjoined and one of the elements of damage sought to be recovered is for delay in its collection, the proper measure for this element of damage is additional court costs, if any, and interest at the rate which the judgment draws during the time of such delay. *First Nat. Bank of Harvard v. Hockett*, 2 Unof. 512 (89 N. W. 412).

Wrongful sale of realty.

66. (1894.) Where the plaintiff sells land of defendant under execution upon a judgment which the latter has paid, the measure of damages defendant may recover is the fair market value of his interest in the land at the time it was sold by the sheriff. *Pope v. Benster*, 42 Neb. 304 (60 N. W. 561; 47 Am. St. Rep. 703).

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Use of property by bailee.

67. (1905.) The measure of damages for the unauthorized use of the property of another by a bailee therof is not the value that may be produced by the labor and investment of the bailee, combined with such use of the property, but is the value of the use itself and any damage that may be done to the property in so using it, or, if the use amounts to a conversion, then the measure of damages will be the value of the property. *State v. State Journal Co.*, 75 Neb. 275 (106 N. W. 434; 9 L. R. A. [n. s.] 174).

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C. Breach of Contract.

Negligence of bank in making collection, see *Banks and Banking*, § 255.

For refusal of bank to pay check, see *Banks and Banking*, §§ 197, 198.

Measure for loss to live stock by carrier, see *Carriers*, § 161.

Amount recoverable in action for breach of contract, see *Contracts*, §§ 523-560.

For breach of covenant, see *Covenants*, §§ 77-82.

For breach of marriage promise, see *Breach of Marriage Promise*, §§ 3, 4.

Amount recoverable from agent for negligence, see *Principal and Agent*, §§ 72, 73.

Measure of recovery for error in telegram, see *Telegraphs and Telephones*, §§ 49-54.

In general.

68. (1879.) A party may recover as damages, for the breach of a contract to cut grain, the value of the entire crop, if it is shown the damages amount to so much, and they are the proximate result of the breach. *Kelley v. Peterson*, 9 Neb. 76 (2 N. W. 346).

69. (1880.) Whn a contract has been established, the measure of recovery is the price agreed upon in the contract less the damages sustained by the employer by the breach of the same. *McMillan v. Mallory*, 10 Neb. 228 (4 N. W. 1004; 35 Am. St. Rep. 471).

70. (1884.) When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally; *i. e.*, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. *Aultman & Co. v. Stout*, 15 Neb. 586 (19 N. W. 464).

70*a*. (1894.) It is not the policy of the law to punish a party for violating his contract, but to compel him to make good the losses others have sustained by his default. *Gillilan v. Rollins*, 41 Neb. 540 (59 N. W. 893).

71. (1902.) The general rule is that the injured party is entitled to recover such damages as naturally and reasonably result from a breach of a contract or as may reasonably be supposed to have been in contemplation of the parties as a result of such breach when the contract was made. *Punteney-Mitchell Mfg. Co. v. Northwall Co.*, 66 Neb. 5 (91 N. W. 863).

72. (1904.) The rule is elementary that in an action for damages for breach of contract such damages only may be recovered as are probable, direct and proximate consequences of the wrong complained of, and such as may fairly be supposed to have been within the contemplation of the parties at the time of the making of the contract as a probable result of the breach of the same. *Brown v. Cowles*, 72 Neb. 896 (101 N. W. 1020).

Right after rescinding contract.

73. (1898.) One rescinding a contract on the ground of fraud cannot recover damages sustained by reason of the fraud. *Smith v. Meyers*, 56 Neb. 503 (76 N. W. 1084).

Total failure to perform.

74. (1903.) Where the contract is entire, is one for personal services only and the breach of it is total, the measure of damages is what the plaintiff would have earned, less what it would have cost him to perform it according to its terms. *School District of Omaha v. McDonald*, 68 Neb. 610 (94 N. W. 829).

75. (1901.) 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. *Culley v. Taylor*, 62 Neb. 651 (87 N. W. 341).

76. (1894.) Where plaintiff was ap-

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pointed the exclusive agent for the sale of defendant's goods in a territory, the measure of his damage for defendant's failure to deliver goods to a purchaser procured by him, was the difference between the price at which defendant had agreed to deliver, and the market value of such goods at the time and place when and where they should have been delivered. *Russell v. Horn, Brannen & Forsyth Mfg. Co.*, 41 Neb. 567 (59 N. W. 901).

Partial performance.

77. (1880.) Where a person contracts to thresh the whole of another's crop of grain at a certain price per bushel, but, after threshing about one-third, refused to further carry out his contract, the part performance being beneficial to the employer, the employee may recover for the value of his labor less the damage done the other by reason of the breach of the contract. *McMillan v. Mallory*, 10 Neb. 228 (4 N. W. 1004; 35 Am. St. Rep. 471).

78. (1894.) Where there has been a partial performance of a contract and an offer to perform the balance, the measure of damages is compensation for the part performed, and the profits to be made under the contract. *Roberts v. Drehmer*, 41 Neb. 306 (59 N. W. 911).

79. (1895.) Where the time for completing a continuing contract has not expired the plaintiff, in an action for a breach thereof, can only recover the damages sustained before the suit was instituted. *Terry v. Beatrice Starch Co.*, 43 Neb. 866 (62 N. W. 255).

Partial performance of building contract.

80. (1894. Where a contractor agrees with the owner of real estate to furnish the material and labor and erect for him an improvement thereon, and such contractor voluntarily abandons the work before completion, the owner may charge the contractor with (*a*) the necessary costs of completing the improvement as the contractor agreed to complete it, (*b*) the amount of all payments made to the contractor on the contract, (*c*) the amount of all valid liens on the real estate for labor and material furnished the contractor and used by him in such improvement, and (*d*) the amount of actual damages the owner has sustained by reason of the contractor's default. The difference between the total of these items and the contract price is the measure of damages of both the owner and contractor. *Von Dorn v. Mengedoht*, 41 Neb. 525 (59 N. W. 800).

81. (1894.) Where a contractor agrees with the owner of real estate to furnish the material and labor and erect for him an improvement thereon, and the owner rightfully authorizing him to do so upon the happening of certain contingencies, then the contractor is entitled to recover from the owner the actual benefit he has received from the contractor's partial performance; and this is found by ascertaining the reasonable worth of such partial performance appropriated or received by the owner at the time of such receipt or appropriation, and deducting therefrom payments made to the contractor, and the actual damages, if any, the owner has sustained by the contractor's default, if he has made one. *Von Dorn v. Mengedoht*, 41 Neb. 525 (59 N. W. 800).

82. (1901.) The measure of damages for the breach of a contract to complete a building within the contract time is the loss of the possession of the building as a thing of use. *Lee v. Carroll Normal School Co.*, 1 Unof. 681 (96 N. W. 65).

Preventing or obstructing performance.

83. (1890.) If a contract for particular work is partly performed, and the employer puts an end to it without fault of the contracting party, he is liable for the profits to be made under the contract as well as for compensation for work already done. *Hale v. Hess*, 30 Neb. 42 (46 N. W. 261).

84. (1894.) Where a contractor agrees with the owner of real estate, to furnish the material and labor, and erect for him an improvement thereon, and the owner wrongfully terminates the same or the contractor's employment thereunder before the completion of the work, the contractor's measure of damages is the reasonable value of his partial performance increased by all actual damages sustained by him by reason of the owner's unjustifiable termination of the contract. *Von Dorn v. Mengedoht*, 41 Neb. 525 (59 N. W. 800).

85. (1896.) In a suit against a party for wrongfully terminating work under a contract, plaintiff's measure of damages is the profit he would have made by completing it. *Kreamer v. Irwin*, 46 Neb. 827 (65 N. W. 885).

86. (1897.) Where one party to an express contract is wrongfully prevented by the other party from completing, he may sue

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upon the contract for a breach thereof, and the measure of his damages will be the value of the part performed as measured by the contract price plus the profits, if any, which would have accrued to him had he completed the contract according to its terms; or he may ignore the contract and declare upon a *quantum meruit* or *quantum valebat*, in which case the measure of his damages will be the fair and reasonable value of what he has done. *Thompson v. Gaffey*, 52 Neb. 317 (72 N. W. 314).

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87. (1897.) There is, in principle, as well as on authority, a wide distinction between contracts for personal service and for the doing of specific acts. In the former case, unless the plaintiff, who has been discharged without sufficient cause, is able to secure other employment, the contract price furnishes the exact measure of his damage. In the latter class of cases the measure of damage upon the violation of the agreement by the employer is that asserted by the district court, viz., the plaintiff's probable profit; in other words, the difference, if any, in his favor between the contract price and the sum it would have cost to complete the work. *Jewett v. Wilmot*, 51 Neb. 700 (71 N. W. 775).

Agreement to give security.

88. (1887.) Where A being indebted to B fraudulently procured C to execute to B a mortgage for $2,650, with statements that B would furnish that amount, the proceeds to be applied to the payment of a mortgage of $1,200 already on the land and a $900 note held by A, with remainder in cash, and instead A procured only $1,000 from B and applied the $1,650 to the payment of his indebtedness, the measure of C's damages in an action against A would be the $1,650 and legal interest thereon, notwithstanding the fact that by the increased mortgage liens on C's land he was unable to borrow sufficient to discharge them, and by subsequent foreclosure proceedings the land was sold and C's title destroyed. *Forbes v. Thomas*, 22 Neb. 541 (35 N. W. 411).

Agreement to convey land in payment of note.

89. (1887.) Where in an action on a promissory note the defendant set up in his answer a contract entered into between the parties for the conveyance of certain property in full satisfaction of the debt, and alleged a performance in compliance with the contract, and there was testimony tending to sustain the answer, *held*, that in case of defect of title of, or incumbrance on, part of the property so conveyed, the measure of damages was not the amount of the note less the value of the property conveyed, but the amount of the incumbrances, or value of the property to which the title had failed. *Downie v. Ladd*, 22 Neb. 531 (35 N. W. 388).

Agreement of creditors to continue debtor's business.

90. (1901.) Under a contract by a merchant and his creditors whereby the latter were to assume the management of the business in order to pay off their debts and, also were to keep the stock of goods supplied with new goods, in an action for a breach of such contract by an alleged sale of the goods at public auction in violation of the contract, a refusal to instruct that the measure of damages was the difference in amount for which the price for which they would have sold for at private sale, erroneous. *Paxton & Gallagher v. Vaddonker*, 1 Unof. 776 (96 N. W. 378).

VII. INADEQUATE AND EXCESSIVE DAMAGES.

Adequacy of award for assault, see *Assault and Battery*, §§ 30-36.

Excessiveness of award for causing death, see *Death*, §§ 57-62.

Excessiveness of award for alienation of affections, see *Husband and Wife*, §§ 261, 262.

Inadequate or excessive damage for loss of support or death, see *Intoxicating Liquors*, §§ 456-460.

Personal injuries.

91. (1884.) Verdict for $9,250 for damages caused by explosion of locomotive boiler, resulting in concussion of the spinal cord, *held* excessive, and remittitur of $3,000 ordered. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578 (20 N. W. 860; 49 Am. Rep. 724).

91*a*. (1888.) A verdict for $5,000 for injuries sustained by falling into an excavation in a sidewalk is excessive, and cut down to $3,000. *Village of Orleans v. Perry*, 24 Neb. 831 (40 N. W. 417).

92. (1892.) A verdict for $2,000 was not excessive damage for personal injuries to a healthy boy ten years of age, resulting from being kicked by his step-father, where the proof showed that the boy's spine was permanently injured and caused constant

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pain and unfitted him for hard labor. *Wohlenberg v. Melchert*, 35 Neb. 803 (53 N. W. 982).

93. (1894.) A verdict of $2,650 for an injury consisting of a dislocated shoulder and sprained ankle, received by a young man earning $50 per month, *held excessive*, and reduced to $1,200. *Fremont, E. & M. V. R. Co. v. Leslie*, 41 Neb. 159 (59 N. W. 559).

94. (1896.) A farmer 24 years old, was injured by a railroad train, the fleshy part of his heel being cut and the ankle bruised and lacerated and strained, but no bones broken. He was in bed for eleven weeks and required crutches for eight or nine months. He lost about a year's time, but was not permanently disabled. *Held*, That a verdict for $6,300 was excessive and a remittitur of $1,300 ordered. *Fremont, E. & M. V. R. Co. v. French*, 48 Neb. 638 (67 N. W. 472).

95. (1897.) Where a bridge in a city collapsed, throwing plaintiff and his horses and loaded wagon into a creek, injuring him and the team and breaking the wagon, a judgment against the city for $2,500 *held* not excessive. *City of South Omaha v. Powell*, 50 Neb. 798 (70 N. W. 391).

96. (1898.) A verdict for $1,200 for injuries to an arm by reason of a fall on a defective sidewalk sustained. *City of Harvard v. Stiles*, 54 Neb. 26 (74 N. W. 399).

97. (1902.) In an action for damages for injuries to the person and property of the plaintiff, where the testimony clearly shows that plaintiff has sustained substantial damages to both person and property, a judgment for $1 damages will be set aside as grossly inadequate. *Carpenter v. City of Red Cloud*, 64 Neb. 126 (89 N. W. 637).

98. (1903.) A verdict in an action for malpractice for $1,140 for the negligent treatment of a compound fracture of plaintiff's leg bone upheld when corrected by a remittitur of an item of interest erroneously allowed between the date of the injury and that of the judgment. *Leisenring v. La Croix*, 68 Neb. 803 (94 N. W. 1009).

99. (1903.) Where plaintiff, an electric lineman of 33 years of age, earning $65 monthly, has been injured in both feet and one ankle in such a manner as to compel amputation of the right foot almost eleven months later, with severe suffering, a verdict for $15,000 will not be reduced or set aside as excessive. *New Omaha Thomson-Houston Electric Light Co. v. Rombold*, 68 Neb. 54 (93 N. W. 966).

100. (1903.) An award of $3,000 damages for a broken leg which was skillfully set and "formed a good union" in the ordinary course, and is not shown to have resulted in any permanent injury beyond what is usually involved in such an accident, *held* excessive. *City of South Omaha v. Fennell*, 4 Unof. 427 (94 N. W. 632).

101. (1904.) Evidence examined and *held* that, in the case stated, a verdict for $1,500 for a broken leg and sprained ankle, is excessive for personal injuries. Judgment affirmed upon condition. *Johnson v. Heath*, 5 Unof. 369 (98 N. W. 832).

101*a*. (1906.) In an action by a shipper of stock to recover for personal injuries received at a crossing of the railroad and a highway by user, resulting in he loss of both legs, a verdict for $27,500 *held* not excessive. *Union P. R. Co. v. Connolly*, 77 Neb. 254 (109 N. W. 368).

102. (1904.) Verdict for $18,000 for the loss of a foot by a child 4 years old reduced in the district court by remittitur to $12,000 *held* to still be execessive and a further remittitur of $3,000 directed. *Chicago, B. & Q. R. Co. Krayenbuhl*, 70 Neb. 766 (98 N. W. 44).

Loss of life.

103. (1895.) A verdict for $2,000 for the death of plaintiff's husband, a healthy man, 38 years old, earning $10 per week, and with plaintiff and eight minor children wholly dependent on him for support, was not excessive. *Kearney Electric Co. v. Laughlin*, 45 Neb. 390 (63 N. W. 941).

104. (1896.) Verdict for plaintiff for $2,400 sustained where the person killed was a boy of 17, a competent compositor, able to earn $4 a day, and his next of kin, his father, forty-six years old, a poor man with four children. *Post v. Olmstead*, 47 Neb. 893 (66 N. W. 828).

105. (1896.) A verdict for $2,850 for the death of a boy 10 years of age who was drowned in a pond of water accumulated in a street of a municipality. *City of Omaha v. Richards*, 49 Neb. 244 (68 N. W. 528).

106. (1901.) In this action brought by an administratrix for causing the death of her intestate, being her son, 7 years of age, a verdict for $1,525 *held* not excessive so as to require a reversal. *City of Omaha v. Bowman*, 63 Neb. 333 (88 N. W. 521).

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107. (1903.) Damages in the sum of $1,100 on behalf of a mother and a sister to whom a son and brother, 35 years of age, able-bodied, successful in business, earning a salary of $1,800, unmarried, was accustomed from time to time to render pecuniary assistance, is not excessive. *Chicago, R. I. & P. R. Co. v. Young*, 67 Neb. 568 (93 N. W. 922).

Breach of contract.

108. (1902.) Where by reason of the delay in delivering a message summoning a physician to a woman in confinement the labor of the woman is unduly prolonged, a verdict for $950 as damages for the additional suffering in body and mind on account of the physician's failure to attend is not so excessive as to be presumptively the result of passion and prejudice. *Western Union Telegraph Co. v. Church*, 3 Unof. 22 (90 N. W. 878).

Injury to feeling and humiliation.

109. (1902.) In an action by one who was employed as a messenger for a central committee of a political party that maintained headquarters in a hotel, against such hotel for refusing to permit him to use the elevator in going to and from such headquarters, evidence showing the damage to be trifling will not support a verdict for $500. *Hoover v. Haynes*, 65 Neb. 557 (91 N. W. 392).

Remission of excess.

110. (1879.) Where, in an action for damages for fraud and breach of warranty, the recovery is clearly excessive, the supreme court will, on appeal, affirm the judgment on condition plaintiff remit a certain sum to defendant, otherwise the judgment will be reversed. *Patrick v. Leach*, 8 Neb. 530.

111. (1884.) In an action for injuries sustained by reason of an explosion of a boiler a verdict of $9,250 *held* excessive and a remittitur of $3,000 ordered. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578 (20 N. W. 860).

112. (1889.) In an action for damages in replevin a verdict of $1 *held* excessive as nominal damages and a remittitur of 95 cents ordered. *White v. Woodruff*, 25 Neb. 797 (41 N. W. 785).

113. (1894.) Where a verdict is too large and the amount of excess definitely appears from the record for review in supreme court, the party in whose favor the verdict was rendered, in absence of other error, may be permitted to remit the excess and have judgment for balance affirmed. *Omaha & R. V. Co. v. Ryburn*, 40 Neb. 87 (58 N. W. 541).

114. (1894.) Where part of an award by a jury for damages for personal injuries is not supported by evidence, judgment rendered thereon will be reversed where defendant in error fails to remit the excess. *Fremont, E. & M. V. R. Co. v. Leslie*, 41 Neb. 159 (59 N. W. 559).

115. (1894.) An award of a jury for damages for personal injuries will not be reduced by supreme court where it is supported by sufficient competent evidence. *Fremont, E. & M. V. R. Co. v. Leslie*, 41 Neb. 159 (59 N. W. 559).

115*a*. (1897.) The mere fact that a verdict for $2,865.30 was $105 in excess of the amount recoverable is not sufficient to show that the jury was influenced by passion or prejudice. *Omaha Fire Ins. Co. v. Thompson*, 50 Neb. 580 (70 N. W. 30).

116. (1904.) In an action for personal injuries, where substantial damages are proved, but the verdict of the jury appears to be excessive, the error may be corrected by a proper remittitur of the excess directed by the district court, or by the supreme court on a proceeding in error. *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 70 Neb. 766 (98 N. W. 44).

VIII. PARTIES, PLEADING, EVIDENCE, AND ASSESSMENT.

A. Parties and Pleadings.

Parties.

117. (1890.) A purchaser of real estate holding the same by contract and being in possession may recover damages for injuries to the land. *Omaha & R. V. R. Co. v. Brown*, 29 Neb. 492 (46 N. W. 39); *Omaha & R. V. R. Co. v. Slanden*, 29 Neb. 622 (46 N. W. 46).

Pleading.

——— In general.

118. (1892.) In an action for breach of a contract to open and maintain a public road, damages which necessarily result from the breach may be recovered without any special statement of the same, and a motion to make the petition more definite and certain was properly overruled. *Kingsley v. Butterfield*, 35 Neb. 228 (52 N. W. 1101).

119. (1898.) A recovery may be had

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under a general allegation of damages for all injuries which necessarily follow as the results of the act, the subject of complaint. They need not be specially pleaded, and this is applicable to necessarily resulting permanent effects of the injuries. *City of Harvard v. Stiles*, 54 Neb. 26 (74 N. W. 399).

119*a*. (1906.) It is unnecessary in most actions where the demand is unliquidated and sounds wholly in damages, and where there is but a single cause of action, to state specifically and in amounts the different elements or items which go to make up the sum total of the damages. It is enough generally to claim so much in gross as damages for the wrongs done. *Habig v. Parker*, 76 Neb. 102 (107 N. W. 127).

119*b*. (1906.) In case the pleader elects to claim a named sum for any one or more of the items of claimed damages, he is restricted in his recovery on these items to the amount named in his petition, and the court should so charge. *Habig v. Parker*, 76 Neb. 102 (107 N. W. 127).

120. (1904.) In actions for personal injuries it is not necessary to specially allege every indirect injury to each part of the body to lay the foundation for such proof on the trial; such proof may be admitted when the injury alleged is shown to have been the natural and proximate cause of the injury proved. *City of South Omaha v. Sutliffe*, 72 Neb. 746 (101 N. W. 997).

——— Consequential damages.

121. (1893.) Where only consequential damages are claimed they should be pleaded. *Omaha Coke, Coal & Lime Co. v. Fay*, 37 Neb. 68 (55 N. W. 211).

——— Special damages.

122. (1888.) Where special damages are properly pleaded a recovery may be had for the same, although the prayer for relief is general. *Everton v. Esgate*, 24 Neb. 235 (38 N. W. 794).

123. (1892.) A claim for special damages, in an action for a breach of a contract, *held* frivolous and failed to show a cause of action. *Boyer v. Cox*, 34 Neb. 813 (52 N. W. 715).

124. (1897.) Special damages to be recovered must be specially pleaded. *Chicago, B. & Q. R. Co. v. Emmert*, 53 Neb. 237 (73 N. W. 540; 68 Am. St. Rep. 602).

B. Evidence.

Opinion evidence as to amount of damage, see *Evidence*, §§ 538-549; 568.

Exhibit of injured part of body to jury, see *Evidence*, §§ 203-207.

Declarations as to physical sufferings.

125. (1898.) In an action for damages for personal injuries evidence of plaintiff's complaints of such suffering as would probably be caused by the injuries may be admitted. *Omaha Street R. Co. v. Emminger*, 57 Neb. 240 (77 N. W. 675).

Proof of mental suffering.

126. (1898.) In an action for personal injuries plaintiff may make proof of such physical pain and mental suffering as resulted from the injury. *Omaha Street R. Co. v. Emminger*, 57 Neb. 240 (77 N. W. 675).

127. (1902.) In an action for damages, in which injury to the feelings is alleged as an element of damages, direct proof of damage is not indispensable. The existence and amount of such damage is to be determined from the circumstances of the case disclosed by the evidence. *Hoover v. Haynes*, 65 Neb. 557, 564 (93 N. W. 732).

Physical condition.

128. (1904.) Rulings of the trial court rejecting offered testimony of plaintiff as to condition of her health prior to the injury *held* error. *Nielson v. Cass County*, 5 Unof. 430 (98 N. W. 1090).

Expense of medical services.

129. (1894.) The evidence in the case *held* sufficient to sustain the verdict generally, but that there was no testimony of the reasonable and fair value of the services of the physicians, and defendant in error is allowed to file a remittitur of the sums charged for their services, and the judgment then to stand affirmed. If the remittitur is not filed, the case reversed and remanded. *City of Friend v. Ingersoll*, 39 Neb. 717 (58 N. W. 281).

130. (1897.) In order to recover for expenses of medical treatment in an action for personal injuries it is not necessary to prove by the record that the physician rendering the services was licensed to practice under the statute. Proof that he practiced as a physician raises the presumption in actions between third parties that he was licensed to do so. *Golder v. Lund*, 50 Neb. 867 (70 N. W. 379).

Incapacitated from labor.

131. (1903.) In an action by a married woman for personal injuries it is proper to

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show that she has been incapacitated by reason of her injuries from performing labor, for the purpose of showing the nature and extent of her injuries. *Pomerene Co. v. White*, 70 Neb. 171 (97 N. W. 232).

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131*a*. (1907.) In an action by a married woman for personal injuries it is proper to show that she has been incapacitated by reason of her injuries from performing labor, for the purpose of showing the nature and extent of her injuries. *Bliss v. Beck*, 80 Neb. 290 (114 N. W. 162).

Earning capacity and profits.

132. (1871.) The value of services cannot be shown by proof of what was paid therefor, but only by proof of what they are worth. *Holmes v. Boydston*, 1 Neb. 346.

133. (1888.) In an action for damages resulting from personal injury, the plaintiff was permitted to testify to the amount of her earnings prior to the injury, for the purpose of showing the value of her time. This was without objection. She was then asked how much she made each week by her labor. Objection was made to the question, which was overruled. *Held*, No error. *City of Lincoln v. Beckman*, 23 Neb. 677 (37 N. W. 593).

134. (1894.) The testimony of defendant in error showed what had been his earning capacity just previous to the receipt of his injuries, and what he had actually earned during twenty-five weeks immediately following his injuries. *Held*, Error to permit a much greater earning capacity during the same period to be shown by proof that in larger towns than that wherein the defendant in error had had employment a much higher rate of wages prevailed than what was paid in the town in which he was employed during and just preceding the aforesaid twenty-five weeks. *Omaha & R. V. R. Co. v. Ryburn*, 40 Neb. 87 (58 N. W. 541).

Mortality tables.

135. The Carlisle tables of mortality are admissible in evidence in an action for damages for personal injuries. (1879) *Roose v. Perkins*, 9 Neb. 304; (1882) *King v. Bell*, 13 Neb. 409 (14 N. W. 41); (1898) *City of Friend v. Burleigh*, 53 Neb. 674 (74 N. W. 50).

136. (1894.) The Carlisle tables of expectancy of life are admissible in evidence as tending to prove the expectancy of life of a plaintiff in an action for damages for personal injury. *City of Friend v. Ingersoll*, 39 Neb. 717 (58 N. W. 281); *City of Lincoln v. Smith*, 28 Neb. 762 (45 N. W. 41).

136*a*. (1898.) Carlisle tables *held* admissible in evidence in an action for death by wrongful act. *City of Friend v. Burleigh*, 53 Neb. 674 (74 N. W. 50).

137. (1898.) Where a personal injury is permanent in its character, though plaintiff be a minor, evidence as to his expectancy of life, from experience tables, must be based on his actual age and not on the age of majority. *Swift v. Holoubek*, 55 Neb. 228 (75 N. W. 584).

137*a*. (1902.) When it is shown that a person is affected by a serious constitutional disease or a tendency thereto, it is error to submit to the jury the question of his expectancy of life, in the absence of any evidence bearing upon that question. *City of Central City v. Engle*, 65 Neb. 885 (91 N. W. 849).

137*b*. (1904.) The Carlisle tables of mortality or life expectancy are properly admissible in evidence for the consideration of the jury in determining the probable duration of the life of the deceased, the proper foundation as to age and general health being first proved. *Horst v. Lewis*, 71 Neb. 370 (103 N. W. 460).

138. (1904.) While the Carlisle and other mortuary tables of accepted accuracy and in general use are always properly admissible in evidence for the purpose of aiding a court or jury in determining the probable expectancy of life, when such fact is in issue, yet, when admitted, these mortuary tables are not binding upon the estimate of the triers of such fact. They may, without such tables, make their own estimate from the age, health, habits, physical condition and appearance of the person whose expectancy is at issue. *City of South Omaha v. Sutliffe*, 72 Neb. 746 (101 N. W. 997).

138*a*. (1907.) In an action for personal injuries, the Carlisle tables of expectancy may be given in evidence after the introduction of credible evidence tending to show the permanent character of the injury. *Howard v. McCabe*, 79 Neb. 42 (112 N. W. 305).

Market reports.

139. (1905.) Market reports in journals, such as the commercial world relies upon, are competent evidence of the state of the market. *Chicago, B. & Q. R. Co. v. Todd*, 74 Neb. 712 (105 N. W. 83).

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Sufficiency.

140. (1884.) Evidence in an action by the owner of a livery stable to recover damages for the wrongful hiring out of plaintiff's horse, resulting in its death, sustains a verdict for plaintiff. *Homan v. Boyce*, 15 Neb. 545 (19 N. W. 590).

141. (1889.) Evidence in an action for damages for breach of a contract *held* not to sustain the verdict, as if plaintiff was entitled to recover all, the verdict is too small. *Hancock v. Stout*, 28 Neb. 301 (44 N. W. 446).

C. Proceeding for Assessment.

Physical examination of person injured.

142. (1884.) It is not error for the court during the progress of a trial to refuse to order the plaintiff, who sues for injuries to his person, to submit to an examination of his person by physicians who are witnesses for the defendant, in the absence of any showing whatever that justice would be promoted thereby, and especially so when the plaintiff submits to an examination by such witnesses in the presence of the jury. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578 (20 N. W. 860; 49 Am. Rep. 724).

143. (1885.) If a personal examination is desired, the application should be made before the trial begins and experts agreed upon by the parties or appointed by the court. *Stuart v Havens*, 17 Neb. 211 (22 N. W. 419).

144. (1885.) In an action for personal injuries, where the defendant during the trial asks for an order requiring the plaintiff to submit his person to the personal examination of certain experts selected by the defendant, the application should be denied. *Stuart v. Havens*, 17 Neb. 211 (22 N. W. 419).

144*a*. (1889.) It is not error to refuse to order a plaintiff, in an action for damages for personal injuries to submit to a physical examination in the absence of showing that justice would be promoted thereby. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578 (20 N. W. 860).

145. (1894.) In an action for a personal injury a judge of the district court has no jurisdiction at chambers outside of the county in which the cause is pending to make an order requiring plaintiff to submit his body to a personal examination by a board of physicians appointed by the judge for such purpose. *Ellsworth v. City of Fairbury*, 41 Neb. 881 (60 N. W. 336).

146. (1895.) If it is proper for a court, in an action for personal injuries, to appoint physicians to examine plaintiff physically, if proper in any case, it is only on application made before the trial begins. *City of Chadron v. Glover*, 43 Neb. 732 (62 N. W. 62).

Determination by jury.

147. (1888.) Jurors proceeded to mark down the sum of damages, according to the opinion of each juror respectively, which several sums they added together, taking the gross sum as a dividend, taking their own number as a divisor, and agreed upon the quotient as the amount of their verdict, and returned it into court as such, without any agreement in advance of ascertaining such quotient. *Held*, That this method was within the rule of propriety, and not obnoxious to the law. *Village of Ponca v. Crawford*, 23 Neb. 662 (37 N. W. 609; 8 Am. St. Rep. 144). [See *Burke v. Magee*, 27 Neb. 156 (42 N. W. 890).]

148. (1894.) Where there is no evidence of special damages the jury may determine the general damages by their own opinions and judgment as reasonable men. *Ellison v. Brown*, 43 Neb. 68 (61 N. W. 97).

Questions for court and jury.

149. (1886.) In an action for damages alleged to have been sustained by the next of kin to a deceased, whose death is alleged to have been caused by the negligence of the defendant, the question as to the amount of damages sustained by reason of such death is for the jury to determine, under such testimony as to the measure of damages as may be submitted to them. *Johnson v. Missouri P. R. Co.*, 18 Neb. 690 (26 N. W. 347).

150. (1898.) What acts, omissions, facts and circumstances are competent evidence of damages to be considered by a jury are questions of law for the court; but whether such acts, omissions, facts or circumstances affect an owner's property and damage it, and the amount of such damages, are for the jury. *Jaynes v. Omaha Street R. Co.*, 53 Neb. 631 (74 N. W. 67; 39 L. R. A. 751).

Computation of definite sum.

151. (1901.) Where damages are susceptible of actual computation, the amount thereof should not be left to conjecture. *Paxton & Gallagher v. Vaddonker*, 1 Unof. 776 (96 N. W. 378).

Instructions.

——— In general.

152. (1885.) Where the answer is a general denial, and the witnesses disagree as to

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the amount of damages, an instruction that "the question of amount of damages scarcely requires much attention, since in the trial the defendant has made no contest thereon." is erroneous. *Republican V. R. Co. v. Fink*, 18 Neb. 89 (24 N. W. 691).

153. (1902.) In an action, by an infant in the care and custody of its father, for personal injuries it is error to instruct the jury that his lessened earning capacity is an element of damages, unless it be limited to the period from which he would be entitle to his earnings. *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 65 Neb. 889 (91 N. W. 880).

154. (1902.) The court is not required to cover the rule as to the measure of damages in any one particular paragraph of its instructions. It will be sufficient if the instructions as a whole correctly state the rule. *Rath v. Rath*, 2 Unof. 600 (89 N. W. 612).

——— **Elements of damage in general.**

155. (1888.) An instruction, "You should carefully examine all the evidence as to the nature, character, and extent of the injury, and the result; whether the disability, if any resulted from the injury, is permanent or temporary; its extent, whether total or partial. If any permanent disability resulting, you should consider plaintiff's age, his reasonable expectancy of life, how much money he could earn as he was before the injury, how much, if any, he could earn with his reduced capacity, if any there was on account of the injury, and allow him reasonable compensation for any loss of time and capacity resulting from the injury. You should also allow him for his suffering. The law lays down no rule for estimating his damages on this account, but leaves it to your sound judgment. And you should allow such amount as in your best judgment would be just under the circumstances, not exceeding in all the sum claimed—$25,000," correctly states the law. *Sioux City & P. R. Co. v. Smith*, 22 Neb. 775 (36 N. W. 285).

156. (1891.) Where two instructions are given which state different rules for estimating damages upon the same state of facts, thereby leaving the jury in doubt as to the correct rule, the verdict will be set aside, notwithstanding one of said instructions may have been correct and based upon the testimony. *School District v. Foster*, 31 Neb. 501 (48 N. W. 267).

——— **Harmless error.**

157. (1896.) Even where the damages are unliquidated, where the trial court has, by an instruction, submitted to the consideration of the jury an element of damages not sustained by the evidence, the error will be treated as harmless where, from an examination of the evidence and the verdict, it is reasonably certain that the jury was not misled, and that it allowed nothing on account of the element improperly submitted. *Chicago, R. I. & P. R. Co. v. Archer*, 46 Neb. 907 (65 N. W. 1043)

——— **Failure to caution against punitive damages.**

158. (1903.) Failure to caution the jury against punitive damages is not error where the court has instructed them to allow such damages as "under all evidence would be a just compensation for the injury." *Whiting v. Carpenter*, 4 Unof. 342 (93 N. W. 926).

——— **Permanency of injuries.**

159. (1896.) In an action for personal injuries it is error to submit to the jury a consideration of the question, in assessing damages, as to whether the injuries were permanent, in the absence of evidence tending to establish such permanency of injuries with reasonable certainty. *Chicago, R. I. & P. R. Co. v. Archer*, 46 Neb. 907 (65 N. W. 1043).

160. (1904.) In an action for personal injuries it is error to give an instruction allowing the jury to assess damages for permanent injuries or lasting impairment of health, unless there is evidence showing, with reasonable certainty, that such permanent injuries or lasting impairment of health were in fact sustained by the plaintiff. *Goken v. Dallugge*, 72 Neb. 23 (103 N. W. 287).

——— **Compromise by jury.**

161. (1889.) An instruction that "If the jury wished to compromise the amount of damage, they could each one write his amount of damage separately on paper and then add them together and divide them by five, the number of jurymen, and let that be their verdict," is erroneous, as it substitutes chance or hazard for the deliberate judgment of the jury as a whole. *Burke v. Magee*, 27 Neb. 156 (42 N. W. 890).

Directing verdict.

162. (1895.) Where damages are liquidated and there is no conflict of evidence

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as to their amount, the court may direct the jury as to the precise amount, and not leave it to the assessment of the jury. *Camp v. Pollock*, 45 Neb. 771 (64 N. W. 231).

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DAMS.

See *Water and Watercourses*, VII.

DAYS OF GRACE.

See *Bills and Notes*, §§ 100-102.

DEAD BODIES.

CROSS-REFERENCES.

See, also, *Cemeteries; Coroners.*

1. (1902.) Ordinarily the right to the custody and to decide upon the final place of burial of the body of a deceased unmarried person resides in his next of kin, and this right the courts will not lightly disregard, or treat as having been waived or relinquished, except upon clear and satisfactory evidence of conduct indicative of a free and voluntary intent and purpose to that end. *McEntee v. Bonacum*, 66 Neb. 651 (92 N. W. 633; 60 L. R. A. 440).

2. (1902.) Evidence examined, and *held* not to be sufficient to show that the next of kin of a deceased unmarried person waived her right to decide upon his place of burial. *McEntee v. Bonacum*, 66 Neb. 651 (92 N. W. 633; 60 L. R. A. 440).

3. (1907.) An undertaker who, acting in good faith pursuant to a direction by a coroner, causes the decent burial of a dead body found and being in the county, upon which the latter had held an inquest, will not be denied reasonable compensation for his services and expenses for the sole reason that it may afterwards be shown that the inquest was unnecessary. *Darling v. Box Butte County*, 78 Neb. 564 (111 N. W. 470).

DEAF AND DUMB PERSONS.

See *Asylums.*

DEATH.

ANALYSIS.

I. EVIDENCE OF DEATH AND SURVIVORSHIP.
Presumption of death from absence, §§ 1-6.
Probate of will as evidence of death, § 7.

II. ACTION FOR WRONGFUL DEATH.
Right of action, §§ 8, 9.
Probate of will as evidence of death, § 7.
Right of action as property, § 10.
Statutory provisions, §§ 11, 12.
Survival of right to personal representative, §§ 13-16.
Contributory negligence of beneficiary as defense, § 17.
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Pleadings.
——— Averment of next of kin or beneficiary, §§ 19-25.
——— Pecuniary loss or injury, §§ 26-31.
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——— Averment of revocation of authority to sue, § 33.
——— Construction of pleading, § 34.
Admissibility of evidence.
——— Cause of death, §§ 35, 36.
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——— Expectancy of life of deceased, §§ 38-41.
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——— Pecuniary loss to beneficiary, § 44.
——— Pecuniary condition of deceased, §§ 45, 46.
——— Remarriage of widow, § 47.
Presumptions and burden of proof, §§ 48-50.
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Damages.
——— Elements of damage in general, § 54.
——— Nominal damages, § 55.
——— Mental suffering of beneficiary as element of damage, § 56.
——— Excessiveness of award, §§ 57-62.
——— Inadequate award, § 63.
——— Disposition of award, §§ 64, 65.
Question for jury, §§ 66, 67.
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CROSS-REFERENCES.

Negligence and wrongful acts as grounds for, see specific topics.

See, also, *Damages; Negligence.*

Abatement and revival of action on death of party, see *Abatement and Revival.*

Liability for, from liquor furnished, see *Intoxicating Liquors*, §§ 346-354.

Title to mortgaged chattels on death of mortgagor, see *Chattel Mortgages*, § 232.

Admissibility of mortality tables in action for, see *Damages*, §§ 135-138*a*.

Death of grantor as tolling statutes as to creditor's right to set aside conveyance for fraud, see *Fraudulent Conveyances*, § 382.

Causing death as a crime, see *Homicide.*

Admissibility of Carlisle tables in action against liquor dealers, see *Intoxicating Liquors*, §§ 416-417.

As terminating life estate, see *Life Estates.*

I. EVIDENCE OF DEATH AND SURVIVORSHIP.

Presumption of death from absence.

1. (1884.) When defendant in an action to annul her marriage, relies on the presumption that her former husband was dead, and the evidence shows that soon after such husband left her, she moved from the state where they had been living, and later moved again, and made no effort to ascertain his whereabouts, an instruction to find that such husband was dead if he left defendant "and that she has never heard from him for more than seven years at the time of her marriage," is erroneous. *Thomas v. Thomas*, 16 Neb. 553 (20 N. W. 846).

2. (1884.) In order to raise the presumption of death by an absence of seven years, it must be shown that the party alleged to be dead has been absent from his usual place of resort for more than seven years and that during that time he has not been heard from by those who would naturally do so. *Thomas v. Thomas*, 16 Neb. 553 (20 N. W. 846).

3. (1886.) Where a husband leaves his wife in anger, declaring an intention never to return, and there is evidence to show that he was seen within seven years prior to the wife's remarriage, the presumption of his death is overcome, and the second marriage dissolved on the prayer of the second husband. *Thomas v. Thomas*, 19 Neb. 81 (27 N. W. 84).

4. (1885.) Evidence of character, habits, domestic relations, and the like, making the abandonment of home and family improbable, and showing a want of all those motives which can be supposed to influence men to such acts, may be sufficient to raise the presumption of death, or from which the death of one absent and unheard from may be inferred without regard to the duration of such absence. *Cox v. Ellsworth*, 18 Neb. 664 (26 N. W. 460; 54 Am. Rep. 827).

5. (1886.) The death of an absent person may be presumed in less than seven years from the date of the last intelligence from him, from facts and circumstances other than those showing his exposure to danger which probably resulted in his death. *Cox v. Ellsworth*, 18 Neb. 664 (26 N. W. 460; 54 Am. Rep. 827).

5*a*. (1907.) A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him. *Holdrege v. Livingston*, 79 Neb. 238 (112 N. W. 341).

5*b*. (1907.) Proof of a change of residence from one state to another, and that such person has not been heard of in the former state for a period of seven years, does not create the presumption. *Holdrege v. Livingston*, 79 Neb. 238 (112 N. W. 341).

6. (1903.) Depositions given in the same action about five years previous to the final decision, showing next of kin to be then alive, carry a presumption of their existence at the time of the verdict. *Chicago, R.*

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I. & P. R. Co. v. Young, 67 Neb. 568 (93 N. W. 922).

Probate of will as evidence of death.

7. (1884.) The probate of a will and the issuing of letters testamentary are *prima facie* evidence of the death of the testator. *Hendrix v. Boggs*, 15 Neb. 469 (20 N. W. 28).

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II. Actions for Wrongful Death.

Right of action.

8. (1881.) At common law and independent of statutory provisions, an action for damages cannot be maintained for the death of a human being. *Wilson v. Bumstead*, 12 Neb. 1 (10 N. W. 611).

9. (1881.) Application of principles of action for wrongful death. *Wilson v. Bumstead*, 12 Neb. 1 (10 N. W. 411).

Right of action as property.

10. (1898.) A cause of action for death by wrongful act is not an asset of decedent's estate. *City of Friend v. Burleigh*, 53 Neb. 674 (74 N. W. 50).

Statutory provisions.

11. (1895.) Though the action created by chapter 21, Compiled Statutes, is purely a creature of the statute, the courts will not give the statute a technical or narrow construction. *Kearney Electric Co. v. Laughlin*, 45 Neb. 390 (63 N. W. 941).

12. (1900.) Chapter 21, Compiled Statutes, creating rights of action for death by negligence, is not amendatory of section 3, article I, chapter 72, Compiled Statutes, making a carrier presumptively liable for injuries to passengers nor do the acts in anywise conflict, one with the other. *Chicago, R. I. & P. R. Co. v. Zernecke*, 59 Neb. 689 (82 N. W. 26; 55 L. R. A. 610).

Survival of right to personal representative.

13. (1881.) An action for causing the death of a human being must be brought by the personal representatives of the deceased. *Wilson v. Bumstead*, 12 Neb. 1 (10 N. W. 411.) [See *City of Friend v. Burleigh*, 53 Neb. 674 (74 N. W. 50).]

14. (1899.) Under Lord Campbell's Act (Comp. Stats., ch. 21) an action may be maintained by a personal representative of a decedent who left surviving one belonging to the class for whose benefit the statute was enacted and who sustained pecuniary loss. *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1 (78 N. W. 359).

15. (1899.) Under chapter 21, Compiled Statutes, the legal representative of one who died in consequence of an injury sustained through the wrongful act of another has a right of action where the injured person might have maintained a suit had he survived the injury. *Chicago, R. I. & P. R. Co. v. Young*, 58 Neb. 678 (79 N. W. 556).

16. (1900.) Under chapter 21, Compiled Statutes, known as "Lord Campbell's Act," a right of action is given the legal representative of one who has died in consequence of injuries sustained while being transported by a railroad company, where the injured party could have maintained an action had he survived. *Chicago, R. I. & P. R. Co. v. Zernecke*, 59 Neb. 689 (82 N. W. 26; 55 L. R. A. 610).

Contributory negligence of beneficiary as defense.

17. (1901.) In an action for the death of a child, the father as administrator being plaintiff, it is error to instruct the jury that contributory negligence of the father is no defense. *Tucker v. Draper*, 62 Neb. 66 (86 N. W. 917; 54 L. R. A. 321).

Jurisdiction of state courts for death in foreign state.

18. (1888.) State courts have jurisdiction in actions against a railroad company for death in a foreign state. *Missouri P. R. Co. v. Lewis*, 24 Neb. 848 (40 N. W. 401; 2 L. R. A. 67*n*).

Pleading.

——Averment of next of kin or beneficiary.

19. (1885.) In an action by the personal representatives of a deceased person to recover damages for his death, it must be alleged in the petition that the deceased left a widow or next of kin, or both, according to the fact. *Burlington & M. R. R. Co. v. Crockett*, 17 Neb. 570 (24 N. W. 219).

20. (1885.) A husband, as executor, cannot maintain an action under the statute approved February 25, 1873, for the death of his wife, unless it appear that there are next of kin entitled to the amount to be recovered and if the petition fails to state facts showing the existence of next of kin it will not state a cause of action. *Warren v. Englehart*, 13 Neb. 283 (13 N. W. 401).

21. (1898.) A petition in an action based on chapter 21, Compiled Statutes, which avers that the defendant by his wrongful act, neglect, or default caused the death of a person, that the plaintiff is such person's

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duly-appointed personal representative, and that the deceased left a widow and children, states a cause of action. *City of Friend v. Burleigh*, 53 Neb. 674 (74 N. W. 50).

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22. (1899.) In an action for damages the petition should disclose the names of all beneficiaries, but where the names of dependent minor children of decedent are averred, omission to allege whether he left a widow does not make the petition demurrable. *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1 (78 N. W. 359).

23. (1899.) Where the facts alleged in the petition do not show that the persons, for whose benefit the suit was instituted, had a pecuniary interest in the life of the deceased person the pleading is defective. *Chicago, R. I. & P. R. Co. v. Young*, 58 Neb. 678 (79 N. W. 556).

24. (1899.) In a suit for damages for death by wrongful act a petition is fatally defective which discloses no survivor entitled by law to support by the person deceased, and in which, with reference to such survivor as is described, there is no averment of pecuniary injury. *Chicago, B. & Q. R. Co. v. Van Buskirk*, 58 Neb. 252 (78 N. W. 514).

25. (1899.) In an action for damages under the provisions of chapter 21, Compiled Statutes, a petition is fatally defective which discloses no survivor entitled by law to support by the person deceased, and in which, with reference to such survivor as is described, there is no averment of pecuniary injury. *Chicago, B. & Q. R. Co. v. Bond*, 58 Neb. 385 (78 N. W. 710).

——— **Pecuniary loss or injury.**

26. (1895.) In a suit by a widow as administratrix to recover from a corporation damages for negligently causing the death of her husband, a petition alleging that deceased left seven minor children who were wholly dependent upon him for support and maintenance, is not open to the objection that it fails to aver facts showing the wife and next of kin sustained pecuniary injuries within the meaning of chapter 21, Compiled Statutes. *Kearney Electric Co. v. Laughlin*, 45 Neb. 390 (63 N. W. 941).

27. (1895.) A petition under chapter 21, Compiled Statutes, for the death of the plaintiff's intestate by the wrongful act of the defendant is fatally defective, which fails to show that the person or persons for whose benefit the action is brought have sustained pecuniary injury by the death of the deceased. Nor will the petition in the absence of such allegation support a judgment for nominal damages. *Orgall v. Chicago, B. & Q. R. Co.*, 46 Neb. 4 (64 N. W. 450).

28. (1898.) A petition under Lord Campbell's Act, which alleges that the deceased left a widow and next of kin, describing them, on whom the law confers the right to be supported by the person killed, sufficiently avers pecuniary loss, and in that respect states a cause of action. *Omaha & R. V. R. Co. v. Crow*, 54 Neb. 747 (74 N. W. 1066; 69 Am. St. Rep. 741).

29. (1901.) In an action by an administrator to recover damages for the death of his intestate under chapter 21, Compiled Statutes, the petition must show a pecuniary injury to the widow or next of kin, but as against a general demurrer it is sufficient in that regard to allege that "by reason of the death of the intestate and the loss of the service and society and fellowship of the said intestate the plaintiff has been damaged in the sum of five thousand dollars." *Tucker v. Draper*, 62 Neb. 66 (86 N. W. 917; 54 L. R. A. 321).

30. (1903.) In an action by an administrator for damages for causing the death of his intestate, it is proper to allege such facts as will show a pecuniary loss to the next of kin. *Union P. R. Co. v. Roeser*, 69 Neb. 62 (95 N. W. 68).

31. (1903.) The petition is not demurrable because it alleges a contract to support the next of kin made by the deceased in his lifetime, without alleging that the estate of the deceased is insufficient for that purpose. *Union P. R. Co. v. Roeser*, 69 Neb. 62 (95 N. W. 68).

——— **Amendment.**

32. (1093.) Where the petition sets forth in general terms pecuniary loss in an action under Lord Campbell's Act, it is no abuse of discretion to permit an amendment setting forth the particular facts from which such loss is inferable. *Chicago, R. I. & P. R. Co. v. Young*, 67 Neb. 568 (93 N. W. 922).

——— **Averment of revocation of authority to sue.**

33. (1885.) Where an administratrix had authority when the action was commenced to bring an action to recover damages for the death of the intestate, a subsequent revocation of the authority must be specially

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pleaded, and is not put in issue by a denial of her authority "to sue or recover in and maintain this action." *Burlington & M. R. R. Co. v. Crockett*, 17 Neb. 570 (24 N. W. 219).

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——— Construction of pleading.

34. (1895.) The words "support and maintenance" in a petition for negligently causing the death of plaintiff's husband, mean food, clothing, and shelter. *Kearney Electric Co. v. Laughlin*, 45 Neb. 390 (63 N. W. 941).

Admissibility of evidence.

——— Cause of death.

35. (1895.) In an action for damages for death by reason of a brick wall falling on decedent, defendant, in a defense of act of God by means of a severe wind storm, may produce evidence that there had been no such severe storm of recent years. *Olsen v. Meyers*, 46 Neb. 240 (64 N. W. 954).

36. (1899.) The testimony of a witness describing the positions of decedent and the engine shortly after the accident which resulted in the death of the plaintiff's intestate was admissible as *res gestæ*. *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1 (78 N. W. 359).

——— Dying declaration.

37. (1898.) Where the negligence of a city causes the death of one, and his personal representative sues such city to recover for the benefit of the widow and next of kin of the deceased damages to compensate them for the pecuniary loss they have sustained by reason of his death, the exclusion from evidence of the declaration of the deceased that his injury was the result of his own carelessness, held not prejudicial. *City of Friend v. Burleigh*, 53 Neb. 674 (74 N. W. 62).

——— Expectancy of life of deceased.

38. The Carlisle tables of mortality are admissible in an action for death by wrongful act. (1879) *Roose v. Perkins*, 9 Neb. 304; (1882) *King v. Bell*, 13 Neb. 409 (14 N. W. 41); (1898) *City of Friend v. Burleigh*, 53 Neb. 674 (74 N. W. 62).

39. (1894.) The Carlisle tables of expectancy of life are admissible in evidence as tending to prove the expectancy of the life of a deceased. *City of Friend v. Ingersoll*, 39 Neb. 717 (58 N. W. 281); *City of Lincoln v. Smith*, 28 Neb. 762 (45 N. W. 41).

40. (1904.) The Carlisle table of mortality or life expectancy is properly admissible in evidence for the consideration of the jury in determining the probable duration of the life of the deceased, the proper foundation as to age and general health being first proved. *Horst v. Lewis*, 71 Neb. 370 (103 N. W. 460).

41. (1904.) The Carlisle table of morality or life expectancy is properly admissible in evidence for the consideration of the jury in determining the probable duration of the life of the deceased, the proper foundation as to age and general health being first proved. *Horst v. Lewis*, 71 Neb. 370 (103 N. W. 460).

——— Earning capacity of deceased.

42. (1889.) In an action by a widow for damages for the death of her husband, a question to plaintiff as to how much her husband could earn, when answered by a statement as to what he had earned per year in the past, is not erroneous. *Sellars v. Foster*, 27 Neb. 118 (42 N. W. 907).

43. (1893.) In an action by an administrator under the provisions of chapter 21, Compiled Statutes, to recover damages for the death of his intestate, it is proper to prove the value of the services of the deceased which the next of kin of the deceased could reasonably expect but for the injury would have been rendered in their behalf, the natural expectancy of life of the deceased just previous to receiving the injury which resulted in her death having been duly shown. *Missouri P. R. Co. v. Baier*, 37 Neb. 235 (55 N. W. 913).

——— Pecuniary loss to beneficiary.

44. (1901.) 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. *South Omaha Water-Works Co. v. Vocasek*, 62 Neb. 710 (87 N. W. 536).

——— Pecuniary condition of deceased.

45. (1902.) In an action to recover damages for the death of a person it is incompetent for the defendant to show what the value of the estate of the deceased was. *Chicago, R. I. & P. R. Co. v. Hambel*, 2 Unof. 607 (89 N. W. 643).

46. (1903.) In an action by an administrator for the benefit of the widow and children under section 2, chapter 21, Compiled Statutes, evidence as to the amount of prop-

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erty left by the deceased is inadmissible. *Chicago, R. I. & P. R. Co. v. Holmes*, 68 Neb. 826 (94 N. W. 1007).

——— **Remarriage of widow.**

47. (1902.) In an action by an administrator to recover damages resulting to a wife on account of the death of her husband, alleged to have been caused by the negligence of the defendant, the fact that such wife has subsequently remarried is immaterial, and should not be submitted to the jury, nor considered by them, in fixing the amount of the recovery. *Chicago, St. P., M. & O. R. Co. v. Lagerkrans*, 65 Neb. 566 (91 N. W. 358).

Presumptions and burden of proof.

48. (1895.) The mere fact that a man is found dead under a railroad car does not raise the presumption that he came to his death through the negligence of the railroad company. *Spears v. Chicago, B. & Q. R. Co.*, 43 Neb. 720 (62 N. W. 68).

49. (1895.) In a suit by an administrator against a railroad company for negligently causing the death of his intestate, there is no presumption of law that either party was guilty of negligence. *Spears v. Chicago, B. & Q. R. Co.*, 43 Neb. 720 (62 N. W. 68).

50. (1892.) Where, in an action for damages against a railroad company for wrongfully causing the death of plaintiff's intestate, the plaintiff proves his case without disclosing any negligence on the part of his intestate, contributory negligence is a matter of defense, and the burden of establishing it is on the defendant. *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95 (52 N. W. 840).

Weight and sufficiency of evidence.

51. (1892.) Evidence in an action to recover for the death of one killed by a railroad *held* to sustain a verdict for nominal damages. *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95 (52 N. W. 840).

52. (1896.) Evidence in an action by an administrator for injuries causing the death of his decedent examined, and *held* sufficient to sustain the verdict for plaintiff. *Post v. Olmstead*, 47 Neb. 893 (66 N. W. 828).

53. (1901.) In an action for damages for the death of plaintiff's child, caused by falling into a well on defendant's premises, the evidence examined, and found sufficient to warrant the trial court in submitting the question of negligence to the jury. *Tucker v. Draper*, 62 Neb. 66 (86 N. W. 917; 54 L. R. A. 321).

Damages.

——— **Elements of damage in general.**

54. (1892.) In case of a verdict in favor of the plaintiff, in an action against a railroad company for wrongfully causing the death of plaintiff's intestate, he is entitled to recover such a sum as the jury may deem from the evidence a fair and just compensation to the next of kin, for the pecuniary loss resulting from the death which is made the basis of the suit, not exceeding the statutory amount. *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95 (52 N. W. 840).

——— **Nominal damages.**

55. (1892.) Under section 2, chapter 21, Compiled Statutes, in an action against a railroad company for wrongfully causing the death of plaintiff's intestate, where the proof shows that the next of kin was not pecuniarily injured by the death of the intestate, the plaintiff is only entitled to recover nominal damages. *Anderson v. Chicago, B. & Q. R. R. Co.*, 35 Neb. 95 (52 N. W. 840).

——— **Mental suffering of beneficiary as element of damage.**

56. (1904.) Damages recoverable for injuries resulting in death are limited to pecuniary compensation to the next of kin. No damages can be given on account of bereavement, mental suffering, or as a solace on account of such death. *Johnson County v. Carmen*, 71 Neb. 682 (99 N. W. 502).

——— **Excessiveness of award.**

57. (1903.) Damages in the sum of $1,100 on behalf of a mother and a sister to whom a son and brother, 35 years of age, able-bodied, successful in business, earning a salary of $1,800, unmarried, was accustomed from time to time to render pecuniary assistance, is not excessive. *Chicago, R. I. & P. R. Co. v. Young*, 67 Neb. 568 (93 N. W. 922).

58. (1895.) A verdict for $2,000 for the death of plaintiff's husband, a healthy man, 38 years old, earning $10 per week, and with plaintiff and eight minor children wholly dependent on him for support, was not excessive. *Kearney Electric Co. v. Laughlin*, 45 Neb. 390 (63 N. W. 941).

59. (1896.) A verdict for $2,850 for the death of a boy 10 years of age, who was drowned in a pond of water accumulated in a street of a municipality, not excessive.

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City of Omaha v. Richards, 49 Neb. 244 (68 N. W. 528).

60. (1896.) Verdict for plaintiff for $2,400 sustained where the person killed was a boy of 17, a competent compositor, able to earn $4 a day, and his next of kin his father, 46 years old, a poor man with four children. *Post v. Olmstead*, 47 Neb. 893 (66 N. W. 828).

61. (1898.) In an action against a saloon-keeper for the death of plaintiff's husband, a mechanic 38 years old, earning $3 per day, a verdict for $850 *held* not excessive. *Schick v. Saunders*, 53 Neb. 664 (74 N. W. 39).

62. (1901.) In this action brought by an administratrix for causing the death of her intestate, being her son, 7 years of age, a verdict for $1,525 *held* not excessive so as to require a reversal. *City of Omaha v. Bowman*, 63 Neb. 333 (88 N. W. 521).

——— Inadequate award.

63. (1903.) *Held*, That a verdict for only $10, for the pecuniary loss sustained by reason of the death of a minor child 3 years and 4 months old, is inadequate in amount. *Draper v. Tucker*, 69 Neb. 434 (95 N. W. 1026).

——— Disposition of award.

64. (1899.) Damages recovered under Lord Campbell's Act are assets for distribution to the widow and next of kin of decedent. *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1 (78 N. W. 359).

65. (1902.) A judgment recovered by an administrator under the provisions of section 2, chapter 21, Compiled Statutes of Nebraska, is for the exclusive benefit of the widow and the next of kin of such deceased person, and the fact that the administrator, in his petition, for damages, fails to name all the legal beneficiaries provided for in this act, will not bar any legal distributee not named in his petition from receiving his distributive share of the judgment recovered. *Oyster v. Relief Department of Chicago, B. & Q. R. Co.*, 65 Neb. 789 (91 N. W. 699; 59 L. R. A. 291).

Question for jury.

66. (1886.) In an action for damages alleged to have been sustained by the next of kin to a deceased, whose death is alleged to have been caused by the negligence of the defendant, the question as to the amount of damages sustained by reason of such death is for the jury to determine, under such testimony as to the measure of damages as may be submitted to them. *Johnson v. Missouri P. R. Co.*, 18 Neb. 690 (26 N. W. 347).

67. (1901.) In an action for damages for death resulting from the alleged negligence of defendant, unless the facts are undisputed and are of such a nature that ordinary minds would not differ in their judgment of them, the question of negligence must be submitted to the jury. *Tucker v. Draper*, 62 Neb. 66 (86 N. W. 917; 54 L. R. A. 321).

Instructions.

68. (1896.) Where a bath house company was notified of a bather's disappearance soon after he had been seen as to warrant the inference that an immediate search would have resulted in his rescue before death, and the company had no one in charge of the place to watch and rescue bathers, an instruction for a verdict for defendant is erroneous. *Brotherton v. Manhattan Beach Improvement Co.*, 48 Neb. 563 (67 N. W. 479; 58 Am. St. Rep. 709).

69. (1900.) Instructions as to measure of damages *held* proper. *Chicago, R. I. & P. R. Co. v. Zernecke*, 59 Neb. 689 (82 N. W. 26; 55 L. R. A. 610).

DEBTOR AND CREDITOR.

See *Assignments for Benefit of Creditors; Composition with Creditors; Creditors' Suits; Fraudulent Conveyances; Insolvency.*

DECEIT.

See *Fraud.*

DECLARATION.

See *Pleading*, II.

DECLARATIONS.

Admissibility in civil actions, see *Evidence*, §§ 260-273.

Admissibility of, made by decedent, see *Executors and Administrators*, §§ 293-295.

Admissibility in criminal prosecutions, see *Criminal Law*, §§ 300-327.

Dying declarations, see *Homicide*, VIII, C.

DECREE.

See *Equity; Judgments.*

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DEDICATION.

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ANALYSIS.

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CROSS-REFERENCES.

Easements, see *Easements*.

See, also, *Highways*.

Definition.

1. (1877.) A dedication is defined to be the act of devoting or giving property for some proper object in such manner as to conclude the owner. It may be made by parol, and may be presumed from lapse of time. *State, ex rel. Sims, v. Otoe County*, 6 Neb. 129.

Acknowledgment as deed to land.

2. (1897.) Under section 106, article 1, chapter 14, Compiled Statutes, the acknowledgment and registration of a plat subdividing tracts of land are equivalent to a deed in fee-simple of such portion of the premises platted as is on such plat set apart for streets and other public uses. *Ehmen v. Village of Gothenburg*, 50 Neb. 715 (70 N. W. 237).

Platting land as dedication in general.

3. (1894.) The plat of an addition to a city is not void because the owners of the land platted failed to acknowledge the plat. *Pillsbury v. Alexander*, 40 Neb. 242 (58 N. W. 859).

4. (1887.) Where the owners of real estate caused it to be surveyed as a town site and the plat thereof to be recorded, in which plat a square is marked and designated therein as "College Square," the lots in blocks, abutting thereon, being only one-half the size of other lots in that part of the plat, and so laid out as to front to the square, and held at a higher valuation by reason thereof in order to secure compensation for the land included in such square, it was *held*, that there was a dedication of College Square to the public, with a right to the use thereof for the purpose of an institution of learning so long as the user continued; the title remaining in the public as represented by the municipal corporation (after being incorporated) for that use, and ejectment will lie to remove any person unlawfully in possession. *Weeping Water v. Reed*, 21 Neb. 261 (31 N. W. 797).

5. (1897.) Where land is platted into a town site, and signed by all of the several owners save one, whose name was signed by one of the other as "attorney" and the one not signing afterward conveyed his land to another who recognized the validity of the plat, under section 115, chapter 14, of Compiled Statutes, the execution and recording of the plat as amended February 8, 1869, and was equivalent to deed absolute. *Weeping Water v. Reed*, 21 Neb. 261 (31 N. W. 797).

6. (1897.) The statute provides for the acknowledgment and recording of plats subdividing tracts of land, and that the acknowledgment and recording of such a plat is equivalent to a deed in fee-simple of such

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portion of the premises platted as is on such plat set apart for streets and other public use. *Held*, That under this statute a plat, properly acknowledged and recorded, showing the subdivision of land into blocks and lots with streets traversing the same, with a block in the center thereof not subdivided into lots and with no alley traversing the same as was the case with other blocks, said block being designated "Ehmen's Park" (Ehmen being the owner of the land subdivided), operated as a statutory dedication of that block for a public park. *Ehmen v. Village of Gothenburg*, 50 Neb. 715 (70 N. W. 237).

Revocation before acceptance.

7. (1883.) A dedication of property by the state to a private corporation in trust for a public use may be withdrawn at any time before its acceptance. The bringing of an action to recover from a subsequent donee is not an acceptance. *State Historical Ass'n v. City of Lincoln*, 14 Neb. 336 (15 N. W 717).

Reservation by grantor.

8. (1897.) In view of the owner's name to designate a park granted by him, the use of the term "Ehmen's Park" cannot be taken to imply a reservation of the land for Ehmen's private use. *Ehmen v. Village of Gothenburg*, 50 Neb. 715 (70 N. W. 237).

Highways, streets and alleys.

——— Right to acquire by dedication.

9. (1880.) The public may acquire by dedication from the owner an easement in land for the purpose of travel. *Graham v. Hartnett*, 10 Neb. 517 (7 N. W. 280).

——— Right to dedicate.

10. (1888.) Where a party has entered land under the homestead law of the United State, and made final proof, and complied with the law on his part to entitle him to a patent, he may make a valid dedication of a portion of said land for a public road, although the patent has not been issued. *Rube v. Sullivan*, 23 Neb. 779 (37 N. W. 666).

11. (1890.) To establish the existence of a highway by dedication by deed it must appear that the grantor was the owner of the land when the dedication was made. *Warren v. Brown*, 31 Neb. 8 (47 N. W. 633).

12. (1898.) An effectual statutory dedication of land for use as a public street cannot result from the filing of a plat, in the office of the county clerk or register of deeds, by one who is not the owner of the fee. *Lewis v. City of Lincoln*, 55 Neb. 1 (75 Neb. 154).

——— Who may accept.

13. (1906.) In order to constitute a highway by dedication, it is not necessary that the offer of dedication be accepted by the public authorities, it may be accepted by the public itself. *Cassidy v. Sullivan*, 75 Neb. 847 (106 N. W. 1027).

Title and rights acquired.

14. (1898.) Where land is surveyed and platted into an addition to a city, the fee simple title to the streets and alleys of the addition vests in the public. *Jaynes v. Omaha Street R. Co.*, 53 Neb. 631 (74 N. W. 67; 39 L. R. A. 751).

15. (1898.) The dedication of streets in a platted addition to a city contemplates the right of the public to use them for the purpose of passage by such means as it may see fit to employ, but the grant does not contemplate that one may exclusively and permanently appropriate a portion of a street to the exclusion of the remainder of the public. *Jaynes v. Omaha Street R. Co.*, 53 Neb. 631 (74 N. W. 67; 39 L. R. A. 751).

——— Acts constituting dedication.

16. (1882.) Where the owner of a tract of land adjoining the city of Lincoln laid out the same into additions to said city and filed plats upon which "K" street was marked as if laid out, and lots were sold fronting thereon, but the description merely extended to the outer line of the street, there was sufficient dedication of the street. *Gregory v. Lincoln*, 13 Neb. 352 (14 N. W. 423).

17. (1884.) Where a deed containing description by metes and bounds describes one line as an alley when in fact there was no such alley, the land not having been platted, and such knowledge was known by the purchaser, there is no dedication of the alley to the city, thus giving the purchaser the rights to a public alley. *Bushman v. Gibson*, 15 Neb. 676 (20 N. W. 106).

18. (1894.) The state of Nebraska sold to Arnold & Abbott certain land and gave them a contract for a deed; Arnold & Abbott caused this land to be surveyed and platted into lots, blocks, and streets, and designated as "Arnold & Abbott's Addition to Grand Island." They did not attach or acknowledge or sign a certificate to such plat as required by section 105, chapter 14, Compiled Statutes, 1893. They caused said plat

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to be filed in the office of the recorder of deeds of Hall county. They sold and conveyed parts of the land platted, describing the parts so sold as lots and blocks in Arnold & Abbott's addition. The public took possession of and used the land designated as streets on said plat. *Held*, That Arnold & Abbott, by their acts, had estopped themselves, their heirs and grantees, from claiming any title to said land designated as streets on the plat in said addition; and their acts in platting said addition amounted to a common law dedication to the public of the land reserved on said plat for streets. *Pillsbury v. Alexander*, 40 Neb. 242 (58 N. W. 859).

19. (1906.) Where adjoining landowners place fences and plant trees along the line between their lands in such a way as to leave an intervening space for public travel, and with the intention that it be used for that purpose, and the public enter upon and use the intervening space as a highway and continue in such use and enjoyment thereof for almost 20 years, it will be regarded as a highway by dedication. *Cassidy v. Sullivan*, 75 Neb. 847 (106 N. W. 1027).

Evidence to establish.

——— Title of grantor.

20. (1890.) To establish the existence of a highway by dedication by deed it must appear that the grantor was the owner of the land when the dedication was made. *Warren v. Brown*, 31 Neb. 8 (47 N. W. 633).

——— Acceptance by public.

21. (1880.) If acts alone of the owner be relied on to prove it, they must be such as to clearly manifest an intention to dedicate, and the public must have so acted with reference to it as to indicate an acceptance thereof. *Graham v. Hartnett*, 10 Neb. 517 (7 N. W. 280).

22. (1890.) Where the acts of the owner of the land are relied on to establish a dedication of land for the purpose of a public road, an acceptance of the same by the public must be proved. *Warren v. Brown*, 31 Neb. 8 (47 N. W. 633).

23. (1906.) The acceptance by the public itself is shown by its entering upon the land and enjoying the privilege offered by user. *Cassidy v. Sullivan*, 75 Neb. 847 (106 N. W. 1027).

23*a*. (1907.) An acceptance of the dedication of lands of the general government, for road purposes, made by section 2477, Revised Statutes U. S., may be shown by the acts of the public authorities, or by the acts of the public itself. *Van Wanning v. Deeter*, 78 Neb. 282 (110 N. W. 703).

24. (1907.) The acceptance of a grant of land to a county for road purposes may be shown by proof that the public authorities afterwards assumed control over it and improved a portion of it, and that it was used by the public as a highway. *Lyons v. Mullen*, 78 Neb. 151 (110 N. W. 743).

——— Intent to dedicate.

25. (1880.) To establish the existence of a public road by dedication the clear assent of the owner of the land must be shown. *Graham v. Hartnett*, 10 Neb. 517 (7 N. W. 280).

26. (1880.) If acts alone of the owner be relied on to prove dedication, they must be such as to clearly manifest an intention to dedicate, and the public must have so acted with reference to it as to indicate an acceptance thereof. *Graham v. Hartnett*, 10 Neb. 517 (7 N. W. 280).

27. (1880.) An entry in the county commissioners' record, purporting to be a statement to the county clerk that the owner of land, for a stated consideration, had agreed to release the county from the payment of damages awarded him for locating a public road across his land, is not competent evidence against him, without showing that he either made or authorized the statement. *Graham v. Hartnett*, 10 Neb. 517 (8 N. W. 280).

28. (1888.) Unless there is some clear and unequivocal manifestation of an intention to dedicate, dedication will not be presumed until after the lapse of ten years. *Rube v. Sullivan*, 23 Neb. 779 (37 N. W. 666).

29. (1888.) A party owning land, in fencing the same, left a strip along the section line, a rod or more in width, apparently for the use of the public for a public road, and it was traveled as such; but there was no proof of dedication or an intention to dedicate any of the land within the enclosure. *Held*, That without such proof the jury would not be justified in finding that any of the land within the enclosure had been dedicated to public use, and, therefore, a road overseer who removed the fence as an obstruction to the highway would be liable for the trespass, *Rube v. Sullivan*, 23 Neb. 779 (37 N. W. 666).

30. (1894.) In order to establish the existence of a public highway over private

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property by dedication the *animus dedicendi* is essential, and must be clearly proved. *Brown v. Stein*, 38 Neb. 596 (57 N. W. 401).

31. (1896.) Where the acts of an owner of real estate are relied upon to prove that he has dedicated it to the public the acts must be such as to clearly manifest an intention on his part to dedicate it, and the public must have so acted with reference to the property as to indicate an intention of acceptance of the property dedicated. *City of Omaha v. Hawver*, 49 Neb. 1 (67 N. W. 891).

32. (1896.) Acts of an owner which amount to a dedication of his property to the public must be such as indicate an abandonment of the use of the property exclusively to the public. *City of Omaha v. Hawver*, 49 Neb. 1 (67 N. W. 891).

33. (1902.) To constitute a valid dedication of private property for a public highway, it must clearly appear that the owner intended to dedicate the land for a highway, and that the public by user or otherwise accepted the land for that purpose. *Close v. Swanson*, 64 Neb. 389 (89 N. W. 1043).

34. (1903.) The allegation that private property has been dedicated to a public use, can only be established from declarations or circumstances showing that the owner intended to make the donation in question. *Langan v. Whalen*, 67 Neb. 299 (93 N. W. 393).

Weight and sufficiency of evidence.

——— In general.

35. (1894.) Evidence examined, and *held* insufficient to establish a dedication of the property in controversy as public streets. *Brown v. Stein*, 38 Neb. 596 (57 N. W. 406).

36. (1896.) The evidence examined, and *held* to sustain the finding of the district court that the defendant in error had not dedicated certain real estate to the public for use as a highway. *Oyler v. Ross*, 48 Neb. 211 (66 N. W. 1099).

37. (1896.) Evidence showing that a city contractor, in grading a street entered upon adjoining land and took away dirt for grading purposes, without authority from anyone, and unknown to the owner, will not sustain a finding of a dedication of such land for street purposes. *City of Omaha v. Hawver*, 49 Neb. 1 (67 N. W. 891).

38. (1906.) Evidence showing use by the public for twenty years as a highway sustains a finding of dedication to the public by the owners. *Cassidy v. Sullivan*, 75 Neb. 847 (106 N. W. 1027).

39. (1907.) To prove an implied dedication of a road to the public as a highway and the acceptance thereof by the public, it is not necessary to prove that the public authorities have improved or repaired the road, where the evidence showed that it rquired no improving or repairing to fit it for public travel. *Brandt v. Olson*, 79 Neb. 612 (113 N. W. 151).

40. (1907.) Evidence of ten years' use by the public of a road through cultivated land without substantial variance, with the knowledge and acquiescence of the owner for a period of ten years, raises the presumption of an implied dedication and acceptance of such road as a public highway. *Brandt v. Olson*, 79 Neb. 612 (113 N. W. 151).

——— Plats and recognition.

41. (1884.) The city of O. having been in fact laid out into lots, blocks, streets, and squares more than twenty-five years ago, during all of which time the same have been used, enjoyed, and the lots taxed as such, *held*, that a decision of the supreme court that such lots have no legal existence for the reason that no plat or map of said city has ever been filed or recorded, would be against public policy, and a discussion of authorities which might logically lead to such a decision, declared inexpedient. *Bryant v. Estabrook*, 16 Neb. 217 (20 N. W. 245).

42. (1898.) The owners of real estate situated within the corporate limits of a city subdivided and platted the same. On the recorded plat, L street, which the public authorities had previously undertaken to establish, was indicated as being 66 feet wide, and the surveyor's certificate, in effect, declared that to be its width. The owners of the subdivision built houses on said street as shown on the plat, and along the same constructed a sidewalk, of which the general public enjoyed the unhindered use. They also mortgaged some of the lots, and represented to the mortgagee, as an inducement to make the loan, that such lots were located on L street. *Held*, That the finding of the trial court that L street is a thoroughfare 66 feet wide was warranted by the evidence, and should be sustained. *McCague v. Miller*, 55 Neb. 762 (76 N. W. 422).

——— Abandonment, and use by public.

43. (1880.) The building of a bridge by the county on a road leading to and across

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the plaintiff's land, he not being either by word or deed connected therewith, is no proof against him of dedication. *Graham v. Hartnett*, 10 Neb. 517 (7 N. W. 280).

44. (1882.) A public road over wild unenclosed prairie lands cannot be established by mere user, yet where the testimony shows that the landowner assisted in staking out and afterwards dedicated such road to the public, which accepted and worked the same, the jury will be justified in finding the establishment of such public road. *Rathman v. Norenberg*, 21 Neb. 467 (32 N. W. 305).

45. (1888.) Ten years' uninterrupted use of a public road will create a presumption of dedication, but a much shorter period will be sufficient, where the act of the owner from which the dedication is inferred is clear and unequivocal, and accompanied or immediately followed by public use. *Rube v. Sullivan*, 23 Neb. 779 (37 N. W. 666).

46. (1888.) A party owning land, in fencing the same, left a strip along the section line a rod or more in width, apparently for the use of the public for a public road, and it was traveled as such; but there was no proof of dedication or an intention to dedicate any of the land within the enclosure. *Held*, That without such proof the jury would not be justified in finding that any of the land within the enclosure had been dedicated to public use, and, therefore, a road overseer who removed the fence as an obstruction to the highway would be liable for the trespass, *Rube v. Sullivan*, 23 Neb. 779 (37 N. W. 666).

47. (1901.) Evidence of long continued use by the public tends to show the establishment of a road by dedication over the public domain. So also does the surveying, marking out, platting and improvement of a road by the public authorities. *Streeter v. Stalnaker*, 61 Neb. 205 (85 N. W. 47).

48. (1903.) The passive permission by the owner of lands of the use of them by the public, is not alone sufficient evidence of an intent to dedicate them to such use. *Postal v. Martin*, 4 Unof. 534 (95 N. W. 8).

49. (1905.) Evidence of user, and of surveying, platting and otherwise improving by public authorities, examined, and *held* sufficient to show the establishment of a public road by dedication. *Eldridge v. Collins*, 75 Neb. 65 (105 N. W. 1085).

50. (1906.) Evidence showing use by the public for twenty years as a highway sustains a finding of dedication to the public by the owners. *Cassidy v. Sullivan*, 75 Neb. 847 (106 N. W. 1027).

DEEDS.

ANALYSIS.

I. REQUISITES AND VALIDITY.
(A) Nature and essentials in general.
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I. REQUISITES AND VALIDITY.

Essentials of deed to homestead, see *Homesteads*.

A. Nature and Essentials in General.

What law governs.

1. (1876.) At common law lands could be conveyed only by conforming to the law of the place where the lands were situated, but, by statute, lands in this state may be conveyed by conforming to the law of the place where the deed is executed and acknowledged. *Hoadley v. Stephens*, 4 Neb. 432.

Definition.

2. (1877.) A deed at common law is defined to be a written instrument under seal, containing a contract or agreement, which has been delivered by the party to be bound and accepted by the obligee or covenantee. *McMurtry v. Brown*, 6 Neb. 368.

Deed or testament.

3. (1898.) An instrument, although in form a deed, which by its terms was to operate only after the death of the maker or grantor, is testamentary in its character, and not a deed, and passes no present estate in the premises therein described. *Pinkham v. Pinkham*, 55 Neb. 729 (76 N. W. 411).

Absolute deed as mortgage.

See, also, *Mortgages*, §§ 38-72.

4. (1871.) A deed of real estate, absolute on its face, given to secure the payment of a sum of money, as between the parties, and all persons having knowledge of the purpose for which it is given, must be construed as a mortgage. *Wilson v. Richards*, 1 Neb. 342; (1888) *Eiseman v. Gallagher*, 24 Neb. 79 (37 N. W. 941).

5. (1876.) A conveyance in the form of a deed of trust to secure the payment of a promissory note, and conditioned that in case of failure to pay, the trustee shall sell, or upon payment, reconvey, is in effect only a mortgage. *Webb v. Hoselton*, 4 Neb. 308 (20 Am. Rep. 638).

6. (1883.) Where at the solicitation of the agent of a mortgagee, the mortgagor executed a deed to the premises to such agent who was to sell the same and, after paying the mortgage, and other incumbrances, deliver the balance to the mortgagor, such deed as between such agent and the grantor was a mortgage. *Tower v. Fetz*, 26 Neb. 706 (42 N. W. 884; 18 Am. St. Rep. 795).

7. (1891.) An absolute deed of real estate, or a bill of sale of personal property absolute on its face, executed and intended as security for a debt or loan, will be construed as a mortgage as between the parties thereto, and all others, except *bona fide* purchasers for value without notice. *Kemp v.*

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Small, 32 Neb. 318; (49 N. W. 169); (1896) *Names v. Names*, 48 Neb. 701 (67 N. W. 751).

8. (1893.) Where a conveyance of property is shown, by the contemporaneous written contract of the parties thereto, to have been intended solely as security for the payment of money, or as indemnity against liability, such conveyance between against liability, such conveyance as between is, a mere mortgage. *Nelson v. Atkinson*, 37 Neb. 577 (56 N. W. 313).

9. (1895.) A deed absolute in form will be treated as a mortgage when it is given to secure payment of a debt, though the parties may have agreed that upon default of payment the deed should become absolute. *State Bank of O'Neill v. Mathews*, 45 Neb. 659 (63 N. W. 930; 50 Am. St. Rep. 565); (1901) *Fahay v. State Bank of O'Neill*, 1 Unof. 89 (95 N. W. 505); (1902) *First Nat. Bank of David City v. Sargeant*, 65 Neb. 594 (91 N. W. 595; 59 L. R. A. 296).

10. (1896.) The statute of limitations runs against a bill to declare a deed absolute in form a mortgage, in favor of a grantee in possession, from the time such possession becomes adverse to the grantor's title. *Stall v. Jones*, 47 Neb. 706 (66 N. W. 653).

11. (1896.) In this state a deed absolute in form passes the legal title, although intended as security for a debt, and for most purposes treated as a mortgage. *Stall v. Jones*, 47 Neb. 706 (66 N. W. 653); (1896) *First Nat. Bank of Plattsmouth v. Tighe*, 49 Neb. 299 (68 N. W. 490).

12. (1896.) That grantee's possession under a deed claimed to be a mortgage is adverse may be inferred from the exercise of acts of ownership. *Stall v. Jones*, 47 Neb. 706 (66 N. W. 653).

13. (1896.) The true test in determining whether a conveyance absolute in form should be treated as a sale or as a mortgage is whether the relation of the parties toward each other as debtor and creditor continues. If it does so continue, the transaction will be treated as a mortgage and the conveyance as a security only. *Riley v. Starr*, 48 Neb. 243 (67 N. W. 187).

14. (1899.) A quitclaim deed given to secure an indebtedness is in legal effect a mortgage. *Huston v. Canfield*, 57 Neb. 345 (77 N. W. 763).

15. (1901.) Whether a deed absolute on its face it in fact a mortgage, depends on the intention of the parties, gathered from their declarations and conduct, as well as from the papers signed. *Sanders v. Ayres*, 63 Neb. 271 (88 N. W. 526).

16. (1901.) Where in an action to have a deed absolute on its face declared a mortgage, evidence showing a debt existing between plaintiff and defendant at the date of the deed, a cancelation of the evidence of the debt by defendant, a contract to reconvey the premises to plaintiff within six months for a sum equal to the amount of the debt and six months' interest, retention of the premises by plaintiff without paying rent, and making of improvements thereon by him without objection from defendant and that the premises were worth perhaps double the amount of the debt, is sufficient to justify the court in declaring the deed merely security for the debt. *Sanders v. Ayres*, 63 Neb. 271 (88 N. W. 526).

17. (1902.) In equity an unrecorded deed absolute in form, given to secure a debt with parol defeasance, is a mortgage. *Decker v. Decker*, 64 Neb. 239 (89 N. W. 795).

18. (1903.) Where a deed, absolute in form, is given to secure payments of an indebtedness existing between the grantor and grantee therein, and the relation of debtor and creditor continues after the execution of the conveyance, the deed should be treated as a mortgage. *Tannyhill v. Pepperl*, 70 Neb. 31 (96 N. W. 1005).

19. (1904.) Where a party acquires the legal title by purchase of land at a sheriff's sale, in pursuance of a parol agreement with a judgment debtor that he is to hold the title thus obtained as a security for the loan of the money paid to relieve the land from the judgment lien, and that he will reconvey when the money is refunded, the case is not distinguishable from any other, where the deed though absolute in terms was designated simply as security for a loan; and parol evidence is admissible to show the transaction to be of that character. *Dickson v. Stewart*, 71 Neb. 424 (98 N. W. 1085; 115 Am. St. Rep. 596).

20. (1905.) Where a tract of land has been conveyed by a deed absolute in form to satisfy and pay the mortgage liens existing thereon, a subsequent parol promise to reconvey it to the grantor, without any consideration to support it, will not sustain an action to declare the deed a mortgage and redeem from the liens which have been canceled and treated as paid. *Samuelson v. Mickey*, 73 Neb. 856 (106 N. W. 461).

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21. (1907.) Where the parties sustain the relation of debtor and creditor, and the grantee surrenders to the grantor the evidence of indebtedness held against him to the full amount of the consideration for such conveyance, and such indebtedness is understood by the parties to be fully paid and satisfied thereby, the transaction will in the absence of fraud be regarded as an unconditional conveyance. *Harrah v. Smith*, 79 Neb. 51 (112 N. W. 337).

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——— Evidence as to character.

22. (1873.) A formal conveyance may be shown to be a mortgage by extrinsic evidence. *Schade v. Bessinger*, 3 Neb. 140.

23. (1873.) To vary the legal import of an absolute deed, especially when fraud, accident, mistake, or surprise, is not alleged, the evidence in reference to the understanding and intention of the parties, at the time of the execution of the writing, must be clear, certain, and conclusive, before a court of equity will determine such deed to be a mortgage security only. *Schade v. Bessinger*, 3 Neb. 140.

24. (1875.) Evidence that a deed absolute in its terms was intended to be a mortgage must be clear, consistent and satisfactory. *Devoin v. Jennings*, 4 Neb. 97.

25. (1889.) A deed, absolute in its terms, may be shown by parol to have been given for the purpose of securing the payment of money; in which case, as betweeen the parties, such deed will be construed to be a mortgage only. *Tower v. Fetz*, 26 Neb. 706 (42 N. W. 884; 18 Am. St. Rep. 795).

26. (1891.) *Held*, That the deeds and bill of sale, referred to in the opinion, were given as security and were not intended as an absolute transfer of the property therein described. *Kemp v. Small*, 32 Neb. 318 (49 N. W. 169).

27. (1894.) A deed of real estate, absolute in form, may be shown by parol to have been intended by the parties to it as a security for a debt or loan, and as between such parties, at least, the instrument will be construed to be a mortgage merely. *Morrow v. Jones*, 41 Neb. 867 (60 N. W. 369).

28. (1896.) While a preponderance of the evidence in sufficient to establish an issue in any civil action, and while the supreme court will not, in the exercise of its appellate jurisdiction, weigh conflicting evidence, still, in order to sustain a finding for the plaintiff in an action to have a deed absolute in form declared a mortgage, the evidence on behalf of plaintiff, when taken together, and without regard to the contradicting evidence, should present a state of facts consonant with reason and consistent in its different parts. *Stall v. Jones*, 47 Neb. 706 (66 N. W. 653).

29. (1896.) Under the evidence an absolute deed *held* a mortgage, there being no intention to make an absolute transfer of the premises described. *Names v. Names*, 48 Neb. 701 (67 N. W. 751).

30. (1901.) Evidence examined, and *held* to sustain the finding that a conveyance absolute in form was intended as a security only. *Fahay v. State Bank of O'Neill*, 1 Unof. 89 (95 N. W. 505).

31. (1902.) Evidence examined, and *held* sufficient to show that a deed absolute in form was intended as a mortgage. *First Nat. Bank of David City v. Sargeant*, 65 Neb. 594 (91 N. W. 595; 59 L. R. A. 296).

32. (1904.) In an action to have a deed declared to be a mortgage and to have the same canceled on the ground that it had been satisfied, the evidence *held* to sustain a judgment for plaintiff. *Faulkner v. Powell*, 72 Neb 474 (100 N. W. 937).

32*a*. (1907.) Evidence showing a grantor who conveys the absolute title to a business block to a creditor in consideration of the latter surrendering all obligations of the grantor held by him, which amounts to the approximate value of the building, and it is agreed that the grantor shall have sixty days in which to sell the premises and all over the amount of grantee's claims shall be retained by the grantor, is an absolute conveyance and not a mortgage. *Harrah v. Smith*, 79 Neb. 51 (112 N. W. 337).

32*b*. (1907.) Whether a conveyance absolute in form is intended as an unconditional conveyance or as a security, must be determined by a consideration of the peculiar circumstances of each case. *Harrah v. Smith*, 79 Neb. 51 (112 N. W. 337).

33. (1907.) Evidence examined, and *held* to negative the claim that a certain deed, absolute in form, was intended as a mortgage. *Lemke v. Lemke*, 78 Neb. 525 (111 N. W. 138).

Consideration.

Sufficiency of consideration as against creditors of grantors, see *Fraudulent Conveyances*.

34. (1889.) Where a deed given for a

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sufficient consideration is lost without having been recorded, a second deed, executed at a later date for the purpose of taking the place of the former, is founded on a sufficient consideration. *Steel v. Coone*, 27 Neb. 586 (43 N. W. 411; 20 Am. St. Rep. 705).

35. (1891.) When voluntary a deed without consideration is valid as to subsequent purchasers without notice. *Keeling v. Hoyt*, 31 Neb. 453 (48 N. W. 66).

36. (1899.) A deed, for which no valuable consideration has been given, is not entitled to take precedence of a prior unrecorded mortgage of which the grantee in such deed had no actual notice. *Fisk v. Osgood*, 58 Neb. 486 (78 N. W. 924).

37. (1901.) The assumption by the grantee of an incumbrance upon property conveyed to him, is a valuable consideration for the conveyance. *Home Fire Ins. Co. v. Collins*, 61 Neb. 198 (85 N. W. 54).

38. (1903.) Evidence contained in the bill of exceptions examined and *held*, that the consideration for the conveyance sought to be set aside for fraud and undue influence, was adequate. *Tichy v. Simicek*, 4 Unof. 597 (95 N. W. 629).

Operation and effect of defective deed.

39. (1876.) A deed defective in form by reason of a failure to comply with the requirements of the statute in force at the place of execution may convey the equitable title, and be sufficient to authorize a court of equity to grant appropriate relief, but such deed will not pass the legal title to the grantee. *Hoadley v. Stephens*, 4 Neb. 431.

Persons entitled to question validity.

40. (1888.) While it is true that the homestead cannot be conveyed or incumbered unless the instrument is executed and acknowledged by both husband and wife, yet this section is intended as a protection to the person not signing the instrument, and a third party could not question the validity of a conveyance, when it is signed and acknowledged by both, as against the interest of the persons making the conveyance. *Cobbey v. Knapp*, 23 Neb. 579 (37 N. W. 485.

B. Form and Contents of Instruments.

Necessity and sufficiency of writing in general.

41. (1890.) A paper purporting to be an article of agreement stating that one conveys and assigns all of his interests in certain lands to another, undated save as to the acknowledgment, and showing evidence of having been hastily drawn, does not convey the title to the land described. *Norman v. Waite*, 30 Neb. 302 (46 N. W. 639).

42. (1904.) The right of one person holding lands may be transferred to another verbally. *City of South Omaha v. Meehan*, 71 Neb. 230 (98 N. W. 691).

Forms and parts of deeds in general.

43. (1876.) An *habendum* is that part of a deed which usually declares what estate or interest is granted by it, its certainty, duration and to what use. *Mills v. Miller*, 4 Neb. 441.

Designation and description of parties.

44. (1878.) A mistake or abbreviation in the name of a grantee in a deed does not necessarily invalidate the deed, but such mistake or abbreviation may be explained and made certain and definite by extrinsic evidence. *Aultman & Taylor Mfg. Co. v. Richardson*, 7 Neb. 1.

Recitals.

45. (1896.) A correct designation of the statute under which a deed was executed *held* not essential to the validity of the deed. *Green v. Barker*, 47 Neb. 934 (66 N. W. 1032).

46. (1907.) The word "quitclaim" in what purports to be a deed of conveyance to real estate is sufficient to convey the interest of the grantor therein. *Bannard v. Duncan*, 79 Neb. 189 (112 N. W. 353).

Description of property.

47. (1877.) Where one entered a certain tract of land in the land office of this state, and afterward executed a deed conveying a tract of land of the same description without designating the county or state in which the land is situated, it is to be presumed that the deed conveys the land in this state. *Butler v. Davis*, 5 Neb. 521.

48. (1884.) A description "all that land lying in the bend of the Blue river, described as follows: commencing at a point in the center of the river about 5 rods west of the point where it crosses the east line of section 7, T. 9, R. 1, thence nearly due west along the top or brow of the bluff on the south side of said river and past a stake on said bluff, until this line strikes the center of the river at a point about 30 rods west from the place of beginning, thence along the center of said river towards the point of beginning, containing 4¾ acres, more or less," is sufficiently definite. *Smith v. Dean*, 15 Neb. 432 (19 N. W. 642).

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49. (1892.) Real estate is sufficiently described in a conveyance when the deed refers for identification to another deed specifically mentioned therein, which contains an accurate description of the property sold. *Rupert v. Penner*, 35 Neb. 587 (53 N. W. 578; 17 L. R. A. 824).

50. (1901.) A deed which describes land conveyed as "all accretions of lands and parcels of lands belonging to government lot number ten (10) in section number one (1) in township number fifteen (15) north, range number thirteen (13) east; said accretions lying south of the meander-line of the state of Nebraska, according to the government survey," is not void for uncertainty of description. *Delong v. Olsen*, 63 Neb. 327 (88 N. W. 512).

51. (1906.) A deed purporting to convey a half of a government quarter section of land that has not been previously subdivided by plat or survey, or otherwise, is operative as a conveyance of a quantitative half of the tract without regard to the rules of the United States land department with reference to the subdivision of such tracts. *Kirkpatrick v. Schaal*, 77 Neb. 661 (110 N. W. 730).

C. Execution.

Signature.

52. (1877.) If the deed is signed in his presence, by his direction, an oral request is all that is required. But when the deed is to be made in his absence the authority must be given by an instrument under the hand of the principal, and duly acknowledged. *McMurtry v. Brown*, 6 Neb. 368.

53. (1892.) In the body of a deed and in the certificate of acknowledgment the grantor was correctly described as Archibald T. Finn. The deed was signed as Arch T. Finn. The certificate of acknowledgment identified the party mentioned as grantor as known to the officer to be the person whose name is affixed to the instrument and who executed the same. *Held*, That it sufficiently appeared that "Archibald T." and "Arch. T." were one and the same person. *Rupert v. Penner*, 35 Neb. 587 (53 N. W. 598; 17 L. R. A. 824).

54. (1896.) The title to real estate appeared from the record to be in Joel S. Smith. A deed which purported to convey such real estate and which in its recitals and also in the acknowledgment designated the grantor as "Joel S. Smith," but which was signed "John S. Smith," *held* not competent evidence to prove a conveyance of the title of Joel S. Smith in the absence of other proof establishing that the person who signed the deed, John S. Smith, and Joel S. Smith were one and the same person. *Omaha Real Estate & Trust Co. v. Kragscow*, 47 Neb. 592 (66 N. W. 658).

55. (1896.) Deeds were executed purporting to be conveyances of real property by the trustees of the city of Grand View, which were signed "A. B. Moore, chairman." *Held*, That without proof that A. B. Moore who signed the deeds was chairman of the board of trustees of the city of Grand View, the deeds did not evidence the transfer purported to be made. *Green v. Barker*, 47 Neb. 934 (66 N. W. 1032).

Attestation.

56. (1875.) The presence of the attesting witness to a deed or mortgage, at the time it is subscribed by the parties thereto, is not essential, if he is immediately afterwards told by them that such instrument is their agreement, and is by them requested to subscribe the same as a witness. *Mulloy v. Ingalls*, 4 Neb. 115.

57. (1881.) A deed executed in this state must be signed by the grantor in the presence of at least one competent witness, who shall subscribe his name thereto as a witness. *Green v. Gross*, 12 Neb. 117 (10 N. W. 459).

58. (1888.) Witnesses to a deed must be persons having no direct, certain, legal interest in the deed. *Child v. Baker*, 24 Neb. 188 (38 N. W. 725).

59. (1894.) A deed executed, acknowledged, and delivered is valid between the parties and those having knowledge of its existence, although not witnessed. *Pearson v. Davis*, 41 Neb. 608 (59 N. W. 885).

60. (1896.) While it is customary to make use of the word "witness" or "witnessed" in attesting the execution of deeds and other instruments affecting the title to real estate, such practice is neither necessary nor universal. Any expression from which it appears that the subscriber in fact witnessed the execution by the grantor sufficiently answers the requirements of section 1, chapter 73, Compiled Statutes. *Link v. Connell*, 48 Neb. 574 (67 N. W. 475).

61. (1896.) A deed executed within the state and conveying realty situate therein must, under section 1, chapter 73, Compiled Statutes, be witnessed. *Schields v. Horback*, 49 Neb. 262 (68 N. W. 524).

62. (1896.) A deed executed and ac-

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knowledged in Kansas, conveying land in Nebraska, is admissible in evidence in ejectment though not witnessed. *Schields v. Horbach*, 49 Neb. 262 (68 N. W. 524).

63. (1896.) Conveyances of real estate executed within this state, conveying real estate situate within this state, are required to be witnessed. (Comp. Stat., sec. 1, ch. 73.) *Dorsey v. Conrad*, 49 Neb. 443 (68 N. W. 645).

64. (1906.) A deed to real estate, executed, acknowledged, and delivered by the grantor, is valid as between the parties thereto and those having knowledge of its existence, although the conveyance be not witnessed. *Adams v. Dennis*, 76 Neb. 682 (107 N. W. 865).

——— What law governs.

65. (1881.) A deed of lands in this state, made in another state, must be executed according to the laws of such state, and if no witness to the deed is required by the laws of such state the deed is effectual to pass title without being so attested. *Green v. Gross*, 12 Neb. 117 (10 N. W. 459).

66. (1896.) A deed executed and acknowledged in Kansas, conveying land in Nebraska, may be recorded in the latter state, though not witnessed. *Shields v. Horbach*, 49 Neb. 262 (68 N. W. 524).

67. (1896.) A deed to Nebraska land executed in Iowa, and there acknowledged before a notary public who attached his official seal, is presumed to have been executed and acknowledged in conformity with the laws of Iowa, and may be recorded, or read in evidence, in Nebraska without further proof of execution, though it was not witnessed. *Dorsey v. Conrad*, 49 Neb. 443 (68 N. W. 645).

68. (1896.) A deed of land situate in this state, executed in the state of Iowa and acknowledged there before a notary public who attached his official seal to the certificate of acknowledgment, is presumed to have been executed in accordance with the laws of the state of Iowa; and though not witnessed, is entitled to be recorded and read in evidence in this state without further proof that the grantors therein actually executed and delivered the deed. *Dorsey v. Conrad*, 49 Neb. 443 (68 N. W. 645).

Acknowledgment.

See, also, *Acknowledgment*.

69. (1876.) Where a deed is executed and acknowledged in another state before a commissioner of deeds of this state, a notary public, or other officer using an official seal, the law presumes a compliance with the law of the place of execution, and no further authentication is necessary. But in all other cases there must be attached thereto a certificate of the clerk of a court of record or other certifying officer, under his official seal. *Hoadley v. Stephens*, 4 Neb. 431. [Overruled as to commissioner. 47 Neb. 592-612.]

70. (1876.) A deed executed and acknowledged by a justice of the peace, in Virginia, offered in evidence to prove that the grantors had parted with the legal title to certain real estate therein mentioned, is properly excluded, there being no evidence that it was executed and acknowledged according to the laws of Virginia. *Hoadley v. Stephens*, 4 Neb. 431.

71. (1876.) An instrument, purporting to be the deed of a *feme covert*, without her acknowledgment, is void as to her. It is no deed. *Roode v. State*, 5 Neb. 174 (25 Am. Rep. 475).

72. (1876.) A deed of conveyance of land must be executed and acknowledged as directed by the statutes of the state in which the land is situated; if the deed is executed in another state and the statute provides that it shall be executed and acknowledged according to the laws of such state, it must be so executed. *Roode v. State*, 5 Neb. 174 (25 Am. Rep. 475).

73. (1878.) The function of an acknowledgment is twofold—to authorize the deed to be given in evidence without further proof of its execution, and to entitle it to be recorded. The acknowledgment is no part of the deed itself. *Burbank v. Ellis*, 7 Neb. 156; (1896) *Horbach v. Tyrrell*, 48 Neb. 514 (67 N. W. 485; 37 L. R. A. 434).

74. (1881.) A deed, when executed, witnessed and delivered, is effectual to pass title, though not lawfully acknowledged. *Harrison v. McWhirter*, 12 Neb. 152 (10 N. W. 545).

75. (1883.) The objection to a deed, that the acknowledgment was taken before a county clerk, is cured by the second section of the act approved February 24, 1883. *Davis v. Huston*, 15 Neb. 28 (16 N. W. 820).

76. (1893.) A deed in other respects sufficient and regular is effective, as between the grantor and grantee therein, to pass complete title even though executed in a foreign state it is there acknowledged be-

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fore only a purported justice of the peace as to whose genuine signature, official character and power, there is no accompanying certificate of a proper officer having a seal. *Connell v. Galligher*, 36 Neb. 749 (55 N. W. 229).

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77. (1894.) The grantee in a deed of real estate acquires the legal title thereto on the execution and delivery to him of such deed, though said deed be neither acknowledged nor recorded and be afterwards lost; and a sheriff's deed, made in pursuance of a levy upon, and sale of, such real estate to satisfy a judgment against such grantee, will pass the legal title of such real estate to the grantee in such sheriff's deed. *Connell v. Galligher*, 39 Neb. 793 (58 N. W. 438).

78. (1896.) Section 5 of an act entitled "Of real estate and the alienation thereof by deed," and relating to acknowledgment of deeds passed January 26, 1856, as amended February 13, 1864, was in direct and irreconcilable conflict with the provisions of section 44 of chapter 31 of the same statute, passed at the same time, and, consequently, operated its repeal by implication. *Omaha Real Estate & Trust Co. v. Kragscow*, 47 Neb. 592 (66 N. W. 658).

79. (1896.) Sections 5 and 41 of chapter 43, Revised Statutes of 1866, entitled "Real Estate," relating to acknowledgment of deeds, were enacted at the same time, as parts of the same statute, and being in some of their provisions so repugnant that both could not be executed, inasmuch as they conflicted, the last section, 41, prevailed and the other was repealed. *Omaha Real Estate & Trust Co. v. Kragscow*, 47 Neb. 592 (66 N. W. 658).

80. (1896.) Where a deed to a homestead from a husband and wife to a third person, the grantee to reconvey to the wife, was actually acknowledged by a notary in Nuckolls county, but by mistake he certified that he was a notary of Webster county where the deed was recorded, the rights of a judgment creditor of the husband are not thereby affected, and the deed having been actually signed, acknowledged and delivered, conveys the legal title. *Roberts v. Robinson*, 49 Neb. 717 (68 N. W. 1035; 59 Am. St. Rep. 567).

81. (1897.) As between the parties an acknowledgment is not essential to the validity of a conveyance, unless the property be a homestead, or for the purpose of barring dower. *Linton v. Cooper*, 53 Neb. 400 (73 N. W. 731); (1906) *Martin v. Martin*, 76 Neb. 335 (107 N. W. 580).

82. (1897.) A conveyance by a married woman of her separate property, not her homestead, is valid between the parties although not acknowledged. *Linton v. Cooper*, 53 Neb. 400 (73 N. W. 731).

83. (1897.) A valid acknowledgment permits a conveyance to be received in evidence without further proof; but one not acknowledged may be received in evidence if its execution and delivery be otherwise proved. *Linton v. Cooper*, 53 Neb. 400 (73 N. W. 731).

84. (1899.) A United States commissioner has no authority to take acknowledgments of real estate conveyances executed in Nebraska. *Interstate Savings & Loan Ass'n v. Strine*, 58 Neb. 133 (78 N. W. 377).

85. (1901.) Under section 6, chapter 73, Compiled Statutes, providing for the execution of deeds in a foreign country the word "consul" means any person invested by the national government with the functions of consul-general, vice-consul-general, consul or vice-consul. *Morris v. Linton*, 61 Neb. 537 (85 N. W. 565).

——— Certificate of officer.

86. (1878.) A certificate of acknowledgment is sufficient if it shows that the requirements of the statute have been complied with in substance. *Burbank v. Ellis*, 7 Neb. 156.

87. (1878.) A certificate which shows that "On the 29th day of September, 1862, personally appeared before me, David Dorrington, mayor of Falls City," etc., *held*, a sufficient statement of the identity of the grantor. *Burbank v. Ellis*, 7 Neb. 156.

88. (1881.) When a deed is made in another state the certificate of acknowledgment of a notary public thereto, duly attested by his official seal, entitles such deed to be recorded without further authentication. *Green v. Gross*, 12 Neb. 117 (10 N. W. 459).

89. (1883.) The certificate of acknowledgment of a notary public, with his official seal attached, is sufficient proof of the due execution in another state of a deed of real estate lying in this state. *Galley v. Galley*, 14 Neb. 174 (15 N. W. 318).

90. (1886.) Deed executed in another state before an officer having no seal, to be admissible in evidence, must be certified in the manner provided by statute. *O'Brien v. Gaslin*, 20 Neb. 347 (30 N. W. 274).

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91. (1888.) Although a conveyance of a homestead recites that it is made by the husband, he only being mentioned in the body of the instrument, yet if it is signed by his wife and acknowledged by her before the proper officer, the certificate of acknowledgment stating that she appeared with her husband, and that they acknowledged the instrument to be their voluntary act and deed, it is sufficient. *Cobbey v. Knapp*, 23 Neb. 579 (37 N. W. 485).

92. (1892.) A certficate of acknowledgment to a deed which states that "personally came Catherine Tozier, to me known to be the identical person whose name is affixed to the above instrument as grantor, and acknowledged the same to be her voluntary act and deed," which certificate is signed by an officer authorized to take acknowledgments, and attested with his official seal, *held*, valid. *Gregory v. Kenyon*, 34 Neb. 640 (52 N. W. 685).

93. (1892.) A certificate of acknowledgment of a deed or mortgage, in proper form, can be impeached only by clear, convincing, and satisfactory proof that the certificate is false and fraudulent. *Phillips v. Bishop*, 35 Neb. 487 (53 N. W. 375); (1893) *Barker v. Avery*, 36 Neb. 599 (54 N. W. 989).

94. (1894.) The record of a deed is not admissible in evidence unless the certificate of acknowledgment is substantially in accordance with the statute. *Maxwell v. Higgins*, 38 Neb. 671 (57 N. W. 388).

95. (1901.) The certificate of an officer having authority to take the acknowledgment of a deed cannot be impeached except for fraud, collusion or imposition. *Boldt v. Becker*, 1 Unof. 75 (95 N. W. 509).

96. (1907.) Failure of a notary to write under his official signature the date when his commission expires does not render his certificate void. *Sheridan County v. McKinney*, 79 Neb. 223 (115 N. W. 548).

Execution in blank.

97. (1888.) Where a wife executes a deed of her real estate, leaving the name of the grantee, the amount of consideration, and the date blank, and delivers such deed to her husband for the purpose of enabling him to sell and convey said real estate, such deed duly filled up in the hands of a *bona fide* grantee, who purchased the land from the husband and paid the consideration therefor, will be sustained. *Reed v. Morton*, 24 Neb. 760 (40 N. W. 282; 8 Am. St. Rep. 247; 1 L. R. A. 736).

D. Delivery.

Record as evidence of delivery, see *post*, § 219.

Delivery of deed as taking contract out of statute of frauds, see *Frauds, Statute of*, § 112.

Necessity.

98. Delivery is essential to the validity of a deed, and it takes effect only from the delivery. (1879) *Roberts v. Swearingen*, 8 Neb. 363; (1880) *Patrick v. McCormick*, 10 Neb. 1 (4 N. W. 312); (1896) *Brown v. Westerfield*, 47 Neb. 399 (66 N. W. 439; 53 Am. St. Rep. 532); (1904) *Schneider v. Vogler*, 5 Unof. 246 (97 N. W. 1018).

Sufficiency.

99. (1882.) No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient. And a delivery may be presumed from the grantee's possession of the instrument, in the absence of proof to the contrary. *Brittain v. Work*, 13 Neb. 347 (14 N. W. 421).

100. (1896.) Delivery is purely a question of intent to be determined by the facts and circumstances of each particular case. *Brown v. Westerfield*, 47 Neb. 399 (66 N. W. 439; 53 Am. St. Rep. 532).

101. (1901.) The delivery of an instrument is a question of fact to be determined by ascertaining the intention of the parties thereto. *Home Fire Ins. Co. v. Collins*, 61 Neb. 198 (85 N. W. 54).

102. (1901.) Where it is intended that a deed shall operate as a transfer of title, in contemplation of law it has been delivered. *Home Fire Ins. Co. v. Collins*, 61 Neb. 198 (85 N. W. 54).

——— Delivery to third person.

Delivery in escrow, see *Escrow*.

103. (1880.) Where a deed is given to a stranger, to be held by him until the grantee shall perform certain conditions, and the deed is delivered, without the consent or knowledge of the grantor, to the grantee, who wholly failed to perform any of the conditions, no title passes to such grantee. *Patrick v. McCormick*, 10 Neb. 1 (4 N. W. 312).

104. (1896.) It is not essential to the validity of a deed that it should be delivered to the grantee personally. It is sufficient, if the grantor delivers it to a third

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person unconditionally for the use of the grantee, the grantor reserving no control over the instrument. *Brown v. Westerfield*, 47 Neb. 399 (66 N. W. 439; 53 Am. St. Rep. 532).

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105. (1896.) A mother signed and acknowledged a deed before a justice of the peace, conveying to her minor daughter certain real estate, and delivered the deed to the justice for the use and benefit of the grantee, without any reservation of control, with the intention and understanding that the justice should retain the custody of the instrument until the grantor's death, when he was to file it for record. The mother subsequently told the daughter that the property belonged to the latter, and that it had been fixed so she would have a home. *Held*, That the delivery to the justice was sufficient to pass the title to the property to the grantee at the date of such delivery. *Brown v. Westerfield*, 47 Neb. 399 (66 N. W. 439; 53 Am. St. Rep. 532).

106. (1899.) A delivery of a deed to an agent appointed by the vendee therein to receive it is a delivery to such vendee. *Sowards v. Moss*, 58 Neb. 119 (78 N. W. 373).

107. (1899.) A deed placed in the hands of the grantor's agent to be held until the consideration is paid, is not a delivery to the vendee. *Soward v. Moss*, 59 Neb. 71 (80 N. W. 268).

108. (1905.) Where the agent of a vendor receives a deed for the purpose of delivery upon payment of the consideration, without disclosing that he is also agent for the purchaser, and places the deed upon record after he has been notified by the vendor that the contract has been rescinded for nonperformance, no legal delivery of the deed has been made, and the grantee acquires no title thereby. *Mason v. Strickland*, 73 Neb. 783 (103 N. W. 458).

109. (1906.) A delivery of a deed by the grantor to a third person for the grantee, with directions to deliver it to such grantee, constitutes a sufficient delivery of a deed of conveyance. *Martin v. Martin*, 76 Neb. 335 (107 N. W. 580).

Record or delivery for record.

110. (1896.) Where a mother executes a deed to her son, and voluntarily places the same upon record for the purpose, and with the intent, of passing title to the grantee, actual manual delivery and formal acceptance are not essential to the validity of the conveyance. *Issitt v. Dewey*, 47 Neb. 196 (66 N. W. 288).

111. (1899.) An instrument transferring property, even though recorded before delivery, cannot be given effect to the prejudice of third parties who acquired rights in the property before the actual delivery of the conveyance. *Barnes v. Cox*, 58 Neb. 675 (79 N. W. 550).

112. (1901.) The recording of a deed by the grantor is evidence both of delivery and acceptance, if the conveyance is beneficial to the grantee. *Home Fire Ins. Co. v. Collins*, 61 Neb. 198 (85 N. W. 54).

113. (1906.) Where a grantor places his deed on record for the purpose and with the intent of passing title to his grantee pursuant to a valid agreement between them, actual manual delivery and formal acceptance are not essential to the validity of the conveyance. *Fryer v. Fryer*, 77 Neb. 293 (109 N. W. 175).

——— Conditional delivery.

114. (1882.) It is only where the deed is delivered to a third person, to be held until some condition be performed on behalf of the grantee, that it can properly be said to be an escrow. If it be delivered to the grantee, although with the understanding that the wife of the grantor shall afterwards execute it also, this being solely for the benefit of the grantee, he may waive it, and the delivery is complete. *Brittain v. Work*, 13 Neb. 347 (14 N. W. 421).

Ratification of defective delivery.

115. (1902.) The owner of real estate signed and acknowledged a deed of conveyance thereof, and at the same time took back a lease, executed by the grantee, for a life estate in the same premises; he retained possession of both instruments; his grantee obtained possession of the deed and filed it for record, without his knowledge or consent. After the death of the grantee, the grantor, on learning that the deed had been taken from his possession and recorded, filed the lease for record. The deed purports to have been given for a valuable consideration. *Held*, That his conduct rendered the deed as effective as though formally delivered. *Palmer v. Mizner*, 2 Unof. 899 (90 N. W. 637).

Operation and effect.

116. (1899.) Where a deed is delivered to the grantee by the grantor, it at once becomes operative as a conveyance, if such was the intention of the parties, even though the instrument was not to be recorded during the lifetime of the grantor. *Brown v. Hartman*, 57 Neb. 341 (77 N. W. 776).

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E. Validity.

Capacity and assent of parties.

What constitutes mental incapacity, see *Insane Persons*, §§ 21-25.

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117. (1872.) Weakness of understanding alone is not sufficient to avoid a deed, but it is a material circumstance in establishing an inference of unfair practices and imposition. *Franklin v. Kelley*, 2 Neb. 79.

118. (1875.) In the absence of fraud, mere imbecility or weakness of mind in a grantor, however great, will not avoid his deed, unless there be evidence to show a total want of reason or understanding. *Mulloy v. Ingalls*, 4 Neb. 115; (1877) *Johnson v. Phifer*, 6 Neb. 401; (1903) *Tichy v. Simicek*, 4 Unof. 597 (95 N. W. 629).

119. (1382.) A deed executed by one while he is *non compos mentis*, for no consideration, is invalid and may be canceled. *Fisher v. Fisher*, 12 Neb. 416 (11 N. W. 864).

120. (1896.) While mere imbecility or weakness of mind in a grantor will not, in the absence of fraud, avoid his deed, insanity will do so if of such a character as to induce the conveyance, although such insanity may not amount to a complete dethronement of reason and understanding upon all subjects. *Hay v. Miller*, 48 Neb. 156 (66 N. W. 1115).

121. (1902.) Although mental weakness may fall short of entire incompetency to transact business, if it is taken advantage of to procure a conveyance by inequitable means, the conveyance may be set aside. *Bennett v. Bennett*, 65 Neb. 432 (91 N. W. 409).

122. (1902.) A court of equity will scrutinize jealously a transaction as to which there is ground for holding that influence has been acquired over a person of weak mind, and has been abused. *Bennett v. Bennett*, 65 Neb. 432 (91 N. W. 409).

123. (1902.) The acts and contracts of a person of weak understanding will be set aside by a court of equity, when the nature of the acts or contracts justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented or overcome by cunning, artifice or undue influence. *Meyer v. Fishburn*, 65 Neb. 626 (91 N. W. 534).

Mistake.

124. (1902.) A husband against whom divorce proceedings had been instituted conveyed a valuable farm, upon which the family resided, to the wife, relying upon representations that the consideration for the deed was to be a home with his wife, permanent reconciliation, and a life annuity of $200. The husband could neither read nor write the English language. The deed as finally executed gave the wife the option of receiving the husband into the home, or excluding him upon the payment of the $200 annuity. *Held*, That the deed could not be upheld. *Brun v. Brun*, 64 Neb. 782 (90 N. W. 860).

Fraud.

125. (1885.) A deed from a mother to a daughter, induced by false and fraudulent representations by the daughter, will be set aside in a suit by the mother. *Kleeman v. Pettzer*, 17 Neb. 381 (22 N. W. 793).

126. (1888.) Where a vendor and purchaser stand on an equal footing, the expression of opinions as to the value of property will not usually be considered so material that misstatements will constitute fraud. Where, however, the purchaser resides near the property, and has knowledge of its value, and the owner is a resident of another state, and has no knowledge on that subject, statements of the purchaser representing the property to be greatly beneath its true value, and that the vendor's title has been conveyed by sale for taxes, will be sufficient to avoid the deed given to such purchaser. *Morgan v. Dinges*, 23 Neb. 271 (36 N. W. 544; 8 Am. St. Rep. 121).

127. (1888.) Where a person desiring to purchase real estate knows its value, and when asked by the vendor, a resident of another state, and who has no knowledge of such value, as to the worth of such property, designates a sum greatly beneath its worth, as he well knows, and such statement is relied upon by the vendor and a sale effected, it may be sufficient to authorize a cancelation of the deed at the suit of the vendor. *Morgan v. Dinges*, 23 Neb. 271 (36 N. W. 544; 8 Am. St. Rep. 121).

Duress.

128. (1886.) Where an old woman has been induced through coercion, though not amounting to fraud, to deed her property to her son, who agreed to care for her and husband, but, after securing the deed, mistreats her and the father and does not properly provide for them, the deed will be set aside. *Munson v. Carter*, 19 Neb. 293 (27 N. W. 208).

129. (1903.) A deed for the conveyance

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of land, if obtained by duress, may be avoided by the entry of the grantor or his heirs within the statutory period of limitation. *Hovorka v. Havlik*, 68 Neb. 14 (93 N. W. 990; 110 Am. St. Rep. 387).

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Undue influence.

130. (1886.) Undue influence exerted upon an uncle by his niece, by reason of which he conveyed to her certain real estate upon a promise to reconvey, may be sufficient to justify a court of equity in setting aside the deed. *Hansen v. Berthelsen*, 19 Neb. 433 (27 N. W. 423).

131. (1892.) In an ejectment suit the jury was warranted in finding that the deed of plaintiff's grantor was obtained by fraud and undue influence where the testimony showed that the maker was a drinking man, old, feeble, and childish; that he conveyed the land while sick and delirious, without lawful consideration, to a young, vigorous, and attractive woman, who had unlawfully cohabited with him, and promised to stay with him while he lived, and afterward abandoned him. *Staley v. Housel*, 35 Neb. 160 (52 N. W. 888).

132. (1894.) Equity will grant relief against persons procuring transfer of property by coercion and undue social or domestic force exerted on a party which controls the free action of his will and prevents a voluntary act. *Hartnett v. Hartnett*, 42 Neb. 23 (60 N. W. 362).

Illegality.

133. (1902.) A deed from a husband to wife conveying the farm upon which they both reside, the consideration being a home for the husband and cohabitation for an indefinite period, or exclusion of the husband from the home, at the will of the wife, upon the payment of a $200 annuity for life, is opposed to sound principles of public policy, as being a contract calculated to bring about a separation which has not yet taken place. *Brun v. Brun*, 64 Neb. 782 (90 N. W. 860).

Ratification of voidable deed.

134. (1892.) The ratification of a deed procured by fraud and undue influence must be with full knowledge of all facts affecting its validity. *Staley v. Housel*, 35 Neb. 160 (52 N. W. 888).

II. RECORDING AND REGISTRATION.

Necessity and effect as to third persons, see *Vendor and Purchaser*.

Record as notice to subsequent purchasers, see *Vendor and Purchaser*.

Recording deed as a delivery, see *ante*, §§ 110-113.

Effect of failure to record as against subsequent purchasers, see *Vendor and Purchaser*, §§ 271-323.

Priorities between unrecorded deed and creditors of grantor, see *Vendor and Purchaser*, §§ 222-234.

Purpose and scope of requirements.

135. (1877.) The policy of our law is to discourage secret liens, and to require all instruments affecting the title of real estate to be entered of record. *Edminster v. Higgins*, 6 Neb. 265.

Necessity as between parties to instrument.

136. (1880.) It is not the recording of the deed that passes the title, but it only secures the title from being defeated by a subsequent sale of land to an innocent purchaser. *Kittle v. St. John*, 10 Neb. 605 (7 N. W. 271).

137. (1881.) A deed when executed, witnessed and delivered, is effectual to pass title, though not lawfully acknowledged or recorded. *Harrison v. McWhirter*, 12 Neb. 152 (10 N. W. 545).

138. (1891.) An unrecorded deed is good against everybody except creditors of the grantor, and subsequent purchasers without notice of the first conveyance. *Keeling v. Hoyt*, 31 Neb. 453 (48 N. W. 66).

Sufficiency.

139. (1886.) A deed wrongly described in the records is as an unrecorded deed, as to subsequent grantees. *Hubbart v. Walker*, 19 Neb. 94 (26 N. W. 713).

Effect as between parties to instrument.

140. (1902.) The mere record of an instrument, signed and acknowledged by the owner of real estate, but not delivered, which is taken from his possession and filed for record, without his knowledge or consent, by the grantee named therein is not notice to such owner that such grantee asserts some right or title under the deed. *Palmer v. Mizner*, 2 Unof. 899 (90 N. W. 637).

III. CONSTRUCTION AND OPERATION.

A. General Rules of Construction.

Intention of parties.

141. (1888.) In the construction of deeds the intention of the grantor must be carried into effect. *McCulloch v. Valentine*, 24 Neb. 215 (38 N. W. 854).

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142. (1900.) In a suit between others than original parties, the description in a deed, if unambiguous, governs, and the intention of the parties to the conveyance cannot take the place of calls. *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Neb. 364 (83 N. W. 201).

Construing instruments together.

143. (1907.) Where a deed given in January recites that it was made in lieu of one for the same property executed in the preceding October, and there is neither evidence nor allegation of any new consideration or change of circumstances between the parties during the interval, the two deeds are to be considered as a part of the same transaction. *Rihner v. Jacobs*, 79 Neb. 742 (113 N. W. 220).

Conflicting clauses.

144. (1878.) The *habendum* in a deed cannot divest the estate vested by the grant in the deed; and when it is repugnant to the grant it must be treated as of no validity or effect. *Aultman & Taylor Mfg. Co. v. Richardson*, 7 Neb. 1.

145. (1889.) The certificate of acknowledgment as shown by the record of a deed, was dated on the 16th day of August, 1872, while the deed itself bore date of the 16th day of October of the same year. It was *held* that the date of the certificate of acknowledgment would prevail over that of the deed, and that the district court did not err in admitting a copy of the record in evidence, when objected to on account of the discrepancy in dates. *Buck v. Gage*, 27 Neb. 306 (43 N. W. 110).

146. (1892.) Under the provisions of section 53, chapter 73, Compiled Statutes, in construing an instrument conveying real estate, when by any reasonable interpretation the granting clause and the *habendum* can be reconciled, effect must be given both. *Rupert v. Penner*, 35 Neb. 587 (53 N. W. 598; 17 L. R. A. 824).

Extrinsic circumstances.

147. (1903.) The description in a deed may be aided by extrinsic circumstances. *Keplinger v. Woolsey*, 4 Unof. 282 (95 N. W. 1008).

148. (1905.) The construction of an ambiguous deed is ascertained from the language used and from a consideration of the situation and circumstances of the transaction of which it was a part. *Hart v. Saunders*, 74 Neb. 818 (105 N. W. 709).

Construction as to parties.

149. (1905.) "Grantee" as used in a party wall agreement means persons to whom the real estate might be conveyed by deed. *Loyal Mystic Legion v. Jones*, 73 Neb. 342 (102 N. W. 621).

Conclusiveness of recitals.

150. (1902.) When recitals in a deed are of the essence of the contract, neither party is permitted to deny them. *McNaughton v. Burke*, 63 Neb. 704 (89 N. W. 274).

B. Property Conveyed.

Property included in description in general.

151. (1884.) Where there is a call in a deed, which was in fact not intended by the parties, and is unambiguous, the intention of the parties cannot be made to take the place of the call, neither is parol proof competent to locate the land. *Gillespie v. Sawyer*, 15 Neb. 536 (19 N. W. 449); (1900) *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Neb. 364 (83 N. W. 201).

152. (1900.) A definite description of lands in a deed designating the initial point, courses and distances, and followed by a statement of the number of acres conveyed, passes the quantity of land embraced in the specific boundaries, though greater or less than the number of acres stated. *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Neb. 364 (83 N. W. 201).

153. (1903.) Where the owner of two adjoining tracts of land sells one of them, the purchaser takes the tract sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the tract which the vendor retains. *Znamanacek v. Jelinek*, 69 Neb. 110 (95 N. W. 28; 111 Am. St. Rep. 533).

154. (1904.) A conveyance of land bounded in part by a river which has receded leaving accretions to the land, without describing such lands by metes and bounds, but by the number or numbers by which the same are designated in the government survey, passes the title, not only to the land originally constituting the grant from the United States, but to the accretions thereto. *Topping v. Cohn*, 71 Neb. 559 (99 N. W. 372).

154*a*. (1907.) Deed construed, and *held* to convey the land in dispute. *Lamson v. Village of Elm Creek*, 80 Neb. 369 (114 N. W. 277).

154*b*. (1907.) In a description of land

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by metes and bounds a point of the compass named in a survey may be construed to mean a different or opposite direction, when it appears to have been written by clerical error, and is so inconsistent with the remaining parts of the description as to demonstrate that the different or opposite direction was intended. *Hart v. Murdock*, 80 Neb. 274 (114 N. W. 268).

References to plats.

155. (1901.) Where the official plat of the survey of government lands shows a river as one boundary of a certain lot, a subsequent patent for the lot, describing it by number, and referring to the plat on which it is marked as containing a certain amount, and deeds, describing the lot by number, passes all accretion to the lot up to their respective dates. *Delong v. Olsen*, 63 Neb. 327 (88 N. W. 512).

After-acquired property or title.

156. (1894.) The state of Nebraska sold certain land to Arnold & Abbott and gave them a contract for a deed. They platted the land into an addition, and sold and conveyed by warranty deed lots 3 and 4 in block 18 of said addition to one McCarthy, and he conveyed said lots to one Pillsbury. Arnold & Abbott then assigned their state contract to one Thomas, and the state of Nebraska conveyed the legal title of all said land to him. Thomas then conveyed the said lots 3 and 4 to Abbott. *Held*, That the legal title of said lots acquired by Abbott, by his conveyance from Thomas, passed at once by operation of law to, and vested in, Pillsbury, the grantee of McCarthy. *Pillsbury v. Alexander*, 40 Neb. 242 (58 N. W. 859).

157. (1898.) The general rule is that an ordinary quitclaim deed vests only in the grantee such title or estate as the grantor was at the time of the execution and delivery of the deed possessed of; and if a grantor in such a deed subsequently acquires the title to the real estate thereby conveyed, that title does not inure to the grantee in the quitclaim deed. *Hagensick v. Castor*, 53 Neb. 495 (73 N. W. 932).

158. (1899.) An after-acquired title does not inure to the benefit of the grantee, where the deed of conveyance under which he claims has been canceled and annulled by a decree of court. *Troxell v. Stevens*, 57 Neb. 329 (77 N. W. 781).

159. (1899.) By virtue of section 51, chapter 73, Compiled Statutes, an after-acquired interest in real estate by a grantor inures to the benefit of the grantee when the deed purports to convey a greater interest or estate than the grantor owns at the time of the conveyance. *Troxell v. Stevens*, 57 Neb. 329 (77 N. W. 781).

160. (1899.) Grantee in a quitclaim deed takes only the grantor's existing interest, and the after-acquired title of his grantor in the property does not pass to grantee. *Troxell v. Stevens*, 57 Neb. 329 (77 N. W. 781).

161. (1905.) If a grantor of quitclaim obtains an instrument that evidences and fortifies the very estate or interest which his deed purports and was intended and effectual to convey, such instrument inures to the benefit of his grantee. *Ford v. Axelson*, 74 Neb. 92 (103 N. W. 1039).

Appurtenances.

162. (1888.) On the 29th of April, 1885, A executed to B a lease to certain real estate, for a term of one year from March 1, 1885, and while the tenant was in possession, crop, to be delivered on or before January 1, 1886. Under this lease, B took possession of the premises. On the 30th day of April 1885, and while the tenant was in possession, A sold the real estate to C, conveying the same by warranty deed "subject to a lease which expires March 1, 1886." *Held*, That C was entitled to the rent reserved; the limitation in the deed only being intended as a recognition of the rights of the lessee, and a limitation upon the covenants of warranty contained in the deed. *Eiseley v. Spooner*, 23 Neb. 470 (36 N. W. 659; 8 Am. St. Rep. 128).

Evidence.

163. (1884.) In an action between others than the original parties to a deed, the intention of the parties to the conveyance cannot be inquired into for the purpose of ascertaining the land sought to be conveyed, if the calls in the deed refer to fixed monuments or points, nor is parol proof competent to locate the land. *Gillespie v. Sawyer*, 15 Neb. 536 (19 N. W. 449).

164. (1894.) Where the description in a deed contains a call to and along a line, the true location of which is uncertain, maps proved to be in common and accepted use in the community at the time of the conveyance are admissible to show that a particular line was in the community generally recognized by the name used in the deed. *Hanlon v. Union P. R. Co.*, 40 Neb. 52 (58 N. W. 590).

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165. (1894.) Where the description in a deed contains a call to and along a line, the true location of which is uncertain, parol evidence is admissible to show that at the time of the conveyance a particular line was in the community generally recognized by the name used in the deed. *Hanlon v. Union P. R. Co.*, 40 Neb. 52 (58 N. W. 590).

166. (1903.) The description in a deed may be aided by extrinsic evidence. *Keplinger v. Woolsey*, 4 Unof. 282 (93 N. W. 1008).

C. Estates and Interests Created.

Effect of conveyance subject to mortgage, see *Mortgages*, §§ 300-302.

Reformation of deed to cover property intended to be conveyed, see *Reformation of Instrument*, § 2.

Operation of quitclaim deed.

Effect as to after-acquired title, see *ante*, §§ 160, 161.

167. (1889.) A husband and wife being in possession of a homestead which was heavily mortgaged, and the husband, being sick and about to die, executed a quitclaim deed of said homestead to his brother for the purpose of enabling him to settle up the estate without expense. The wife at first refused to sign the deed, alleging that it would deprive her of her rights in the estate, but upon the assurance of persons employed by the grantee to procure the deed, in effect that she would lose none of her rights thereby, she was induced to sign and acknowledge the deed. *Held*, That the grantee was bound by the representations of the persons obtaining the deed for him. *Barker v. Barker*, 27 Neb. 135 (42 N. W. 889).

168. (1897.) Covenants of warranty not broken when made pass with the title, unaffected by the fact that the conveyances are by quitclaim deed. *Walton v. Campbell*, 51 Neb. 788 (71 N. W. 737); (1899) *Troxell v. Stevens*, 57 Neb. 329 (N. W. 781).

169. (1898.) A quitclaim deed for realty passes all the interest of grantor at date of delivery, in absence of a contrary intent. *Leavitt v. Bell*, 55 Neb. 57 (75 N. W. 524).

170. (1898.) A deed of quitclaim passes only the interest of the grantor, subject to any equities which might be enforced against him. *Arlington Mill & Elevator Co. v. Yates*, 57 Neb. 286 (77 N. W. 677).

171. (1903.) The quitclaim deed of an owner, purporting to convey all his interest in land, carries not only his interest in possession, but also any reversionary rights in the same land which he holds subject to a then existing dower estate. *Curtis v. Zutavern*, 67 Neb. 183 (93 N. W. 400).

172. (1903.) Owners of land who have given quitclaim deeds to all their interest in the land, and have suffered a decree in partition against them that their grantee holds title to the land so conveyed and have allowed in such action of partition one-third of the net proceeds of the sale to be paid to the purchaser of the dower estate, to be held by him during the life of the doweress, are estopped to assert any claim accruing before the partition proceedings to the reversion of the dower. *Curtis v. Zutavern*, 67 Neb. 183 (93 N. W. 400).

Particular words or terms.

173. (1876.) Where a judgment creditor conveys his interests to his son and the debtor as tenants in common, and the judgment debtor is to buy in an outstanding title in himself and the other as tenants in common, such deed conveys only the interests of the grantor in the premises, and does not assign any interest in the judgments. *Mills v. Miller*, 4 Neb. 441.

174. (1885.) Where land was conveyed by husband and wife by warranty deed to trustees appointed by the will of her father, for the "sole and separate use and benefit" of the wife, etc., the consideration being derived from the father's estate, a provision in the deed that the husband "shall have the right to occupy, farm, and control said lands for her (the wife)" does not create any estate in him, where there is no fraud. *Pemberton v. Pollard*, 18 Neb. 435 (25 N. W. 582).

175. (1903.) A conveyance, before the partition proceedings, by one of the owners of the land to a brother, though purporting to convey all his interest, where by its other terms and the circumstances it is clear that only a transfer of an interest obtained by purchase was intended, and where the decree of partition so finds, will be held to convey the purchased interest only, and not the one inherited. *Curtis v. Zutavern*, 67 Neb. 183 (93 N. W. 400).

Life estates.

176. (1892.) The premises of a deed were "do hereby grant, sell, and convey unto J. P. C." The *habendum* clause was "to

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have and to hold said premises, with the appurtenances, unto the said J. P. C. for and during the term of his natural life, and at his decease the same shall descend in equal shares to his children," naming them. *Held*, That the deed conveyed a life estate to J. P. C., with remainder to his children therein mentioned. *Rupert v. Penner*, 35 Neb. 587 (53 N. W. 598; 17 L. R. A. 824).

Estoppel to deny estate conveyed.

177, 178. (1898.) Whatever be the form or nature of the conveyance of real property, if the grantor therein sets forth on the face of such instrument by way of recital or averment, either in express terms or by necessary implication, that he is seized or possessed of a particular estate in the premises conveyed, then such grantor and all persons claiming under him are ever afterward estopped from denying that he was so seized and possessed at the time he made such conveyance. Such an estoppel operates upon the estate and binds an after-acquired title as between parties and privies. *Hagensick v. Castor*, 53 Neb. 495 (73 N. W. 932); (1903) *Omaha B. & T. R. Co. v. Whitney*, 68 Neb. 399 (99 N. W. 525).

179. (1898.) In 1887 the children of George H. Ohler, believing him dead, partitioned among themselves his real estate, by quitclaim deeds from one to another, each deed reciting that the grantor "being one of the three heirs of George H. Ohler." In 1891 Ohler died owning this real estate and it descended to his heirs, the three children who had already partitioned it. *Held*, That the recital in the quitclaim deeds, "being one of the three heirs of George H. Ohler," was not a mere *descriptio personæ* of the grantor, but an assertion by such grantor that he was then an heir at law of Ohler, and the grantors had by such recital estopped themselves and those claiming under them from asserting that they were not heirs of George H. Ohler in 1887, and from asserting the title to the land which they acquired by his death in 1891, against the grantees in said quitclaim deeds and those claiming under them. *Hagensick v. Castor*, 53 Neb. 495 (73 N. W. 932).

D. Exceptions and Reservations.

Construction and operation of exceptions.

180. (1902.) A recital in a deed of conveyance that it is subject to certain mortgages, described therein, is notice to all persons claiming through or under such deed of such facts as might be ascertained reasonably by investigation of the record and following up the information imparted thereby. *Carter v. Leonard*, 65 Neb. 670 (91 N. W. 574).

181. (1902.) A recital in a deed that it is subject to a certain mortgage is not less constructive notice because contained in and a part of an agreement to pay the mortgages referred to. *Carter v. Leonard*, 65 Neb. 670 (91 N. W. 574).

182. (1902.) Where a mortgage is of record, which might reasonably be taken to be one of those referred to in a recital, in a deed that it was subject to the mortgage, one claiming through the deed is bound to inquire, and cannot avoid such duty because of an error in the description, which renders it somewhat doubtful what tract is intended. *Carter v. Leonard*, 65 Neb. 670 (91 N. W. 574).

Validity of reservations.

183. (1899.) A reservation in a deed is ineffectual to create title in a stranger to the conveyance, but may, when so intended by the parties, operate as an exception to the grant. *Buchard v. Walther*, 58 Neb. 539 (78 N. W. 1061).

184. (1899.) A conveyance by warranty deed to B, with a reservation of a life estate in the grantor, and after the death of the latter a life estate to C, a stranger to the deed, conveys no estate to C, since a reservation in a deed is ineffectual to create title in a stranger to the conveyance. *Buchard v. Walther*, 58 Neb. 539 (78 N. W. 1061).

E. Conditions and Restrictions.

Conditions running with the land.

185. (1903.) A condition in a deed conveying real estate by which it is provided "That no malt, spirituous or vinous liquors shall be kept or disposed of on the premises conveyed, and that any violation of this condition, either by the grantee or any person claiming rights under him or her, shall render the conveyance void, and cause the premises to revert to the grantor, his heirs and assigns," is a valid condition subsequent which, until broken, runs with the land. *Jetter v. Lyon*, 70 Neb. 429 (97 N. W. 596).

Effect of breach.

186. (1884.) A purchased of B a certain lot, paying therefor $50 in cash, and agreeing in the deed as part of the consideration to erect a building of a certain description

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thereon. *Held*, That B was entitled to the performance of the contract, and in case of the failure of A, after a reasonable time upon tendering back the money received, to a rescission. *Willard v. Ford*, 16 Neb. 543 (20 N. W. 859).

187. (1903.) On breach of a condition in a deed that no intoxicating liquors should be kept or sold on the premises, the grantor, if living, or, if dead, his heirs, may claim a reversion of the estate and can maintain an action in ejectment to recover it. *Jetter v. Lyon*, 70 Neb. 429 (97 N. W. 596).

Release or waiver of condition.

188. (1903.) A condition in a deed against the sale of intoxicating liquors on the premises *held* not waived by the grantor by subsequent conveyances of other property withiuo similar conditions. *Jetter v. Lyon*, 70 Neb. 429 (97 N. W. 596).

F. Loss or Relinquishment of Rights.

Redelivery of deed to grantor.

189. (1886.) Where a deed of conveyance of real estate is executed and delivered to a purchaser, such execution and delivery vests the title of the grantor in the grantee and a redelivery or surrender of the deed unaccompanied with the purpose of rescinding and annulling the contract of purchase will neither divest the grantee of the title nor operate as an estoppel against him. *Bunz v. Cornelius*, 19 Neb. 107 (26 N. W. 621).

190. (1899.) The surrender of an unrecorded deed by the grantee to the grantor will not reinvest the title in the latter. *Brown v. Hartman*, 57 Neb. 341 (77 N. W. 776).

Destruction or loss of deed.

191. (1896.) The loss or destruction of a deed after delivery thereof, does not divest the title of the grantee. *Brown v. Westerfield*, 47 Neb. 399 (66 N. W. 439; 53 Am. St. Rep. 532).

192. (1899.) The destruction of a deed, after its delivery, does not divest the title of the grantee. *Brown v. Hartman*, 57 Neb. 341 (77 N. W. 776).

IV. PLEADING AND EVIDENCE.

Pleading.

193. (1896.) An allegation in a pleading that the grantor "made and executed" a deed, includes all acts essential to the completion of the muniment of title,—the delivery of the instrument to the grantee as well as the signature of the grantor. *Brown v. Westerfield*, 47 Neb. 399 (66 N. W. 439; 53 Am. St. Rep. 532).

195. (1898.) In an action for damages for a breach of the covenant against incumbrances contained in a deed, an answer charging that the deed executed by the grantors does not contain a correct expression of the intention of the parties in regard to the transaction sufficiently alleges the mutuality of the mistake. *Hotaling v. Tecumseh Nat. Bank*, 55 Neb. 5 (75 N. W. 242)

195. (1902.) In a suit to cancel a conveyance by an old man alleged to have been of weak mind, allegations that the defendant represented that the grantor's son and son-in-law were conspiring to defraud him of his land; that they were intending to bring an action against him and would be able to procure a judgment by false evidence, and cause the land to be sold to satisfy it unless conveyed to the defendant; that the defendant promised to hold the land in trust and reconvey it; that such representations were false; that the conveyance was without consideration; and that it was procured by said false representations in consequence of the extreme old age, mental weakness and childishness of the grantor, state a cause of action. *Bennett v. Bennett*, 65 Neb. 432 (91 N. W. 409).

Presumptions and burden of proof.

196. (1879.) The possession of a deed by the grantee, in the absence of opposing circumstances, is *prima facie* evidence of delivery, and the burden of proof is on him who disputes this presumption. *Roberts v. Swearingen*, 8 Neb. 363.

197. (1892.) When a deed, which is beneficial in its character to the grantee named therein, is properly acknowledged and recorded, the presumption of law is that it was delivered by the grantor and accepted by the grantee. *Bowman v. Griffith*, 35 Neb. 361 (53 N. W. 140).

198. (1892.) Identity of the name of a grantor or grantee is *prima facie* evidence of identity of the person. *Rupert v. Penner*, 35 Neb. 587 (53 N. W. 578; 17 L. R. A. 824).

199. (1902.) The circumstances under which a conveyance was made, the condition of the grantor at the time, and the injustice to him and his heirs if it is upheld, may be such as to cast upon the grantee the burden of showing that it is untainted with

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undue influence, imposition, or fraud, but is the intelligent and deliberate act of the grantor. *Bennett v. Bennett*, 65 Neb. 432 (91 N. W. 409).

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Admissibility of evidence.

200. (1892.) Where a deed, beneficial to the grantee, recites that it is executed for the purpose of correcting an error in a prior deed between the same parties, the record thereof is evidence of the facts therein recited. *Bowman v. Griffith*, 35 Neb. 361 (53 N. W. 140).

——— **Execution, existence and identity.**

201. (1884.) When a deed is introduced in evidence, and it is shown by sufficient testimony that the alleged grantor has been absent from the state and his whereabouts unknown for more than ten years, and a claim of title under such deed is made for the first time, the alleged deed having existed more than twenty-three years, the admission of evidence impeaching the deed as a forgery *held* competent. *Snyder v. Jennings*, 15 Neb. 372 (19 N. W. 501).

202. (1892.) When attesting witnesses are absent from the county in which the action is pending, the execution of the instruments in question may be proved by any other competent evidence. *Buchanan v. Wise*, 34 Neb. 695 (52 N. W. 163).

203. (1892.) The absence of the attesting witnesses to an instrument may be established like any other facts. It is sufficient to prove facts from which a presumption will arise that they are absent from the county. *Buchanan v. Wise*, 34 Neb. 695 (52 N. W. 163).

204. (1892.) Testimony of an old resident of the county that he had never heard of the witnesses to a certain deed in controversy, coupled with the fact that their attestation was made in another state, is sufficient to raise a presumption that such witnesses are absent from the county and to authorize proof of the execution of the deed by other evidence. *Buchanan v. Wise*, 34 Neb. 695 (52 N. W. 163).

——— **Capacity of grantor.**

205. (1906.) The fact that the attending physician prescribed certain drugs for a patient which are used in the treatment of mental disorders is not competent evidence tending to establish the insanity of the patient. *Ames v. Ames*, 75 Neb. 473 (106 N. W. 584).

206. (1906.) In a suit by one of the representatives of a deceased person to set aside a conveyance made by the deceased on the ground that he was mentally incompetent to execute such conveyance, an answer filed by the deceased in a suit pending in his lifetime, in which he averred that at the time of executing the contract then in suit he was suffering from mental and physical prostration, and *non compos mentis*, is inadmissible in evidence on the question of the mental capacity of the grantor. *Ames v. Ames*, 75 Neb. 473 (106 N. W. 584).

207. (1906.) On the trial of the cause, where a non-expert witness was asked to state whether the grantor was able to converse intelligently on any particular subject for any length of time, the witness having given the conversations and described the conduct of the grantor, it was for the court to draw inferences therefrom as to his inability to converse intelligently. *Ames v. Ames*, 75 Neb. 473 (106 N. W. 484).

——— **Fraud.**

208. (1872.) Fraud may be shown in an action of ejectment to avoid a deed. *Franklin v. Kelley*, 2 Neb. 79.

——— **Performance or breach.**

209. (1902.) In an action by a grantee of a deed against his grantor to recover for a breach of covenant against incumbrances, parol evidence is inadmissible to show that taxes were, by contemporaneous oral agreement, excepted from the terms of the deed. *Stanisics v. McMurtry*, 64 Neb. 761 (90 N. W. 884).

Weight and sufficiency.

210. (1893.) A recital in a deed of recent date that the grantors are the heirs at law of a former owner of the lands therein described, is not sufficient evidence, as against a stranger to the instrument, of the death of the supposed ancestor, or that the persons who executed the deed are his heirs, and hence is insufficient to prove title in the grantee. *McMurtry v. Keifner*, 36 Neb. 522 (54 N. W. 844).

211. (1901.) A deed, unaided by other proof, is not ordinarily evidence of title to land described therein. *Lesieur v. Custer County*, 61 Neb. 612 (85 N. W. 892).

——— **Execution.**

212. (1899.) Evidence examined, and *held* to sustain a finding that a deed was forged. *Lindsay v. Palmer*, 58 Neb. 168 (78 N. W. 371).

213. (1902.) Evidence examined, and

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held to sustain the findings of the trial court that the premises in controversy were the homestead of the appellee, and that she did not voluntarily execute the deed of conveyance. *Blumer v. Albright*, 64 Neb. 249 (89 N. W. 809).

214. (1907.) Evidence examined, and found insufficient to support a finding that the name of a grantee was inserted without authority in a deed regular upon its face, and that the same was intended as a mortgage. *Butler v. Peterson*, 79 Neb. 715 (116 N. W. 515).

——— **Delivery and acceptance.**

215. (1888.) Where the evidence as to the delivery of a deed is conflicting and nearly equally balanced, and the court below found in favor of delivery, such finding will not be set aside as being against the weight of evidence. *Smith v. Mesarvey*, 22 Neb. 756 (36 N. W. 137).

216. (1893.) Where by the terms of a deed a grantee assumes a debt secured by a mortgage on the land and the grantee denies the debt and the delivery of the deed, to bind such grantee the proof must show an actual delivery, from which, if he retains the deed, an acceptance may be presumed. Very clear proof will be required where the property conveyed is of much less value than the incumbrance which it is alleged the grantee assumed. *Stuart v. Hervey*, 36 Neb. 1 (53 N. W. 1032.)

217. (1893.) The finding of the trial court that the deed executed by the plaintiff and deposited in escrow with a third person, to be delivered to the vendee on the performance by the latter of certain conditions, was delivered by the depository in escrow by instructions of the vendor before the conditions of the holding had been complied with, considered to be sustained by the evidence in the case. *Eggleston v. Pollock*, 38 Neb. 188 (56 N. W. 805).

218. (1898.) The mere circumstance that a deed was found among the papers of the deceased grantor named in it *held to be* without significance, in view of the fact that such grantor—a resident of Nebraska—had, since the making of the deed, been constituted by the grantee—a resident of New York—his attorney in fact to sell, manage, and convey the property described in such deed. *Gustin v. Michelson*, 55 Neb. 22 (75 N. W. 153).

219. (1898.) The fact that a deed of conveyance has been recorded affords *prima facie* evidence of its delivery, which is a question of fact. *Gustin v. Michelson*, 55 Neb. 22 (75 N. W. 153).

220. (1898.) The introduction in evidence of a recorded deed by the grantee mentioned therein in support of his claim of title to the property is sufficient to establish his acceptance of such deed. *American Fire Ins. Co. v. Landfare*, 56 Neb. 482 (76 N. W. 1068).

221. (1901.) The presumption of law of the delivery of a deed of conveyance on the date of its execution is overcome by proof of a manual delivery and acceptance by the grantee at a subsequent date, where there is nothing warranting a conclusion that a delivery was intended by the grantor prior to the time of the manual delivery. *Blair State Bank v. Bunn*, 61 Neb. 464 (85 N. W. 527).

222. (1903.) Evidence examined, and found sufficient to sustain the conclusions of the trial court that the deed in question was a forgery. *Mavity v. Stover*, 68 Neb. 602 (94 N. W. 834).

222*a*. (1908.) In an action to set aside a conveyance on the ground that the deed had not been delivered, the evidence *held* sufficient to sustain a judgment for plaintiff. *Wetherell v. Adams*, 80 Neb. 584 (114 N. W. 778).

——— **Consideration.**

223. (1895.) An alleged agreement to pay an existing mortgage, as part of the consideration for the conveyance of mortgaged premises, is not established by recitations in the deed of conveyance that such deed is subject to said mortgage, nor a mere recitation that said mortgage is part of the consideration or purchase price. *Green v. Hall*, 45 Neb. 89 (63 N. W. 119).

224. (1895.) A binding assumption of the payment of a mortgage by the grantee in a deed which merely recites the existence of such mortgage on the premises conveyed, and that such mortgage is a part of the consideration or purchase price, cannot be established by proof that subsequent to the execution of such deed the grantee therein named, orally, and without consideration, promised the mortgagee that he would pay such mortgage. *Green v. Hall*, 45 Neb. 89 (63 N. W. 119).

——— **Validity.**

225. (1881.) Evidence *held* sufficient to show that deed executed by person under

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arrest, was obtained by duress. *McCulley v. Jones*, 11 Neb. 513 (9 N. W. 695).

226. (1892.) Upon the facts stated, *held*, that the deed for the plaintiff's land was obtained by fraudulent professions of friendship and undue influence, and the judgment of the court below, setting it aside, was right. *Kithcart v. Larimore*, 34 Neb. 273 (51 N. W. 768).

227. (1892.) In an action to set aside a deed made by a father in his dotage to his youngest son, *held*, that the testimony tended to show undue influence on the part of the son, and that the father was not in a mental condition to transact important business. *Loder v. Loder*, 34 Neb. 824 (52 N. W. 814).

228. (1895.) Evidence discussed *held* insufficient to show plaintiff's right to have a conveyance executed by her canceled on account of fraud, duress, and undue influence. *Firestein v. Horwich*, 43 Neb. 453 (61 N. W. 592).

229. (1896.) Evidence in an action to cancel a deed from a mother to a son *held* to sustain a decree for defendant. *Issitt v. Dewey*, 47 Neb. 196 (66 N. W. 288).

230. (1896.) Evidence *held* to sustain a decree that a deed was not procured by fraud and duress. *Stochl v. Caley*, 48 Neb. 786 (67 N. W. 783).

231. (1904.) Evidence in an action to set aside certain deeds made by an old man to a woman claiming to be his wife *held* not to show such total want of understanding, or such mania, affecting the transactions in question, as to avoid the deeds and marriage of the grantor for insanity, in the absence of fraud or undue influence. *Aldrich v. Steen*, 71 Neb. 33 (98 N. W. 445).

232. (1904.) Evidence *held* sufficient to avoid, for undue influence, the deeds concerning all his property, of the value of many thousand dollars, made by a frail old man, who had shown symptoms of dementia, to his housekeeper, without consideration. *Aldrich v. Steen*, 71 Neb. 33 (98 N. W. 445).

233. (1905.) Evidence in an action to cancel a deed in blank, delivered to a real estate broker, who was to obtain the signature of plaintiff's wife, *held* to sustain a decree for defendant. *Lucas v. Cass County Recorder*, 75 Neb. 351 (106 N. W. 217).

DE FACTO CORPORATIONS.

See *Corporations*, §§ 26-29.

DE FACTO OFFICERS.

See *Officers*, §§ 7-9.

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See *Judgment*, §§ 39-112.

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DEFENSES.

To action on negotiable instrument, see *Bills and Notes*, §§ 420-445.

To action for divorce, see *Divorce and Alimony*, §§ 23-37.

To suits by property owners on condemnation proceedings, see *Eminent Domain*, §§ 276-279.

Acts for false imprisonment, see *False Imprisonment*, §§ 10-14.

To action to set aside transfer as fraudulent, see *Fraudulent Conveyances*, §§ 351-354.

To prosecution for sale of adulterated food, see *Food*, § 13.

To action on foreign judgment, see *Judgments*, §§ 926-929.

Proving truth as defense for libel, see *Libel and Slander*, § 42.

Inconsistent defenses, see *Pleading*, §§ 112-117.

To revival of judgment, see *Judgment*, §§ 847-854.

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DELIVERY.

Of promissory note, see *Bills and Notes*, §§ 14-16.

Of goods by carrier, see *Carriers*, II, D; §§ 144-151.

Of contract, see *Contracts*, § 26.

Of deeds, see *Deeds*, §§ 98-116.

Effect of fraud in delivery of instrument held in escrow, see *Escrow*, §§ 7-9.

Of indemnity bond, see *Indemnity*, §§ 11, 12.

Of insurance policy, see *Insurance*, § 85.

Of mortgage, see *Mortgages*, §§ 93-95.

Of official bond, see *Officers*, §§ 162-166.

Of property to plaintiff in replevin, see *Replevin*, § 184.

Of goods sold, see *Sales*, §§ 138-161.

DEMAND.

For payment of negotiable instrument, see *Bills and Notes*, §§ 317-357.

For jury, see *Jury*, §§ 36, 37.

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As affecting statute of limitations, see *Limitation of Action*.

Necessity of, as prerequisite to mandamus, see *Mandamus*, §§ 40-43.

Sufficiency of allegation of demand, see *Pleading*, §§ 71-72.

Condition precedent to replevin, see *Replevin*, §§ 59-72.

Condition precedent to recovery of taxes paid, see *Taxation*, §§ 472, 473.

Condition precedent to action for conversion, see *Trover and Consersion*, §§ 33, 34.

DEMONSTRATIVE EVIDENCE.

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In criminal prosecutions, see *Criminal Law*, X, E.

DEMURRAGE.

See *Carriers*, § 119.

DEMURRER.

In particular actions or proceedings, see specific topics.

In civil actions, see *Pleading*, §§ 213-273.

In action before justice of the peace, see *Justices of the Peace*, § 131.

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In pleading, see *Pleading*, §§ 118-152.

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Statutory provisions, §§ 2, 3.
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Delivery of instruments in escrow, see *Escrow*.

Deposits in banks, see *Banks and Banking*, §§ 125-217.

Deposits in insolvent bank, see *Banks and Banking*, §§ 152-155.

Of county funds, see *Counties*, §§ 411-419.

Compelling deposit of public funds, see *Mandamus*, §§ 169, 170.

Deposit of deed as mortgage, see *Mortgages*, §§ 38-72.

Nature of contract.

1. (1897.) A deposit of public moneys by a state treasurer in a legally constituted depository for public funds, in compliance with the provisions of the depository law is in substance and legal effect a loan of the moneys so deposited. *In re State Treasurer's Settlement*, 51 Neb. 116 (70 N. W. 532; 36 L. R. A. 746).

Statutory provisions.

2. (1897.) The state depository law is not amendatory of subdivision 8, section 2, article IV, chapter 83, Compiled Statutes, in such a sense as to render it inimical to section 11, article III of the constitution. *In re State Treasurer's Settlement*, 51 Neb. 116 (70 N. W. 532; 36 L. R. A. 746).

3. (1898.) Depository law (Session Laws 1891, p. 347, ch. 50) *held* valid. *Holt County Bank v. Holt County*, 53 Neb. 827 (74 N. W. 259).

Appointment and designation.

4. (1894.) Under the provisions of chapter 50, Session Laws of 1891, it is the duty of the county board to act on the propositions of each bank to become a depository of current funds of the county, as well as to approve the bond incident to that relation. *State, ex rel. First Nat. Bank, v. Owen*, 41 Neb. 651 (59 N. W. 886).

5. (1900.) When a county board has acted upon the propositions of different banks applying to be made depositories of county funds, and approved or rejected the bonds presented for that purpose, its powers and authority in the premises cease, and it is without power or authority to control the action of the county treasurer, and direct in which of the depositories, or in what amount, the depositing of county funds shall be had; and when an attempt is made to designate one bank as a preferred depository, such action is a nullity, and without force or effect. *State, ex rel. Irrigators Bank, v. Whipple*, 60 Neb. 650 (83 N. W. 921).

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6. (1900.) A board of county commissioners is without authority to make one of two or more banks, designated as depositories of county funds, a preferred depository, in which county funds are to be first deposited by the county treasurer until the sum of such deposit shall reach the amount allowed under the law and depository bond of such bank. *State, ex rel. Irrigators Bank, v. Whipple*, 60 Neb. 650 (83 N. W. 921).

Bond.

7. (1894.) The mere fact that a county treasurer has assumed to designate the bank in which he shall deposit current funds of the county, and to fix the penal bond, confers upon the bank designated no right by mandamus to compel the county board to approve the sufficiency of the bond. *State, ex rel. First Nat. Bank of Stanton, v. Owen.* 41 Neb. 651 (59 N. W. 886).

8. (1894.) Under the provisions of chapter 50, laws of 1891, it is the duty of the county board to act on the propositions of each bank to become county depositories, and to approve the bond incident to that relation. *State, ex rel. First Nat. Bank of Stanton, v. Owen*, 41 Neb. 651 (59 N. W. 886).

9. (1897.) To constitute a bank a state depository of public funds it must give a bond for the safe keeping and payment of such deposits and the accretions thereof, conditioned as required by law, and approved by the governor, secretary of state, and attorney general, or any two of them, where all were present and conferred upon the subject. *In re State Treasurer's Settlement*, 51 Neb. 116, (70 N. W. 532; 36 L. R. A. 746).

10. (1902.) Under the terms of the statute providing for the depositing of public funds by the county treasurer in depository banks, a depository bond of such bank is a continuing liability, which can be discharged only by the paying out of the funds deposited on account of the giving of the bond. *Hall County v. Thomsen*, 63 Neb. 787 (89 N. W. 393).

11. (1902.) The delivery of checks, drawn by an out-going county treasurer on county funds in a depository bank that had given the proper bond as such depository, by the incoming treasurer who had such checks certified instead of drawing out the cash, after which the bank failed, is not a redeposit of the funds as a general deposit, as will relieve the bank from liability on the depository bond. *Hall County v. Thomsen*, 63 Neb. 787 (89 N. W. 393).

11*a*. (1907.) The cashier of a bank is the proper officer to execute a bond on its behalf to secure a deposit of public money made therein, and the bank will be bound by such execution, in the absence of some rule or regulation adopted by the directors or stockholders requiring special authority on the part of the cashier to execute such bonds, and notice of such fact brought to the attention of the obligee therein. *Johnson County v. Chamberlain Banking House*, 80 Neb. 96 (113 N. W. 1055).

Liability of depositary in general.

12. (1903.) Where a warrant drawn upon the general fund "For to reimburse for state sinking fund" and registered for payment, is unlawfully sold by the state treasurer, who afterwards in payment thereof draws his check on a state depository in whose hands the warrant was for collection, the latter will be protected in paying such check, unless it had actual notice of the unlawful purpose. *State v. Omaha Nat. Bank*, 66 Neb. 857 (93 N. W. 319).

13. (1905.) If money belonging to the state in the hands of a county treasurer is by him deposited in a bank that has been designated as a depository of county funds, and is lost by a failure of the bank, it is not the duty of the treasurer to use the money of the county to make good the loss to the state, and his action in doing so without authority from the county board will not estop the county to recover the money from the state. *Lancaster County v. State*, 74 Neb. 215 (107 N. W. 388).

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DEPOSITIONS.

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——— Non-attendance of witness, § 69.
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——— Saving exceptions, § 72.
——— Statement of conclusions of witness, § 73.
——— Waiver of objection, § 74.
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CROSS-REFERENCES.

See, also, *Affidavits; Discovery; Witnesses.*

Continuance to take depositions, see *Continuance*, §§ 3, 4.

Affidavit for continuance for loss of, see *Continuance*, § 51.

Compelling taking in election contest, see *Mandamus*, § 178.

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Right to take in general.

1. (1895.) Provisions for the taking of testimony in one state for use in the courts of another, and the enforced attendance of witnesses for that purpose, are founded upon comity, and are, in the absence of express statutory provision to the contrary, extrajudicial as to the courts of the state where such evidence is sought. *Stratton v. Dole*, 45 Neb. 472 (63 N. W. 875).

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Right to take second deposition.

2. (1903.) In this state the taking of depositions is regulated by statute, and there is no provision which requires leave of court to entitle a party to take a second deposition of the same witness for use in the same case. *Peycke v. Shinn*, 68 Neb. 343 (94 N. W. 135).

Persons authorized to take depositions.

3. (1876.) Unless authorized by special commission, the clerk of a court out of the state has no authority to take depositions. *Starring v. Mason*, 4 Neb. 367.

4. (1902.) Section 1750, Revised Statutes of the United States, confers on consular officers the power "to perform any notarial act which any notary public is required or authorized by law to do within the United States." *Held*, That such consular officer is a notary public within the meaning of our statute, and authorized to take and certify affidavits of depositions for use in the courts of the state. *Browne v. Palmer*, 66 Neb. 287 (92 N. W. 315).

5. (1904.) A county judge in this state has the same jurisdiction and powers in taking depositions that are conferred by law upon a notary public, including full authority to commit a witness for refusing to be sworn or give testimony in a proper case. *Olmstead v. Edson*, 71 Neb. 17 (98 N. W. 415).

Persons whose depositions may be taken.

6. (1887.) A party plaintiff who is a non-resident of the county where the trial is held need not appear personally to testify in the case, but his deposition may be taken as in the case of other non-resident witnesses. *Sells v. Haggard & Co.*, 21 Neb. 357 (32 N. W. 66).

Time for taking.

7. (1894.) Either party may commence taking depositions any time after service of summons. *Kansas City, W. & N. W. R. Co. v. Conlee*, 43 Neb. 121 (61 N. W. 111).

8. (1902.) In the absence of a statute or standing court rule forbidding the taking of depositions during a term time of the court in which the cause is pending, the fact that they are so taken is not ground for suppressing them. *Donovan v. Hibbler*, 3 Unof. 652 (92 N. W. 637).

Notice to take.

——— Certainty of place.

9. (1886.) In a notice to take the deposition of witnesses therein named, "at the office of M. C. Little in the town of Tonica, county of La Salle and state of Illinois," *held*, to contain a sufficient description of the place of taking such depositions *prima facie*. *Britton v. Berry*, 20 Neb. 325 (30 N. W. 254).

——— Reasonable time.

10. (1883.) A notice served on the 24th to take depositions on the 28th of a month, a Sunday intervening, at a place requiring two days' travel to reach by the usual route, gives one day less than the statute requires. *Cool v. Roche, Hall & Ray*, 15 Neb. 24 (17 N. W. 119).

11. (1883.) The notice to take depositions shall be served so as to allow the adverse party sufficient time by the usual route of travel to attend, and one day for preparation, exclusive of Sunday and the day of service. *Cool v. Roche, Hall & Ray*, 15 Neb. 24 (17 N. W. 119).

——— Names of witnesses.

12. (1896.) Under our statute requiring a notice to take depositions to "specify the names of witnesses to be examined," the deposition of "G. A. Hollem" cannot be taken under a notice specifying the name of "Gus Hahn" or "Gus Halin," such names not being *idem sonans*. *Miller v. Frey*, 49 Neb. 472 (68 N. W. 630).

——— Service.

13. (1896.) Section 378, code of civil procedure, requires notice of the taking of depositions (unless taken under a special commission) to be served upon the adverse party, his agent or attorney of record, or left at his usual place of residence. *Atchison, T. & S. F. R. Co. v. Meek*, 49 Neb. 295 (68 N. W. 509).

14. (1896.) Service of notice to take depositions upon a station agent, who is not the attorney of record of the adverse party, a railroad company, whose employment in nowise relates to the particular controversy, and who is without authority to accept or waive service in its behalf in any suit or pro-

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ceeding to which it may be a party, does not satisfy the requirement of the statute. *Atchison, T. & S. F. R. Co. v. Meek*, 49 Neb. 295 (68 N. W. 509).

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Use of deposition on appeal.

15. (1896.) Depositions taken in a case pending before a justice and by stipulation used in said case and another pending before said justice, may be used on the trial of both cases in the appellate court, the stipulation in the meantime not having been set aside. *Keens v. Robertson*, 46 Neb. 837 (65 N. W. 897).

Place of taking.

16. (1878.) Whether it is proper to take depositions in the office of one of the parties or of his attorney, or before an officer who is also the clerk or student of such party or attorney, *quære*. *Payne v. Briggs*, 8 Neb. 75.

17. (1887.) The fact that a notary before whom a deposition is taken has his office in a room occupied by the attorneys who represented the party taking the deposition, is not of itself sufficient to warrant the exclusion of the deposition when offered to be read upon the trial. The practice of taking depositions in the office of an attorney interested in the cause is objectionable, yet there is no law to prohibit it. *Singer Mfg Co. v. McAllister Bros.*, 22 Neb. 359 (35 N. W. 181).

18. (1906.) When depositions are to be taken in a large city, designation of the place by giving the name of the building or block in which the same are to be taken is sufficient without giving the street number. *Sheibley v. Fales*, 75 Neb. 823 (106 N. W. 1032).

Presence of parties or counsels.

19. (1888.) Where depositions of certain witnesses on behalf of the defendant in a criminal case are taken by a commission appointed by a judge of the district court, such judge has the power under section 460 of the criminal code to prescribe the manner of taking such depositions, the usual mode being by interrogatories and cross-interrogatories, but this will not prevent the attorney of either or both parties from appearing and further examining or cross-examining the witnesses. *Gandy v. State*, 24 Neb. 716 (40 N. W. 302).

Functions of officer taking.

20. (1906.) In the taking of depositions notaries public are not exercising judicial functions, and do not constitute a law court. Their powers are derived solely from the statute. *In re Butler*, 76 Neb. 267 (107 N. W. 572.

Examination of witness.

21. (1902.) An answer of a witness in a deposition is not to be stricken out because in answer to a proper question he gives the effect of a conversation, instead of the very terms thereof. If the other party desires to know what transpired in more detail, he should cross-examine. *Bowman v. Wright*, 65 Neb. 661 (91 N. W. 580).

22. (1904.) Where the testimony of a person having a direct legal interest in the result of an action, where the adverse party is a representative of a deceased person is taken by deposition, and his testimony as to transactions with the deceased is objected to upon that ground, the adverse party may cross-examine. By so doing he does not waive his objections to the competency of the witness, but may urge the same at the trial. If the evidence in chief is admitted at the trial the cross-examination should also be admitted; but, if the evidence in chief is excluded upon the objections of defendant as to competency, the cross-examination should also be excluded upon the defendant's objection, and the plaintiff is not entitled to use it to establish his case. *Bentley v. Estate of Bentley*, 72 Neb. 803 (101 N. W. 976).

——— On subsequent deposition.

23. (1895.) Where a deposition was wrongfully transmitted and never filed a subsequent deposition of the same witness taken on proper notice before the same notary in the same case will not be quashed on the ground that the notary failed to propound the cross-interrogatories originally filed. *City of Chadron v. Glover*, 43 Neb. 732 (62 N. W. 62).

Subscription by witness.

24. (1886.) Depositions with the names of the witnesses respectively attached thereto, with a cross between the Christian and surname, and the word "his" written above and the word "mark" written below the cross, and followed by the words, "subscribed and sworn to before me and in my presence. M. C. Little, Notary Public," is a sufficient compliance with the statute requiring depositions to be "subscribed by the witness." *Britton v. Berry*, 20 Neb. 325 (30 N. W. 254).

Punishment of witness for misbehavior.

25. (1887.) A notary public has power to commit for contempt a witness who re-

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fuses to give his deposition in a proper case. *Dogge v. State*, 21 Neb. 272 (31 N. W. 929).

26. (1891.) Notaries public, under section 7 of chapter 61, Compiled Statutes, are not authorized to punish by fine or imprisonment persons guilty of misdemeanor, or misbehavior during the taking of depositions. *Courtnay v. Knox*, 31 Neb. 652 (48 N. W. 763).

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Requisites and sufficiency of return and certificate.

——— Time, place, and before whom taken.

27. (1878.) The certificate of the officer taking a deposition ought to show on its face the county and state or country where the same is taken, as well as the state or country from which the officer derived his official character. *Payne v. Briggs*, 8 Neb.75.

28. (1889.) To entitle a deposition to be read in evidence the certificate must show that the deposition was taken at the place, room, or office, named in the notice, and the certificate or deposition on its face must show that the taking of the deposition was commenced on the day named in the notice. *Dawson v. Dawson*, 26 Neb. 716 (42 N. W. 744).

29. (1897.) The caption of a deposition may be read in connection with the certificate at the end thereof for the purpose of determining whether the deposition discloses that it was taken at the time and place and before the officer mentioned in the notice. *McClintock v. State Bank of Table Rock*, 52 Neb. 130 (71 N. W. 978).

30. (1906.) A certificate to a deposition, which fails to show that the deposition was reduced to writing by the officer, or by the witness, or by a disinterested person, in the presence of the officer, and which further fails to show that the deposition was taken at the time and place named in the notice, is fatally defective. *American Bonding Co. v. Pulver*, 77 Neb. 211 (109 N. W. 156).

——— Venue.

31. (1883.) If the venue of a deposition apears in the body of the certificate, it is not a fatal defect that the notary has failed to place it at the head of the certificate. *Glidden v. Moore*, 14 Neb. 84 (15 N. W. 226; 45 Am. Rep. 98).

——— Reading to witness.

32. (1886.) It is unnecessary that the certificate appended to a deposition should contain a statement that the deposition was read to the witness, even where the witness subscribes the deposition by mark. *Britton v. Berry*, 20 Neb. 325 (30 N. W. 254).

——— Oath.

33. (1871.) A certificate to depositions, showing that the witnesses were sworn to testify the truth, the whole truth, and nothing but the truth, without naming the cause or matter in or about which they were sworn, and showing the other facts prescribed by the statutes, is sufficient. *Jameson v. Butler*, 1 Neb. 115.

34. (1902.) It is not a sufficient objection to the reading of a deposition in evidence that the officer before whom it was taken does not certify that the witnesses were sworn as well after as before testifying. *Donovan v Hibbler*, 3 Unof. 652 (92 N. W. 637).

——— Authentication.

35. (1875.) Depositions taken in Illinois by a notary public, certified to under his hand and official seal, may be read in evidence here without further authentication. *Martin v. Coppock*, 4 Neb. 173.

——— Transcribing.

36. (1897.) Unless the annexed certificate of the officer before whom the deposition of a witness has been taken affirmatively shows that the deposition of such witness was written in the presence of such officer it is incompetent evidence. (Code of civil procedure, secs. 380, 385.) *New Kentucky Coal Co. v. Union P. R. Co.*, 52 Neb. 127 (71 N. W. 948).

37. (1906.) A deposition to be admitted in evidence must be reduced to writing by the officer taking the deposition, or by the witness giving the testimony, or by a disinterested person, in the presence of the officer. *American Bonding Co. v. Pulver*, 77 Neb. 211 (109 N. W. 156).

——— Transmission.

38. (1898.) Depositions filed in a lower court are presumed, in the absence of proof to the contrary, to have been transmitted to the district court within the time limited by the statute for that purpose. *Thomas v. Nebraska Moline Plow* Co., 56 Neb. 383 (76 N. W. 876).

Admissibility in evidence.

——— In general.

39. (1871.) Depositions taken in a cause instituted by one plaintiff with whom others are afterwards joined, may be read in evi-

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dence, if applicable to the case, after the amendment as to parties. *Holmes v. Boydston*, 1 Neb. 346.

40. (1903.) The plaintiff gave notice to the attorney of the defendant of the taking of depositions in the state of Ohio. The defendant at the time was confined in a jail in Ohio, and his attorney, immediately on receipt of the notice, sent the same to him through the mail. The notice never reached him, and he was unrepresented at the taking of the plaintiff's depositions, and her witnesses were not cross-examined in his interest. These depositions were taken three months or more before the trial of the case, and no effort was made to secure a cross-examination of the witnesses prior to the trial. *Held*, That the court properly refused to suppress the depositions. *Diedrichs v. Diedrichs*, 68 Neb. 534 (94 N. W. 536).

41. (1905.) In the case of alienation of lands *pendente lite*, depositions of witnesses taken after the alienation and before the alienee becomes a party to the cause may be used against the alienee the same as they might have been used against the party under whom he claims. *Morris v. Linton*, 74 Neb. 411 (104 N. W. 927).

42. (1906.) Depositions cannot be used as evidence against parties who were not notified of the time and place of taking the same, and did not participate therein. *State v. Omaha Elevator Co.*, 75 Neb. 654 (106 N. W. 979).

——— **Right of adverse party to use.**

43. (1901.) 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*, 62 Neb. 116 (86 N. W. 913).

44. (1901.) A deposition, regularly taken and filed in a cause, not used by the party taking it, may be offered and read by the other party, whether he participated in taking it or not. *Ulrich v. McConaughey*, 63 Neb. 10 (88 N. W. 150).

45. (1907.) A deposition, and exhibit thereto attached, when properly identified by the deponent, may, when material to the case, be given in evidence by the party not taking the deposition. *Keller v. Chicago B. & Q. R. Co.*, 78 Neb. 604 (111 N. W. 384).

——— **Use of part only.**

46. (1883.) When in the taking of a deposition of a witness, the adverse party has appeared and cross-examined, he is entitled to the benefit of the deposition, and may read such portions of it as he chooses, without being compelled to read the whole. *Converse v. Meyer*, 14 Neb. 190 (15 N. W. 340).

47. (1901.) If the witness has been examined as to different transactions, a party may introduce only 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. *Hamilton Brown Shoe Co. v. Milliken*, 62 Neb. 113 (86 N. W. 913).

——— **Irrelevancy of matter.**

48. (1884.) A deposition offered in a case which is wholly irrelevant to the matter in issue between the parties should be ruled out on objection. *Charlton Plow Co. v. Davidson*, 16 Neb. 374 (20 N. W. 256).

——— **Absence of deponent.**

49. (1892.) Under section 372 of the code the deposition of a witness may be used only in the following cases: "First—When the witness does not reside in the county where the action or proceeding is pending, or is sent for trial by change of venue, or is absent therefrom. Second—When, from age, infirmity, or imprisonment, the witness is unable to attend the court, or is dead. Third—When the testimony is required upon a motion, or in any other case where the oral examination of a witness is not required." *Everett v. Tidball & Fuller*, 34 Neb. 803 (52 N. W. 816).

50. (1892.) When a deposition is offered to be read in evidence, it must appear to the satisfaction of the court that for any cause specified in section 372 the attendance of the witness cannot be procured. If the witness is openly within the county at the time of the trial and is not prevented by age, infirmity, or imprisonment from appearing in court, his deposition cannot be substituted for his personal presence to give testimony if the adverse party object to such deposition. *Everett v. Tidball & Fuller*, 34 Neb. 803 (52 N. W. 816).

51. (1894.) The deposition of a witness, who resides in the county where an action originated and is being tried, cannot be read in evidence until it is made to appear that such witness is absent from the county, or by reason of age, infirmity, imprisonment, or death is unable to attend in person at

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the trial. *Munro v. Callahan*, 41 Neb. 849 (60 N. W. 97).

52. (1894.) Whether or not the deposition of a witness should be received in evidence must be determined from the facts in existence at the time of the trial, and if at that time it is shown that the witness does not reside in, or has removed from, the county wherein the trial is proceeding, his deposition, otherwise unobjectionable, is receivable in evidence. *Grimes Dry Goods Co. v. Shaffer*, 41 Neb. 112 (59 N. W. 741).

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——— Exhibits attached.

53. (1901.) Exhibits sufficiently identified by marks of a notary and testimony of witness, who saw them used, may be considered in connection with deposition though not attached as recited. *Black v. Webber*, 1 Unof. 468 (96 N. W. 606).

——— Sufficiency of showing of absence.

54. (1887.) Where from the deposition of certain witnesses it appears that they are non-residents of the state, it is unnecessary for the party offering the depositions in evidence to prove they are not present in court. *Sells v. Haggard & Co.*, 21 Neb. 357 (32 N. W. 66).

55. (1896.) Where a deposition shows that the witness is a non-resident of the county, it is unnecessary for the party offering it to prove that the witness is not present in court. *Lowe v. Vaughan*, 48 Neb. 651 (67 N. W. 464).

56. (1904.) Where from the deposition of a witness it appears that he is a non-resident of the county, it is unnecessary for the party offering the deposition in evidence to prove that such witness is not present in court or in the county. *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 70 Neb. 766 (98 N. W. 44).

——— Sufficiency of authentication.

57. (1897.) Unless the certificate of the officer taking a deposition affirmatively shows that it was written in the presence of the officer it is not admissible. *New Kentucky Coal Co. v. Union P. R. Co.*, 52 Neb. 127 (71 N. W. 948).

58. (1897. It is reversible error to overrule a motion to suppress a deposition that does not show it was taken in the presence of the officer authenticating, and permit it to be read to the jury when it tends to support the contention of the party offering it as to a material issue. *New Kentucky Coal Co. v. Union P. R. Co.*, 52 Neb. 127 (71 N. W. 948).

59. (1898.) Depositions *held* inadmissible where the notary failed to authenticate them by his seal. *Welton v. Atkinson*, 55 Neb. 674 (76 N. W. 473; 70 Am. St. Rep. 416).

——— Mistake in notice to take.

60. (1906.) Where an action was pending in the county court and depositions taken in relation thereto, but which notice, by mistake, referred to an action pending in the district court, were by consent of parties read in evidence, it was not error on appeal to the district court to admit them in evidence. *Union P. R. Co. v. Thompson*, 75 Neb. 464 (106 N. W. 598).

——— Effect of absence of revenue stamp.

61. (1902.) The federal congress is not authorized to prescribe rules governing the admissibility of evidence in the courts of this state; and hence absence of a revenue stamp from a deposition will not render it inadmissible. *Sulpho-Saline Bath Co. v. Allen*, 66 Neb. 295 (92 N. W. 354).

Defects and objections.

——— Time for making and filing.

62. (1882.) Objections to the admission of depositions in evidence, except for incompetency or irrelevancy, must be "made and filed before the commencement of the trial," or they come too late. *Dietrichs v. Lincoln & N. W. R. Co.*, 13 Neb. 43 (13 N. W. 13).

63. (1884.) Objections to depositions, except upon the grounds of incompetency or irrelevancy, must be reduced to writing and filed before the commencement of the trial or they must be disregarded by the court. *Sioux City & P. R. R. Co. v. Finlayson*, 16 Neb. 578 (20 N. W. 860; 49 Am. Rep. 724).

64. (1898.) No exception to depositions other than for incompetency or irrelevancy shall be regarded unless made and filed before the commencement of the trial. *Poske v. Stearns*, 56 Neb. 541 (76 N. W. 1078; 71 Am. St. Rep. 688; 42 L. R. A. 427).

65. (1899.) An exception other than for incompetency or irrelevancy, made to a deposition, must be filed before the trial commences, but unless one of the parties so demands, it need not be ruled on prior to the trial. *Union P. R. Co. v. Vincent*, 58 Neb. 171 (78 N. W. 457).

66. (1899.) To secure a reversal error must affirmatively appear. Therefore, when

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it appears that exceptions to depositions were filed the day the trial began, it will not be presumed that they were filed after the commencement of the trial, although it appears they were not called to the attention of the court until the jurors had been called into the box. *Union P. R. Co. v. Vincent*, 58 Neb. 171 (78 N. W. 457).

67. (1901.) Objections to depositions other than for incompetency or irrelevancy must be presented to the court before the commencement of the trial. *Woodard v. Cutter*, 2 Unof. 84 (96 N. W. 54).

——— **Objection to part only, time for.**

68. (1901.) Where an entire deposition is not asked to be suppressed, the customary method of procedure is to wait until the deposition is offered in evidence before objections to certain questions and answers, contained in the deposition as passed upon; but this is not an inflexible rule, and where nothing but irrelevant and improper testimony is stricken from a deposition the action is without prejudice, whether done before or after it is actually offered in evidence. *Stull v. Stull*, 1 Unof. 389 (96 N. W. 196).

——— **Non-attendance of witness.**

69. (1883.) An objection to the reading of a deposition, on the ground that it has not been shown that the personal attendance of the witness could be procured, to be availing must be made before the deposition is read. *Converse v. Meyer*, 14 Neb. 190 (15 N. W. 340).

——— **Failure of clerk's file mark of filing.**

70. (1898.) An objection to the reading of depositions, based on the fact that they did not bear the clerk's file mark showing that they had been filed more than one day before the trial, was properly overruled where it appeared that such depositions had been taken and used in the lower court and had been for a long time among the files of the case in the district court. *Thomas v. Nebraska Moline Plow Co.*, 56 Neb. 383 (76 N. W. 876).

——— **On appeal to district court.**

71. (1901.) Where depositions are filed, but not used, in a case pending in the county court, on an appeal to the district court, exceptions to such depositions may be filed at any time before the trial in the appellate court. *Collier v. Gavin*, 1 Unof. 712 (95 N. W. 842).

——— **Saving exceptions.**

72. (1889.) Where a motion to suppress a deposition has been erroneously overruled, in order to make such error available, the party against whom such ruling is made, must, when such deposition is offered in evidence, object thereto and save his exception. *Dawson v. Dawson*, 26 Neb. 716 (42 N. W. 744).

——— **Statement of conclusions of witness.**

73. (1895.) It is not reversible error for the trial court to refuse to strike out a portion of the answer of a witness in a deposition because the answer stated the witness' conclusion as to the effect of the language used by one whose conversation is related, instead of repeating the language itself, the answer being probative in its character and material to the issues, and no objection having been made until the deposition was read at the trial. *Woodworth v. Thompson*, 44 Neb. 311 (62 N. W. 450).

——— **Waiver of objection.**

74. (1876.) Although a court may commit error in refusing to suppress a deposition, yet if the moving party fail to object to its being read to the jury at the trial, he cannot complain of such error in the appellate court. *Starring v. Mason*, 4 Neb. 367.

——— **Sufficiency of objection.**

75. (1884.) The rulings of the district court denying the objections of the defendant to certain depositions, on the ground that the deponents did not disclose the ground or source of their knowledge of the facts to which they deposed, and the defendant, being present by counsel, failed to cross-examine said deponents, upheld. *Frederick v. Ballard*, 16 Neb. 559 (20 N. W. 870).

76. (1881.) Where depositions were taken in breach of an agreement for the taking thereof, and the agreement is denied and it is clear that no advantage was taken of the complaining party, and it is proper evidence, such depositions are admissible. *Dale v. Hunneman*, 12 Neb. 221 (10 N. W. 711).

77. (1895.) It is not a sufficient objection to depositions that the cross-interrogatories, as originally filed, were asked a witness on subsequent taking of depositions. *City of Chadron v. Glover*, 43 Neb. 732 (62 N. W. 62).

78. (1897.) Where an answer in a deposition contained both competent and incompetent testimony, an objection to the entire answer was *held* properly sustained. *Brinckle v. Stitts*, 53 Neb. 10 (73 N. W. 223).

79. (1898.) Since a party is not required

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to make out his entire case, or any particular branch thereof, by a single witness. An objection to a deposition on the ground that the witness did not testify to all the elements of a valid contract is without merit. *Zobel v. Bauersachs*, 55 Neb. 20 (75 N. W. 43).

Refiling.

80. (1903.) Where depositions are withdrawn from a case, to entitle them to be read on the trial they must be refiled in accordance with the provisions of section 387, code of civil procedure. *Peycke v. Shinn*, 68 Neb. 343 (93 N. W. 135).

DEPOSITS.

See, also, *Depositaries*.

In banks, see *Banks and Banking*, III, C.

Of deed in escrow, see *Escrow*.

DEPOSITS INTO COURT.

CROSS-REFERENCES.

Deposits in lieu of bail, see *Bail*, § 24.

Clerk of court as custodian of deposits, see *Clerk of Courts*, §§ 34-46.

1. (1899.) Bringing money into court is the act of depositing money in the hands of the proper officer of the court for the purpose of satisfying a debt or duty. *Dirks v. Juel*, 59 Neb. 353 (80 N. W. 1045).

2. (1899.) The clerk of the court is the proper custodian of money paid into court pursuant to an order or judgment of the court. *Dirks v. Juel*, 59 Neb. 353 (80 N. W. 1045).

3. (1899.) Money paid to the clerk of the district court by referees in partition proceedings, in obedience to an order directing the money to be brought into court, is received by such clerk in his official capacity. *Dirks v. Juel*, 59 Neb. 353 (80 N. W. 1045).

4. (1900.) A person wishing to avoid paying interest upon an admitted obligation, where there is a dispute as to whom the obligation is due, must bring the money into court to abide its final judgment, unless the court otherwise direct under the provisions of section 48 of the code. *Elkhorn Valley Lodge v. Hudson*, 59 Neb. 672 (81 N. W 859).

DEPUTY.

Of county officers, see *Counties*, §§ 129, 169, 170.

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DESCENT AND DISTRIBUTION.

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CROSS-REFERENCES.

See, also, *Curtesy; Dower.*

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Inheritance by adopted child, see *Adoption*, §§ 7-9.

Right of alien to inherit, see *Aliens*, §§ 1-3.

Right of bastards to inherit, see *Bastards*, §§ 2-10.

Assignment of dower to widow, see *Dower*, §§ 36-49.

Right of heir or devisee to maintain ejectment, see *Ejectment*, §§ 36-38.

Disposition of property of person without heirs, see *Escheat.*

Rights in and affecting homestead, see *Homesteads.*

As to property of spouse, see *Husband and Wife.*

Of partnership property, see *Partnership.*

Probate of wills, see *Wills.*

Heirs as representative of deceased person to disqualify witness, see *Witnesses*, § 73.

Interest of heir as disqualifying such from testifying in action against testator, see *Witnesses*, §§ 95-98.

What law governs.

1. (1882.) The distribution of an estate of an intestate is made in accordance with the laws of his domicile. *Minkler v. Woodruff*, 12 Neb. 267 (11 N. W. 296).

Statutory provisions.

2. (1893.) Chapter 57, Session Laws of 1889, providing for the descent of real property and the distribution of personal property of intestates, the disposition of homesteads of intestates, the barring of an insane wife's interest in the lands of her husband by deed of her guardian, and the abolition of the estates of dower and curtesy, is void, because it contains more than one subject. *Trumble v. Trumble*, 37 Neb. 340 (55 N. W. 869).

3. (1898.) Under the provisions of section 30 and section 176, chapter 23, Compiled Statutes, the personal property of a childless intestate, after the payment of his debts, descends to his widow, to the exclusion of his brothers and sisters who survive him and the children of other brothers and sisters whom he had survived. *Hinds v. Hinds*, 56 Neb. 545 (76 N. W. 1087).

4. (1898.) The curative act of 1895 (Session Laws, ch. 32) was intended to legalize orders, judgments, and findings of the county court which depended for their validity on the decedents' act of 1889 (Session Laws, ch. 57) and has no relation to orders, judgments, and findings which were valid independent of that act. *Boales v. Ferguson*, 55 Neb. 565 (76 N. W. 18).

5. (1899.) "Baker's Decedent's Law" was never in force, and notwithstanding its adoption by the legislature and approval by the governor, it did not change, or affect in any way, the statutes regulating the descent and transmission of testate or intestate estates. *Finders v. Bodle*, 58 Neb. 57 (78 N. W. 480).

6. (1900.) The purpose of the curative act of 1895 (Session Laws, 1895, ch. 32) was to legalize findings, orders, judgments and decrees made under the provisions of the decedent's law which was held to be unconstitutional in *Trumble v. Trumble*, 37 Neb. 340 (55 N. W. 869). *Motley v. Motley*, 60 Neb. 593 (83 N. W. 830).

Persons entitled to inherit.

7. (1882.) The phrase "next of kin" includes such persons as are entitled to inherit the personal estate of a deceased person. Under our statute of descent and distribution a husband does not inherit his wife's personal estate, and is not the next of kin. *Warren v. Englehart*, 13 Neb. 283 (13 N. W. 401).

8. (1889.) Where a party, having a daughter by a former marriage, devised his realty to a trustee for the use of his second wife so long as she should remain his widow, but she afterward remarried, the estate of the son, who was the sole issue of the second marriage, and died unmarried and without issue, under section 30, chapter 23, Compiled Statutes, descended in equal proportions to his mother and half-sister. *Rice v. Saxon*, 28 Neb. 380 (44 N. W. 456).

9. (1889.) The fact that a widow had elected to take under the will instead of claiming dower in the estate, merely precludes her from claiming aught against the heirs not provided for in the will, and did not debar her of an estate of inheritance from the son, of the property mentioned in the will. *Rice v. Saxon*, 28 Neb. 380 (44 N. W. 456).

10. (1890.) Where it cannot be gathered from the pleadings that an estate left by a married woman is ancestral, but it was apparently acquired by purchase, section 33, chapter 23, Compiled Statutes, is not appli-

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cable; and if one of decedent's two children, who have inherited the estate, dies, the surviving father normally takes the interest of such child. *Shellenberger v. Ransom*, 31 Neb. 61 (47 N. W. 700; 28 Am. St. Rep. 500; 10 L. R. A. 810). [Overruled. *Veeder v. McKinley-Lanning Loan Co.*, 61 Neb. 892.]

11. (1892.) Under the statute in force in 1880, a widowed mother inherited the lands of an only son, dying intestate and without issue. *Gwyer v. Hall*, 34 Neb. 589 (52 N. W. 372).

12. (1892.) *Held*, That on the death of a married woman, in 1880, all the real estate of which she died seized descended, subject to the husband's right of curtesy, to intestate's daughter. *Deming v. Miles*, 35 Neb. 733 (53 N. W. 665; 37 Am. St. Rep. 464).

13. (1896.) A. died intestate, leaving surviving him neither issue, nor father, mother, brother, or sister. There were surviving four children of a deceased brother, eight children of a deceased sister, and three children of a deceased daughter of such sister. *Held*, That under our statute of descent the twelve surviving nephews and nieces took each one-twelfth part of the intestate's land, *per capita*, and that the grand-nephews and grand-nieces took nothing. Such a case falls within the fifth subdivision of section 30, chapter 23, Compiled Statutes, and not within the third subdivision. *Douglas v. Cameron*, 47 Neb. 358 (66 N. W. 430).

14. (1902.) G. died intestate, leaving surviving her neither issue nor husband, father, mother, brother, sister, nephew, niece, grandfather, grandmother or grandchildren; her nearest relatives being two uncles, an aunt, cousins and second cousins. Under our statute of descent, the two uncles and the aunt took the entire estate, to the exclusion of cousins and second cousins. *Clary v. Watkins*, 64 Neb. 386 (89 N. W. 1042).

15. (1906.) The right of heirship in an estate can only be established in an action in equity; an action at law cannot be maintained to recover the value of an undivided half of an unsettled estate on the ground that the decedent agreed in his lifetime to make the claimant his heir. *Peterson v. Estate of Bauer*, 76 Neb. 661 (107 N. W. 993).

Inheritance per stirpes.

16. (1896.) Inheritance *per stirpes* does does not obtain except where affirmatively provided. *Douglas v. Cameron*, 47 Neb. 353 (66 N. W. 430).

17. (1896.) The rule of inheritance *per stirpes* is in general applied only from necessity, as where the heirs are of unequal degree of kinship to the intestate. Where they are of equal degree, they take as principals. *Douglas v. Cameron*, 47 Neb. 358 (66 N. W. 430).

18, 19. (1896.) It is the object of our statute to cut off inheritance *per stirpes* among collaterals where at any point beyond the children of brothers and sisters the surviving kindred are of unequal degrees. In such case those nearest in degree take the estate to the exclusion of those more remote. *Douglas v. Cameron*, 47 Neb. 358 (66 N. W. 430); (1902) *Clary v. Watkins*, 64 Neb. 386 (89 N. W. 1042).

Expectancy to inherit as a property.

20. (1899.) A mere hope of succession to an estate is not property. *Kocher v. Cornell*, 59 Neb. 315 (80 N. W. 911).

Relation of heir to administrator.

21. (1898.) There is no privity between an administrator and an heir so far as regards the decedent's estate. *Eayrs v. Nason*, 54 Neb. 143 (74 N. W. 408).

Widow's right to possession.

22. (1905.) The widow's right to possession is by virtue of the marital relation, and will not be construed to be independent and hostile to that of her husband's heirs, unless by some means she brings to their attention the fact that she claims to own the property in her own right and adversely to any right derived through her husband. *Larson v. Anderson*, 74 Neb. 361 (104 N. W. 925).

Title acquired by heirs.

23. (1881.) Where the estate is solvent the heir has a beneficiary interest in the trust as distributee. *Becker v. Anderson*, 11 Neb. 493 (9 N. W. 640).

Vesting of right or title in heirs.

24. (1892.) On the death of an intestate his lands immediately descend to his heirs subject to the right of possession by the administrator, pending administration, and to his power to sell the real estate to pay the debts of the estate, in case the personal property is insufficient for that purpose. *Rakes v. Brown*, 34 Neb. 304 (51 N. W. 848).

25. (1897.) The lands of an intestate descend to his heirs subject to his unsecured debts. *Motley v. Motley*, 53 Neb. 375 (73 N. W. 738; 68 Am. St. Rep. 608).

26. (1898.) The personal property descends in equal proportions between the

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widow and children. *Hinds v. Hinds*, 56 Neb. 545 (76 N. W. 1087).

27. (1898.) Undivided lands of which one dies seized descend to the heirs, and title vests in them subject to the ancestor's debts. *Lewon v. Heath*, 53 Neb. 707 (74 N. W. 274).

28. (1902.) Real estate, other than the homestead of an intestate decedent, descends to his heirs and the title vests immediately in them subject to the administrator's right of possession and to its application in payment of decedent's debts. *Security Investment Co. v. Lottridge*, 2 Unof. 489 (89 N. W. 298).

29. (1904.) Newly discovered assets of an insolvent estate are a trust fund in the hands of an administrator for the payment of debts and costs of administration, and do not descend to the heirs and distributees until such claims are paid. *Sharp v. Citizens Bank of Stanton*, 70 Neb. 758 (98 N. W. 50).

——— Time of vesting title.

30. (1889.) O. was the owner of a homestead on which he lived with his wife and her several grown sons and daughters by a former marriage. Owing to ill treatment by O. of the family, and especially of the daughters, the family left the homestead and went to a distant part of the county, where they remained, the wife and mother going with them and remaining with them for the most part until the death of O., but several times returning and remaining at the homestead for longer or shorter lengths of time; at one time, when O. was sick, for about three weeks. O. remained on the homestead for a year, more or less, after the departure of the family, when on account of illness he was removed to a hospital at the county seat, where he died. *Held*, That upon the death of O. the widow, Bridget O'Brien, became vested with a life estate in the homestead. *Lamb v. Wogan*, 27 Neb. 236 (42 N. W. 1041).

31. (1897.) Where an ancestor dies intestate his lands descend instantly to his heirs. It does not require settlement of his estate or a probate order declaring heirship to vest the title. *Johnson v. Colby*, 52 Neb. 327 (72 N. W. 313).

32. (1892.) Lands of an intestate descend immediately upon his death to his heirs. *Rakes v. Brown*, 34 Neb. 304 (51 N. W. 848).

33. (1894.) Our statute of descent is plain and unambiguous, and by its own operation, and solely in accordance with its own terms, vests in the heir such estate as he is thereby entitled to, *eo instanti*, upon the death of the intestate from whom the inheritance comes. *Shellenberger v. Ransom*, 41 Neb. 631 (59 N. W. 935). [Overruled. *Veeder v. McKinley-Lanning Loan Co.*, 61 Neb. 892.]

Advancements.

34. (1900.) Advancements made by a father to a son may be deducted from the distribute share of the latter. *McClave v. McClave*, 60 Neb. 464 (83 N. W. 668).

35. (1902.) Where, pending the settlement of a decedent's estate, advancements have been made in good faith to an heir by the administrator with the assent of the coheirs, which were accepted by the recipient as in full of his share and as entitling the other heirs to his proportion of the remaining estate, the heir who has under such arrangement received his full share of the estate, has not thereafter an attachable interest in real property of the deceased. *Security Investment Co. v. Lottridge*, 2 Unof. 489 (89 N. W. 298).

36. (1903.) Evidence *held* sufficient to sustain finding that the conveyance from father to son was upon an oral agreement that it should be an advancement, and a release and relinquishment of grantee's interest in the father's estate. *Riddell v. Riddell*, 70 Neb. 472 (97 N. W. 609).

37. (1904.) Evidence examined, and *held* insufficient to show that the consideration for the promissory note executed by a daughter and her husband to the father was intended as an advancement. *Lodge v. Fitch*, 72 Neb. 652 (101 N. W. 338).

38. (1904.) Section 34, chapter 23, Compiled Statutes, provides: "All gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if changed in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant." In an action to adjust advancements, *held*, that oral testimony is incompetent to prove the advancements. *Boden v. Mier*, 71 Neb. 191 (98 N. W. 701).

39. (1904.) To constitute an advancement as defined in section 37, chapter 23, Compiled Statutes, 1903, it is necessary either that the ancestor express in the gift or grant his intention that it be an advancement, or

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that he charge it in writing as an advancement, or that the child or other descendant acknowledge in writing the gift or grant as an advancement. *Lodge v. Fitch*, 72 Neb. 652 (101 N. W. 338).

40. (1904.) A debt from an heir to an ancestor may be converted by the ancestor, with the consent of the heir, into an advancement, but when such debt is evidenced by note or bond this fact raises a strong presumption that the transaction was intended as a loan and not as an advancement. *Lodge v. Fitch*, 72 Neb. 652 (101 N. W. 338).

Relinquishment in interest by heirs.

41. (1903.) A relinquishment by a son of his interest in his father's estate, to be effectual as to lands must be in writing signed by the party to be charged. *Riddell v. Riddell*, 70 Neb. 472 (97 N. W. 609).

42. (1903.) Receipt and rentention of lands from the father in consideration of an oral agreement to relinquish the son's interest in the father's estate, is not such a part performance of it as to take it out of the statute of frauds. *Riddell v. Riddell*, 70 Neb. 472 (97 N. W. 609).

Disqualification of heir by murder of intestate.

43. (1890.) Where a child was murdered by the father, he does not acquire the estate of the former. *Shellenberger v. Ransom*, 31 Neb. 61 (47 N. W. 700; 28 Am. St. Rep. 500; 10 L. R. A. 810). [Overruled. *Shellenberger v. Ransom*, 41 Neb. 631.]

44. (1894.) The murder of an interstate by one to whom ordinarily his property would descend as heir will not prevent the property from so descending. *Shellenberger v. Ransom*, 41 Neb. 631 (59 N. W. 935; 25 L. R. A. 564). [See 61 Neb. 892.]

Dedications from distributee's share.

45. (1904.) In the distribution or partition of an estate, a debt due the estate from a distributee, or some person through whom he inherits by right of representation, which is barred by the statute of limitations, cannot be deducted from the share of such distributee. *Boden v. Mier*, 71 Neb. 191 (98 N. W. 701).

46. (1907.) After the death of one to whom has been made a gift or loan, the distributive shares of the children of the debtor or donee, as heirs at law of the creditor or donor, cannot without their consent be diminished by charging a gift or loan as an advancement to their ancestor, which has not acquired that character during the lifetime of the latter. *In re Estate of Hessler*, 79 Neb. 691, (113 N. W. 147).

Liability of heir for debts of decedent.

47. (1902.) A claim on a simple contract debt, for which a man's heirs as such are not liable, cannot be prosecuted against them. *Buck v. Hogeboom*, 63 Neb. 672 (88 N. W. 857).

48. (1939.) Where a county has a claim against the estate of a deceased insane person for her support, it must be presented during administration, and cannot be recovered after distribution of the estate, by a suit against the distributees. *Richardson County v. Smith*, 25 Neb. 767 (41 N. W. 774).

Rights of heir to maintain ejectment.

49. (1898.) An heir may bring and maintain an action of ejectment relative to lands of which his ancestor died seized against any and all persons except the administrator of the estate and such as have a right or rights thereto deprived from the administrator, and this the heir may do during the pendency of the administration proceedings and prior to final settlement or any decree of distribution. *Leivon v. Heath*, 53 Neb. 707 (74 N. W. 274).

Actions for distribution.

——— Right of heir to partition and distribution of estate.

50. (1889.) An heir or devisee of an estate cannot maintain an action for distribution or partition until the debts, allowances, and expenses against said estate have been paid or provided for, unless he give a bond with approved sureties to pay for the same. *Alexander v. Alexander*, 26 Neb. 68 (41 N. W. 1065); (1890) *Reckewey v. Waltemath*, 28 Neb. 492 (44 N. W. 659).

51. (1889.) Where a widow has a life estate in all the lands of which her husband died seized, the heirs cannot maintain an action of partition against her and disturb her possession. *Alexander v. Alexander*, 26 Neb. 68 (41 N. W. 1065).

——— Sufficiency of petition.

52. (1882.) Petition alleged that A. R. M. died at Beatrice, Gage county, Nebraska, intestate; that plaintiff was duly appointed his administrator, and has paid all funeral charges, debts of the deceased, and costs and expenses of administration; that deceased left no issue or widow; that plaintiff

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is his father and sole heir at law; that deceased left real estate in Indiana and Minnesota, and personal estate in Ohio, which estate is in the possession of the defendant; but the petition does not state that the deceased was at any time domiciled in Nebraska. *Held*, That a general demurrer to the petition was rightly sustained by the district court. *Minkler v. Woodruff*, 12 Neb. 267 (11 N. W. 296).

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——— **Parties.**

53. (1903.) In a contest between rival claimants seeking to establish heirship and have distribution of the estate of a decedent, the administrator of such estate has no official interest. As the representative of the deceased person he is not an adverse party to any of the claimants in the controversy. *Sorensen v. Sorensen*, 68 Neb. 500 (100 N. W. 930).

——— **Proof of heirship.**

54. (1903.) Brothers, and children of deceased brothers and sisters, of an intestate are not *prima facie* heirs and distributees, and must allege and prove that there are no persons of the several classes which would take before them and exclude them, under the statute, before they can obtain an order for distribution of the estate. *Sorensen v. Sorensen*, 68 Neb. 483 (94 N. W. 540).

55. (1903.) Proof of heirship is not confined to the records of the probate court alone, but may be established by the testimony of any one who knows the facts constituting such relation. *Jetter v. Lyon*, 70 Neb. 429 (97 N. W. 596).

——— **Right to open and close.**

56. (1903.) In a proceeding for the distribution of the estate of an intestate, in a contest between parties, each claiming as next of kin and heir at law, to the exclusion of the other and all other persons, the right to open and close rests in the discretion of the court. *Sorensen v. Sorensen*, 68 Neb. 490 (98 N. W. 837).

DESCRIPTION.

Of parties and property attached, see *Attachment*, IV.

Of boundary lines, see *Boundaries*, §§ 1-23.

Of chattels mortgaged, see *Chattel Mortgages*, §§ 44-77.

Of animals in chattel mortgage, see *Chattel Mortgages*, §§ 62-77.

Of property and parties to deed, see *Deeds*, §§ 44-51.

Of defendant and crime charged in criminal prosecution, see *Indictment and Information*, §§ 43-73.

Of property insured, see *Insurance*, V.

Of parties to judgment, see *Judgment*, §§ 143-148.

Of leased property, see *Landlord and Tenant*, VI, A.

Of property and labor and material furnished on building, see *Mechanics' Liens*, §§ 92-123.

Of land mortgaged, see *Mortgages*, §§ 77, 78.

Of parties to action, see *Parties*, IV.

Of parties in pleadings, see *Pleadings*, §§ 66, 67.

Of persons and property for taxation, see *Taxation*, §§ 237-246.

Of parties in verdict, see *Trial*, §§ 744, 745.

Of property devised, see *Wills*, §§ 187, 188.

DESERTION.

Ground for divorce, see *Divorce*, §§ 19-21.

Sufficiency of proof of, see *Divorce*, §§ 85-89.

DETECTIVES.

Credibility as witness, see *Witnesses*, §§ 369, 370.

DEVISES.

See *Wills*.

DICTUM.

Effect of, in opinion, see *Courts*, §§ 59, 60.

DIPSOMANIACS.

Commitment to asylum, see *Insane Persons*, §§ 18-20.

DISABILITIES.

Of insane persons, see *Insane Persons*.

Infants, see *Infants*.

Married women, see *Husband and Wife*.

Effect on running of statute of limitations, see *Limitation of Actions*, II, B.

Contributory negligence of persons under, see *Negligence*, §§ 66-71.

Of witnesses, see *Witnesses*, II.

DISBARMENT.

Of attorney, see *Attorney and Client*, §§ 14-29.

DISCHARGE.

Of particular proceedings or action, see specific topics.

Of particular persons or officers, see specific topics.

DISCLAIMER.

Effect on right to costs, see *Costs*, § 46.

Estoppel by disclaimers, see *Estoppel*, §§ 62-69.

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DISCOVERY.

CROSS-REFERENCES.

Of property of debtor, see *Creditors' Suit; Fraudulent Conveyances.*

Right to physical examination of injuries, see *Damages*, §§ 142-146.

Exhibit of personal injury to jury, see *Evidence*, §§ 203-207.

Taking and using testimony by depositions, see *Depositions.*

Authority of county judge to take depositions, see *Depositions*, § 5.

Disclosures by garnishee, see *Garnishment*, §§ 89-100.

Of fraud as starting running of statutes against right to set aside conveyance by debtor, see *Fraudulent Conveyances*, §§ 365-374.

Inspection and view by jury, see *Trial*, §§ 55-60.

1. (1886.) Section 394 of the code, for the inspection of books, papers, or documents in the hands of the adverse party, does not apply to copies of a public record open to the inspection of both parties; and a copy of which may be obtained by either or both parties upon payment of the necessary fees. *Spielman v. Flynn*, 19 Neb. 342 (27 N. W. 224).

2. (1893.) There is no statutory provision which requires that a party shall either pay or tender fees in order to entitle him to an inspection of a book or paper in the possession of his adversary. *First Nat. Bank of Dorchester v. Smith*, 36 Neb. 199 (54 N. W. 254).

3. (1893.) The plaintiff in a civil action made a written demand upon the defendant for an inspection and copy, or permission to take a copy, of certain specified entries in a certain book belonging to, in the possession of, and under the control of the latter, relating to the merits of the suit, which demand was not complied with within four days. *Held*, That under section 394 of the code the court in which the action is pending, or the judge thereof in vacation, has the power, on motion and notice to the defendant, to order that an inspection and copy, or permission to take a copy, of such entries shall be given within a specified time, and on a failure of the defendant to comply with such order, the court may exclude the entries from being given in evidence, or if wanted as evidence by the plaintiff, may direct the jury to presume them to be such as the plaintiff by affidavit alleges them to be. *First Nat. Bank of Dorchester v. Smith*, 36 Neb. 199 (54 N. W. 254). [Reversed on rehearing. 39 Neb. 90.]

4. (1894.) The making of an order requiring plaintiff to submit his body to a personal examination by physicians, is not sufficient ground for reversing a judgment where the plaintiff has acquiesced therein by selecting a physician to act as a member of such board of examiners, by submitting to an examination without objecting thereto, and by permitting the testimony of said physicians to be given without raising the want of power of the judge to make the order. *Ellsworth v. City of Fairbury*, 41 Neb. 881 (60 N. W. 336).

5. (1903.) Under section 394, code of civil procedure, the granting of orders for inspection of books or papers is left to the discretion of the trial court, and it is also left to the discretion of the court whether or not to exclude such books or papers at the trial if inspection is not permitted. *Chamberlain v. Chamberlain Banking House*, 4 Unof. 278 (93 N. W. 1021).

DISCRETION OF COURT.

Review on appeal or error, see *Appeal and Error*, XV, F.

Bail in criminal prosecutions, see *Bail.*

On continuance, see *Continuance*, §§ 58-65.

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I. VOLUNTARY.

Dismissal without prejudice.

1. (1889.) An action may be dismissed without prejudice to a future action by a plaintiff before the final submission of the case to the jury or court where the trial is to the court (sec. 430 of the civil code); and such dismissal may be made at the option of the plaintiff without leave of the court. It is a right specially given by statute which the court has no power to refuse. *Grimes v. Chamberlain*, 27 Neb. 605 (43 N. W. 395).

2. (1896.) The plaintiff may, as a matter of right, under section 430 of the civil code, dismiss his action without prejudice at any time before its final submission to the court or jury. *Sharpless v. Giffen*, 47 Neb. 146 (66 N. W. 285).

3. (1906.) Where the plaintiff in a civil action appeals from the judgment of the county court to the district court, he has the same right to dismiss his action without prejudice as though it had originated in the district court. *Thornhill v. Hargreaves*, 76 Neb. 582 (107 N. W. 847).

——— **After submission for trial.**

4. (1884.) After the introduction of the testimony of the plaintiff to a jury impaneled to try the cause, the court has no authority to dismiss a case and discharge the jury without a verdict upon the merits. *Smith v. Sioux City & P. R. Co.*, 15 Neb. 583 (19 N. W. 638).

5. (1888.) Under section 430 of the code the plaintiff cannot as a matter of right dismiss an action after the final submission of the case to the court. *State, ex rel. Burlington & M. R. R. Co., v. Scott*, 22 Neb. 628 (36 N. W. 121).

6. (1888.) Where a cause was submitted to the court on a demurrer to the petition and a decision rendered sustaining the demurrer, but no opinion filed, and afterwards, and before the preparation of the opinion the plaintiff attempted to dismiss the action, to which the defendant objected, *held*, that the attempt to dismiss was unavailing, and that the cause having been finally submitted final judgment in the case would be rendered. *State, ex rel. Burlington & M. R. R. Co., v. Scott*, 22 Neb. 628 (36 N. W. 121).

7. (1889.) After the introduction of the testimony of the plaintiff to a jury impaneled to try a cause the court has no authority to dismiss a case and discharge the jury without a verdict upon the merits. *Chicago, B. & Q. R. Co., v. Richardson*, 28 Neb. 118 (44 N. W. 103).

8. (1892.) After a cause is submitted to the court the right of the plaintiff to dismiss the cause without prejudice without leave of court is at an end. *Sharp v. Brown*, 34 Neb. 406 (51 N. W. 1030).

9. (1894.) A plaintiff cannot, as a matter of right, dismiss his action after the final submission of the case to the court or jury. *State, ex rel. Holt County, v. Hazelet*, 41 Neb. 257 (59 N. W. 891).

10. (1903.) The district court may, in the just exercise of its discretionary power, permit plaintiff to dismiss his case after it has been finally submitted to the court or jury. But where the discretionary power of the court is not invoked and the application to dismiss after final submission is made and allowed as a demandable right, the order of dismissal will not be upheld unless a denial of the application would amount to an abuse of discretion. *Bee Building Co. v. Dalton*, 68 Neb. 38 (93 N. W. 930).

11. (1903.) When a case has been submitted upon a demurrer to the evidence, plaintiff's absolute right to dismiss without prejudice is lost. *Bee Building Co. v. Dalton*, 68 Neb. 38 (93 N. W. 930).

12. (1903.) A plaintiff can not dismiss his action without prejudice, after there has been a final submission of it either to the court or jury. *Bee Building Co. v. Dalton*, 68 Neb. 38 (93 N. W. 930).

13. (1903.) Where a case has been submitted upon a demurrer to the evidence, plaintiff's absolute right to dismiss without prejudice is lost. *Fronk v. Evans City*

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Steam Laundry Co., 70 Neb. 75 (96 N. W. 1053).

Parties entitled to dismiss.

14. (1898.) A case cannot be dismissed at the instance of a party who may be liable to a judgment therein, against the objection of his adversary, although the recovery might be only for nominal damages. *Houck v. Linn*, 56 Neb. 743 (77 N. W. 51).

15. (1902.) Three plaintiffs, who were heirs of a deceased party and who had joined with each other in an action to set aside the probated will and declare the same revoked, may dismiss the case as to themselves upon payment of their proportionate share of accrued costs even though they had entered into contracts with attorneys to prosecute their suit for a portion of whatever recovery may be had. *Williams v. Miles*, 63 Neb. 851 (89 N. W. 455).

Discretion of court.

16. (1901.) Discretion to dismiss a cause depends upon the existence of rights which would be jeoparded by dismissal, not upon the manner in which the court may become cognizant of them and is not conditioned upon some formal claim or assertion of them in the record. *Horton v. State, ex rel. Hayden*, 63 Neb. 34 (88 N. W. 146).

17. (1901.) The right of a plaintiff to dismiss his action is not absolute in the sense that the court has no power over or discretion with respect to its exercise. Whenever justice to the court or its officers or to any of the parties requires imposition of terms or retention of the cause upon the docket, the court, in its discretion, may impose such terms or refuse to permit dismissal. *Horton v. State, ex rel. Hayden*, 63 Neb. 34 (88 N. W. 146).

18. (1901.) The rule that the court has full power and control over its judgments and orders during the term at which they are rendered applies to an order of dismissal entered at the instance of a plaintiff. *Horton v. State, ex rel. Hayden*, 63 Neb. 34 (88 N. W. 134).

Dismissal by agreement.

19. (1886.) The parties to a cause may dismiss at any time, by agreement. *Wilcox v. Brown*, 20 Neb. 355 (30 N. W. 264).

Dismissal as to one co-plaintiff.

20. (1898.) Where two persons joined as plaintiffs in an action of replevin and took the property under the writ, claimed a concurrent right of possession, but by several titles, and one recovered judgment, the other could not thereupon dismiss the case as to himself, without the consent of the defendant. *Houck v. Linn*, 56 Neb. 743 (77 N. W. 51).

Dismissal as to one defendant.

21. (1888.) In a personal action against two defendants, a summons was served on one in the county where the action was pending, and another summons was issued therein to the sheriff of another and different county, and served on the other defendant in such other county, of which other county he was an inhabitant, and before a general appearance of the party served as last aforesaid in the action, the plaintiff voluntarily dismissed the case as to the defendant served in the county where the said cause was pending. *Held*, That the court thereby lost jurisdiction of the other defendant. *Cobbey v. Wright*, 23 Neb. 250 (36 N. W. 505).

22. (1886.) Although the answer of one defendant is a plea in abatement for misjoinder of the other defendant, plaintiff may dismiss as to the latter pending the trial, without re-empaneling or reswearing the jury. *Morrissey v. Schindler*, 18 Neb. 672 (26 N. W. 476).

Dismissal as to part of cause of action.

23. (1897.) It appeared that one item in the suit, as to which there was a distinct paragraph, separately numbered, in the petition, was not due at the time the action was commenced. *Held*, That the court did not err, at the time of rendering judgment, in sustaining a motion by plaintiff to dismiss the suit as to such item, without prejudice. *Grotte v. Nagle*, 50 Neb. 363 (69 N. W. 973).

23*a*. (1908.) In case of misjoinder of two causes of action in the same petition, the plaintiff may dismiss one of such causes of action and proceed to trial upon the other. *McCague Savings Bank v. Croft*, 80 Neb. 702 (115 N. W. 315).

Order for dismissal.

24. (1887.) A paper filed by plaintiff to the effect that he does not want the cause to be prosecuted longer, and that the allegations in the petition are not true, does not operate as a dismissal unless called up in open court, and a ruling obtained on it. *Cole v. Cole*, 21 Neb. 84 (31 N. W. 493).

Proceedings in another county.

25. (1877.) It is no objection to the exercise of the right of dismissal that it was

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done to enable plaintiff to proceed with another action, fraudulently instituted in another county. *Banks v. Uhl*, 6 Neb. 145.

Payment of costs as condition.

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26. (1895.) The right of a plaintiff to dismiss an action at any time he so desires is not an absolute unqualified right, but conditions precedent, such as payment of costs, may be imposed by the court in its discretion. *Sheedy v. McMurtry*, 44 Neb. 499 (63 N. W. 21).

27. (1898.) A plaintiff has an absolute right to dismiss his action at any time before the final submission of the cause, subject alone to compliance with conditions precedent, such as the payment of costs, etc., as may be imposed by the court. *Beals, Torrey & Co. v. Western Union Telegraph Co.*, 53 Neb. 601 (74 N. W. 54).

28. (1905.) Under our practice the common law rule, making the payment of costs in the action dismissed a prerequisite to the prosecution of another, is one which the trial court in the exercise of a sound discretion may or may not apply. *Yates v. Jones Nat. Bank*, 74 Neb. 734 (105 N. W. 287); *Yates v. Utica Bank*, Id.; *Yates v. Bailey*, Id.; *Yates v. Bank of Staplehurst*, Id.

Operation and effect.

29. (1877.) A voluntary dismissal of an action by the plaintiff is, practically, a final disposition of the case, except as to unpaid costs, for which the court may enter judgment against him. *Banks v. Uhl*, 6 Neb. 145.

30. (1885.) Where a cause has been dismissed in vacation by the party plaintiff, who paid all costs, an intervention at a subsequent term cannot be had in the same cause. *Harris v. Cronk*, 17 Neb. 475 (23 N. W. 341).

31. (1889.) An entry of dismissal terminates the jurisdiction of the court over the cause of action presented by plaintiff, except for the purpose of entering the order of dismissal and rendering judgment for costs. *Grimes v. Chamberlain*, 27 Neb. 605 (43 N. W. 395).

32. (1896.) In an action wherein the defendant has not appeared, a dismissal filed by plaintiff, as provided by statute, ends the case, and litigation therein cannot be continued. *Sims v. Davis*, 48 Neb. 720 (67 N. W. 765).

33. (1898.) A dismissal which does not involve the merits of the case is not a bar to another suit upon the same cause of action nor to presentation of the claim against the estate of deceased defendant. *Bank of Maywood v. Estate of McAllister*, 56 Neb. 188 (76 N. W. 552).

34. (1903.) The commencement of a suit in replevin which was immediately dismissed without prejudice, and the property in question returned to the officer, to be delivered by him to the defendant, will not operate as a bar to the bringing of a subsequent action. *Cinfel v. Malena*, 67 Neb. 95 (93 N. W. 165).

35. (1903.) When a suit is dismissed as to one of two or more defendants without prejudice, such defendant ceases to be a party to the record, and the effect of the dismissal is to leave such defendant in the same position as if he had never been a party to the action. *Agnew v. Omaha Nat. Bank*, 69 Neb. 654 (96 N. W. 189).

36. (1903.) If, before an order of dismissal, as to one defendant, there has been a decision or decree upon one of several issues made by the pleadings, but such decision does not fix or determine the liability of the defendant who is subsequently dismissed, such preliminary decree does not estop the defendant dismissed from litigating in a subsequent action the same issue. *Agnew v. Omaha Nat. Bank*, 69 Neb. 654 (96 N. W. 189).

37. (1905.) The voluntary dismissal of an action before final submission does not operate as an estoppel, and is without prejudice to a future action. *Yates v. Jones Nat. Bank*, 74 Neb. 734 (105 N. W. 287); *Yates v. Utica Bank*, Id.; *Yates v. Bailey*, Id.; *Yates v. Bank of Staplehurst*, Id.

38. (1906.) A dismissal of an appeal from a county court does not operate as an affirmance of the judgment of the inferior court, and such judgment is not available in bar of a future action on the demand. *Thornhill v. Hargreaves*, 76 Neb. 582 (107 N. W. 847).

——— As to set-off and counter-claim.

39. (1882.) When an action is dismissed without prejudice before submission, a defense of usury to a promissory note is not such a set-off as can be retained and tried by the court. *New England Mortgage Co. v. Angle*, 12 Neb. 504 (11 N. W. 753).

40. (1884.) If after a set-off is filed the plaintiff dismisses his action and pays the costs, the justice after the entry of dismissal should docket the set-off under its

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proper title—the claimant as plaintiff and the adverse party defendant. *Rawalt v. Brewer*, 16 Neb. 444 (20 N. W. 391).

41. (1898.) A plaintiff has the right, before final submission of his cause of action, to dismiss the same, but this right does not control defendant's right to proceed to trial of a set-off or counter-claim properly pleaded in the answer. *Adams v. Osgood*, 55 Neb. 766 (76 N. W. 446).

42. (1907.) Upon appeal to the district court from a judgment against a plaintiff upon a set-off rendered in a justice of the peace court, the plaintiff cannot defeat the judgment by a dismissal of his action. *Hess v. Hess*, 78 Neb. 347 (110 N. W. 999).

Questions determined on motion to dismiss.

43. (1902.) The liability of plaintiffs moving to dismiss their action of contest of a probated will to attorneys, who had a contract to prosecute such action to the end on a contingent fee, and who had expended considerable money in the prosecution of the suit, for the value of their services cannot be litigated or determined on a motion to dismiss. *Williams v. Miles*, 63 Neb. 851 (89 N. W. 455).

Reinstating cause.

44. (1889.) The supreme court, in the exercise of its appellate jurisdiction, has no authority to reinstate a cause in the district court which has been there voluntarily dismissed by the plaintiff. Where it is claimed that a dismissal was obtained by fraud, an application to reinstate must be made in the court where the cause was pending at the time the dismissal was entered. *Grimes v. Chamberlain*, 27 Neb. 605 (43 N. W. 395).

45. (1901.) The denial by a district court of a motion to reinstate an action, voluntarily dismissed at the same term at which the motion is made, will not be reversed in the absence of evidence that the party making the application was laboring under some mistake or misaprehension of fact at the time of the dismissal. *Tighe v. Winger*, 2 Unof. 155 (95 N. W. 1053).

Dismissal in county or probate court.

46. (1877.) The dismissal of actions in the probate courts, now county courts, is governed by the rules applicable to cases before justices of the peace. *Banks v. Uhl*, 6 Neb. 145.

47. (1877.) The voluntary dismissal by the plaintiff, of a cause in the county court, practically disposes of the case. *Banks v. Uhl*, 6 Neb. 145.

48. (1877.) The plaintiff in an action brought in the probate court could, at any time before the case was finally submitted, and on his own motion, dismiss it. And the failure to pay the costs that had then accrued will not prevent him from exercising this right. *Banks v. Uhl*, 6 Neb. 145.

49. (1877.) It is no objection to a dismissal of a cause in a county court, by plaintiff, that it is done in order to enable plaintiff to proceed with another action concerning same subject-matter, fraudulently instituted in another county. *Banks v. Uhl*, 6 Neb. 145.

II. INVOLUNTARY.

Jurisdiction to dismiss suit pending in another county.

50. (1898.) A district court has no jurisdiction to render a judgment in an action pending in one county dismissing such action from the district court of another county. *Lefferts v. Bell*, 57 Neb. 248 (77 N. W. 680).

51. (1898.) An order of dismissal rendered by the district court of one county dismissing an action pending in the district court of another county, is void. *Lefferts v. Bell*, 57 Neb. 248 (77 N. W. 680).

Notice of motion to dismiss.

52. (1888.) In the district court, where a motion is filed to dismiss an action for want of prosecution, it is the duty of the moving party to serve notice of such motion upon the adverse party. If the action is dismissed for want of prosecution without notice, the appellant may have the cause re-instated. *Berggren v. Berggren*, 24 Neb. 764 (40 N. W. 284).

Grounds for dismissal.

——— Fraud by plaintiff during trial.

52*a*. (1907.) Fraud or imposition upon the court and against defendant, practiced by a plaintiff during the progress of the trial of his cause, does not justify the dismissal of his action without a determination of its merits. *Fitch v. Martin*, 80 Neb. 60 (113 N. W. 796).

——— Disobedience of order of court.

53. (1907.) Under section 430 of the code, it is within the sound discretion of the district court to dismiss a petition without prejudice for disabedience by the plaintiff of a reasonable order concerning the proceedings in the action. *Howell v. Malmgren*, 79 Neb. 16 (112 N. W. 313).

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——— Restraint of action by federal court.

54. (1901.) 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.*, 62 Neb. 123 (87 N. W. 188).

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——— Failure to plead.

55. (1891.) Where new matter is set up in the answer, and no reply is filed by plaintiff, a motion to dismiss should be sustained. *Hamilton Loan & Trust Co. v. Gordon*, 32 Neb. 663 (49 N. W. 699).

55*a*. (1902.) In an action for an accounting, wherein the answer in addition to a general denial pleads a final settlement between the parties, and plaintiff demurs to such answer on the ground that it does not state facts sufficient to constitute a defense, and after an adverse ruling elects to stand on his demurrer, refusing to plead further, a judgment of dismissal by the trial court is proper. *Brown v. Houghton*, 2 Unof. 425 (89 N. W. 251).

——— Action barred by statute of limitations.

56. (1884.) When the summons served on the defendant was issued after the statute of limitations had barred the action, *held*, that a motion to dismiss on that ground was properly sustained. *Aultman & Taylor Co. v. Cole*, 16 Neb. 4 (19 N. W. 783).

——— Insecurity of costs.

57. (1889.) A cause was instituted in the district court, by a non-resident of the state, who failed to give security for costs at the commencement of the action. Upon motion of the defendant to dismiss the cause for that reason, the district court, upon an application of plaintiff, entered an order permitting plaintiff to file the necessary security for costs within thirty days, "and in default thereof the cause to stand dismissed." The required security was not given until after the expiration of the thirty days. The cause was placed upon the docket of the next term of the district court, when defendant moved to strike it therefrom, for the reason that the action had been dismissed by the prior order of the court, and the default of the plaintiff, which motion was sustained. *Held*, That the decision of the district court was erroneous. *King Bros. v. Jackson*, 25 Neb. 466 (41 N. W. 448).

58. (1892.) Under the common law, where an action is dismissed for want of prosecution, at the costs of the plaintiff, the plaintiff is required to pay such costs before prosecuting a second action for the same cause. In equity procedure, however, this rule is not enforced. A court of equity will be governed by the circumstances of each case, and where there is a valid excuse given for the failure to pay the costs in the former suit, will not compel such payment as a condition of permitting the second to proceed. *Union P. R. Co. v. Mertes*, 35 Neb. 204 (52 N. W. 1099).

——— Defects of pleadings or filings.

59. (1877.) Failure to sign and verify a petition is not grounds for dismissing an action. *Fritz v. Barnes*, 6 Neb. 435.

60. (1886.) Failure to entitle papers in a case, or properly entitle them, if it is apparent to what case they relate, is not sufficient to justify a dismissal of the cause. *Jansen & Co. v. Mundt*, 20 Neb. 320 (30 N. W. 53).

——— Transfer of plaintiff's interest.

61. (1882.) A transfer by a plaintiff of his interest in the action to a co-plaintiff during the pendency of the suit will not justify a court in dismissing the action. *Magemau v. Bell*, 13 Neb. 247 (13 N. W. 277).

——— Defect as to parties.

62. (1890.) Where a demurrer is sustained on the ground of non-joinder of parties defendant, the court should not dismiss the action without giving the plaintiff an opportunity to bring in the absent party. *Alexander v. Thacker*, 30 Neb. 614 (46 N. W. 828).

63. (1894.) An action should not be dismissed because the plaintiff's full first name is omitted from the title of the cause, until an opportunity has been given the party to correct the defect by amendment. *Real v. Honey*, 39 Neb. 516 (58 N. W. 138).

64. (1895.) A suit by an heir and devisee against an executor for the construction of a clause in a will devising real estate may be dismissed, where it appears that the latter has no interest in the adjudication and that an interpretation will not assist him in administering the estate. *Kennedy v. Merrick*, 46 Neb. 260 (64 N. W. 960).

——— Defect of process.

65. (1891.) A motion objecting to the jurisdiction of the court over the person of

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the defendant on the grounds: "First, that no service of summons has been made upon the defendant as required by law; second, that no return of summons has been made as required by law," is too general to be considered. *Forbes v. McHaffie*, 32 Neb. 742 (49 N. W. 721).

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Requisites and sufficiency of motion to dismiss.

66. (1891.) When a party files a motion objecting to the jurisdiction of the court over his person, he must specifically state in his motion the grounds of objection. *Forbes v. McHaffie*, 32 Neb. 742 (49 N. W. 721).

Operation and effect.

67. (1883.) Where an action is dismissed by the court, without a hearing upon the merits, the order of dismissal will not be a bar to a future action. *Cheney v. Cooper*, 14 Neb. 415 (16 N. W. 471).

68. (1901.) Where a defendant is sued and summons served on her by her true full name, and she is also mentioned in the pleadings and summons by the initials of her given name, the court does not lose jurisdiction over her by dismissing the action as to the person named and designated by the initial letters of the defendant's given name. *Nebraska Loan & Trust Co. v. Krosner*, 63 Neb. 289 (88 N. W. 499).

Questions determined on dismissal.

69. (1905.) A court has no power or jurisdiction, upon dismissing a cause without prejudice to a new action, to adjudge that such new action shall not be subject to the defense that it is barred by the statute of limitations. *Linton v. Cooper*, 75 Neb. 167 (106 N. W. 170).

Setting aside and reinstating.

70. (1872.) A petition to reinstate a cause dismissed at a term prior to filing the same for want of prosecution, alleging as excuse a change by general statute of the time of holding the court, of which the petitioner had no knowledge, does not show unavoidable causualty or misfortune entitling him to relief. *Smith v. Pinney*, 2 Neb. 139.

71. (1872.) In an appeal from a justice's judgment to the district court, the defendant's death was suggested, and his administrator substituted, and the cause continued. At next term, the plaintiff neither filed his petition, nor appeared; and, on defendant's motion, the cause was dismissed for want of prosecution. At the following term, the plaintiff filed his petition to reinstate, alleging that he was ignorant of the time at which the preceding term was held, the same having been changed by recent statute not published, although grand and petit jurors were summoned from the body of the county, and all the machinery of a court put in operation. *Held*, That a case was not alleged. *Smith v. Pinney*, 2 Neb. 139.

72. (1890.) On a contingent and alternative agreement between attorneys of record to an action pending in a county court, for the continuance of the cause for trial to a day certain, by which the plaintiffs' attorneys were misled as to the consent and fact of postponement of the trial, which was called in their absence and dismissed, and a motion to reinstate the case upon affidavits of the facts, and of merits, overruled, and which was subsequently reversed on error in the district court, *held*, that the evidence presented to the county court was sufficient to sustain the last judgment. *Brusa v. Sandwich Mfg. Co.*, 28 Neb. 827 (45 N. W. 250).

73. (1892.) Where a case is dismissed for want of prosecution on the first regular call, and a new action would be barred as to many of the claims, a motion to reinstate, supported by two uncontradicted affidavits, should be sustained. *Flannagan v. Elton*, 34 Neb. 355 (51 N. W. 967).

74. (1892.) When affidavits filed in support of a motion to reinstate a case are not denied, for the purpose of the motion they will be taken as true. *Flannagan v. Elton*, 34 Neb. 355 (51 N. W. 967).

75. (1893.) In the district court, on motion of defendants, and in absence of plaintiff and his attorney, the suit was dismissed for want of prosecution. On the same day, counsel for plaintiff, as soon as he learned of the order of dismissal, moved to set the same aside and reinstate the suit, supported by affidavit, which is uncontradicted, showing that he was not guilty of laches in failing to appear and prosecute the cause when called for trial, and that plaintiff had a meritorious case. *Held*, That the showing was sufficient to entitle plaintiff to have the judgment of dismissal vacated and the case reinstated. *Lundaren v. Erik*, 38 Neb. 363 (56 N. W. 992).

76. (1896.) Where there was a stipulation for a continuance, and a dismissal at the same term, the order of dismissal can-

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not be reviewed in absence of a record showing the grounds of the court's ruling. *School District v. Bishop*, 46 Neb. 850 (65 N. W. 902).

77. (1901.) A suit in equity may be maintained for the purpose of reinstating a case erroneously dismissed, when there is no adequate legal remedy therefor. *Edney v. Baum*, 2 Unof. 173 (96 N. W. 167).

78. (1901.) After his employment had been terminated, an attorney who had been employed to bring an action dismissed it contrary to his client's desire. The statutory period of limitation for actions of that nature had elapsed pending suit. *Held*, That a motion, made at the same term, to set aside the order of dismissal and reinstate the case should have been sustained. *Steinkamp v. Gaebel*, 1 Unof. 480 (95 N. W. 684).

79. (1905.) Where neither the plaintiff nor his attorney are in attendance when the cause is reached for trial, a judgment of dismissal should not be set aside, in the absence of a showing of due diligence. *Poggensee v. Feddern*, 75 Neb. 584 (106 N. W. 654).

DISORDERLY HOUSES.

CROSS-REFERENCES.

See, also, *Prostitution*.

Effect of ordinance against by second ordinance, see *Municipal Corporations*, § 130.

1. (1880.) Where a city passed an ordinance to "restrain, prohibit, and suppress" houses of prostitution while a former ordinance to suppress such houses was in full force and effect, the second does not repeal the existing ordinance. *In re Hall*, 10 Neb. 537 (7 N. W. 287).

2. (1883.) To authorize a conviction under section 210 of the criminal code, for permitting a house to be used as one of ill-fame or for purposes of prostitution, it must be shown that the house is a house of ill-fame in fact, or, in other words, a house resorted to for purposes of prostitution; that the prisoner was the owner, or had control of the house, and that he knowingly permitted it to be occupied as a house of ill-fame. *Drake v. State*, 14 Neb. 535 (17 N. W. 117).

3. (1883.) The bawdy character of the house may be shown by its general reputation and that of the persons frequenting it, together with other facts and circumstances which lead satisfactorily to that conclusion. It is not necessary to show particular acts of prostitution. *Drake v. State*, 14 Neb. 535 (17 N. W. 117).

4. (1895.) Evidence examined, and *held* to sustain a conviction under section 210, criminal code, for the knowingly owning, using, and occupying of a house in this state for the purpose of prostitution. *Wright v. State*, 45 Neb. 44 (63 N. W. 147).

5. (1893.) Before a person can be lawfully convicted of being an inmate of a house of prostitution there must be introduced in evidence a valid ordinance forbidding persons from being inmates of such houses. *Perry v. State*, 37 Neb. 623 (56 N. W. 315).

6. (1893.) The mayor and council of a city of the second class have authority to prohibit by ordinance persons from being inmates of houses of prostitution, and to punish them for the violation of such ordinance. *Perry v. State*, 37 Neb. 623 (56 N. W. 315).

DISQUALIFICATION.

Of officer to take acknowledgment, see *Acknowledgment*, §§ 16-21.

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Of attachment, see *Attachment*, §§ 274-391.

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DISTRESS.

Collection of taxes by distress, see *Taxation*, §§ 501-504.

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See *County Attorneys*.

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See *Courts*, §§ 150-153.

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DISTURBANCE OF PUBLIC ASSEMBLAGE.

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CROSS-REFERENCE.

Disturbance of public schools, see *Schools and School Districts*, § 279.

1. (1890.) An information against certain parties charging that at certain times and places they did "wilfully, maliciously and unlawfully interrupt, molest, and disturb a religious society, to-wit, 'The Welsh Presbyterian church,' and the members thereof while said members were met to perform the duties enjoined upon them and appertaining to them as members," etc., is sufficient to sustain a conviction. *Jones v. State*, 28 Neb. 495 (44 N. W. 658; 7 L. R. A. 325).

DITCHES.

See *Drains; Water and Watercourses.*

For drains by railroads, see *Railroads*, §§ 73-85.

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On corporate stock, see *Corporations*, §§ 120-123.

Of banks, see *Banks and Banking*, §§ 12-16.

DIVORCE AND ALIMONY.

ANALYSIS.

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See, also, *Curtesy; Dower; Husband and Wife; Parent and Child.*

Annulment of marriage relation, see *Marriage.*

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Allowance of expense on annulment of marriage, see *Marriage*, §§ 32-34.

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Effect of divorce on privilege of confidential comunications, see *Witnesses*, § 161.

I. NATURE AND FORM OF REMEDY.

Nature of action.

1. (1879.) An action for a divorce is in its nature a proceeding *in rem*. *Atkins v. Atkins*, 9 Neb. 191 (2 N. W. 466).

Contracts for divorce.

2. A contract intended to facilitate the procuring of a divorce at the suit of either of the parties thereto is void. (1893) *Wilde v. Wilde*, 37 Neb. 891 (56 N. W. 724); (1895) *Davis v. Hinman*, 73 Neb. 850 (103 N. W. 668).

3. (1893.) The enforcement of a contract between a husband and wife to separate will be refused, even though the illegality of consideration is not shown on its face. *Wilde v. Wilde*, 37 Neb. 891 (56 N. W. 724).

Construction of statutes.

4. (1894.) Our divorce laws are liberal and should be liberally construed; but they are not designed for, and should not be used to enable designing husbands, without cause, to legally discard their wives whether domiciled in this or other states, or to escape the performance of their marriage contracts. *Cochran v. Cochran*, 42 Neb. 612 (60 N. W. 942).

II. GROUNDS.

In general.

5. (1881.) The marriage relation should not be severed for slight and trivial causes. A party seeking a divorce should be required to bring his case clearly within the provisions of the statutes. If he does so he is entitled to a divorce. *Brotherton v. Brotherton*, 12 Neb. 72 (10 N. W. 543).

6. (1884.) A decree of divorce should not be granted for light and trivial causes, but every party seeking a decree of divorce should be required to bring himself clearly within the provisions of the statute. *Swan v. Swan*, 15 Neb. 453 (19 N. W. 639).

7. (1889.) The marriage relation is designed to continue so long as both the parties entering into it shall live; and the relation will not be dissolved except for adequate legal cause. *Dunn v. Dunn*, 26 Neb. 136 (42 N. W. 279).

8. (1907.) It is not ground for divorce in this state that a man asserts and exercises the right to govern his own household, or that he indulges in the habitual, if moderate, use of intoxicating liquors. *Bain v. Bain*, 79 Neb. 711 (113 N. W. 141).

Discretion of court.

9. (1904.) Under the provisions of section 7, chapter 25, Compiled Statutes, whether a plaintiff shall be granted a divorce from bed and board, or a divorce from the bonds of matrimony, is vested in the sound discretion of the trial court. This discretion is not an arbitrary one, either form of relief to be granted according as the applicant may ask for one or the other; but the court will look primarily to the conduct of the parties, an absolute divorce being granted where the separation has been brought about wholly through the fault of the defendant, the plaintiff being without reproach. *McKnight v. McKnight*, 5 Unof. 260 (98 N. W. 62).

Cruelty.

10. (1884.) Mere austerity of temper and petulance of manners of the wife are not

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sufficient to defeat a divorce on the ground of extreme cruelty of the husband by blows inflicted by him on her. *Boeck v. Boeck*, 16 Neb. 196 (20 N. W. 223).

11. (1884.) Mere rudeness of language, petulance of manners, austerity of temper, or even occasional sallies of passion, if they do not threaten personal violence, do not constitute legal cruelty. *Gleason v. Gleason*, 16 Neb. 15 (19 N. W. 784).

12. (1898.) A decree of divorce may be granted in this state for "extreme cruelty, whether practiced by using personal violence, or by any other means." *Berdolt v. Berdolt*, 56 Neb. 792 (77 N. W. 399).

13. (1898.) A false charge of physical incompetency or disqualification to consummate the marriage or fully perform marital duties may, under certain circumstances, and if thereby such mental disquietude or suffering is caused as to impair the health or threaten its injury, or as to render the further continuance of the marriage contract and life intolerable and impracticable, constitute extreme cruelty within the meaning of the words as they are employed in our statutes on the subject of divorce. *Berdolt v. Berdolt*, 56 Neb. 792 (77 N. W. 399).

14. (1898.) A husband who falsely, and without reasonable cause therefor, charges his wife with unchastity, accuses her on the public streets with being criminally intimate with other men, calls her vile, opprobrious, and degrading names, beats and chokes her, is guilty of extreme cruelty within the meaning of section 7, chapter 25, Compiled Statutes. *Walton v. Walton*, 57 Neb. 102 (77 N. W. 392).

15. (1901.) A husband who requires his wife to live with him in the home of his mother who treats the wife with extreme cruelty, cannot defend an action for divorce brought by the wife on the ground that he himself was not guilty of the acts of cruelty complained of. By allowing third parties to abuse and mistreat his wife and refusing to provide her with another home, he becomes legally answerable for the cruel treatment. *Dakin v. Dakin*, 1 Unof. 457 (95 N. W. 781).

16. (1902.) Any unjustifiable conduct on the part of either the husband and wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes "extreme cruelty" as defined in section 7, chapter 25, Compiled Statutes, although no physical or personal violence may be inflicted or even threatened. *Ellison v. Ellison*, 65 Neb. 412 (91 N. W. 403).

17. (1902.) While the habitual use of rough or vile language may amount to cause of divorce, much must depend upon the character of the parties, their situation in life, and the degree of cultivation and refinement they exhibit. *Shuster v. Shuster*, 3 Unof. 610 (92 N. W. 203).

18. (1906.) Continued threats of personal violence indulged in by a husband toward his wife, and accusations of crime and the use of profane language, such as is described in the opinion, are sufficient to support the wife's petition for a divorce on the grounds of cruelty. *Griffith v. Griffith*, 77 Neb. 180 (108 N. W. 981).

Desertion or abandonment.

19. (1884.) To sustain an action for divorce on the ground of abandonment, an intent to desert or abandon the plaintiff must actually exist in the mind of the defendant. *Swan v. Swan*, 15 Neb. 453 (19 N. W. 639).

20. (1888.) A husband who brings an action against his wife for a divorce, on the ground of abandonment, will not be entitled to a decree of divorce if it is made to appear on the trial that she was compelled to leave the home of the plaintiff, by reason of his cruel treatment of her. *Kikel v. Kikel*, 25 Neb. 256 (41 N. W. 180).

21. (1893.) Cruel and brutal treatment of a wife by a husband justifies her abandoning him, and instituting divorce proceedings. *McConnell v. McConnell*, 37 Neb. 57 (55 N. W. 292).

Effect of collusion of parties.

22. (1906.) An agreement between the parties to a pending suit for a divorce for the collusive rendition of a decree therefor will defeat the action, and it is immaterial that one of the parties may have supposed such agreement to be free from legal or moral wrong. *Branson v. Branson*, 76 Neb. 780 (107 N. W. 1011).

III. DEFENSES.

Insane temperament.

23. (1898.) A husband's conduct in charging his wife with unchastity, and calling her vile names, and in choking and beat-

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ing her, is not deprived of its legal character of "extreme cruelty" because his conduct was the result of his insanely jealous temperament, actual insanity not appearing. *Walton v. Walton*, 57 Neb. 102 (77 N. W. 392).

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Provocation.

24. (1887.) Words, no matter how violent or ill advised, afford no justification to a husband to inflict blows upon his wife. *Brotherton v. Brotherton*, 12 Neb. 75 (10 N. W. 544).

25. (1898.) If the husband's cruelty was disproportionate to his wife's offense, her conduct affords him no justification, and the cruelty entitles the wife to relief. *Walton v. Walton*, 57 Neb. 102 (77 N. W. 392).

26. (1898.) Whether the cruelty inflicted by a husband upon his wife because of her disobedience, impropriety, or misconduct was so far disproportionate to her offense as to be unjustifiable is a mixed question of law and fact, to be determined in any case from the particular facts and circumstances in evidence therein. *Walton v. Walton*, 57 Neb. 102 (77 N. W. 392).

27. (1898.) No conduct on the part of a wife that does not threaten great and immediate bodily injury will justify her husband in beating or choking her. *Walton v. Walton*, 57 Neb. 102 (77 N. W. 392).

28. (1898.) No conduct on the part of a wife, short of notorious and shameless unchastity,—if that does,—justifies her husband in calling her a "whore." *Walton v. Walton*, 57 Neb. 102 (77 N. W. 392).

29. (1898.) It is a general rule that a husband's cruelty caused by the conjugal misconduct of his wife does not invest her with a cause of action for a divorce. *Walton v. Walton*, 57 Neb. 102 (77 N. W. 392).

Condonation.

30. (1889.) Where the wife, in a cross-bill, was charged by the husband with certain acts of cruelty committed against him, and it appeared that after such alleged acts he freely cohabited with the plaintiff as his wife, he will be held to have condoned the offenses. *Dunn v. Dunn*, 26 Neb. 136 (42 N. W. 279).

31. (1893.) Condonation is not necessarily to be inferred from the fact alone that the wife continued to live with the husband after an alleged cruelty. *McConnell v. McConnell*, 37 Neb. 57 (55 N. W. 292).

32. (1896.) Condonation of extreme cruelty may be avoided by abusive language and the use of opprobrious epithets. *Heist v. Heist*, 48 Neb. 794 (67 N. W. 790).

33. (1896.) Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and the repetition of the offense revives the wrong condoned. *Heist v. Heist*, 48 Neb. 794 (67 N. W. 790).

34. (1896.) Conduct of a husband towards his wife which would not alone support a decree of divorce on the ground of extreme cruelty may, nevertheless, be sufficient to avoid a condonation extended to the husband by the wife for such cruelty. *Heist v. Heist*, 48 Neb. 794 (67 N. W. 790).

35. (1903.) Condonation is a question of fact to be determined from the evidence. *Diedrichs v. Diedrichs*, 68 Neb. 534 (94 N. W. 536).

36. (1906.) The absence of a plea of condonation does not prevent the court from considering the same. *Griffith v. Griffith*, 77 Neb. 180 (108 N. W. 981).

37. (1906.) The condonation of a wife's wrongs, not subsequently repeated, will bar the husband from obtaining a divorce therefor. *Griffith v. Griffith*, 77 Neb. 180 (108 N. W. 981).

IV. JURISDICTION, PROCEEDINGS AND RELIEF.

A. Jurisdiction.

In general.

38. (1903.) Jurisdiction of the court in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist. *Cizek v. Cizek*, 69 Neb. 800 (99 N. W. 28); (1906) *Cizek v. Cizek*, 76 Neb. 797 (107 N. W. 1012).

Jurisdiction of district court.

39. (1904.) The district courts of this state have no jurisdiction of the subject of divorce except such as is given them by the statute providing for divorce and alimony. *Aldrich v. Steen*, 71 Neb. 57 (100 N. W. 311).

Residence of parties.

40. (1879.) When it appears that the defendant cannot be served with process in the state, the records, in the absence of an appearance, must show how jurisdiction was acquired. *Atkins v. Atkins*, 9 Neb. 191 (2 N. W. 466).

41. (1879.) The action for divorce can only be maintained by a party who has resided in this state at least six months, un-

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less the marriage was solemnized in this state, and the applicant shall have continued to reside therein from the time of the marriage until the time of filing the complaint. *Atkins v. Atkins*, 9 Neb. 191 (2 N. W. 466).

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42. (1886.) To give the court jurisdiction in an action for divorce at least one of the parties must be a *bona fide* resident of the state or territory where the action was brought. *Smith v. Smith*, 19 Neb. 706 (28 N. W. 296).

43. (1893.) In a proceeding for a divorce the statutes of Nebraska recognize the right of each party to reside in a county different from that in which the other resides; whether or not they so reside, is a question of fact to be determined upon the evidence. *McConnell v. McConnell*, 37 Neb. 57 (55 N. W. 292).

44. (1897.) Proof of the law of Colorado, in evidence, relating to the jurisdiction of county courts of that state to decree divorces, examined, and *held* not to satisfactorily establish such jurisdiction. *Clemons v. Heelan*, 52 Neb. 287 (72 N. W. 270).

45. (1904.) The residence of one of the parties in the county in which the action is brought is necessary to the jurisdiction of the court. *Aldrich v. Steen*, 71 Neb. 57 (100 N. W. 311).

46. (1905.) Section 6, chapter 25, Compiled Statutes, 1903, confers jurisdiction upon the district court to hear and determine an action for divorce in any county in the state where the parties, or one of them, reside. *Eager v. Eager*, 74 Neb. 827 (105 N. W. 636).

46*a*. (1908.) The record in a divorce case disclosing that neither of the parties to the action had resided in this state either continuously since the marriage or continuously for six months immediately preceding the filing of the petition, *held*, that the district court was without jurisdiction to grant a divorce. *Keil v. Keil*, 80 Neb. 496 (114 N. W. 570).

47. (1907.) In an action by a wife for alimony and support of her child, against her husband who deserted his family and became a non-resident of the state, where the only relief sought is the appropriation of real estate of the husband, situated in the state, residence of the wife in the county where the property of the husband is situated is not required. *Rhoades v. Rhoades*, 78 Neb. 495 (111 N. W. 122).

B. Parties, Process.

Parties.

48. (1896.) Section 10, chapter 25, Compiled Statutes, confers upon the wife the right to commence an action of divorce in her own name and without the intervention in the suit of a next friend as was formerly required, and not to authorize the granting of alimony or maintenance to the husband, to be paid from the estate of the former wife. *Greene v. Greene*, 49 Neb. 546 (68 N. W. 947; 59 Am. St. Rep. 560; 34 L. R. A. 110).

Process.

Process in general, see *Process*.

——— In general.

49. (1905.) By section 902 and 903 of the code, the action for a divorce is taken out of the general provisions of the code for the prosecution of other actions therein mentioned. *Eager v. Eager*, 74 Neb. 827 (105 N. W. 636).

——— Service by publication.

50. (1907.) In an action by a wife for alimony and support of her child, against the husband who deserted his family and became a non-resident of the state, jurisdiction to subject property, within the territorial jurisdiction of the court, to its judgment may be acquired by the service of process by publication and the placing of the property in the hands of a receiver. *Rhoades v. Rhoades*, 78 Neb. 495 (111 N. W. 122).

51. (1907.) Service by publication is authorized by section 77 of the code in an action by a wife for alimony and support of her child against the husband, who deserted his family and because a non-resident of the state, where the only relief sought is the appropriation of the real estate of the husband, situated in the county where the action is brought, to the payment of the amount that should be allowed for such alimony and support. Such an action is substantially one *in rem*, and the court has jurisdiction upon the completion of the service by publication to decree the relief sought. *Rhoades v. Rhoades*, 78 Neb. 495 (111 N. W. 122).

——— Service of, out of county.

52. (1880.) Where an action for divorce is commenced in Gage county, the residence of plaintiff, and service was had on defendant in Nuckolls county, such service gives the court jurisdiction over the defendant. *Brown v. Brown*, 10 Neb. 349 (6 N. W. 397).

53. (1905.) Where the plaintiff resides in one county and the defendant in another,

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summons may issue from the county where the plaintiff resides and the action is commenced to any other county in the state where the defendant resides. *Eager v. Eager*, 74 Neb. 827 (105 N. W. 636).

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——— Affidavit for publication.

54. (1879.) The affidavit for service by publication in a divorce case is jurisdictional, and unless it conform substantially to the statutory requirements the court will not acquire jurisdiction. *Atkins v. Atkins*, 9 Neb. 191 (2 N. W. 466).

55. (1880.) Where service is had by publication the affidavit must show that the case is one in which service may be had by publication, and service cannot be made within this state on the defendant. *O'Connell v. O'Connell*, 10 Neb. 390 (6 N. W. 467).

56. (1880.) It is not necessary to state in the affidavit for publication that the plaintiff is resident of the state or that the marriage was solemonized therein. All that is necessary is to state facts sufficient to show the case is one in which service by publication may be had. *O'Connell v. O'Connell*, 10 Neb. 390 (6 N. W. 467).

57. (1887.) An affidavit for service by publication in an action for divorce: "Nettie B. Shedenhelm, plaintiff in the above action, being first duly sworn, on oath says: She has this day caused a petition to be filed in said court against the said defendant, the object and prayer of which are to obtain a divorce, with alimony, from said defendant; that the defendant is a non-resident of the state of Nebraska, and that service of a summons cannot be had on him in this state. Wherefore plaintiff prays for service upon said defendant by publication," is sufficient. It is unnecessary to set forth the particular cause or causes upon which a divorce is sought, and the affiant may state or omit the same at his option. *Shedenhelm v. Shedenhelm*, 21 Neb. 387 (32 N. W. 170).

——— Effect of defective notice.

58. (1889.) In an action for divorce, where service was had by publication only, the publication of a notice requiring the defendant to answer on or before the second Monday after completed service, instead of the third, as provided by section 110 of the civil code, would not prevent the court from acquiring jurisdiction, and a decree rendered in such case would be subject to be set aside on motion, as having been irregularly entered, under the provisions of section 602 *et seq.* of the civil code. *Wilkins v. Wilkins*, 26 Neb. 235 (41 N. W. 1101).

C. Pleading.

Pleading in general, see *Pleading*.

Sufficiency of allegations.

59. (1901.) A petition or cross-petition for a divorce is sufficient to support a decree entered thereon, if the allegations of extreme cruelty or other cause relied on, are set forth with sufficient fullness to allow of the introduction of evidence in its support where no objection thereto is made. *Dakin v. Dakin*, 1 Unof. 457 (95 N. W. 781).

Answer.

60. (1877.) A general denial is a good plea to an allegation of adultery, and the verdict of the jury finding the defendant not guilty is conclusive, unless upon proper grounds shown it is set aside and vacated. *Oades v. Oades*, 6 Neb. 304.

61. (1886.) A denial in the language of the petition that the defendant "denies that said marriage was unlawful and wrongful, and denies that he has cohabited with L. W. S., etc., in a state of adultery," is not a denial of the cohabitation. *Smith v. Smith*, 19 Neb. 706 (28 N. W. 296).

Demurrer.

62. (1903.) In an action brought by the wife for a divorce on the ground of cruelty, a demurrer to the petition on the ground that it shows condonation of the offense charged will not be sustained unless the statements of the petition plainly show acts and conduct on the part of the wife amounting to condonation. *Diedrichs v. Diedrichs*, 68 Neb. 534 (94 N. W. 536).

Cross-petition.

63. (1898.) The charges made in a petition in a suit for divorce do not furnish proper and forceful grounds to be pleaded and urged in the cross-petition in the same action. *Berdolt v. Berdolt*, 56 Neb. 792 (77 N. W. 399).

64. (1898.) It is competent in this state, in an action for divorce, for the defendant to file a cross-petition, in effect a cross-action for divorce, and the defendant may be accorded affirmative relief. *Berdolt v. Berdolt*, 56 Neb. 792 (77 N. W. 399).

Misjoinder of causes.

65. (1904.) An action to determine property rights not growing out of the marriage relation can not be joined with an action

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for divorce, and where such causes of action are joined in a petition, a demurrer thereto for misjoinder of causes of action should be sustained. *Reed v. Reed*, 70 Neb. 775 (98 N. W. 76).

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66. (1904.) Where a petition for a divorce contains a second cause of action for the settlement and adjudication of property rights, not growing out of the marriage relation, a demurrer thereto for misjoinder of causes of action should be sustained. *Reed v. Reed*, 70 Neb. 779 (98 N. W. 73).

67. (1902.) The determination of property rights not growing out of the marriage relation should not be joined with an action for divorce, but when such rights are asserted in the petition for a divorce and no objection is made to the misjoinder, the court should hear and determine the controversy. *Reed v. Reed*, 65 Neb. 849 (91 N. W. 857).

D. Evidence.

Presumptions.

68. (1889.) Condonation may be inferred from cohabitation with knowledge of the offense, after the conduct complained of. *Dunn v. Dunn*, 26 Neb. 136 (42 N. W. 279).

69. (1893.) Condonation is not necessarily to be inferred from the fact alone that the wife continued to live with the husband after an alleged cruelty. *McConnell v. McConnell*, 37 Neb. 57 (55 N. W. 292).

70. (1906.) The law presumes that a man does not intend to abandon his family, in the absence of cogent proof to the contrary. *Price v. Price*, 75 Neb. 552 (106 N. W. 657).

Burden of proof.

71. (1878.) A plaintiff in a divorce suit on the grounds of cruelty must show by a preponderance of the evidence treatment amounting to extreme cruelty at the time she left defendant. *Callahan v. Callahan*, 7 Neb. 38.

72. (1893.) A wife may condone the cruelty of her husband, but the husband, to avail himself of such condonation, must establish the same by clear and satisfactory proofs. *McConnell v. McConnell*, 37 Neb. 57 (55 N. W. 292).

73. (1905.) In case of the separation of husband and wife, it is incumbent upon the spouse first repudiating marital obligations to establish freedom from fault and justification or excuse for such conduct. *Chapman v. Chapman*, 74 Neb. 388 (104 N. W. 880).

Admissibility.

74. (1889.) Where two actions for divorce between the same parties, each being plaintiff in one case and defendant in the other, were commenced in the district court in the year 1883, and trial had upon the merits, no evidence relative to circumstances previous to that year can be considered. *Paden v. Paden*, 28 Neb. 275 (44 N. W. 228).

Proof of divorce.

75. (1899.) To prove a divorce the record of the decree, or a duly authenticated copy thereof, is the appropriate and only competent evidence. *Reynolds v. State*, 58 Neb. 49 (78 N. W. 483).

Weight and sufficiency of evidence.

——In general.

76. (1889.) In an action for divorce, where two actions are consolidated, each party seeking the decree, the evidnce and testimony being conflicting, a decree for the wife is set aside and one for the husband sustained. *Paden v. Paden*, 28 Neb. 275 (44 N. W. 228).

77. (1907.) In an action for a divorce by a wife on the grounds of extreme cruelty and failure to support, the court will not consider evidence of the husband's alleged cruelty and failure to support prior to a judgment of dismissal in a former suit between the same parties based on the same grounds, when there was a trial on the merits and no appeal taken. *Whitney v. Whitney* 78 Neb. 240 (110 N. W. 555).

——On default of defendant.

78. (1896.) In an action for divorce, even where there is no appearance by the defendant, the trial judge must be satisfied that the case is prosecuted in good faith and without collusion, and that a cause of action exists. He is not bound to accept as conclusive, in all cases, the testimony of the plaintiff, although corroborated in some minor details. *Cummins v. Cummins*, 47 Neb. 872 (66 N. W. 858).

79. (1896.) Where the testimony, when taken in connection with all the circumstances, is weak and open to suspicion, through a failure to corroborate it on points admitting of corroboration, the action of the district judge in denying a divorce will not be set aside, although the evidence may have been such that it would have sustained a decree for plaintiff, and in cases of a different character might have required it. *Cummins v. Cummins*, 47 Neb. 872 (66 N W. 858).

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——— Abuse and acts of disrespect.

80. (1886.) Evidence of constant use of profane language to a wife, with evidence of other abusive acts will support a decree for divorce and alimony. *Powers v. Powers*, 20 Neb. 529 (31 N. W. 1).

81. (1901.) Evidence showing a husband who, with his wife lived with his parent's family, permitted his mother to abuse the wife and that the mother and sister were teaching the wife's children to disrespect her, is sufficient to sustain a decree of divorce. *Dakin v. Dakin*, 1 Unof. 457 (95 N. W. 781).

——— Adultery.

82. (1890.) On the evidence contained in the record, the charge of adultery against the defendant was fully proved, while a like charge against the plaintiff was not sustained and a divorce granted. *Small v. Small*, 28 Neb. 843 (45 N. W. 248).

83. (1890.) In an action for divorce evidence examined and held not to sustain charge of adultery. *James v. James*, 29 Neb. 533 (45 N. W. 777).

——— Physical incompetency.

84. (1898.) The evidence adjudged insufficient to warrant a finding for the plaintiff upon the ground of physical incompetency of defendant. *Berdolt v. Berdolt*, 56 Neb. 792 (77 N. W. 399).

——— Desertion.

85. (1884.) Evidence *held* insufficient to sustain a decree of divorce for desertion. *Swan v. Swan*, 15 Neb. 543 (19 N. W. 629).

86. (1904.) Evidence in an action for divorce showing the wife, who filed a cross-petition, has absolutely and without cause refused to live with the husband, sustains a decree for the latter, and an award that each pay one-half of the costs. *Isaacs v. Isaacs*, 71 Neb. 537 (99 N. W. 268).

87. (1904.) Evidence examined, and *held* that plaintiff was entitled to an absolute divorce on the ground of cruelty and desertion. *McKnight v. McKnight*, 5 Unof. 260 (98 N. W. 62).

88. (1906.) The evidence examined and *held* to sustain the decree of the district court granting a divorce on the ground of desertion. *Bascombe v. Bascombe*, 75 Neb. 495 (106 N. W. 468).

89. (1906.) Where a wife goes to a town near that which is the domicile of her husband, and makes her residence there for the purpose of educating her children, evidence showing the husband visited her frequently and cohabited with her, and acquiesced in her living apart from him but complained of keeping up two places, though she owned the property she lived in, and also evidence showing her willingness to live with him when he would provide a home, does not show a voluntary abandonment by the wife. *Price v. Price*, 75 Neb. 552 (106 N. W. 657).

——— Cruelty.

90. (1884.) Evidence examined, and *held* sufficient to entitle plaintiff to a decree of divorce for cruelty. *Vocacek v. Vocacek*, 16 Neb. 453 (20 N. W. 635).

91. (1898.) The evidence in this case *held* to sustain a finding of extreme cruelty by the plaintiff toward the defendant. *Berdolt v. Berdolt*, 56 Neb. 792 (77 N. W. 399).

92. (1900.) Evidence examined, and found to support the decree of the trial court granting a divorce from the bonds of matrimony, on the ground of extreme cruelty practiced by the husband towards the wife. *Tietken v. Tietken*, 60 Neb. 138 (82 N. W. 367).

93. (1902.) Where the testimony in a suit for divorce tends to show that each party was addicted to the use of profane language about the home and in addressing the other, the court is justified in refusing to grant a divorce to either on that ground. *Shuster v. Shuster*, 3 Unof. 610 (92 N. W. 203).

94. (1905.) Evidence showing defendant slapped plaintiff in the presence of bystanders does not show such cruelty that amounts to grounds for divorce. *Loomer v. Loomer*, 73 Neb. 359 (102 N. W. 759).

95. (1906.) Evidence examined, and *held* to justify a decree of divorce on the ground of extreme cruelty and an order giving the plaintiff custody of the children. *Hays v. Hays*, 75 Neb. 728 (106 N. W. 773).

96. (1907.) Evidence examined, and *held* insufficient to sustain the allegations of extreme cruelty and failure to support. *Whitney v. Whitney*, 78 Neb. 240 (110 N. W. 555).

97. (1907.) It is not error to deny a divorce from the bonds of matrimony on the charge of extreme cruelty on the part of the wife, where the evidence of the husband as to alleged misconduct is not corroborated, and discloses, at most, occasional ill temper. *Haines v. Haines*, 79 Neb. 684 (113 N. W. 125).

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——— Condonation.

98. (1889.) Condonation may be inferred from cohabitation with knowledge of the offense, after the conduct complained of. *Dunn v. Dunn*, 26 Neb. 136 (42 N. W. 279).

99. (1889.) An action for a legal separation on the ground of abandonment, brought by the wife against her husband, cannot be maintained where the uncontradicted testimony shows that about the time the action was instituted the plaintiff and defendant had freely cohabited together as husband and wife. *Dunn v. Dunn*, 26 Neb. 136 (42 N. W. 279).

E. Dismissal, Trial or Hearing.

Dismissal.

99*a*. (1906.) When the parties become reconciled and resume marital relations before issue joined, it is not error for the court to dismiss the suit at the instance of the plaintiff, and such a dismissal carries with it a pending application for temporary alimony, which the plaintiff's attorney is not entitled to revive, by means of intervention, and prosecute for his own benefit. *Petersen v. Petersen*, 76 Neb. 282 (107 N. W. 391).

99*b*. (1906.) Evidence in a suit for divorce wherein a cross-petition was filed by defendant *held* to sustain a dismissal without relief to either. *Judkins v. Judkins*, 76 Neb. 213 (107 N. W. 254).

Entry of decree before elapse of time for answer.

100. (1871.) A decree of divorce, entered before the elapse of time given defendant to answer a supplemental bill, without defendant's consent, and before he had pleaded to the supplemental bill, is reversed. *Orr v. Orr*, 1 Neb. 359.

Questions for trial court.

101. (1902.) Whether the alleged improper language of the husband was provoked by indiscreet actions of the wife, unless the language used was entirely disproportionate to the occasion, is a question for the trial court. *Shuster v. Shuster*, 3 Unof. 610 (92 N. W. 203).

New trial.

102. (1904.) A petition for a new trial, in a divorce after the expiration of six months from the granting of a decree to the wife, that states the applicant had no knowledge of the proceeding; that the wife was not a *bona fide* resident of this state when she procured her decree; and that she had procured the decree by fraud, states a cause within section 602 of the code. *Schafer v. Schafer*, 71 Neb. 708 (99 N. W. 482).

F. Judgment, Review, Costs.

Scope and extent of relief.

103. (1904.) When the plaintiff in a divorce suit has resided in this state the full statutory period and the defendant has appeared in the cause, the court has jurisdiction over the parties, and the right to dispose of all the issues between them upon their merits and according to equity, even if, in order to do so, it is necessary to grant a divorce to a non-resident defendant upon a cross-petition. *Pine v. Pine*, 72 Neb. 463 (100 N. W. 938).

Modification and vacating.

As to allowance to alimony, see *post*, §§ 190-196.

As to custody of children, see *post*, §§ 213-215.

——— In general.

104. (1886.) Decree in case stated modified to correspond with special findings of fact by trial court. *Roehl v. Roehl*, 20 Neb. 55 (29 N. W. 357).

——— Statutory provisions.

105. (1880.) Section 82 of the code, providing for opening judgments rendered upon constructive service, has no application to actions for divorce. *O'Connell v. O'Connell*, 10 Neb. 390 (6 N. W. 467).

106. (1904.) The provisions of section 602 of the code apply to divorce proceedings as well as to other proceedings in which it is sought, upon the grounds therein mentioned, to vacate or modify a decree or judgment after the term. *Schafer v. Schafer*, 71 Neb. 708 (99 N. W. 482).

——— Petition.

107. (1893.) A petition that states that plaintiff's husband, eleven years before the commencement of this suit, obtained a decree of divorce in this state by measure of fraud and perjured testimony; that plaintiff was a resident of Pennsylvania and had no notice of the divorce proceedings and had no knowledge of the whereabouts of the defendant, her husband, states a cause of action to vacate such decree of divorce and the court which allowed the decree may, in the exercise of its general equity powers, vacate it upon the proper showing of fraud and imposition. *Smithson v. Smithson*, 37 Neb. 535 (56 N. W. 300; 40 Am. St. Rep. 504).

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108. (1897.) Petition examined, and *held* to state a cause of action for the vacation of a decree of divorce on account of fraud practiced by the successful party. *Hard v. Hard*, 51 Neb. 412 (70 N. W. 1122).

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——— Grounds for application.

109. (1906.) An application to change a decree for alimony at a subsequent term must be founded on facts arising subsequently to the decree. *Chambers v. Chambers*, 75 Neb. 850 (106 N. W. 993).

——— Jurisdiction and right.

110. (1880.) Where the evidence introduced is clearly insufficient to warrant a finding of cruelty on the part of the defendant, a decree for divorce on the grounds will be set aside. *Faller v. Faller*, 10 Neb. 144 (4 N. W. 1036).

111. (1882.) Where a decree ordering defendant to convey property to plaintiff by way of alimony has not been discharged by compliance, the court has power, at a subsequent term, to alter such decree so as to allow plaintiff a sum of money in lieu of the property. *Ellis v. Ellis*, 13 Neb. 91 (13 N. W. 29).

112. (1888.) Courts of general jurisdiction have power to set aside or vacate decrees of divorce after the term at which the decree was rendered, when obtained by fraud. *Wisdom v. Wisdom*, 24 Neb. 551 (39 N. W. 594: 8 Am. St. Rep. 215).

113. (1893.) The district court of Douglas county has no jurisdiction to set aside and vacate a decree of divorce obtained in Fillmore county eleven years before on the ground that the decree was obtained by fraud, the defendant's wife residing in Pennsylvania. *Smithson v. Smithson*, 37 Neb. 535 (56 N. W. 300; 40 Am. St. Rep. 504).

Collateral attack.

114. (1904.) A decree of divorce obtained without collusion by a defendant on a cross-bill in a suit begun in a county where neither party resided, but by a resident of the state, whose motion to dismiss the cross-bill for want of jurisdiction was denied, and who contested its allowance at the trial but took no appeal, is not open to collateral attack by his heirs in claiming his property. *Aldrich v. Steen*, 71 Neb. 33 (98 N. W. 445).

Conclusiveness of adjudication.

115. (1901.) A decree of divorce obtained by publication, without appearance of defendant, in a foreign state is a bar to an action by her for alimony in this state. *Eldred v. Eldred*, 62 Neb. 613 (87 N. W. 340).

116. (1905.) When both parties to the divorce proceedings in the state of Washington have appeared before the court, being a court of general jurisdiction, and have asked the court to distribute their property, including land in this state, and the court by its decree has done so, its decree is conclusive of the equities of the parties in the real estate situated in this state. *Fall v. Fall*, 75 Neb. 104 (106 N. W. 412).

Appeals.

117. (1881.) An appeal will lie to the supreme court from a decree of a district court granting a divorce. *Brotherton v. Brotherton*, 12 Neb. 72 (10 N. W. 543).

118. (1886.) An application to modify a decree of divorce is a special proceeding within the meaning of section 581 of the civil code, and an order made therein affecting a substantial right may be reviewed on error. In such case it is not necessary to a review that the order complained of terminates the action or prevents a judgment. *O'Brien v. O'Brien*, 19 Neb. 584 (27 N. W. 640).

119. (1887.) The admission of incompetent evidence in an action of divorce tried to the court, is not alone grounds for reversal of a decree. *McConahey v. McConahey*, 21 Neb. 463 (32 N. W. 300).

120. (1894.) The supreme court will not disturb a decree granting a divorce where no question of law is involved and the finding of the trial court is based upon conflicting testimony. *Nygren v. Nygren*, 42 Neb. 408 (60 N. W. 885).

121. (1896.) In a suit for a divorce, objections not made below to adjudicating the husband's rights in land, the title being in the wife, will be disregarded on review. *Greene v. Greene*, 49 Neb. 546 (68 N. W. 947; 59 Am. St. Rep. 560; 34 L. R. A. 110).

122. (1896.) When the record presented to the supreme court does not disclose that any objections were made in the district court to its trial and adjudication in this, an action for divorce, of the alleged rights of a husband in real estate, the title to which rested in the wife, the questions will not be considered in the supreme court. *Greene v. Greene*, 49 Neb. 546 (68 N. W. 947; 59 Am. St. Rep. 560; 34 L. R. A. 110).

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Costs.

123. (1890.) The district court has power in divorce proceedings to decree costs against either party. *Eckhard v. Eckhard*, 29 Neb. 457 (45 N. W. 466).

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V. ALIMONY, ALLOWANCE, AND DISPOSITION OF PROPERTY.

Effect of dismissal of suit on application for alimony, see *ante*, § 99*a*.

Definition of alimony.

124. (1896.) Alimony may be defined to be such sum as is ordered by the court to be paid to the wife by the husband, for her support during the time she lives separate from him, or to be paid by her late husband for her maintenance after divorce from the marriage tie. This latter is a creation of modern law and is what is known as permanent alimony. *Greene v. Greene*, 49 Neb. 546 (68 N. W. 947; 59 Am. St. Rep. 560; 34 L. R. A. 110).

Jurisdiction to award.

125. (1889.) Courts of equity have authority to enforce the duty of a husband to support his wife and family, in a suit by the wife, whether or not the suit is for divorce. *Earle v. Earle*, 27 Neb. 277 (43 N. W. 118; 20 Am. St. Rep. 667).

126. (1889.) Whether or not a court of equity has authority to award alimony in an action for divorce, when not asked for, by implication, *quære*. *Earle v. Earle*, 27 Neb. 277 (43 N. W. 118; 20 Am. St. Rep. 667).

127. (1895.) In an action for divorce, where the husband is a non-resident served only by publication of notice and he does not appear, the court has no jurisdiction to render a personal judgment, as for alimony. *Dillon v. Starin*, 44 Neb. 881 (63 N. W. 12).

128. (1903.) Jurisdiction of the courts in matters relating to alimony is given by statute, and every power so exercised must look for its source in the statute. *Cizek v. Cizek*, 69 Neb. 800 (99 N. W. 28).

129. (1906.) Where a court has jurisdiction of the parties, its authority to grant a divorce carries with it authority to adjust the property rights of the parties with respect to personal property within its jurisdiction. *Hays v. Hays*, 75 Neb. 728 (106 N. W. 773).

——— Authority of referee to award.

130. (1883.) A referee in a divorce suit has no power to decree alimony and make the same a lien upon defendant's real estate. *Brotherton v. Brotherton*, 14 Neb. 186 (15 N. W. 347). [Overruled. *Nygren v. Nygren*, 42 Neb. 408.]

Action for alimony alone.

131. (1894.) A court of equity will entertain an action brought for alimony alone, and will grant the same, although no divorce or other relief is sought, where the wife is separated from the husband without her fault. *Cochran v. Cochran*, 42 Neb. 612 (60 N. W. 942).

132. (1894.) Where a husband leaves his wife and children in Wisconsin and comes to this state where he obtains a divorce on the ground of desertion, service is had by publication and the wife had no knowledge of the proceedings, and two years after brings suit for alimony, such suit is a separate and independent action for support based on the legal obligation of the husband to support his family, and the wife need not allege that she is destitute or in actual need of support. *Cochran v. Cochran*, 42 Neb. 612 (60 N. W. 942).

133. (1907.) A court of equity will entertain an action brought for alimony, and will grant the same, although no divorce or other relief is sought, where the wife is separated from the husband without her fault. *Rhoades v. Rhoades*, 78 Neb. 495 (111 N. W. 122).

Right of husband to recover alimony.

134. (1896.) A husband cannot, in this state, whether he or the wife be granted the divorce, recover alimony to be paid out of the divorced wife's separate estate *Greene v. Greene*, 49 Neb. 546 (68 N. W 947; 59 Am. St. Rep. 560; 34 L. R. A. 110).

Property liable and disposition thereof.

135. (1891.) Property within jurisdiction of court will be subjected to alimony, even where divorce is obtained *ex parte* against a non-resident defendant, if he enters a personal appearance in the suit to have the property subjected to the payment of the alimony. *Johnson v. Johnson*, 31 Neb. 385 (47 N. W. 1115).

136. (1894.) The value of property acquired by a husband, after obtaining a decree of divorce from his wife, by exchanging for it other property which he owned at the time of obtaining such divorce, should be taken into consideration by the court in determining the amount of alimony to which the wife is entitled. *Cochran v. Cochran*, 42 Neb. 612 (60 N. W. 942).

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137. (1895.) Section 18, chapter 25, Compiled Statutes, providing that on dissolution of a marriage the court may make a decree restoring to the wife personal estate that shall have come to the husband by reason of the marriage or awarding to her the value thereof, refers to property which the law gives the husband by reason of the marriage and not to property obtained by the husband from the wife by gift or contract. *Dillon v. Starin*, 44 Neb. 881 (63 N. W. 12).

138. (1895.) A petition alleging that a certain sum had come to the husband by reason of the marriage and praying restitution thereof is not supported by proof of money voluntarily advanced by the wife to the husband after the marriage. *Dillon v. Starin*, 44 Neb. 881 (63 N. W. 12).

139. (1903.) Where a petition for divorce alleged that defendant owned several parcels of real estate, specifying them, and that one was occupied by plaintiff as a homestead, and that defendant is in debt to the full value of his property except the homestead, and prays that she may be awarded such homestead as alimony, not asking for a decree as to the other property, the court has no jurisdiction to award her the other property. *Banking House of A. Castetter v. Dukes*, 70 Neb. 648 (97 N. W. 805).

140. (1905.) The statute of the state of Washington, as construed by the courts of that state, gives the courts jurisdiction in the trial of a divorce case to make distribution between the parties of all of the property possessed jointly or severally by the parties upon principles of general equity, "having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired." *Fall v. Fall*, 75 Neb. 104 (106 N. W. 412).

141. (1907.) In a suit for divorce and alimony, a district court has jurisdiction to award to the wife specific articles of personal property from the estate of the husband in addition to alimony. *Washington v. Washington*, 78 Neb. 741 (111 N. W. 787). 787).

——Award of the fee to realty.

142. (1903.) In a suit arising under the provisions of chapter 25, Compiled Statutes, the district court has not jurisdiction to award real estate of the husband to the wife in fee as alimony, and a decree in so far as it attempts so to do is void and subject to collateral attack. *Cizek v. Cizek*, 69 Neb. 800 (99 N. W. 28).

——Order of sale of realty.

143. (1894.) The decree of the lower court, in so far as it orders the sale of specific real estate for the payment of alimony, is reversed. *Nygren v. Nygren*, 42 Neb. 408 (60 N. W. 885).

Attorney fees and expenses pending suit.

144. (1878.) A reasonable allowance of alimony, during the pendency of an action for divorce brought into the supreme court upon appeal, will be made. *Callahan v. Callahan*, 7 Neb. 38.

145. (1886.) Where the divorced wife seeks a modification of the decree for alimony, alleging that the decree was obtained by the fraud of the husband and his agents, the district court has authority to require the husband to pay into court a reasonable sum of money, to enable her to prosecute her action. *O'Brien v. O'Brien*, 19 Neb. 584 (27 N. W. 640).

146. (1891.) Section 12, chapter 25, Compiled Statutes, authorizes the court in a divorce suit "to require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency." *Held*, That the remedy here given for attorney fees for the wife is exclusive, and that the attorney cannot afterwards maintain an action against the husband for fees in addition to those allowed by the court and paid. *Burnham v. Tizard*, 31 Neb. 781 (48 N. W. 823).

147. (1896.) It is within the discretion of the court to postpone until the final hearing of the case allowances of alimony for expenses made and then render a decree against the husband therefor. *Brasch v. Brasch*, 50 Neb. 73 (69 N. W. 392).

148. (1896.) What sum a husband may be required to pay to his wife for her support during the pendency of a divorce suit for her "expenses" in prosecuting or defending the action, for counsel fees, and whether such sums shall be paid before the final hearing of the action and as a condition precedent to the right of the husband to further prosecute or defend, are matters within the discretion of the district court. *Brasch v. Brasch*, 50 Neb. 73 (69 N. W. 392).

149. (1896.) Within the meaning of section 12, chapter 25, Compiled Statutes, an action is pending from its commencement until its final determination on appeal or

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error, or until the time fixed by statute for prosecuting an appeal or an error proceeding has expired. *Brasch v. Brasch*, 50 Neb. 73 (69 N. W. 392).

150. (1897.) Under section 12, chapter 25, Compiled Statutes, the allowance of attorney's fees to the counsel of the wife is ancillary to or an incident of the action for divorce, and a separate suit cannot be maintained against the husband by such attorney to recover for his professional services therein rendered to the wife. *Yeiser v. Lowe*, 50 Neb. 310 (69 N. W. 847).

151. (1906.) On an application at a subsequent term for custody of children, the court may require the husband to pay a reasonable sum as costs to enable the wife to prosecute such application. *Chambers v. Chambers*, 75 Neb. 850 (106 N. W. 993).

Reference to ascertain defendant's income.

152. (1881.) Upon affirming a decree for divorce a reference was ordered to take additional testimony and report on the question of the income of the husband. *Brotherton v. Brotherton*, 12 Neb. 75 (10 N. W. 544).

153. (1907.) Where the record is not sufficient to inform the court of the value of the husband's property, and it appears that the alimony awarded the wife is grossly in excess of what should be allowed, the case will be remanded for further finding as to the value of the husband's property. *Yaryan v. Yaryan*, 79 Neb. 574 (113 N. W. 138).

Permanent alimony.

——— Right to, in general.

154. (1880.) When a man and woman, each having children by a former marriage, were married and the wife refused to go to the home of the husband, abandoning him entirely after two years, in an action for divorce a decree for permanent alimony is erroneous. *Shafer v. Shafer*, 10 Neb. 468 (6 N. W. 768).

155. (1889.) Under section 22, chapter 25, Compiled Statutes, a district court or supreme court, upon appellate proceedings may, after a divorce is granted at the suit of the husband, make a decree for alimony in favor of the wife, out of the property of the husband, even though the decree of divorce be against the wife, for any of the enumerated causes except the adultery of the wife. *Dickenson v. Dickenson*, 26 Neb. 318 (42 N. W. 9).

156. (1904.) When a wife, without cause, refuses to live with her husband, and the evidence shows that she did not assist in or contribute to the accumulation of any of his property, but that it was all accumulated by him prior to their marriage, the husband, on obtaining a divorce on the ground of desertion, will not be required to pay alimony. *Isaacs v. Isaacs*, 71 Neb. 537 (99 N. W. 268).

157. (1904.) A judgment for alimony is the legal method for enforcing the husband's moral obligation to provide sustenance for his wife, the amount thereof to be determined primarily by consideration of the wife's need and the husband's ability. So, where a husband abandoned his wife and two minor children, having first deeded to his wife half of the property, and in a subsequent suit for divorce it appeared that the wife, who was in poor health, was in need, and that the husband, in addition to an income amply sufficient to support him, had made an arrangement with the property retained by him in the settlement by which he received his support for life, *held* that the settlement was not an adequate discharge of the husband's obligations to provide for his wife, and that further provision should be made for her out of his estate. *McKnight v. McKnight*, 5 Unof. 260 (98 N. W. 62).

——— Settlement as bar.

158. (1904.) A settlement between husband and wife in contemplation of a separation, although equitable, is not a bar to a judgment for alimony in a subsequent suit by the wife for divorce; but it may be considered in determining the amount of alimony to be awarded. *McKnight v. McKnight*, 5 Unof. 260 (98 N. W. 62).

——— Determination of amount.

159. There is no fixed rule for determining what portion of a husband's estate should be decreed to his wife for alimony. The amount should be just and equitable, due regard being had for the rights of each party, the ability of the husband, the estate of the wife, and the character and situation of the parties. (1894) *Cochran v. Cochran*, 42 Neb. 612 (60 N. W. 942); (1890) *Small v. Small*, 28 Neb. 843 (45 N. W. 248); (1896) *Heist v. Heist*, 48 Neb. 794 (67 N. W. 790); (1898) *Walton v. Walton*, 57 Neb. 102 (77 N. W. 392); (1899) *Zimmerman v. Zimmerman*, 59 Neb. 80 (80 N. W. 643); (1900) *Smith v. Smith*, 60 Neb. 273 (83 N. W. 72); (1902), *McKee v. McKee*, 2 Unof. 322 (96 N. W. 489).

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160. (1894.) In estimating the value of a husband's property for determining the amount of alimony to be awarded the wife, the court should take the value of the husband's estate at the date of the rendition of the decree for alimony. *Cochran v. Cochran*, 42 Neb. 612 (60 N. W. 942).

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161. (1902.) While there is no fixed rule for determining the amount of alimony to be awarded under section 22, chapter 25, Compiled Statutes, such award should bear a reasonable relation to the husband's ability to pay, as disclosed by the evidence *McKee v. McKee*, 2 Unof. 322 (96 N. W. 489).

162. (1905.) In awarding alimony the court should consider the condition, situation and standing of the parties, financially and otherwise, the duration of their marriage, the amount and value of the husband's estate, the source from which it came and how far, if at all, the wife contributed thereto. *Metcalf v. Metcalf*, 73 Neb. 79 (102 N. W. 79).

——— **Discretion of court as to amount.**

163. (1893.) In the allowance of alimony upon the awarding of a divorce much discretion is necessarily conferred upon the district court, and this court will not interfere on the grounds that the amount allowed is excessive unless there appears to have been a clear abuse of discretion. *Wilde v. Wilde*, 37 Neb. 891 (56 N. W. 724).

164. (1904.) What sum the husband may be required to pay his wife during the pendency of a divorce suit as temporary alimony, expense money and counsel fees, to enable her to properly defend the action, are matters within the discretion of the district court. *Reed v. Reed*, 70 Neb. 779 (98 N. W. 73).

165. (1904.) It is entirely within the sound discretion of the district court to require the husband to pay the sums of money allowed the wife as temporary alimony and counsel fees in a divorce case, to enable her to make a proper defense, as a condition precedent to the right to further prosecute his action. And an order requiring such payment does not conflict with any right guaranteed him by our constitution. *Reed v. Reed*, 70 Neb. 779 (98 N. W. 73).

166. (1907.) The court, in awarding permanent alimony, will not speculate upon a future income from a continuous and persistent career of vice and criminality, and adopt as a basis for its decree a division of the anticipated spoils of iniquity. *King v. King*, 79 Neb. 852 (113 N. W. 538).

——— **Excessiveness of award.**

167. (1882.) Decree for alimony modified by reducing the same from $5,500 to $3,000, and an allowance for attorney fees and expenses from $2,000 to $1,000. *Atkins v. Atkins*, 13 Neb. 271 (13 N. W. 285).

168. (1886.) Where a husband's property is valued at $15,000, and the wife has received as temporary alimony $2,000 and has $800 of her own, a permanent decree of $6,000 will be reduced to $4,000. *Smith v. Smith*, 19 Neb. 706 (28 N. W. 296).

169. (1887.) Where it was shown that the husband was possessed of property of the value of $2,200, and the wife was possessed of $500 worth of property in her own right, it was *held* that a decree allowing the wife $800 of alimony and $150 attorney's fees, was excessive, and the decree for alimony was modified, and the sum of $500 allowed in addition to the attorney's fees, it not appearing that the wife had contributed to the common fund. *McConahey v. McConahey*, 21 Neb. 463 (32 N. W. 300).

170. (1890.) A decree for $20 monthly allowance in addition to the homestead is excessive. *Small v. Small*, 28 Neb. 843 (45 N. W. 248).

171. (1893.) An award of $2,000 alimony is not excessive when it is shown the husband is worth over $8,000, saved since his marriage, and earned with money furnished by the wife. *Wilde v. Wilde*, 37 Neb. 891 (56 N. W. 724).

172. (1896.) Where the wife was awarded the custody of the minor children, and the husband's unincumbered property was valued at $4,500, an allowance to the wife of $2,250 as alimony was *held* not excessive. *Heist v. Heist*, 48 Neb. 794 (64 N. W. 790).

173. (1898.) The permanent alimony ordered paid in the sum of $5,000 adjudged excessive, defendant in error allowed to file a remittitur of $3,500, and the decree thus changed affirmed. If remittitur is not filed, the decree of divorce is affirmed, and the branch of the cause in regard to permanent alimony reversed and remanded. *Berdolt v. Berdolt*, 56 Neb. 792 (77 N. W. 399).

174. (1898.) In the case at bar the parties had been married six months. The wife was 38 years of age and healthy. She had

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no one depending upon her for support. The husband was worth $24,000, no part of which the wife had contributed. The marriage was dissolved because of extreme cruelty practiced by the husband. *Held*, That an award of $5,000 permanent alimony and $700 counsel fees should be affirmed. *Walton v. Walton*, 57 Neb. 102 (77 N. W. 392).

175. (1899.) Excessive alimony should not be allowed. *Zimmerman v. Zimmerman*, 59 Neb. 80 (80 N. W. 643).

176. (1900.) Evidence examined, and *held* to support a judgment rendered, awarding the wife permanent alimony in the sum of $1,000 out of a husband's estate worth $9,670. *Tietken v. Tietken*, 60 Neb. 138 (82 N. W. 367).

177. (1905.) An award of $500 alimony to a wife against whom the husband has procured a divorce is not excessive. *Metcalf v. Metcalf*, 73 Neb. 79 (102 N. W. 79).

178. (1905.) Alimony in gross of $5,500 is excessive when it appears that the husband's estate was valued at $25,000. *Kimbro v. Kimbro*, 73 Neb. 171 (102 N. W. 271).

179. (1906.) The allowance of alimony of $1,000 from an estate of $2,200 is not unreasonable on granting a divorce for cruelty. *Hays v. Hays*, 75 Neb. 728 (106 N. W. 773).

——— **Mode of allowance.**

180. (1903.) Provisions of chapter 25, Compiled Statutes, relative to alimony, its allowance and the mode of its enforcement, *held* excessive. *Cizek v. Cizek*, 69 Neb. 800 (99 N. W. 28).

——— **Award in gross or instalments.**

181. (1894.) An award of alimony in gross sustained. *Cochran v. Cochran*, 42 Neb. 612 (60 N. W. 942). [Overruled. *Chapman v. Chapman*, 74 Neb. 388 (104 N. W. 880).]

182. (1895.) Alimony should not be awarded a wife in instalments during her life. *McGechie v. McGechie*, 43 Neb. 523 (61 N. W. 692). [Overruled. *Chapman v. Chapman*, 74 Neb. 388 (104 N. W. 880).]

183. (1906.) Where the situation of the parties and the contingencies are such that the amount of alimony cannot be placed at a lump sum without danger that such allowance may prove unjust or inequitable to one or other of the parties, it is proper for the court to provide for the payment of a stated sum at fixed periods for a given length of time, or until the further order of the court. *Hays v. Hays*, 75 Neb. 728 (106 N. W. 773).

——— **Lien of judgment.**

184. A decree, declaring alimony a lien upon real estate is erroneous. (1881) *Swansen v. Swansen*, 12 Neb. 210 (10 N. W. 713); (1883) *Brotherton v. Brotherton*, 14 Neb. 186 (15 N. W. 347). [Overruled. *Nygren v. Nygren*, 42 Neb. 408.]

185. (1886.) Fraudulent conveyance made by husband to wife, set aside after divorce, and is subject to lien for alimony. *Roehl v. Roehl*, 20 Neb. 55 (29 N. W. 257).

186. (1894.) Since the enactment of section 4*a*, chapter 25, Compiled Statutes, a decree for alimony is a lien upon real estate the same as a judgment at law, and is enforceable in the same manner. *Nygren v. Nygren*, 42 Neb. 408 (60 N. W. 885).

187. (1898.) In a suit by a wife for a divorce a decree for alimony in her favor is a lien on the family homestead, the title to which is in the husband. *Best v. Zutavern*, 53 Neb. 604 (74 N. W. 64).

188. (1900.) A decree for alimony is a lien upon real estate the same as a judgment at law and is enforceable in like manner. *Dufrene v. Johnson*, 60 Neb. 18 (82 N. W. 107).

189. (1902.) A judgment for alimony in favor of a wife, rendered in an action for divorce against the husband, is a lien upon the family homestead, the title whereof is in the husband. *Fraaman v. Fraaman*, 64 Neb. 472 (90 N. W. 245; 97 Am. St. Rep. 650).

——— **Modification of judgment or award.**

Of decree for divorce, see *ante*, §§ 104-113.

190. (1897.) A district court has jurisdiction to hear and determine an application for the modification of a decreee for permanent alimony. *State, ex rel. Beard, v. Cook*, 51 Neb. 822 (71 N. W. 733).

191. (1897.) Where an order on an application to modify a decree for permanent alimony directs the payment of money, whether it may be superseded is not a matter resting in the discretion of the district court. Such order may be superseded as a matter of right, on the execution of a supersedeas bond as required by the first subdivision of section 677 of the code of civil procedure. *State, ex rel. Beard, v. Cook*, 51 Neb. 822 (71 N. W. 733).

192. (1899.) Where, in a divorce proceeding, a decree is entered dissolving a

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marriage, and awarding the wife a judgment against the husband for $—— in full of all her claims upon him or his property by reason of their former marriage relations, it seems that the courts have no jurisdiction to vacate or modify such a judgment, after the term at which rendered, solely because of a change in the circumstances, financial or otherwise, of either of the parties thereto. *Beard v. Beard*, 57 Neb. 754 (78 N. W. 255).

193. (1899.) If, by reason of a change in the circumstances or conditions of either or both the parties, the courts have jurisdiction to vacate or modify a judgment awarding the wife a certain sum in full of all her claims against the husband, after term, the fact that the property of the husband has depreciated in value, because of drouths and crop failures since the entry of the judgment, is not sufficient to support a decree modifying or vacating such judgment. *Beard v. Beard*, 57 Neb. 754 (78 N. W. 255).

194. (1906.) Where a husband seeming a divorce fails to prove any alleged infidelity on the part of his wife, and a decree is rendered, requiring him to pay a monthly sum to the wife and, also, to furnish electric light, he being employed by an electric light company, the latter part of the decree is modified upon the wife's removal from that town. *Russell v. Russell*, 77 Neb. 136 (108 N. W. 149).

195. (1906.) Under section 27, chapter 25, Compiled Statutes 1905, the district court has a continuing power, after a decree of divorce and alimony has been granted, to review and revise the provisions for alimony at its subsequent terms on petition of either of the parties. *Cizek v. Cizek*, 76 Neb. 797 (107 N. W. 1012).

196. (1906.) If the decree of the trial court awarding alimony in a divorce proceeding is void for want of jurisdiction, the court may at a subsequent term award suitable alimony upon application and a sufficient showing. *Cizek v. Cizek*, 76 Neb. 797 (107 N. W. 1012).

Enforcement of order or decree.

197. (1898.) A decree awarding permanent alimony is enforceable in the same manner as judgments at law. *Leeder v. State*, 55 Neb. 133 (75 N. W. 541).

198. (1888.) The provisions of section 4, chapter 25, Compiled Statutes, providing for the payment of alimony, afford a just and reasonable remedy, and, except in extraordinary cases, none other will be resorted to for the enforcement of judgments or orders in cases of alimony or maintenance. *Segear v. Segear*, 23 Neb. 306 (36 N. W. 536).

Effect of obtaining release of decree by fraud.

199. (1892.) Where a divorced husband induced his former wife to again marry him and they go to Kansas where an alleged minister performs a marriage ceremony which is solemnized in the full belief of its validity by the persons so married, and the wife receipts for a judgment obtained for alimony in her divorce action, she cannot recover damages on the ground of fraud, but may recover the amount of the judgment for alimony. *Haggin v. Haggin*, 35 Neb. 375 (53 N. W. 209).

Conclusiveness of adjudication.

200. (1899.) A judgment in divorce proceedings awarding the wife $5,000 in full of all her claims upon the husband or his property, is a judicial determination of the share of the husband's property to which the wife is entitled as permanent alimony, and is final and conclusive unless modified or vacated in a direct proceeding. *Beard v. Beard*, 57 Neb. 754 (78 N. W. 255).

Contempt for non-payment.

201 (1898.) Ordinarily the non-compliance with an order for payment of permanent alimony is not punishable as for contempt of court. *Leeder v. State*, 55 Neb. 133 (75 N. W. 541).

Award of alimony as bar to dower.

202. (1898.) A wife, by praying for a reasonable sum as permanent alimony, elects to take such sum in lieu of dower in her husband's lands. *Walton v. Walton*, 57 Neb. 102 (77 N. W. 392).

203. (1885.) Upon a divorce being granted, a decree in favor of the wife for permanent alimony will bar her right to any further claims against the estate of the husband. *Tatro v. Tatro*, 18 Neb. 395 (25 N. W. 571; 54 Am. Rep. 820).

204. (1885.) Under section 23 of chapter 25, Compiled Statutes, entitled "Divorce and Alimony," a wife, upon obtaining a divorce for the cause of misconduct, etc., of the husband, is entitled to dower in his lands in the same manner as if he were dead. *Tatro v. Tatro*, 18 Neb. 395 (25 N. W. 571; 54 Am. Rep. 820).

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Appeal.

205. (1885.) An order in an action for divorce awarding the wife alimony and suit money *pendente lite* to be paid by the husband, cannot be taken by appeal or error to the supreme court before judgment or decree granting or denying a divorce. *Aspinwall v. Aspinwall*, 18 Neb. 463 (25 N. W. 623); *Aspinwall v. Sabin*, 22 Neb. 73 (34 N. W. 72; 3 Am. St. Rep. 72).

206. (1897.) An order made on application to modify a decree for permanent alimony is appealable. *State, ex rel. Beard, v. Cook*, 51 Neb. 822 (71 N. W. 733).

207. (1907.) The findings of a trial judge as respects the value of real property situated in localities with which he is familiar, and made, after hearing conflicting testimony of witnesses, and will not be disregarded upon appeal, unless it is made to appear that inferences from the evidence drawn by the supreme court are more likely to be correct than were his. *King v. King*, 79 Neb. 852 (113 N. W. 538).

——— Bond.

208. (1896.) Neither the district court nor the judge thereof has the power to fix the amount of the penalty of the bond to be given on appeal from a decree awarding alimony, since the amount is prescribed by statute. *State, ex rel. Walton, v. Cornish*, 48 Neb. 614 (67 N. W. 481).

209. (1896.) The penalty of a supersedeas bond for appeal from a decree awarding alimony must be double the amount of the decree, and the bond must be conditioned according to subdivision 1, section 677 of the code. *State, ex rel. Walton, v. Cornish*, 48 Neb. 614 (67 N. W. 481).

210. (1897.) Where an order on an application to modify a decree for permanent alimony directs the payment of money, whether it may be superseded is not a matter resting in the discretion of the district court. Such an order may be superseded as a matter of right, on the execution of a supersedeas bond as required by the first subdivision of section 677 of the code of civil procedure. *State, ex rel. Beard, v. Cook*, 51 Neb. 822 (71 N. W. 733).

VI. CUSTODY AND SUPPORT OF CHILDREN.

In general.

211. (1890.) Where the evidence shows her to be the proper person, the custody of the children will be given to the mother. *Small v. Small*, 28 Neb. 843 (45 N. W. 248).

212. (1890.) Where a decree of divorce, obtained in a foreign state, contains no provision for the custody of a minor child, and the mother who has the care of it removes to this state, in an action by the father to obtain possession of the child, the best interests of the child will control the court in the award; and on a showing that the father has no permanent home the child should be given to the mother. *Giles v. Giles*, 30 Neb. 624 (46 N. W. 916).

Modifying decree.

Of decree in general, see *ante*, §§ 104-113.

213. (1898.) When a decree of divorce has settled the custody of children in one of the parents, the court should not, in habeas corpus proceedings, in effect give them into the custody of the other, by committing them to the care of strangers with whom that other makes his home. *Norval v. Zinsmaster*, 57 Neb. 158 (77 N. W. 373; 73 Am. St. Rep. 500).

214. (1890.) The plaintiff obtained a decree of divorce on the grounds of numerous acts of adultery committed by the wife. The children were awarded to the custody of their grandparents who reside in Colorado, and with whom the erring wife makes her home. *Held*, On the proof, that the decree be modified by committing the children to the care of the father. *Eckhard v. Eckhard*, 29 Neb. 457 (45 N. W. 466).

215. (1906.) Where the circumstances require it, the court may at a subsequent term enter a supplemental decree with respect to the custody of the children, although the original decree contains no provision therefor. *Chambers v. Chambers*, 75 Neb. 850 (106 N. W. 993).

VII. OPERATION AND EFFECT OF DIVORCE.

Decree of divorce as bar to dower, see *Dower*, § 20-23.

Conclusiveness of foreign divorces.

216. (1886.) A divorce procured in Salt Lake City while neither of the parties were residents of that territory is null and void. *Smith v. Smith*, 19 Neb. 706 (28 N. W. 296).

217. (1901.) 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 by her for alimony in this state. *Eldred v. Eldred*, 62 Neb. 613 (87 N. W. 340).

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Effect of foreign decree on land in this state.

218. (1905.) A decree of divorce rendered in a sister state, and setting aside lands in this state to the wife, has no effect as to the title to such land. *Fall v. Fall*, 75 Neb. 120 (106 N. W. 412).

Right of husband in wife's property.

219. (1903.) After decree of divorce, the husband has no right of possession in the separate property of the wife, occupied as a homestead while the marriage relation subsisted. *Cizek v. Cizek*, 69 Neb. 797 (96 N. W. 657).

DOCKETS.

Trial dockets, see *Trial*, §§ 13-16.

Of justice of the peace, see *Justices of the Peace*, §§ 270-283.

DOCUMENTS.

As evidence, see *Evidence*, §§ 284-390.

In criminal prosecution, see *Criminal Law*, §§ 328-331.

DOGS.

Running at large and killing, see *Animals*, §§ 38-45.

DOMICILE.

ANALYSIS.

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Change of domicile, §§ 6-8.
Effect of temporary removal, §§ 9-11.
Husband, § 12.
Married women, §§ 13, 14.
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CROSS-REFERENCES.

See, also, *Aliens; Citizens.*

Of corporations, see *Corporations.*

Absence from, as grounds for attachment, see *Attachment*, §§ 26-30.

Of parties in divorce, see *Divorce and Alimony*, §§ 40-47.

Residence as affecting right to vote, see *Elections*, §§ 26-32.

Of testator as determining jurisdiction over estate, see *Executors and Administrators*, §§ 4-8.

Absence from, as tolling operation of statute of limitations, see *Limitation of Actions*, §§ 79-93.

What is usual place of, see *Process.*

As affecting place of taxation, see *Taxation*, §§ 150-152.

As venue of action, see *Venue*, II.

In general.

1. (1895.) The domicile of a defendant is that place where he has his fixed and permanent home, and to which, when absent, he has the intention of returning. *Wood v. Roeder*, 45 Neb. 311 (63 N. W. 853).

2. (1895.) The words "residence," and "usual place of residence," as employed in statutes, are generally synonymous with the term "domicile." *Wood v. Roeder*, 45 Neb. 311 (63 N. W. 853).

3. (1896.) The question of residence is one of intention. *Johnson v. May*, 49 Neb. 601 (68 N. W. 1032).

4. (1898.) One's residence is where he has his established home, and to which, when absent, he intends to return. *State, ex rel. Vale, v. School District*, 55 Neb. 317 (75 N. W. 855).

What constitutes.

5. (1905.) A box-stall at a fair ground provided with inside fastenings to its doors, which is prepared and used by a man as his office and sleeping apartment, the place where he resides, he having no other place of abode, and which contains his clothing, his money, and all of his belongings, is in legal effect his home or domicile, within the rule that one may take life if necessary to repel an attack upon his domicile. *Young v. State*, 74 Neb. 346 (104 N. W. 867).

Change of domicile.

6. (1898.) To effect a change of domicile there must not only be a change of residence, but an intention to permanently abandon the former home. *State, ex rel. Vale, v. School District*, 55 Neb. 317 (75 N. W. 855).

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7. (1895.) To effect a change of domicile there must not only be a change of residence, but an intention to permanently abandon the former home. The mere residing at a different place, although evidence of the required intention, does not *per se* constitute a change of domicile. *Wood v. Roeder*, 45 Neb. 311 (63 N. W. 853).

8. (1882.) The test of residence, when a party removes from one state to another, seems to be, did he remove from his former residence with the intention of abandoning the same? If a party, in pursuance of that intention, actually went beyond the borders of the state, he will become a non-resident of that state, and upon going into another state, with the intention of residing there, he will become a resident thereof. *Swaney v. Hutchins*, 13 Neb. 266 (13 N. W. 282).

Effect of temporary removal.

9. (1898.) Where one who owns a farm, which has been his domicile for many years, moves his family and a portion of his furniture to a neighboring city during the fall, temporarily, for the purpose of educating his children, and not with the intention of gaining a new home, and returns to the farm at the end of each school year with his family and furniture, his legal residence remains at the farm. *State, ex rel. Vale, v. School District*, 55 Neb. 317 (75 N. W. 855).

10. (1895.) Where one with his family goes to a foreign state, leaving his household goods in a rented house, and in charge of servants in this state and he continues to pay rent on such place, and writes to the owner for a renewal lease for the ensuing year, stating that business will keep him away a few weeks longer, and the servants in the house understood the absence to be merely temporary, such absence is not a change of domicile and summons served at the place maintained in this state was at the usual place of residence. *Wood v. Roeder*, 45 Neb. 311 (63 N. W. 853).

11. (1887.) The cause of action accrued in 1875. In 1877 defendant, who was in business in O., in this state, changed his place of business to D., in Dakota territory. From that time until 1880 his family remained in O., when his wife joined him in Dakota, and remained there about four months. In 1881 his family all joined him in Dakota. The principal part of the time from 1877 until 1881 his family resided in the place occupied by him previous to his departure. He occasionally visited O., but did not make that his usual place of abode. *Held*, Sufficient to sustain a finding that his "usual place of residence" was not in O., and that the statute of limitations did not run. *Forbes v. Thomas*, 22 Neb. 541 (35 N. W. 411).

Husband.

12. (1904.) The general rule is that the domicile of the husband is the domicile of the wife. *Isaacs v. Isaacs*, 71 Neb. 537 (99 N. W. 268).

Married women.

13. (1882.) The wife's domicile is that of her husband. *Swaney v. Hutchins*, 13 Neb. 266 (13 N. W. 282).

14. (1886.) The general rule is that the domicile of the wife follows that of the husband. This is based upon the unity of husband and wife, and generally implies continuing, though temporarily interrupted, cohabitation. Proof of the domicile of the husband is sufficient *prima facie* to establish that of the wife. *Smith v. Smith*, 19 Neb. 706 (28 N. W. 296).

Minors.

15. (1901.) An emancipated minor may acquire a residence of his own. *Russell v. State*, 62 Neb. 512 (87 N. W. 344).

16. (1907.) The domicile of the parents is presumably the residence of their minor children, but that presumption may be overcome by facts and circumstances showing a different condition. *Wirsig v. Scott*, 79 Neb. 322 (112 N. W. 655).

Allegation of residence.

17. (1901.) 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*, 62 Neb. 856 (87 N. W. 1065).

DONATIONS.

See, also, *Subscription; Gifts.*

Construction of contract, see *Contracts*, § 159.

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DOWER.

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ANALYSIS.

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Bar and release.
——— Statutory provisions, §§ 15-17.
——— Antenuptial settlement or agreement, §§ 18, 19.
——— Divorce and alimony, §§ 20-23.
——— Execution of mortgage, §§ 24-26.
——— Estoppel, §§ 27-29.
——— Judicial sale of property, §§ 30-35.
Assignment of dower.
——— In general, §§ 36-39.
——— Petition for assignment, §§ 40, 41.
——— Notice of assignment, § 42.
——— Limitation of action, § 43.
——— Jurisdiction to assign, §§ 44-49.
Liability of purchaser pending action for dower, §§ 50, 51.
Sale and conveyance of dower, §§ 52-56.

CROSS-REFERENCES.

See, also, *Curtesy*.

Community of property in general, see *Husband and Wife*.

Right of widow to possession, see *Descent and Distribution*, § 22.

Right to homestead, see *Homesteads*.

Dower as supporting partition suit, see *Partition*, § 5.

Nature of right.

1. (1898.) The dower right of a wife in the real estate of her husband, while inchoate, is not a possessory right, but is a present, subsisting right or interest of a legal character, and can only be extinguished by the voluntary release or act of the wife or operation of law. *Adler & Sons Clothing Co. v. Hellman*, 55 Neb. 266 (75 N. W. 877).

Statutory provisions.

2. (1905.) The assignment of dower is not the settlement of an estate nor any part of a settlement of the estate of a deceased person. It is not a matter of probate, for it has nothing whatever to do with the probate of a will. *Swobe v. Marsh*, 73 Neb. 331 (102 N. W. 619).

Property subject to dower.

3. (1885.) Where a husband conveys lands in this state while his wife is a non-resident thereof, she has no dower interest in the lands thus conveyed. *Atkins v. Atkins*, 18 Neb. 474 (25 N. W. 724).

4. (1886.) In this state a widow is entitled to dower, or the use, during her natural life, of one-third part of all the lands whereof her husband was seized, of all estate of inheritance at any time during the marriage, unless she is lawfully barred thereof. *Horste v. Hotaling*, 20 Neb. 178 (29 N. W. 299).

5. (1891.) The wife of an assignee of a purchaser of a contract of sale of school land executed by the state upon payment of one-tenth of the purchase price, has no dower interest in the land as against a purchaser from her husband. *Crawl v. Harrington*, 33 Neb. 107 (49 N. W. 1118).

6. (1895.) When lawful marriage of a man and woman and the ownership of real estate by the former concur, an inchoate dower right attaches in the nature of a charge or incumbrance upon the real estate of the husband; and when such right has once attached, it means and continues a charge or incumbrance upon the real estate, unless released by the voluntary act of the wife or be extinguished by operation of law, and is consummate upon the death of the husband. *Butler v. Fitzgerald*, 43 Neb. 192 (61 N. W. 640; 47 Am. St. Rep. 741; 27 L. R. A. 252).

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7. (1895.) The statute of this state, prescribing in what real estate of the husband a wife shall be entitled to dower, is but declaratory of the common law. *Butler v. Fitzgerald*, 43 Neb. 192 (61 N. W. 640; 47 Am. St. Rep. 741; 27 L. R. A. 252).

8. (1897.) The lands of a husband during his life are subject to his wife's inchoate right of dower therein; and, at the instant of his death intestate, the law transmutes the inchoate dower lien into an absolute dower estate, subtracts it from the lands of the intestate and vests the right thereto in his widow. *Motley v. Motley*, 53 Neb. 375 (73 N. W. 738; 68 Am. St. Rep. 608).

9. (1898.) A widow in this state is entitled to dower in all lands whereof her husband was seized of an estate of inheritance at any time during marriage, unless she has been lawfully barred thereof. *Pinkham v. Pinkham*, 55 Neb. 729 (76 N. W. 411).

10. (1900.) A widow is entitled to dower in the lands owned by her intestate husband at the time of his death unless barred therefrom in the manner prescribed by the statute. *Motley v. Motley*, 60 Neb. 593 (83 N. W. 830).

11. (1903.) The wife of a devisee has an inchoate right of dower in his share of the lands devised, and a decree in partition, which bars her of any right, title or interest in such lands, is erroneous. *Schick v. Whitcomb*, 68 Neb. 784 (94 N. W. 1023).

12. (1904.) The heirs of a vendee in possession under a contract of sale of real estate are not possessed of "an estate of inheritance" at common law; hence, the widow of the deceased is not legally entitled to be endowed thereof. *Cutler v. Meeker*, 71 Neb. 732 (99 N. W. 514).

Dower not subject to debts.

13. (1897.) The lands of an intestate descend to his heirs subject to his unsecured debts; but his widow's dower estate in such lands is not incumbered with such debts. *Motley v. Motley*, 53 Neb. 375 (73 N. W. 738; 68 Am. St. Rep. 608).

14. (1904.) An unassigned dower interest in land is not the subject of a leasehold contract conveying any interest in the lands. *Jackson v. O'Rorke*, 71 Neb. 418 (98 N. W. 1068).

Bar and release.

——— **Statutory provisions.**

15. (1893.) Chapter 57, Session Laws of 1889, providing for the descent of real property and the distribution of personal property of intestates, the disposition of homesteads of intestates, the barring of an insane wife's interest in the lands of her husband by deed of her guardian, and the abolition of the estates of dower and curtesy, is void, because it contains more than one subject. *Trumble v. Trumble*, 37 Neb. 340 (55 N. W. 869).

16. (1897.) The statutes of the state expressly provide how a widow may be lawfully barred of dower in the lands of which her husband died seized, and this bar is made to depend upon her voluntary act. *Motley v. Motley*, 53 Neb. 375 (73 N. W. 738; 68 Am. St. Rep. 608).

17. (1900.) The fact that the husband died after "Baker's Decedent Law" (Session Laws 1889, ch. 57) was adopted and before it was adjudged to be unconstitutional, does not in any way affect the widow's right to dower. *Motley v. Motley*, 60 Neb. 593 (83 N. W. 830).

——— **Ante-nuptial settlement or agreement.**

18. (1898.) The manner in which dower may be barred by an antenuptial arrangement between the parties concerned is regulated by statute, and in the absence of any contravening equitable considerations the method prescribed by statute is exclusive. *Fellers v. Fellers*, 54 Neb. 694 (74 N. W. 1077).

19. (1898.) An alleged antenuptial contract whereby each party agreed to claim no interest in the property of the other after marriage, and by which the proposed husband was required after the making of the antenuptial contract to make his will in such terms that his intended wife, thereunder, would be entitled to a certain estate in his real property, *held* to be an entirety; that the two above provisions were interdependent, and that, therefore, the alleged antenuptial agreement was but an executory contract, which, in view of the statute prescribing the method of barring dower in this state, is unenforceable. *Fellers v. Fellers*, 54 Neb. 694 (74 N. W. 1077).

——— **Divorce and alimony.**

20. (1885.) Upon a divorce being granted, a decree in favor of the wife for permanent alimony will bar her right to any further claims against the estate of the husband. *Tatro v. Tatro*, 18 Neb. 395 (25 N. W. 571; 54 Am. Rep. 820).

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21. (1885.) Under section 23 of chapter 25, Compiled Statutes, entitled "Divorce and Alimony," a wife, upon obtaining a divorce for the cause of misconduct, etc., of the husband, is entitled to dower in his lands in the same manner as if he were dead. *Tatro v. Tatro*, 18 Neb. 395 (25 N. W. 571; 54 Am. Rep. 820).

22. (1885.) If the wife make no demand for dower, and the court in making a division of the property of the husband, in the nature of permanent alimony, awards a sum in gross to her, it will be deemed to include all her interest in the husband's estate, and will bar her claim for dower, unless a contrary intent is shown in the decree. *Tatro v. Tatro*, 18 Neb. 395 (25 N. W. 571; 54 Am. Rep. 820).

23. (1898.) A wife, by praying for a reasonable sum as permanent alimony, elects to take such sum in lieu of dower in her husband's lands. *Walton v. Walton*, 57 Neb. 102 (77 N. W. 392).

——— Execution of mortgage.

24. (1885.) A married woman who has not joined with her husband in the execution of a mortgage upon real estate not the homestead, if made a party defendant in an action to foreclose the mortgage, must assert her inchoate right of dower in the mortgaged premises or she will be barred by the decree. *Miller v. Boehme*, 17 Neb. 377 (22 N. W. 797).

25. (1885.) Where a husband alone executed a mortgage upon real estate, and in a second mortgage the wife joins, and on a foreclosure of the second mortgage the premises are sold but the proceeds are insufficient to satisfy the first mortgage the wife's right of dower is barred. *Miller v. Boehme*, 17 Neb. 377 (22 N. W. 797).

26. (1898.) The wife may make her release of her dower interest, or by signature to a mortgage that it be subjected to the lien and operation thereof, matter of forceful consideration for the conveyance to her of other property. *Adler & Sons Clothing Co. v. Hellman*, 55 Neb. 266 (75 N. W. 877).

——— Estoppel.

27. (1897.) A widow made party to a proceeding by her husband's administrator to sell the lands of which he died seized, to pay debts allowed against his estate does not estop herself from claiming her dower estate in the lands sold solely because she neglected to appear in such proceeding. *Motley v. Motley*, 53 Neb. 375 (73 N. W. 738; 68 Am. St. Rep. 608).

28. (1897.) A widow does not estop herself from claiming her dower estate in lands sold by her husband's administrator because she attended the administrator's sale, made no objections thereto, and neglected to advise the bidders thereat that she had a dower estate in such lands. *Motley v. Motley*, 53 Neb. 375 (73 N. W. 738; 68 Am. St. Rep. 608).

29. (1897.) A widow is not estopped from claiming her dower estate in the lands sold at administrator's sale because she received a part of the proceeds of such sale as her "distributive share of such estate"; such payment not having been made to nor received by her in lieu of her dower estate. *Motley v. Motley*, 53 Neb. 375 (73 N. W. 738; 68 Am. St. Rep. 608).

——— Judicial sale of property.

30. (1895.) The sale of the real estate of the husband under execution on a judgment against him alone, followed by judicial confirmation and conveyance, does not extinguish the inchoate dower right of the wife in such real estate, and upon the death of her husband the wife is entitled to have her dower assigned out of such real estate. *Butler v. Fitzgerald*, 43 Neb. 192 (61 N. W. 640; 47 Am. St. Rep. 741; 27 L. R. A. 252).

31. (1395.) Real estate which has been sold under execution on a judgment against the husband alone, such sale followed by judicial confirmation and conveyance, is real estate aliened by the husband, within the meaning of section 7, chapter 23, Compiled Statutes 1893. *Butler v. Fitzgerald*, 43 Neb. 192 (61 N. W. 640; 47 Am. St. Rep. 741; 27 L. R. A. 252).

32. (1395.) The phrase "enhanced in value," found in section 7, chapter 23, Compiled Statutes 1893, is limited in its meaning to appreciation in the value of real estate by reason of improvements put thereon by the alienee. *Butler v. Fitzgerald*, 43 Neb. 192 (61 N. W. 640; 47 Am. St. Rep. 741; 27 L. R. A. 252).

33. (1897.) The sale of the lands of his intestate by an administrator, made in pursuance of a license therefor to pay debts allowed against his estate, does not, of itself, divest the widow's dower estate in such lands. *Motley v. Motley*, 53 Neb. 375 (73 N. W. 738; 68 Am. St. Rep. 608).

34. (1897.) Where the record of a pro-

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ceeding, which resulted in a district court's licensing an administrator to sell the lands of his intestate, discloses that such intestate left a widow, this is, of itself, notice to a purchaser at such sale of such widow's dower estate in such lands. *Motley v. Motley*, 53 Neb. 375 (73 N. W. 738; 68 Am. St. Rep. 608).

35. (1901.) The sale of real estate of the husband under an execution on a judgment against him alone, does not extinguish the wife's inchoate right of dower. *Martin v. Abbott*, 1 Unof. 59 (95 N. W. 356).

Assignment of dower.

——— In general.

36. (1885.) When a widow is entitled to dower in the lands of which her husband died seized, and her right to dower is not disputed by the heirs or devisees, or any person claiming under them or either of them, it may be assigned to her in whatever county the lands may lie, by the county court of the county in which the estate of the husband is settled, upon the application of the widow. *Guthman v. Guthman*, 18 Neb. 98 (24 N. W. 435).

37. (1889.) The acceptance by the probate judge of the assignment of dower as set-off by commissioners, and recording the same, is, under section 9, chapter 23, Compiled Statutes, equivalent to a confirmation of the assignment. *Serry v. Curry*, 26 Neb. 353 (42 N. W. 97).

38. (1895.) In estimating the value of real estate, aliened by the husband during his marriage, for the purpose of assigning his widow dower therein, the value of the real estate is to be estimated as it is at the time of the assignment of dower, excluding the increase in value of the real estate resulting from improvements made thereon by the alienee subsequent to the date of alienation. *Butler v. Fitzgerald*, 43 Neb. 192 (61 N. W. 640; 47 Am. St. Rep. 741; 27 L. R. A. 252).

39. (1905.) The assignment of dower is not the settlement of an estate nor any part of a settlement of the estate of a deceased person. It is not a matter of probate for it has nothing whatever to do with the probate of a will. *Swobe v. Marsh*, 73 Neb. 331 (102 N. W. 619).

——— Petition for assignment.

40. (1889.) In a petition filed by a widow in the probate court to have dower in the lands of which her husband died seized, assigned to her, the failure to allege in such petition that her right to dower "is not disputed by the heirs or devisees" is not fatal to the jurisdiction of the court. *Serry v. Curry*, 26 Neb. 353 (42 N. W. 97).

41. (1889.) When a petition for dower is filed, it is proper for the judge to enter an order directing the manner of service of notice; but the failure to enter such order does not oust the court of jurisdiction and render its proceedings void. *Serry v. Curry*, 26 Neb. 353 (42 N. W. 97).

——— Notice of assignment.

42. (1889.) The manner of giving notice of the assignment of dower interest to the widow by the probate court is largely discretionary with such court; and when such notice is read to the children by the widow and explained by her to them, and approved by the probate court, it is sufficient. *Serry v. Curry*, 26 Neb. 353 (42 N. W. 97).

——— Limitation of action.

43. (1901.) An action for dower in the district court is within the statute of limitations and must be brought within ten years from the time it accrued. *Beall v. McMenemy*, 63 Neb. 70 (88 N. W. 134; 93 Am. St. Rep. 427).

——— Jurisdiction to assign.

44. (1885.) In order to oust the county court of jurisdiction to assign dower the right of the applicant to such dower must be disputed by presenting an issue of fact which, if established by proof, would defeat her claim of dower, and such issue must be one which the county court by its organization is unable to try. *Guthman v. Guthman*, 18 Neb. 98 (24 N. W. 435).

45. (1897.) Where the right of dower of a widow is not disputed, it may be assigned by the county court, under the provisions of sections 8-11, chapter 23, Compiled Statutes. If such a right is disputed, it may be established by a decree of the district court. *Clemons v. Heelan*, 52 Neb. 287 (72 N. W. 270).

46. (1904.) In order to oust the county court of jurisdiction to assign a dower or homestead the right of the widow must be disputed by presenting an issue of fact which, if established by proof, would defeat her claim of dower or homestead, and such issue must be one which the county court by its organization is unable to try. *Tyson v. Tyson*, 71 Neb. 438 (98 N. W. 1076).

47. (1904.) When a widow is entitled

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to dower and homestead in lands of which her husband died seized, and the facts upon which her right of homestead and dower depend are not in dispute, the county court of the county in which the estate of the husband is settled has jurisdiction to assign such dower and homestead. *Tyson v. Tyson*, 71 Neb. 438 (98 N. W. 1076).

48. (1905.) The county court has jurisdiction to assign dower only when the right to dower is not disputed by the heirs and devisees or any persons claiming under them or either of them. *Swobe v. Marsh*, 73 Neb. 331 (102 N. W. 619).

49. (1905.) The district court has jurisdiction in proceedings to assign dower. *Swobe v. Marsh*, 73 Neb. 331 (102 N. W. 619).

Liability of purchaser pending action for dower.

50. (1904.) One who purchases real estate from a defendant in an action brought to recover dower, after a decree of the district court in favor of such defendant and while the case is duly pending in the supreme court on appeal, with actual notice of the plaintiff's claim of dower, takes his title subject to such claim. *Martin v. Abbott*, 72 Neb. 89 (100 N. W. 142).

51. (1904.) Where an appeal is taken from a decree for defendant, in an action to recover dower, where no supersedeas bond is provided for by statute and none is filed, the decree appealed from will not protect a purchaser who takes the title with actual notice of its condition and of the pendency of the appeal. *Martin v. Abbott*, 72 Neb. 89 (100 N. W. 142).

Sale and conveyance of dower.

52. (1839.) Where a widow after dower has been assigned, and she is in possession, conveys her interest to another, the assignee will take her dower interest in the estate. *Gerry v. Curry*, 26 Neb. 353 (42 N. W. 97).

53. (1903.) Assignment of an interest in a reversion fund may be oral and may be proved by oral testimony. *Curtis v. Zutavern*, 67 Neb. 183 (93 N. W. 400).

54. (1903.) A quitclaim deed of lands, made after the confirmation of a partition sale to the purchaser at such sale, may or may not be evidence of an assignment of the reversion of the widow's dower, but it would not of itself constitute such an assignment. *Curtis v. Zutavern*, 67 Neb. 183 (93 N. W. 400).

55. (1903.) Where one-third of the net proceeds of a partition sale has been delivered to the assignee of the widow's dower for his use during her life only, and on his bond conditioned for its repayment into court at her death, it will come back into court for distribution in the same proportions as originally decreed for the remainder of the estate unless transfers have intervened. *Curtis v. Zutavern*, 67 Neb. 183 (93 N. W. 400).

56. (1906.) Where a wife joins her husband in a conveyance of their realty by warranty deed in form, but in fact as security for a debt which is paid by the husband, the wife has a dower interest in the land as against a subsequent purchaser with notice. *Wild v. Storz Brewing Co.*, 77 Neb. 94 (108 N. W. 145).

DRAFTS.

See *Bills and Notes.*

DRAINS.

ANALYSIS.

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CROSS-REFERENCES.

Natural drainage and rights as to surface waters in general, see *Water and Watercourses.*

Sewers and drains for cities, see *Municipal Corporations*, §§ 695-697.

Liability of cities for defective drains or sewers, see *Municipal Corporations*, §§ 880-903.

Right of railroads to construct drains on right of way, see *Railroads*, § 85.

Irrigation ditches, see *Water and Watercourses.*

I. ESTABLISHMENT AND MAINTENANCE.

Drainage and reclamation districts and commissions.

1. (1904.) The drainage and reclamation of large tracts of swamp and overflow or submerged lands is a matter of general public utility and concern, for which the legislature may provide by the creation of local administrative organizations or political corporations. *Neal v. Vansickle*, 72 Neb. 105 (100 N. W. 200).

1*a*. (1907.) The act of 1905 (laws 1905, ch. 161), relative to "the organization and government of drainage districts; for the reclamation and protection of swamps, overflowed or submerged lands," does not contemplate the inclusion of a railroad company's right of way, depot grounds and appurtenances as a part of the district. *Barnes v. Minor*, 80 Neb. 189 (114 N. W. 146).

1*b*. (1907.) The power of the legislature over the subject of procedure, within limits not impairing the inherent powers or jurisdiction of the courts, is not restricted; and it is competent to require, by statute, a preliminary judicial ascertainment of facts, the existence of which is made a condition precedent to the creation of a public corporation. *Barnes v. Minor*, 80 Neb. 189 (114 N. W. 146).

1*c*. (1907.) The term "marsh or swamp lands," as used in laws 1881, ch. 51, has a wider significance than the terms "marsh" or "swamps." The power is conferred by this act to drain lands which are not strictly speaking "marshes" or "swamps," but which are "marsh or swamp lands," meaning thereby lands which are so situated as to be rendered difficult or incapable of successful cultivation by reason of retaining in the soil or carrying on the surface an excessive quantity of water during certain portions of the year, even though at other times they may be as solid, dry and firm as lands in general. *Campbell v. Youngson*, 80 Neb. 322 (114 N. W. 415).

1*d*. (1907.) The drainage act of 1881 (laws 1881, ch. 51) confers the power upon county authorities to create drainage districts for the purpose of draining "marsh or swamp lands" alone, and does not confer power to change the channel or divert the flow of running streams or natural surface water drains for the purpose of relieving the lands of riparian proprietors lower down the stream from periodical overflows in seasons of freshet. *Campbell v. Youngson*, 80 Neb. 322 (114 N. W. 415).

1*e*. (1907). Under the facts set forth in the opinion, *held* that the county board of Kearney county is without jurisdiction to change the channel and divert the waters of the streams mentioned in the opinion from their natural flow for the purpose of preventing overflows, nor has it the authority to take part of the plaintiff's land against his will for the purpose of draining the lands embraced within the proposed drainage district. *Campbell v. Youngson*, 80 Neb. 322 (114 N. W. 415).

1*f*. (1908.) The constitution does not prohibit contemporary legislative acts providing different modes for the formation of drainage districts. *State, ex rel. Harris, v. Hanson*, 80 Neb. 724 (115 N. W. 294).

1*g*. (1907.) Chapter 153, laws 1907, providing for the formation of drainage dis-

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tricts, and requiring the county commissioners to fix the boundaries thereof "with a view to promoting the interest of said drainage district," and providing that the district may condemn private property for its use in constructing drains, dykes, or levees, is not open to the objection that it permits the organization of a corporation in furtherance of private interests, and permits the taking of property for private purposes. *State, ex rel. Harris, v. Hanson*, 80 Neb. 724 (115 N. W. 294).

1*h*. (1908.) From the language used in chapter 153, laws 1907, it is apparent that the legislature intended that the provisions of the act should not be applied except that the county board should prescribe a district which, if organized and improved, would in fact promote the public health, convenience or welfare. *State, ex rel. Harris, v. Hanson*, 80 Neb. 738 (117 N. W. 412).

Establishment by landowners over lands of others.

2. (1881.) Three individuals, by forming a corporation, may locate and open a drain across the property of others without their consent, under section 19, article IV, chapter 39, Compiled Statutes. *Jenal v. Green Island Draining Co.*, 12 Neb. 163 (10 N. W. 547).

3. (1881.) Drains or levees for the reclamation of wet or overflowed lands can be constructed across the lands of others, and the cost assessed thereon, except by consent, only in cases where the public welfare will be subserved. *Jenal v. Green Island Draining Co.*, 12 Neb. 163 (10 N. W. 547).

Proceedings for establishment.

4. (1887.) In a proceeding to establish a drain or ditch, under chapter 89 of Compiled Statutes, the jurisdictional facts are, first, a petition signed by one or more owners of land to be affected by the proposed ditch; second, the bond provided by statute; third, that the proposed improvement is necessary, and will be conducive to the health, convenience, and welfare of the public; and fourth, the statutory notice, and the failure of the county board to find that the signers of the petition are owners of lands to be affected is not jurisdictional. *Dakota County v. Cheney*, 22 Neb. 437 (35 N. W. 211); (1891) *Darst v. Griffin*, 31 Neb. 668 (48 N. W. 819); (1901) *Dodge County v. Acom*, 61 Neb. 376 (85 N. W. 292).

5. (1897.) In a proceeding to establish a drainage ditch under article 1, chapter 89 of the Compiled Statutes, one of the jurisdictional facts which the county board is required to find and enter upon its journal is whether the line described in the petition for the proposed ditch is the best route for the improvement. *State, ex rel. Union P. R. Co., v. Colfax County*, 51 Neb. 28 (70 N. W. 500).

6. (1900.) The provisions of section 4, article I, chapter 89, Compiled Statutes, relating to drainage of swamp lands, must be strictly complied with before a county board can acquire jurisdiction to establish and construct a drain thereunder; and a bond that fails to comply with the provisions of said section 4 is void, and confers no jurisdiction upon the board to act, although such bond may be a good common-law bond. *Casey v. Burt County*, 59 Neb. 624 (81 N. W. 851).

6*a*. (1908.) The establishment of the boundaries of a proposed drainage district is *prima facie* evidence that the county commissioners proceeded regularly in the establishment thereof and that all conditions precedent have been complied with. *State, ex rel. Harris, v. Hanson*, 80 Neb. 724 (115 N. W. 294).

——— Petition.

7. (1901.) A petition which describes with certainty the point of beginning of a drainage ditch and the direction in which the same is to run, giving the sections through which it passes, and the place where terminating, and providing that the line may vary from a straight line to avoid improvements and take advantage of the ground, but not more than 160 rods, is a sufficient compliance with the provisions of the statute to give the board jurisdiction to act in respect to the same. *Dodge County v. Acom*, 61 Neb. 376 (85 N. W. 292).

——— Submission of question to popular vote.

7*a*. (1908.) Section 22 of the bill of rights (Const., art. I), providing that "all elections shall be free, and there shall be no hindrance or impediment of the right of a qualified voter to exercise the elective franchise," does not apply to an election upon the formation of a drainage district, nor one for the election of officers therefor. *State, ex rel. Harris, v. Hanson*, 80 Neb. 724 (115 N. W. 294).

7*b*. (1908.) After the county board has fixed the boundaries of a district the reclamation or protection of which would be of

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public utility, it is competent for the legislature to permit the property owners within the proposed district to determine by vote whether or not they will avail themselves of the benefits of the act, and the provisions permitting none but property owners to vote, and authorizing each owner of real estate to cast a vote for every acre of land or town lot which he owns within the proposed district, and permitting non-resident owners and foreign corporations owning real estate therein to vote upon the question of organization and for the officers of the district, are not unlawful, nor does such election call for the exercise of the elective franchise secured to all electors by section 22 of the bill of rights. *State, ex rel. Harris, v. Hanson*, 80 Neb. 738 (117 N. W. 412).

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——— **Hearing and determination of questions.**

8. (1895.) Where a petition is filed for the construction of a county ditch, and the county commissioners on the same day adjourned and, without any special session being called, two of the members met a few days later and ordered the proposed ditch constructed, and special assessment levied for that purpose, such proceedings are void and of no effect. *Morris v. Merrell*, 44 Neb. 423 (62 N. W. 865).

9. (1901.) Where the record shows that a county board adjourned its sitting at the court house, and went in a body to view the proposed ditch and that they made such view, and afterwards resumed their sitting, such act is a compliance with the statute, and the view made will be regarded as the act of the board and not of individuals. *Dodge County v. Acom*, 61 Neb. 376 (85 N. W. 292).

10. (1907.) Whether a drainage ditch proposed to be constructed pursuant to article I, chapter 89, Compiled Statutes 1905, will be conducive to the public health, convenience or welfare, or whether the route thereof is practicable, are questions of governmental or administrative policy, and are not of judicial cognizance, and jurisdiction over them by appeal or otherwise cannot be conferred upon the courts by statute. *Tyson v. Washington County*, 78 Neb. 211 (110 N. W. 634).

10*a*. (1908.) Chapter 153, laws 1907, provides that, "whenever it will be conducive to the public health, convenience or welfare either to drain * * * any land which will be improved by drainage, or to build or construct any dyke or levee to prevent overflow by water, * * * a drainage district may be formed," the boundaries of which are to be fixed by the county board upon the filing of a petition by interested property owners, and providing that the county board shall fix the boundaries "with a view to promoting the interest of said drainage district, if formed, and with a view to doing justice and equity to all persons." *Held*, That it is a necessary inference from the language used that the board shall determine the public utility of the proposed district, and that it is not the imperative duty of the board to fix the boundaries if the reclamation and improvement of the district would not promote the public health, convenience or welfare. *State, ex rel. Harris, v. Hanson*, 80 Neb. 738 (117 N. W. 412).

——— **Effect of irregularities.**

11. (1891.) Where the county board has jurisdiction, irregularities in the proceedings will not render the assessment void. *Darst v. Griffin*, 31 Neb. 668 (48 N. W. 819).

12. (1901.) Where, in proceedings under the provisions of article I, chapter 89, Compiled Statutes 1899, for the establishment of a drainage ditch, a county board acquires jurisdiction over the subject-matter under consideration, any mere irregularity or want of exact compliance with all of the statutory provisions will be deemed insufficient to render void the whole proceedings taken regarding such matters. *Dodge County v. Acom*, 61 Neb. 376 (85 N. W. 292).

13. (1901.) An irregularity in not apportioning and reporting the number of lineal feet and cubic yards to each lot or tract of land according to benefits, is a harmless error, since the parties complaining made no effort to bid on the work of construction. *Dodge County v. Acom*, 61 Neb. 376 (85 N. W. 292).

14. (1905.) When a person files a claim for damages to his premises caused by the location of a proposed drainage ditch, he thereby waives objection to any irregularities in the proceedings to establish the same. *Gutschow v. Washington County*, 74 Neb. 794 (105 N. W. 548).

14*a*. (1907.) In a proceeding to establish a drainage ditch, if the county board possesses jurisdiction and authority to act in the premises, injunction will not lie on account of mere irregularities in the exercise of the powers conferred. *Campbell v. Youngson*, 80 Neb. 322 (114 N. W. 415).

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Reconstruction of insufficient drain.

15. (1904.) Where a ditch constructed jointly by two counties has proved insufficient to drain properly the lands it was intended to benefit, the county board of one of the counties has the power to adopt a new system of drains of which the old ditch, straightened, widened, altered or deepened, shall form a part, and assess the cost of location and construction upon the lands benefited, upon the proper proceedings for that purpose being taken; and the fact that prior to the adoption of the new scheme of drainage it had failed to clean out the old ditch for several years is immaterial. *Morris v. Washington County*, 72 Neb. 174 (100 N. W. 144).

Location.

16. (1901.) Where an engineer is appointed by the board, makes a final survey, sets grade stakes, notes intersections, and makes a profile and plat, fixes the dimensions and slopes of the banks, etc., and his report is confirmed by the board, the action taken will be deemed to be that of the board and in compliance with the statute. The fact that the line as finally established varies from that described in the petition, but for a less distance than is allowed by the petition and by statute, does not affect the validity of such proceedings. *Dodge County v. Acom*, 61 Neb. 376 (85 N. W. 292).

Proceedings for construction.

17. (1901.) Where the engineer divided the proposed ditch into working stations, and showed in each the distance, and the number of cubic feet to be removed, together with the cost of removal, at the estimate upon which the total cost is arrived at, this, with the report of the assessment to be levied on each parcel or tract of land for special benefits, imparts all the information that would be necessary in case of an apportionment of the number of lineal feet and cubic yards to each lot or tract of land according to the benefits which will result to each from the improvement, and is a sufficient compliance with the provisions of the statute in that respect. *Dodge County v. Acom*, 61 Neb. 376 (85 N. W. 292).

Contracts for construction.

18. (1894.) The provision of section 20, chapter 89, Compiled Statutes, for the reletting of contracts where contractors for drainage ditches have failed to complete their work within the time specified, is designed for the benefit of the persons whose property is chargeable with such improvements, and is not the exclusive method of determining the amount of damage on account of such failure. *McDonald & Penfield v. Dodge County*, 41 Neb. 905 (60 N. W. 366).

19. (1894.) An engineer, who examined the work two months after it was abandoned by the contractors and found the original stakes showing the depth of the ditch and was able to verify his estimate from such stakes, held competent to testify to the cost of completing such work in accordance with the contract. *McDonald & Penfield v. Dodge County*, 41 Neb. 905 (60 N. W. 366).

20. (1905.) A contract which has never been begun is a contract "not completed within the time specified," under the provisions of section 20, article I, chapter 89, Compiled Statutes 1903, providing for the reletting of such contracts. *Gutschow v. Washington County*, 74 Neb. 378 (104 N. W. 602).

21. (1905.) The fact that the person to whom a contract is let under the provision of section 1, article I, chapter 89, Compiled Statutes 1903, requiring the contract to be let to the "lowest responsible bidder," is the only bidder, does not render the contract illegal, in the absence of fraud or collusion, or of any showing that the price is excessive or unreasonable. *Gutschow v. Washington County*, 74 Neb. 378 (104 N. W. 602).

22. (1905.) A bid which proposes "to construct, excavate and complete by working sections" at a fixed price per cubic yard of earth responds to a notice that required bids to be made "by each working section," since the proposal means at the same price per yard for each working section or for the whole work. *Gutschow v. Washington County*, 74 Neb. 378 (104 N. W. 602).

Mandamus to compel construction.

23. (1897.) A mandamus will not issue to a county board to compel the construction of a drainage ditch under article I, chapter 89, Compiled Statutes, where the relator is not shown to be interested in the improvement, independent of that which he has in common with the public at large. *Van Horn v. State, ex rel. Allen*, 51 Neb. 232 (70 N. W. 941).

Payment from general fund.

24. (1898.) The provisions of article I, chapter 89, Compiled Statutes, examined,

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and *held* to require the formation of a special ditch fund, which alone is available for payments for improvements made entirely within a single county, under the provisions of said article, and for the purpose of making such payments moneys can only be obtained from the county general fund by borrowing as provided by section 26 of the said article. *Hall v. State, ex rel. Renard*, 54 Neb. 280 (74 N. W. 590).

Damages from construction or maintenance.

25. (1895.) The owner of land appropriated by a county for a drainage ditch is entitled to recover the value of the land taken and any damage to the land not appropriated less special benefits to the latter. *Martin v. Fillmore County*, 44 Neb. 719 (62 N. W. 863).

26. (1895.) Where a petition against a county for damages alleges that a county ditch has been constructed through and across plaintiff's land, and the county in its answer admits that fact without pleading payment, a verdict for defendant is contrary to law. *Martin v. Fillmore County*, 44 Neb. 719 (62 N. W. 863).

27. (1903.) A county is not liable to landowners for injuries caused by the discharge of surface water from ditches constructed by the county authorities diverting such water from its natural course. *Stocker v. Nemaha County*, 4 Unof. 230 (93 N. W. 721).

——— Set-off of special benefits.

28. (1905.) Where an action is brought to recover damages occasioned by the construction of a drainage ditch, and it appears that the special benefits received by any particular tract of land exceed that portion of the cost of the ditch apportioned to it, the special benefits in excess of the cost may be set off against consequential damages. *Gutschow v. Washington County*, 74 Neb. 800 (107 N. W. 127).

29. (1905.) Where an assessment to the amount of the special benefits he has received has already been assessed against the owner of lands over which a drainage ditch is proposed to be constructed, the value of such special benefits should not be deducted from any damages accruing to the land not actually taken for the construction of the proposed improvement. *Gutschow v. Washington County*, 74 Neb. 794 (105 N. W. 548).

II. ASSESSMENTS AND SPECIAL TAXES.

Constitutional and statutory provisions.

30. (1891.) The provisions of section 6, article IX of the constitution, that "the legislature may vest the corporate authority of cities, towns and villages, with power to make local improvements by special assessments or by special taxation of the property benefited," do not prohibit the legislature from conferring the power to make local improvements by special assessment or taxation of property benefited. *Darst v. Griffin*, 31 Neb. 668 (48 N. W. 819).

31. (1901.) The statute providing for the establishment of drainage ditches is not in violation of any of the provisions of sections 3, 13, 21, or 24 of article I of the constitution. *Dodge County v. Acom*, 61 Neb. 376 (85 N. W. 292).

32. (1904.) The provisions of the drainage law, sections 1-28, article I, chapter 89, Compiled Statutes, confer power upon the county board to provide means for raising a fund from which to compensate landowners whose property has been taken or damaged in the construction of the proposed improvement, and its provisions do not violate section 21, article I of the constitution, providing that the property of no person shall be taken or damaged for public use without just compensation therefor. *Morris v. Washington County*, 72 Neb. 174 (100 N. W. 144).

Estoppel or waiver as to objections.

33. (1887.) A party objecting to the construction of a proposed ditch should act with reasonable promptness in urging his objection, and should not wait until the completion of the improvement before alleging an entire want of authority to make the same. *Dakota County v. Cheney*, 22 Neb. 437 (35 N. W. 211).

34. (1891.) A party who sees a public improvement being carried on calculated to benefit his property, cannot wait until it is completed and the expenditure has been made and his property received the benefit before proceeding to avoid the tax, but must, as a condition of relief by injunction, do equity by paying the amount thereof justly chargeable against such property. *Darst v. Griffin*, 31 Neb. 668 (48 N. W. 819).

Benefit to property.

35. (1901.) In determining special benefits accruing to land by reason of the construction of a drainage ditch, it is proper

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to take into consideration whatever will come to the land from the drain to make it more valuable for tillage, or more desirable as a place of residence, or more valuable in the general market, the true and final test being what will be the influence of the proposed improvement on the market value of the property. *Dodge County v. Acom*, 61 Neb. 376 (85 N. W. 292).

36. (1904.) Assessments upon private property to defray the cost of local improvements are void if in excess of the benefits conferred. *Neal v. Vansickle*, 72 Neb. 105 (100 N. W. 200).

Proceedings for assessment.

37. (1901.) Evidence examined, and *held* to support the finding and order of the county board levying special assessments for benefits received by reason of the construction of a drainage ditch. *Dodge County v. Acom*, 61 Neb. 376 (85 N. W. 292).

38. (1904.) The county board, in fixing the assessments to pay for the construction of a drainage ditch, under the provisions of article I, chapter 89, Compiled Statutes, 1899, acts judicially. *Dodge County v. Acom*, 72 Neb. 71 (100 N. W. 136).

39. (1904.) Assessments upon private property to defray the cost of local improvements are void if levied without notice to persons upon whose property they are imposed, or affording them an opportunity to be heard. *Neal v. Vansickle*, 72 Neb. 105 (100 N. W. 200).

Review, correction or setting aside of assessment.

40. (1891.) Where objections are made to certain assessments on the ground of irregularities, the court, as a condition of granting relief, may require the property owner to do equity by paying the amount which his property is benefited by the improvement. *Darst v. Griffin*, 31 Neb. 668 (48 N. W. 819).

41. (1901.) The provisions of section 28, to the effect that assessments shall not be set aside in consequence of any error or irregularity committed or appearing in any of the proceedings, must be given the force and effect fairly justified by the language used when applied to errors, irregularities or non-compliance with the strict letter of every provision of the statute not going to the question of jurisdiction. *Dodge County v. Acom*, 61 Neb. 376 (82 N. W. 292).

42. (1904.) From the judgment and orders of the county board, fixing assessments to pay for a drainage ditch, error will lie to the district court, and the judgment of that court may be reviewed on such proceedings in the supreme court. *Dodge County v. Acom*, 72 Neb. 71 (100 N. W. 136).

43. (1904.) On a petition in error from the judgment of the county board in a proceeding to fix assessments for the construction of a drainage ditch, its findings and orders are entitled to the same weight as the verdict of a jury, or the findings and judgment of a court, and will not be reversed or set aside unless it appears that the evidence is insufficient to sustain them and they are clearly wrong. *Dodge County v. Acom*, 72 Neb. 71 (100 N. W. 136).

DRUGGISTS.

Sale of intoxicating liquors.

See, also, *Intoxicating Liquors*, §§ 231-236.

1. (1879.) The general law relating to licensing the sale of intoxicating liquors at retail is general and applies to all persons including druggists. *Brown v. State*, 9 Neb. 189 (2 N. W. 214).

2. (1885.) A druggist without a permit is absolutely prohibited from selling intoxicating liquors upon any pretext. Such druggist with a permit is equally prohibited from selling except in the best of faith, and strictly for the purposes specified by law. *Warrick v. Rounds*, 17 Neb. 411 (23 N. W. 785).

3. (1892.) Druggists having permits for the sale of liquors for medical, mechanical, chemical, or sacramental purposes are exempted from the operation of chapter 50 of Compiled Statutes, making it unlawful to keep intoxicating liquors for the purpose of sale without a license. *State v. Cloyd*, 34 Neb. 600 (52 N. W. 579).

4. (1897.) The prohibiting features of the statute in regard to the sale of intoxicating liquors apply to druggists. *Wilson v. Parrish*, 52 Neb. 6 (71 N. W. 1010).

Liability for negligence.

5. (1907.) One who has suffered a direct injury by the unlawful or criminal act of another may maintain an action for the recovery of the damages sustained. *McKib-*

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bin v. Bax & Co., 79 Neb. 577 (113 N. W. 158).

6. (1907.) The unlawful sale of a poisonous drug to a minor eighteen years of age, a quantity of which was by said minor administered to another minor to his injury, does not create a cause of action in favor of the father of the latter for loss of his son's services and the expense of medicines and doctor's bills. *McKibbin v. Bax & Co.*, 79 Neb. 577 (113 N. W. 158).

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DRUNKARDS.

CROSS-REFERENCES.

Intoxication as excuse for crime, see *Criminal Law*, §§ 36-38.

Drunkenness as ground for rescinding contract, see *Contracts*, § 265.

Drunkenness as affecting validity of assent to contract, see *Contracts*, §§ 67, 68.

Intoxication as affecting degree of homicide, see *Homicide*, §§ 22-24.

1. (1906.) Section 7, chapter 82, laws 1905, providing for the commitment of dipsomaniacs, is unconstitutional, as in violation of the right to personal liberty. *In re Schwarting*, 76 Neb. 773 (108 N. W. 125).

2. (1906.) A person who has been confined in the hospital for the insane under the provisions of chapter 82, laws 1905, until he has been cured may not be subjected to further restraint without new cause. *In re Schwarting*, 76 Neb. 773 (108 N. W. 125).

3. (1906.) The provisions of chapter 82, laws 1905, known as the "Dipsomaniac Law," are *in pari materia* with other laws providing for the detention, care and discharge of persons committed to the hospital for the insane, and must be construed in connection therewith. *In re Schwarting*, 76 Neb. 773 (108 N. W. 125).

DUE PROCESS OF LAW.

See *Constitutional Law*, §§ 106-137.

DURESS.

Validity of note obtained by duress, see *Bills and Notes*, §§ 61, 62.

Defense to note in hands of *bona fide* purchaser, see *Bills and Notes*, § 302.

As ground for canceling deed or other conveyance, see *Cancelation of Instruments*, §§ 6, 7.

Ground for rescission of contract, see *Contracts*.

Validity of contract procured by, see *Contracts*, §§ 73-81.

As affecting validity of chattel mortgage, see *Chattel Mortgage*, § 78.

Ground for setting aside compromise, see *Compromise and Settlement*, §§ 25-35.

Validity of deed obtained by duress, see *Deeds*, §§ 128, 129.

Threatening removal of administrator, see *Guaranty*, § 18.

Affecting validity of mortgage, see *Mortgages*, §§ 97-103.

Recovery of payments made under, see *Payments*, §§ 107-112.

Defense to action for specific performance, see *Specific Performance*, § 57.

Affecting validity of contract for sale of land, see *Vendor and Purchaser*, §§ 39, 40.

In execution of will, see *Wills*, §§ 60-71.

DWELLING HOUSE.

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Admissibility in prosecution for murder, see *Homicide*, §§ 127*a*-132.

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Evidence of loss of, see *Damages*, §§ 132-134.

Admissibility of earning capacity in action for death, see *Death*, §§ 42, 43.

Of married women, see *Husband and Wife*, §§ 10-12*a*.

Of infant, see *Parent and Child*, §§ 20-24.

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EASEMENTS.

ANALYSIS.

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Effect of grant as against mortgagee, § 2.
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Extent of right acquired, §§ 14-19.
Abandonment, §§ 20, 21.
Rights as against purchaser, §§ 22, 23.
Obstructions and encroachments, §§ 24-27.
Enforcement of grant, §§ 28, 29.

CROSS-REFERENCES.

See, also, *Adverse Possession.*

Acquiring public way by prescription, see *Highways*, § 1.

Necessity of definite line of travel to acquire public way, see *Highways*, § 15.

Effect of deviation from line of travel, see *Highways*, §§ 16-18.

Easement as basis for partition, see *Partition*, § 13.

Railroad right of way as, see *Railroads*, § 48.

In waterways and streams, see *Water and Watercourses*, § 183.

Consideration for mutual grant.

1. (1896.) Adjoining lot owners in a city may, by grant, impose mutual and corresponding restrictions and conditions upon the land owned by each, the mutuality of the covenant in such case being a sufficient consideration for the respective grants. *Barr v. Lamaster*, 48 Neb. 114 (66 N. W. 1110).

Effect of grant as against mortgagee.

2. (1907.) While an easement in real property cannot be granted by the owner thereof so as to affect the rights of a prior mortgagee, the party claiming the easement has the same rights as any other subsequent incumbrancer. If the easement has attached by lapse of time, he must be made a party to the foreclosure proceeding, and, if not, the purchaser at foreclosure sale must take action to dispute his claimed right before the statute has fully run. *Jensen v. Showalter*, 79 Neb. 544 (113 N. W. 202).

Acquisition by adverse possession.

3, 4. (1894.) An easement in real estate may be acquired by open, notorious, peaceable, uninterrupted, adverse possession for a period of ten years. *Omaha & R. V. R. Co. v. Rickards*, 38 Neb. 847 (57 N. W. 739).

5, 6. (1897.) To acquire an easement or way on another's land there must be a use of the way for the length of time which will bar an action for the recovery of title to land, and which is under claim of right, or adverse. *Engle v. Hunt*, 50 Neb. 358 (69 N. W. 970).

7. (1903.) One who seeks to acquire an easement of maintaining a ditch over another's land by adverse user must maintain it without material change of location for the full statutory period. That he may have had a ditch somewhere upon the land for ten years does not give him a right to maintain it in a new location, or to use an extension thereof made within the period. *Dunn v. Thomas*, 69 Neb. 683 (96 N. W. 142).

8. (1906.) An easement by prescription can be acquired only by an adverse user for ten years, and the commencement of the time required for the prescription to ripen dates from the time when the party was damaged or had a cause of action arising from the adverse user. *Roe v. Howard County*, 75 Neb. 448 (106 N. W. 587).

9. (1907.) An easement, being an interest in real estate, can be acquired only by deed; but, by user for the statutory time necessary to gain title to real estate by adverse possession, a grant will be presumed and an easement by prescription established. *Jensen v. Showalter*, 79 Neb. 544 (113 N. W. 202).

10. (1907.) Where adjoining owners agree to and set apart and stake off each six feet of land on their lot line as an alley or driveway, and use the same for over ten years, each acquires an easement by prescription to the land included in such alley. *Jensen v. Showalter*, 79 Neb. 544 (113 N. W. 202).

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11. (1907.) An easement in real estate may be acquired by open, notorious, uninterrupted, adverse possession for the statutory period of ten years. *Agnew v. City of Pawnee City*, 79 Neb. 603 (113 N. W. 236).

12. (1907.) An easement in a city street could be acquired by open, notorious, uninterrupted, adverse possession for the statutory period of ten years prior to the statute of 1899. *Agnew v. City of Pawnee City*, 79 Neb. 603 (113 N. W. 236).

13. (1907.) An easement by prescription may be acquired in a homestead as in other property. *Jensen v. Showalter*, 79 Neb. 514 (113 N. W. 202).

Extent of right acquired.

14. (1899.) The citizen is entitled to the use and enjoyment of the light and the air over, and the water beneath, the surface of his premises, and, in order that his neighbor may devote his property to a particular use, cannot be compelled to surrender those rights, even if fully paid therefor. *Lowe v. Prospect Hill Cemetery Ass'n*, 58 Neb. 94 (78 N. W. 488; 46 L. R. A. 237).

15. (1902.) Only a right to enjoy the privilege and no fee title nor right to exclude the owner, can, in any case, be established by mere user of a privilege of flowage. *Johnson v. Sherman County Irrigation Co.*, 63 Neb. 510 (88 N. W. 676).

16. (1902.) A subsequent use for less than ten years of real estate for flowage of water by gradual encroachment without agreement with the owners, and without compensation to them, and not contemplated at the time of the subscription, will not create an interest in the real estate so flowed, nor establish an irrevocable license to so use it. *Johnson v. Sherman County Irrigation Co.*, 63 Neb. 510 (88 N. W. 676).

17. (1902.) Where a mill is erected and a water power obtained by the aid and co-operation of adjoining landowners, any right of flowage over their premises of water for the mill arranged for and contemplated by the owners, as subscribers towards its construction, becomes appurtenant to the mill. *Johnson v. Sherman County Irrigation Co.*, 63 Neb. 510 (88 N. W. 676).

18. (1904.) An easement consisting of the right to maintain a mill-pond upon the land of another does not deprive the owner of the land of any use thereof which does not interfere with the employment of the easement. *Johnson v. Sherman County Irrigation, Water Power and Improvement Co.*, 71 Neb. 452 (98 N. W. 1096).

19. (1904.) The ruling made on the former appeal, that, "Where a mill is erected and a water-power obtained by the aid and co-operation of adjoining landowners, any right of flowage over their premises of water for the mill arranged for and contemplated by the owners, as subscribers toward its construction, becomes appurtenant to the mill," reannounced. *Johnson v. Sherman County Irrigation, Water Power and Improvement Co.*, 71 Neb. 452 (98 N. W. 1096).

Abandonment.

20. (1907.) Nonuser of an easement for a less period than the statutory period of ten years will not of itself work an abandonment of the right. *Agnew v. City of Pawnee City*, 79 Neb. 603 (113 N. W. 236).

21. (1907.) The burden of proof is on the party alleging it to show abandonment of an easement, and such abandonment must be pleaded. *Agnew v. City of Pawnee City*, 79 Neb. 603 (113 N. W. 236).

Rights as against purchaser.

22. (1903.) Where an owner of land by any artificial arrangements effects an advantage for one portion as against another, upon severance of the ownership the grantees of the two portions take them respectively charged with the easement and entitled to the benefit openly and visibly attaching at the time of the severance. *Fremont, E. & M. V. R. Co. v. Gayton*, 67 Neb. 263 (93 N. W. 163).

23. (1907.) An easement will pass by a deed or grant of conveyance, even if the word "appurtenance," or a similar expression, is not used in the instrument, if it is apparent to an ordinary observer, and naturally and necessarily belonged to the premises. *Agnew v. City of Pawnee City*, 79 Neb. 603 (113 N. W. 236).

Obstructions and encroachments.

24. (1903.) Injunction is a proper remedy to protect against an interference with the enjoyment of an easement. *Keplinger v. Woolsey*, 4 Unof. 282 (93 N. W. 1008).

25. (1903.) A party aggrieved may peacefully remove an obstruction from the enjoyment of an easement without committing an illegal act. *Keplinger v. Woolsey*, 4 Unof. 282 (93 N. W. 1008).

26. (1906.) The easement of view from every part of the public street belongs, as a valuable right, to one owning property, abutting on the street, and will be protected by

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the courts against unlawful encroachments. *Bischof v. Merchants Nat. Bank*, 75 Neb. 838 (106 N. W. 996).

27. (1907.) Injunction will lie to protect the owner of an easement in its enjoyment. *Agnew v. City of Pawnee City*, 79 Neb. 603 (113 N. W. 236).

Enforcement of grant.

28. (1896.) A court of equity will give effect to a parol grant of an easement where there has been a valid consideration, where the grant is certain in its terms, and where there has been such a performance on the part of the grantee as would, in the case of a contract for the sale of the fee, take the case out of the statute of frauds. *Gilmore v. Armstrong*, 48 Neb. 92 (66 N. W. 998).

29. (1896.) Mutual covenants imposing upon adjoining lot owners rights or restrictions will be construed as the grant of reciprocal easements which may, when the remedy at law is insufficient, be enforced and protected by a court of equity. *Barr v. Lamaster*, 48 Neb. 114 (66 N. W. 1110).

EJECTMENT.

ANALYSIS.

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CROSS-REFERENCES.

See, also, *Forcible Entry and Detainer.*

Right to forcibly eject trespasser, see *Trespass*, §§ 4-6.

Judgment in, not an eviction uder a warranty, see *Covenants*, § 31.

By joint tenant, see *Tenancy in Common*, §§ 7, 8.

Against squatters on accretion lands, see *Water and Watercourses*, § 69.

I. RIGHT OF ACTION AND DEFENSES.

Nature and scope of remedy.

1. (1887.) The remedy for the recovery of real estate by one claiming the legal title thereto against one in possession claiming an estate therein, is an action of ejectment in which the facts may be submitted to a jury; and an action to quiet title, if properly objected to, will not lie. *Snowden v. Tyler*, 21 Neb. 199 (31 N. W. 661).

2. (1889.) An action of ejectment against one holding land under an execution sale is a direct and not a collateral attack on the execution sale, and hence is a proper remedy. *Gue v. Jones*, 25 Neb. 634 (41 N. W. 555); *Noyce v. Jones*, 25 Neb. 643; *Gilbert v. Jones*, 25 Neb. 644.

3. (1907.) The essential elements of the action of ejectment are legal estate, a right of possession in the plaintiff, and unlawful detention by defendant; and the plaintiff cannot recover where the latter element is lacking. *Bridenbaugh v. Bryant*, 79 Neb. 329 (112 N. W. 571).

Form of action.

4. (1890.) Where defendant is in actual occupation of land, claiming title thereto, an action of ejectment and not a suit to quiet title, is the proper remedy. *Lejeune v. Harmon*, 29 Neb. 268 (45 N. W. 630).

5. (1892.) A plaintiff out of possession may change his petition to quiet title so as to state a cause of action in ejectment. *Homan v. Hellman*, 35 Neb. 414 (53 N. W. 369).

6. (1893.) When both parties to a suit by their pleadings claim title to the same tract of land, and each asks to have his title quieted, it is too late, after decree, for the losing party to urge for the first time that the proper remedy was by an action of ejectment. *Baumann v. Franse*, 37 Neb. 907 (56 N. W. 395).

Existence of other remedy.

7. (1901.) The grantee in a sheriff's deed executed on a confirmation of sale, in a proceeding to foreclose a tax lien, may maintain ejectment against an adverse claimant to the lands described therein; the proceeding by forcible entry and detainer being a cumulative and not an exclusive remedy for such relief. *Abbott v. Coates*, 62 Neb. 247 (86 N. W. 1058).

Property which may be subject of action.

8. (1887.) Although the remedy given by statute to landowners for injuries sustained by taking the land for railroad purposes is exclusive, yet where a railroad company without consent of the owner takes real estate as a part of its right of way without pursuing the statutory method of appraisement and condemnation, and thus making its possession rightful, it is a trespasser, and the common law remedies are available to the owner. *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb. 371 (32 N. W. 162).

9. (1887.) The constitutional guaranty that "the property of no person shall be

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taken or damaged for public use without just compensation therefor" makes it incumbent upon a railroad company, or other governmental agency, exercising the right of eminent domain, to render such compensation before the right to appropriate the property will exist; and in case of failure to agree upon the damages accruing from the taking, the railroad company must proceed to condemn under the forms of law (unless such proceedings are instituted by the landowner); and in case of failure so to do the possession of the real estate by the company for railroad or other purpose will be illegal, and ejectment may be maintained by the landowner. *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb. 371 (32 N. W. 162).

10. (1899.) The owner cannot maintain ejectment for land upon which a corporation has, with his prior assent or subsequent acquiescence, constructed and put in operation a railroad used by it in its business as a common carrier. *Chicago, B. & Q. R. Co. v. Englehart*, 57 Neb. 444 (77 N. W. 1092)

Title to support action.

11. (1876.) A plaintiff in ejectment must recover, if at all, on the strength of his own title; he cannot rely on the weakness of the title of his adversary. *Butler v. Davis* 5 Neb. 521; (1892) *Gregory v. Kenyon*, 34 Neb. 640 (52 N. W. 685); (1894) *Bigler v. Baker*, 40 Neb. 325 (58 N. W. 1026; 24 L. R. A. 255); (1896) *Omaha Real Estate & Trust Co. v. Kragscow*, 47 Neb. 592 (66 N. W. 658); (1889) *Buck v. Gage*, 27 Neb. 306 (43 N. W. 110); (1898) *Comstock v. Kerwin*, 57 Neb. 1 (77 N. W. 387); (1901) *Abbott v. Coates*, 62 Neb. 247 (86 N. W. 1058); (1905) *Smith v. Curtice*, 73 Neb. 167 (102 N. W. 241; 106 N. W. 460).

12. (1881). A plaintiff in ejectment must possess a legal estate, and be entitled to the possession of the premises sought to be recovered. *Dale v. Hunneman*, 12 Neb. 221 (10 N. W. 711).

13. (1885.) A tax certificate alone is no evidence of title to land, nor is it even when connected with proof of a demand upon the proper officer for a deed. *Ludden v. Hansen*, 17 Neb. 354 (22 N. W. 766).

14. (1894.) The plaintiff in ejectment need not prove title as against the whole world. It is sufficient if he prove a title good as against the defendant. *Carson v. Dundas*, 39 Neb. 503 (58 N. W. 141).

15. (1895.) One tenant in common cannot maintain an action of ejectment in his own name for the entire premises. *Johnson v. Hardy*, 43 Neb. 368 (61 N. W. 624; 47 Am. St. Rep. 765).

16. (1896.) A plaintiff in ejectment must recover upon the strength of his own title, but this does not mean that he is required to prove a title as against the whole world; it is sufficient if he prove title good as against the defendant. *Lantry v. Wolff*, 49 Neb. 374 (68 N. W. 494).

17. (1896.) A plaintiff in ejectment, to recover, must show a legal estate to the premises for which he sues, but the evidence of this legal estate need not be a perfect legal paper title. *Lantry v. Wolff*, 49 Neb. 374 (68 N. W. 494).

18. (1897.) Where a father has a life estate of curtesy in land, with remainder in his son, and falsely represents himself as guardian for his son and sells the premises under a license thus obtained, giving a deed purporting to convey the whole estate, and afterwards executes a quitclaim deed to his son, the son, since he claimed through the quitclam instead of as heir to the remainder, cannot on becoming of age maintain ejectment against the purchaser at the alleged guardian sale. *Wells v. Steckelberg*, 52 Neb. 597 (72 N. W. 865; 66 Am. St. Rep. 529).

19. (1906.) A bolting branch of a church organization has not such interest in the church property as will support ejectment, against the remaining body that is fulfilling the trust under which it holds the property. *Zion Evangelical Lutheran Church v. St. John Evangelical Lutheran Church*, 75 Neb. 774 (106 N. W. 1010).

20. (1907.) In an action of ejectment, when the plaintiff's testimony shows defendant in possession of the disputed lands under a claim of ownership, plaintiff must then recover on the superiority of his title, and, if he relies on a record or paper title, he must show a regular chain of title from the government, or from some grantor in possession, or from a common source from which each of the litigants claims. *Runkle v. Welty*, 78 Neb. 571 (111 N. W. 463).

21. (1907.) Where, in an action in ejectment, the plaintiff's chain of paper title does not reach back to the sovereign, or to a common source from which both parties claim, he must prove that he, or at least one of the grantors in his chain of title, had at some time been in possession of the premises before he can recover. *Runkle v. Welty*, 78 Neb. 574 (113 N. W. 160).

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——— Adverse possession.

22. (1893.) A plaintiff in ejectment, claiming title to the lands sued for by reason of ten years' adverse possession thereof, to prevail, must prove a continuous possession of said property under a claim of ownership in himself, and that such possession was actual, visible, notorious, exclusive, and adverse to the owner of the legal title. *Smith v. Hitchcock*, 38 Neb. 104 (56 N. W. 791).

23. (1901.) Actual prior possession alone is sufficient to entitle one to maintain ejectment against another who is a mere trespasser. *Robinson v. Gantt*, 1 Unof. 51 (95 N. W. 505).

24. (1901.) Evidence that shows a plaintiff in ejectment has had actual possession, under a void tax deed, for more than the statutory period, shows such prior possession as will entitle him to maintain his action against a mere trespasser. *Robinson v. Gantt*, 1 Unof. 51 (95 N. W. 506).

25. (1902.) A naked trespasser can gain no right as against one in peaceable possession, and former peaceable possession is sufficient evidence of title to maintain ejectment. *McBride v. Whitaker*, 65 Neb. 137 (90 N. W. 966).

——— Title by forfeiture.

26. (1903.) On breach of a condition in a deed that no intoxicating liquors should be kept or sold on the premises, the grantor, if living, or, if dead, his heirs, may claim a reversion of the estate and can maintain an action in ejectment to recover it. *Jetter v. Lyon*, 70 Neb. 429 (97 N. W. 596).

——— Equitable title.

27. (1872.) An action for the recovery of real property under the code can only be supported by showing a legal title in the plaintiff as contra-distinguished from an equitable title. *Morton v. Green*, 2 Neb. 441.

28. (1872.) The holder of a receiver's certificate cannot, after the entry upon which the paper was issued has been canceled, maintain an action of ejectment; for he has only an equitable title; and this notwithstanding section 411 of the code of civil procedure, making such certificate proof of title equivalent to a patent against all but the holder of an actual patent. *Morton v. Green*, 2 Neb. 441; (1893) *Headley v. Coffman*, 38 Neb. 68 (56 N. W. 701).

29. (1892.) A mortgage cannot maintain ejectment to recover possession of real estate. *Malloy v. Malloy*, 35 Neb. 224 (52 N. W. 1197).

30. (1892.) A party who holds under a contract for the purchase of real estate is not in law deemed possessed of a legal estate in the premises, and, unless authorized by statute, cannot maintain ejectment. *Malloy v. Malloy*, 35 Neb. 224 (52 N. W. 1197).

31. (1893.) Where the entry upon which a receiver's certificate was issued, has been canceled, the authority of the commissioner of the land office to cancel the entry is not material. The refusal of the government, whether rightful or wrongful, to convey the legal title to the entryman, prevents him from maintaining ejectment against one in possession under a subsequent entry. *Headley v. Coffman*, 38 Neb. 68 (56 N. W. 701).

——— Title from common source.

32. (1888.) Evidence that a plaintiff purchased from the same source as did the defendant, but some time after and for a valuable consideration, but before defendant recorded his deed, is sufficient to sustain a finding for plaintiff. *Kennard v. Dibble*, 24 Neb. 179 (38 N. W. 793).

33. (1902.) Where title is derived from a common source, plaintiff in an action of ejectment need only show title from this common source to enable him to recover on the strength of his own title. *McCarthy v. Birmingham*, 2 Unof. 724 (89 N. W. 1003).

——— Administrator.

34. (1889.) Under section 202 of chapter 23 of Compiled Statutes, an administrator of an intestate's estate may maintain an action of ejectment for the recovery and possession of real property for the necessary purposes of administration. *Dundas v. Carson*, 27 Neb. 634 (43 N. W. 399).

35. (1894.) An administrator may, during the period of administration, maintain ejectment against the grantees of his decedent's heirs. His possessory interest under chapter 23, section 202, Compiled Statutes, is sufficient to sustain such action. *Carson v. Dundas*, 39 Neb. 503 (58 N. W. 141).

——— Heir or devisee.

36. (1886.) Where real estate is devised to take effect upon the death of a party named, who has a life estate in the premises, a party claiming under the will in an action of ejectment must prove the termination of the life estate. *Kirk v. Bowling*, 20 Neb. 260 (29 N. W. 928).

37. (1898.) An heir may bring and maintain an action of ejectment relative to lands of which his ancestor died seized

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against any and all persons except the administrator of the estate and such as have a right or rights thereto derived from the administrator, and this the heir may do during the pendency of the administration proceedings and prior to final settlement or any decree of distribution. *Lewon v. Heath*, 53 Neb. 707 (74 N. W. 274).

38. (1901.) A devisee may prosecute ejectment, for the lands devised to him, during the pendency of probate proceedings. *Beer v. Plant*, 1 Unof. 372 (96 N. W. 348).

Right of plaintiff to possession.

39. (1906.) An action in ejectment, denominated by the code "an action for the recovery of real property," can be maintained only by one who has both a legal estate in and a right to the immediate possession of the demanded lands. *Zion Evangelical Lutheran Church v. St. John's Evangelical Lutheran Church*, 75 Neb. 774 (106 N. W. 1010).

Defenses.

40. (1881.) Where defendant entered into the possession of real property under a lease, remained in possession for several years, and an offer of sale was made and accepted, but no part of the consideration paid or tendered, the mere fact that he had made valuable improvements upon the premises constitutes no defense to an action for the possession. If his case is within the provisions of the occupying claimants' act, he may still apply for relief as to the value of such improvements. *Dale v. Hunneman*, 12 Neb. 221 (10 N. W. 711).

41. (1882.) Ejectment will not lie against the holder of a mortgage who purchases from an appraiser of the premises, who bought at a sum greatly below the actual value, although collusion between such parties is shown. *McKeighan v. Hopkins*, 14 Neb. 361 (15 N. W. 711).

42. (1887.) Where proceedings to condemn real estate, instituted and carried through by a railroad company, are so defective as to be void for want of jurisdiction, such proceeding will afford no defense to an action of ejectment instituted by the landowners to recover the possession of the land taken and occupied by the railroad for right of way purposes. *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb. 371 (32 N. W. 162).

43. (1895.) The defendant in an action of ejectment may interpose any defense, legal or equitable, the effect of which is to negative the plaintiff's right of possession. *Wanser v. Lucas*, 44 Neb. 759 (62 N. W. 1108).

——— Adverse possession.

44. (1888.) Where plaintiffs in ejectment claim title through their father, his death and their minority will not arrest the running of the statute. *Hardy v. Riddle*, 24 Neb. 670 (39 N. W. 841).

45. (1890.) 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. *Fitzgerald v. Brewster*, 31 Neb. 51 (47 N. W. 475).

46. (1894.) Where, in an action of ejectment, title has been adjudicated in the plaintiff, but the defendant in possession decreed to have a lien upon the land and the land ordered sold to satisfy it, the purchaser at a sale under such decree cannot, in a subsequent action of ejectment against him, tack the prior possession of the lienors to his own possession, subsequent to the sale, for the purpose of establishing a title by adverse possession against another who claims under the same source of title as the plaintiff in the action where the sale was had. *Carson v. Dundas*, 39 Neb. 503 (58 N. W. 141).

——— Equitable defenses.

47. (1872.) Fraud may be shown in an action of ejectment to avoid a deed. *Franklin v. Kelley*, 2 Neb. 79.

48. (1877.) Under the code, an equitable defense may be set up in an action of ejectment. *Stalnaker v. Morrison*, 6 Neb. 364.

49. (1881.) In an action by the holder of the title in fee for the recovery of real property, the defendant may interpose an equitable defense. But to avail him his equity must be superior to that of the plaintiff. *Blazier v. Johnson*, 11 Neb. 404 (9 N W. 543).

50. (1893.) Where the evidence shows that defendant bought a city lot from plaintiff in the belief that a street was to be eighty feet in width, and would border on one side of the lot, and was so represented by plaintiff, the grantor, when in fact the street was reduced to sixty-six feet in width, a judgment, in ejectment, for plaintiff will be set aside. *Emery v. Johnson*, 37 Neb. 53 (55 N. W. 225).

51. (1907.) An equitable defense may be interposed in an action in ejectment, but one who seeks the intervention of a court of equity must offer to do equity before he

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is entitled to equitable relief, whether he be plaintiff or defendant. *Union Stock Yards Nat. Bank v. Day*, 79 Neb. 845 (113 N. W. 530).

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——— Estoppel.

52. (1884.) Where a director and large stockholder in a railroad company knowingly permitted said company to construct its track across his land, and, without objecting or seeking to have compensation therefor, allowed it to remain for seven years, during which time bonds were issued by the company and foreclosed and the property of the company sold thereunder, he cannot maintain an action of ejectment against the purchaser. *Omaha & N. W. R. Co. v. Redick*, 16 Neb. 313 (20 N. W. 309).

53. (1893.) Where one in possession of land under an executory contract for the purchase of the same conveys to a railroad company a strip of said land for its right of way, and afterwards by *mesne* assignments of the interest of the respective holders of said executory contract, the right to a deed thereunder vests in one who takes such an assignment and a deed thereunder with full knowledge of the conveyance of said right of way and of the operation of a railroad line thereon for almost ten years, with full acquiescence of all parties concerned, it was properly adjudged by the district court that ejectment would not lie in favor of the holder of such deed against said railroad company for the possession of said right of way strip. *Stratton v. Omaha & R. V. R. Co.*, 37 Neb. 477 (55 N. W. 1058).

——— Set-off and counter-claim.

Pleading set-off or counter-claim, see *post*, §§ 72, 73.

54. (1890.) A counter-claim based on a contract of purchase, being in the nature of a cross-action, the defendant is not compelled to interpose it in an action of ejectment as a defense. If he so elect he may bring a separate action to enforce the contract, subject, however, to a liability to pay the costs in the second case. *Uppfalt v. Woermann*, 30 Neb. 189 (46 N. W. 419).

55. (1903.) In an action of ejectment an offset for board and maintenance of the plaintiff by the defendants cannot properly be introduced; it being pleaded merely as an account and not shown to have any direct connection with plaintiff's cause of action for possession of land and for rents and profits. *White v. Whitney*, 68 Neb. 739 (94 N. W. 1012).

Pendency of other action or proceeding.

56. (1902.) An action in ejectment can not be maintained during the pendency of a prior action in equity between the same parties, in which plaintiff alleges that defendant wrongfully holds possession of the same property from the plaintiff and asks to enjoin the defendant from excluding the plaintiff therefrom. *Shaughnessy v. St. Andrew's Church*, 63 Neb. 798 (89 N. W. 263).

Joinder of causes of action or proceedings.

57. (1882.) A cause of action to recover the possession of land, and for rents and profits, may be joined. *Harrall v. Gray*, 12 Neb. 543 (11 N. W. 851).

58. (1892.) An action of ejectment under our practice, may be joined with one to recover rents and profits. *Fletcher v. Brown*, 35 Neb. 660 (53 N. W. 577).

II. PARTIES AND PROCESS.

Right of administrator to maintain ejectment, see *Executors and Administrators*, § 255.

Parties plaintiff.

59. (1880.) In ejectment by a tenant in common against a mere disseizor to recover possession of undivided premises he may maintain the action in his own name, if no objection is made for defect of parties. As the recovery of possession inures to the benefit of all, a failure to plead a defect of parties plaintiff is a waiver of that objection. *Crook v. Vandevoort*, 13 Neb. 505 (14 N. W. 470).

60. (1886.) Tenants in common may join in an action for the possession of real estate held by one without title, or they may sue severally and recover according to their several interests. *Mattis v. Boggs*, 19 Neb. 698 (28 N. W. 325).

Parties defendant.

61. (1889.) In an action of ejectment to recover the possession of real estate all occupants of the premises must be made defendants, to be concluded by the judgment unless some of such occupants are so in privity with one or more co-defendants that a judgment against such co-defendant will be conclusive upon them. *Tarkington v. Link*, 27 Neb. 826 (44 N. W. 35).

62. (1892.) An action to recover the possession of land may be brought against those in possession thereof although some of the parties may be absent from the state.

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Omaha & F. L. & T. Co. v. Parker, 33 Neb. 775 (51 N. W. 139; 29 Am. St. Rep, 506).

Process.

63. (1893.) Under sections 51 and 77 of the code our statutory action of ejectment may be brought against a non-resident and service obtained by publication. *Lantry v. Parker*, 37 Neb. 353 (55 N. W. 962).

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III. PLEADING AND EVIDENCE.

Petition.

64. (1879.) In a petition to recover real property it is not necessary to use the very expressions declared by section 626 of the code of civil procedure to be sufficient in stating the cause of action, but any other language of equivalent import may be employed. *Dunn v. Remington*, 9 Neb. 82 (2 N. W. 230).

65. (1892.) In an action of ejectment to recover certain real estate which the petition described by metes and bounds, commencing at the southeast corner of the northwest quarter of the northwest quarter of a specified section, town, and range, a motion to make the petition more definite and certain, by requiring the plaintiff to set forth therein by some definite landmark or survey where said corner is situated, was *held* properly overruled. *Mills v. Traver*, 35 Neb. 292 (53 N. W. 67).

66. (1896.) In an action of ejectment under the provisions of the code of civil procedure it must be alleged in the petition that the plaintiff is entitled to the possession of the premises sought to be recovered. *George v. McCullough*, 48 Neb. 680 (67 N. W. 758).

67. (1903.) Where the petition in an ejectment suit contains a particular description, by courses and distances, of the land sought to be recovered, such description will prevail over a general statement that the land is a part and parcel of a certain lot. *Cushing v. Conness*, 4 Unof. 669 (95 N. W. 855).

Answer.

68. (1894.) In an action of ejectment an answer denying plaintiff's title, averring title in the answering defendant, and alleging that defendant's title had been divested by legal proceedings and a judicial sale, and that the purchaser had been put in possession and defendant ousted, amounts to a disclaimer of title and a denial of possession. *Carson v. Dundas*, 39 Neb. 503 (58 N. W. 141).

69. (1902.) An answer denying that plaintiff's testatrix on a date named "was the owner in fee simple and entitled to possession" of the land in controversy, and denying that she died "on or about" said date, being consistent with ownership after said date and before she died, and also with ownership before and at said date, subject to a right of possession in someone else, does not put the plaintiff upon proof of title. *Knight v. Denman*, 64 Neb. 814 (90 N. W. 863).

70. (1903.) The denial of an allegation that "Helena V. W. Knight, on and prior to the 25th day of April, 1898, was the owner in fee simple and entitled to the possession of" certain premises, in *ipsis verbis*, accompanied by a plea that prior to October 25, 1898, defendant had acquired title to the premises by adverse possession, and accompanied by a denial that the plaintiff, who was claiming as executor of Helena V. W. Knight, had title or right of possession, and accompanied by specific denials of plaintiff's alleged executorship, of the death of Helena V. W. Knight, and of plaintiff's right in the premises, does not deny the antecedent title of Helena V. W. Knight. *Knight v. Denman*, 68 Neb. 383 (94 N. W. 622).

71. (1907.) The action was ejectment, the plaintiff claiming a legal estate in, and a right to, the possession of the premises. The answer alleged facts constituting adverse possession of the premises for more than ten years prior to the commencement of the action, but contained no express denial of plaintiff's title. The case was tried without objection made in any way to the sufficiency of the answer to put in issue the plaintiff's legal title. *Held*, That, if the facts set out in the answer were not in themselves a sufficient denial of the plaintiff's title, the further fact that the case was tried on its merits, without objection made by the plaintiff, and on the theory that his legal title was put in issue by the pleadings, should now estop him from raising the question. *Dredla v. Patz*, 78 Neb. 506 (111 N. W. 136).

——— Set-off and counter-claim.

72. (1881.) If a defendant in ejectment seek affirmative relief, such as to enforce a contract which does not give him the right to the possession, but does give him the right to demand a specific execution of the contract, upon which the right to continue in possession depends, he must plead

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the facts entitling him to such relief. *Dale v. Hunneman*, 12 Neb. 221 (10 N. W. 711).

73. (1900.) A defendant, in answer to a petition in ejectment, may show, by his pleading, that he is the equitable owner of the property and entitled to affirmative relief. *Sutton v. Sutton*, 60 Neb. 400 (83 N. W. 200).

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Amendments.

74. (1886.) A petition in ejectment may be amended to be a petition to redeem, the object in both cases being to recover the land. *McKeighan v. Hopkins*, 19 Neb. 33 (26 N. W. 614).

75. (1888.) Where a judgment is rendered, in ejectment, for plaintiff, leaving a lien to defendant for any taxes he may have paid, such defendant may amend his answer so as to present such equities. *Griffey v. Kennard*, 24 Neb. 174 (38 N. W. 791).

76. (1895.) Plaintiff brought an action in ejectment, and the defendant pleaded a contract entered into by plaintiff for the sale for the premises and demanded affirmative equitable relief. The plaintiff was permitted to file an amended pleading, changing the form of the action from ejectment to that of foreclosure of the contract. *Held*, Not reversible error. *Scroggin v. Johnson*, 45 Neb. 714 (64 N. W. 236).

Evidence admissible under pleadings.

77. (1888.) In ejectment by vendee against vendor, the only defenses presented by the answer were a general denial of the allegations of the petition, and a plea of statute of limitations. On the trial defendant sought to prove that he had not been paid the consideration for which he sold the land. The testimony was excluded. *Held*, Correct as said issue was not raised, and no equities were presented by the answer. *Colvin v. Republican Valley Land Ass'n*, 23 Neb. 75 (36 N. W. 361; 8 Am. St. Rep. 114).

78. (1890.) In ejectment under the statute the defendant under a general denial may prove an equity which negatives the plaintiff's right to the possession. *Uppfalt v. Woermann*, 30 Neb. 189 (46 N. W. 419).

79. (1892.) In an action of ejectment, under a general denial, the defendant may show that a deed in plaintiff's chain of title was procured by fraud and undue means. *Staley v. Housel*, 35 Neb. 160 (52 N. W. 888).

80. (1897.) In an action of ejectment, under an answer denying plaintiff's title and right of possession to the premises, the defendant may show title in himself by adverse possession. *Fink v. Dawson*, 52 Neb. 647 (72 N. W. 1037).

81. (1897.) Evidence to prove adverse possession is admissible under a general denial of plaintiff's title. *Oldig v. Fisk*, 53 Neb. 156 (73 N. W. 661); (1900) *Murray v. Romine*, 60 Neb. 94 (82 N. W. 318); (1904) *Link v. Campbell*, 72 Neb. 310 (104 N. W. 939)

82. (1901.) A defendant in the actual occupancy of land may show under a general denial that he is the equitable owner. *Pinkham v. Pinkham*, 61 Neb. 336 (85 N. W. 285).

Burden of proof.

83. (1887.) In an action of ejectment, where defendant relies upon the statute of limitations, the burden is on him to show that his possession has been continuous, adverse, hostile and exclusive, during the ten years last preceding the commencement of the action. *Weeping Water v. Reed*, 21 Neb. 261 (31 N. W. 797).

84. (1902.) In an action of ejectment, where the defendant pleads adverse possession, and the plaintiff in reply pleads the insanity of his ancestor to defeat the statute, plaintiff must show by a preponderance of the evidence that his ancestor was insane with reference to the subject matter of the controversy, and that, owing to the insanity, his ancestor allowed others to assert title to his property, taking no precaution to protect the same, and that such insanity was continuous from the time defendant went into possession until a time less than ten years prior to the commencement of the action. *Clarke v. Irwin*, 63 Neb. 539 (88 N. W. 783).

85. (1901.) In an action of ejectment, where plaintiff claims under a sheriff's deed resulting from a mortgage foreclosure, to which defendant was not a party, and defendant in possession claims under a prior unrecorded deed made by the mortgagor, the burden is upon the plaintiff to show that he took his mortgage for value and without notice, actual or constructive, of defendant's title; and an instruction placing the burden on defendant to show want of *bona fides* and of notice on the part of the plaintiff, is prejudicial error. *Smith v. White*, 62 Neb. 56 (86 N. W. 930).

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Admissibility of evidence.

86. (1888.) In action of ejectment, where the defense consisted of proceedings under the statute for the condemnation of the property to the use of a railroad, the fact of said real estate being necessary to said railroad, as affecting its power to condemn, is ancillary to that of actual legal condemnation, and that the latter not being proved, evidence that said property was necessary to said railroad was properly excluded. *Chicago, B. & Q. R. Co. v. Hull*, 24 Neb. 740 (40 N. W. 280).

87. (1889.) Where a defendant in ejectment prayed as alternative relief that he be subrogated to the right of his grantor, who held the land under a tax title, to a return of the money paid by him for such tax title, and all subsequent taxes paid by him in case of failure of his title, the tax title or deed and receipts for subsequent taxes paid are admissible to establish the amount of such recovery. *Wise v. Newatney*, 26 Neb. 88 (42 N. W. 339).

88. (1906.) In an action of ejectment rejection of certain questions put to plaintiff calling forth statements as to his possession, when such question is indefinite as to time, is not error. *Flanagan v. Fabens*, 77 Neb. 705 (110 N. W. 655).

89. (1907.) In an action of ejection as to part of a military reservation a plat made by a witness at the instance of an attorney is properly rejected from the evidence. *Oldfather v. Ericsson*, 79 Neb. 1 (112 N. W. 356).

——— Title and right to possession.

Copy of record of deed, as evidence of title, see *Evidence*, §§ 168-170.

90. (1885.) In an action of ejectment, a certificate of sale of the land in question for taxes was offered in evidence in connection with an offer of proof that a tax deed on such certificate had been demanded of the county treasurer and refused, was properly excluded. *Ludden v. Hansen*, 17 Neb. 354 (22 N. W. 776).

91. (1892.) Permitting the introduction in evidence of records of deeds duly recorded, instead of requiring the originals, in ejectment trials for the purpose of proving title, rests largely in the discretion of the trial court. *Rupert v. Penner*, 35 Neb. 587 (53 N. W. 598; 17 L. R. A. 824).

92. (1894.) When both plaintiff and defendant claim title from a common source evidence of the derivation of title antecedent to that common source is immaterial. *Carson v. Dundas*, 39 Neb. 503 (58 N. W. 141).

93. (1894.) In an ejectment suit, where the defendant claims title by virtue of a guardian's sale and conveyance, the fact of the approval of the bond by the judge of the court granting the guardian a license to sell may be proved by the best evidence attainable. *Myers v. McGavock*, 39 Neb. 843 (58 N. W. 522; 42 Am. St. Rep. 726).

94. (1895.) In an action of ejectment admissions of defendant's grantor, that he knew a certain fence was not on the line, is not admissible against defendant. *Consolidated Tank Line Co. v. Pien*, 44 Neb. 887 (62 N. W. 1112).

95. (1896.) A deed executed and acknowledged in Kansas, conveying land in Nebraska, is admissible in evidence in ejectment though not witnessed. *Schields v. Horbach*, 49 Neb. 262 (68 N. W. 524).

Weight and sufficiency of evidence.

Sufficiency of evidence as to value of improvements, see *post*, § 168.

——— Identity and description of property.

96. (1888.) In order that a plaintiff may recover real estate in an action of ejectment, his description of the land in dispute must be such as would enable a competent surveyor to locate it by referring to deeds, writings, or known objects by which the exact land can be identified. *Lane v. Abbott*, 23 Neb. 489 (37 N. W. 82).

97. (1888.) Plaintiff claimed the possession of certain lots and blocks in Lane's addition to Pleasant Hill, describing them by their numbers. The addition was surveyed and platted in 1871, after which the proprietor sold the lots described in plaintiff's petition, and which had, by *mesne* conveyances, been transferred to plaintiff. The plat is described by the record as being south and west of the original town of Pleasant Hill, "on south-east ¼ of section 9, town seven (7), range three (3) east, Saline county, Nebraska." No other description, location, or monuments are given. There is no plat of the original town of Pleasant Hill. The certificate of the surveyor described it as "part N. E. ¼ S. E. ¼, Sec. 9, T. 7, R. 3 east. * * W. C. 50 links, S. N. E. corner of S. E. ¼. walnut stake 2 inches square, one foot long, var. 10 degrees, 30 minutes east." No other de-

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scription or monuments are given. In 1877 the proprietor sold and conveyed to defendant the land on which the survey had been made, describing it by the government survey, and not as a platted town. At that time, and prior thereto, the land was used as a farm, and has been so used by defendant since his purchase, until the commencement of this action. It was *held* that, as the lots were incapable of identification, plaintiff could not recover. *Lane v. Abbott*, 23 Neb. 489 (37 N. W. 82).

98. (1893.) In an action of ejectment, the question involved being the location of a corner as located by the government survey, surveys from known government corners both north and south and east and west of the corner in dispute, by which it was located on a line with other corners on both of said lines, and each landowner would thereby be given the full amount of land called for by his patent, would be preferred to a survey which was not begun at a known government corner and lacked many of the elements of certainty, and which gave one of the landowers much more than he was entitled to under his patent, and the other less. *Woods v. West*, 37 Neb. 400 (56 N. W. 30).

99. (1896.) In an action of ejectment the evidence as to the boundary line, though conflicting, will sustain a judgment for defendant. *Blomgren v. Holmquest*, 49 Neb. 49 (68 N. W. 382).

100. (1903.) Evidence of ownership and right to the possession of the south twenty feet of lot 155 in the village of Grafton will not sustain a judgment for the possession of a tract of land described therein as commencing eighteen feet north of the southeast corner of lot 155, running thence east forty feet, thence north two feet, thence west forty feet, thence south on the west line of said lot two feet to the place of beginning, although there is a general statement therein that the tract is a part and parcel of said lot. *Cushing v. Conness*, 4 Unof. 669 (95 N. W. 855).

100*a*. (1908.) It is a general rule that only a preponderance of evidence is required to establish an issue in civil actions; and boundary disputes furnish no exception to this rule. *Bock v. Porterfield*, 80 Neb. 523 (114 N. W. 597).

——— **Title and right to possession.**

Sufficiency of evidence to show title by prescription, see *Adverse Possession*, §§ 156-175.

101. (1882.) Where the evidence shows a tax deed from the county treasurer and a claim of conveyance to the plaintiff and actual possession for a term of years, except for a triangular strip, in possession of defendant, and no evidence of defendant's title, the plaintiff is entitled to a judgment in ejectment. *Simmons v. Minick*, 12 Neb. 536 (11 N. W. 849).

102. (1882.) In a real action brought by the heirs at law of a deceased person against one holding simply under an invalid tax deed, the seizin of the deceased ancestor is sufficiently proved to warrant a recovery, by showing his actual possession of the premises at the time of his death. *Spitznagle v. Vanhessch*, 13 Neb. 338 (14 N. W. 417).

103. (1883.) In ejectment, where both parties claim under the same third person, it is sufficient *prima facie* to prove the derivation of title from him, without proving his title. *Barton v. Erickson*, 14 Neb. 164 (15 N. W. 206).

104. (1886.) Where in an action for the recovery of real property the answer of the defendant put in issue the title of the plaintiff, but alleged no equitable defense, a finding and judgment for the plaintiff upheld, on evidence showing title in plaintiff, nothwithstanding there was evidence which, under proper allegations, would have tended to establish an equitable defense. *Uppfalt v. Nelson*, 18 Neb. 533 (26 N. W. 362). [Overruled in part. *Staley v. Housel*, 38 Neb. 160.]

105. (1886.) Where the defendant relies on a deed of a sheriff on judicial sale, and produces evidence to show such a sale but a failure to deliver the deed, but it is shown, also, that the deed had been executed by the sheriff several years after and the purchase price paid, a finding for such defendant is sustained. *Kingman v. Appleget*, 20 Neb. 605 (31 N. W. 235).

106. (1887.) In case stated *held* that plaintiff had not shown title to land in question, and judgment affirmed. *Methodist Protestant Church v. Johnson*, 22 Neb. 163 (34 N. W. 221).

107. (1889.) In an ejectment action, the evidence failing to support the defendant's title, a finding for the plaintiff is sustained. *Dawson v. Dawson*, 26 Neb. 716 (42 N. W. 744).

108. (1891.) In an action of ejectment, where a deed was omitted in the chain of the defendant's title, but there was proof

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tending to show that such a deed had, in fact, been executed but not recorded, *held*, that a judgment in favor of the defendant conformed to the testimony and is affirmed. *Billingsley v. Ricketts*, 32 Neb. 438 (49 N. W. 443).

109. (1892.) Although the evidence, in ejectment, is conflicting as to possession of the land in question, by reason of plowing and setting out trees thereon, a finding that possession by the defendant had not been exclusive for the statutory period is sustained. *Mills v. Traver*, 35 Neb. 292 (53 N. W. 67).

110. (1901.) Evidence examined, and *held* conclusively to establish plaintiff's right to a verdict. *Nelson v. City of Omaha*, 62 Neb. 823 (88 N. W. 154).

111. (1901.) When, in an action for the trial of the title to the land, the deeds, or authenticated copies of them, constituting parts of the chain of title of one of the parties, are not contained in the record, an attempt to supply the deficiency by an "abstract of title" will be ineffectual unless the recitals in the latter document are sufficiently full and complete to enable the court to make out, without guess or inference, the substantial nature and purport of the instrument supposed to be abstracted from. *Cullen v. Casey*, 1 Unof. 344 (95 N. W. 605).

112. (1904.) In ejectment, where the only defense is the statute of limitations without showing of any claim of right, and the evidence tends to show that defendant went into possession as tenant of the true owner to whose rights the plaintiff had succeeded, a verdict for the plaintiff will be sustained. *Nelson v. Brisbin*, 5 Unof. 496 (98 N. W. 1057).

113. (1905.) A plaintiff in ejectment who shows title only through a sheriff's deed, but fails to show any title of the execution debtor, cannot recover. *Smith v. Curtice*, 73 Neb. 167 (102 N. W. 241; 106 N. W. 460).

114. (1907.) On the trial of an action in ejectment, the usual duplicate receipt of a receiver of a United States land office, in full force and unimpeached, is sufficient evidence of title, except as against one having a patent to the same land or some person or persons claiming under him. *Oldfather v. Ericsson*, 79 Neb. 1 (112 N. W. 356).

115. (1907.) In an action of ejectment by a grantee from the original owner against one claiming under a contract of purchase from the owner's son, evidence *held* to sustain a judgment for plaintiff. *Union Stock Yards Nat. Bank v. Day*, 79 Neb. 845 (113 N. W. 530).

IV. TRIAL, JUDGMENT AND REVIEW.

Right to jury trial.

116. (1900.) Where the answer to a petition in ejectment presents an equitable counterclaim which is traversed by a reply, the issues of fact thus arising are triable to the court without a jury. *Jewett v. Black*, 60 Neb. 173 (82 N. W. 375).

117. (1902.) A waiver of a jury at the first trial in ejectment will not have the effect of precluding either party from demanding a jury at the second trial, after the judgment rendered at the first trial has been set aside under section 630, code of civil procedure. *Schumacher v. Crane-Churchill Co.*, 66 Neb. 440 (92 N. W. 609).

118. (1902.) Where an action in ejectment has been transferred to the equity docket, going to trial upon all the issues, without demanding a jury as to any of them, is a waiver of a jury as to that trial. *Schumacher v. Crane-Churchill Co.*, 66 Neb. 440 (92 N. W. 609).

119. (1902.) An order transferring an action in ejectment to the equity docket because of equitable defenses raised in an answer, will not preclude the moving party from demanding that the purely legal issues be tried by jury, if his request for a jury trial is timely and is insisted upon. *Schumacher v. Crane-Churchill Co.*, 66 Neb. 440 (92 N. W. 609).

Appointment of receiver.

120. (1901.) 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*, 62 Neb. 56 (86 N. W. 930).

Instructions.

121. (1886.) In an action of ejectment an instruction wholly disregarding the manner in which the deed in question was obtained, and where the court has already instructed on that point, is properly refused. *Kingman v. Appelget*, 20 Neb. 605 (31 N. W. 235).

122. (1889.) In an ejectment suit an instruction that deeds and the records of the county are sufficient evidence to vest

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the title in the plaintiff, unless there has been an actual adverse possession by the defendant for at least ten years immediately preceding the commencement of this action is proper. *Obernalte v. Edgar*, 28 Neb. 70 (44 N. W. 82).

123. (1892.) In ejectment, where it is claimed a deed to the premises was procured by fraud and duress, an instruction that if the jury find the deed was procured by fraud but that a valuable consideration was paid, and the grantee's assignees took without notice, the verdict should be for him, was properly refused. *Staley v. Housel*, 35 Neb. 160 (52 N. W. 888).

124. (1894.) In an action of ejectment where the plaintiff attempts to show that an alleged conveyance of the premises from plaintiff's grantors to defendant was in fact executed by such grantors by mistake and fraud, they believing they were signing other papers, it is reversible error to refuse to charge the jury that if they find defendant's deed of conveyance to have been obtained by fraud they should find for plaintiff. *Waldrof v. Haggins*, 39 Neb. 735 (58 N. W. 278).

125. (1902.) Instructions, in an action of ejectment in which, to a defense of adverse possession, plaintiff pleads insanity to stop the running of the statutes, *held* not to present the material issue to the jury. *Clarke v. Irwin*, 63 Neb. 539 (88 N. W. 783).

126. (1902.) Where in an action of ejectment defendants rely on a paper title, and also, as an alternative defense, upon adverse possession, an instruction which defines the latter, though it ignores the former defense, is not prejudicial to plaintiff. *Baty v. Elrod*, 66 Neb. 735 (92 N. W. 1032).

127. (1903.) The fact that the jury were told that an "equitable right" would be no defense against a "legal right" of the plaintiff, if it was found that she had one, is not prejudicial error where no equitable right to the premises is either pleaded or offered to be proved. *White v. Whitney*, 68 Neb. 739 (94 N. W. 1012).

128. (1903.) An instruction which tells the jury that they shall allow "rental value" of the premises as "damages for withholding possession" is not prejudicial error, although the petition of plaintiff makes no claim for any damage aside from rents, issues and profits. *White v. Whitney*, 68 Neb. 739 (94 N. W. 1012).

129. (1904.) In an ejectment case, title by adverse possession may be proved under a general denial, and, when such title is one of the defenses relied upon by the defendant, he is entitled to have the jury instructed with reference to the same, if any competent evidence has been introduced to support that issue, even though the evidence may be contradicted or may be considered insufficient by the jury. *Link v. Campbell*, 72 Neb. 310 (104 N. W. 939).

130. (1904.) In an ejectment case, where the defendant's answer is a general denial, it is not error to instruct the jury that the plaintiff must recover, if at all, upon the strength of his own title to the property, and that he cannot rely upon the weakness of the defendant's title. *Link v. Campbell*, 72 Neb. 310 (104 N. W. 939).

131. (1907.) In ejectment as to a military reservation an instruction that persons not surveyors who testify as to existence of government corners are entitled to consideration, is not erroneous. *Oldfather v. Ericsson*, 79 Neb. 1 (112 N. W. 356).

Right to open and close.

132. (1903.) In an action of ejectment where the answer is a general denial, an offer by defendant to admit that plaintiff has the record title, basing his claim to judgment on a title by adverse possession, does not entitle defendant to open and close. *Zweibel v. Myers*, 69 Neb. 294 (95 N. W. 597).

Conduct of jury.

133. (1894.) In ejectment, where the genuineness of a signature to a deed is in issue, it is error for the jury to take and keep in their room during the consideration of the case a note signed by the alleged forger, the note not having been introduced in evidence. *La Bonty v. Lundgren*, 41 Neb. 312 (59 N. W. 904).

Verdict.

134. (1897.) In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover for withholding the property. *Orr v. Broad*, 52 Neb. 490 (73 N. W. 850).

135. (1899.) A verdict for the plaintiff in ejectment, finding that he was the owner

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erty described in the petition," is sufficient as to description when the property is clearly and accurately stated in such pleading. *Cervenna v. Thurston*, 59 Neb. 343 (80 N. W. 1048).

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Statutory new trial.

136. (1882.) A party is entitled as a matter of right to two trials in an action of ejectment. *Gregory v. City of Lincoln*, 13 Neb. 352 (14 N. W. 423).

137. (1883.) Demand for new trial in ejectment must be made at same term at which first trial was had. *Shawang v. Love*, 15 Neb. 142 (17 N. W. 264).

138. (1898.) Where defendant in ejectment refuses to plead further, but permits judgment to go against him on demurrer to plaintiff's reply in an action of ejectment, he is not as of course entitled to have the judgment set aside and a new trial ordered under section 630 of the code. *Whiteman v. Perkins*, 56 Neb. 181 (76 N. W. 547).

New trial for cause.

139. (1888.) Where the judgment in ejectment is rendered for plaintiff, a new trial will be granted defendant for alleged newly discovered evidence that will tend to show plaintiff grantor had no title to the premises at the time of the grant, and that plaintiff had knowledge that his grantor claimed no interest in the land. *Smith v. Graves*, 24 Neb. 545 (39 N. W. 594).

Judgment.

140. (1886.) In ejectment by a tenant in common against a person in possession without right, the plaintiff can recover only to the extent of his title. *Mattis v. Boggs*, 19 Neb. 698 (28 N. W. 325).

141. (1892.) Where in an action of ejectment it appears that the conveyance by which plaintiff holds title was given as security for advancements of money which the grantor had agreed to repay, the defendant in possession, as heir of such grantor, will be required to pay the sum due plaintiff, and a decree of foreclosure and sale for the amount due should be entered in plaintiff's favor. *Malloy v. Malloy*, 35 Neb. 224 (52 N. W. 1197).

142. (1895.) In ejectment by a tenant in common against a person in possession without right, the plaintiff can recover only to the extent of his title. *Mattis v. Boggs*, 19 Neb., 698, and *Kirk v. Bowling*, 20 Neb. 260, reaffirmed. *Johnson v. Hardy*, 43 Neb. 368 (61 N. W. 624; 47 Am. St. Rep. 765).

——— Conclusiveness and effect.

143. (1884.) After the adjournment of the term, a judgment on the first trial in an action in the nature of ejectment is final. *Bryant v. Estabrook*, 16 Neb. 217 (20 N. W. 245).

144. (1902.) A judgment in ejectment is binding upon all parties to the action. *Van Etten v. Test*, 64 Neb. 407 (89 N. W. 1052).

145. (1903.) A judgment in an action in ejectment, in favor of one holding the paper title to real estate, against one claiming by adverse possession, is not binding on the wife of the latter, if not a party thereto, in a subsequent action brought by her to protect her homestead rights in such premises, where it appears that the adverse possession had ripened into a title in fee before the action against her husband was brought. *Silk v. McDonald*, 4 Unof. 34 (93 N. W. 212).

146. (1903.) With the exception that parties are entitled to two trials in ejectment suits, the judgments in such actions are as conclusive as in any other. *Miles v. Ballantine*, 4 Unof. 171 (93 N. W. 708).

Restraining enforcement of judgment.

147. (1889.) A recovered judgment in ejectment against B for the possession of certain real estate and thereupon caused a writ of restitution to be issued against B and C; C thereupon filed a petition in the case, in which he alleged in substance that he was in possession of the premises adversely to the plaintiff when the action was brought but was not made a party defendant, and that he was still in possession, and asking the court to restrain the plaintiff from ousting him from the estate. *Held*, That the proof sustained the finding of the court below in favor of the injunction, and that C could not be divested of his possession without a trial, and judgment to that effect. *Tarkington v. Link*, 27 Neb. 826 (44 N. W. 35).

Appeal and error.

148. (1881.) Where a party in an action of ejectment elects to institute proceedings under the "act for relief of occupying claimants" he is estopped from seeking relief by proceedings in error against the judgment in the former action. *Buchanan v. Dorsey*, 11 Neb. 373 (9 N. W. 546).

149. (1881.) In an action of ejectment where the plaintiff in his reply pleaded a tender of the amount paid by the defendant

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for taxes due on the premises, but the court on the trial excluded proof of the amount, *held*, that the judgment in ejectment being right, the supreme court will order a reference to ascertain the amount due for taxes, and require the payment of the same as a condition of affirming the judgment. *Howard v. Lamaster*, 11 Neb. 582 (10 N. W. 497).

150. (1882.) Where a party in ejectment elects to proceed under the "act for the relief of occupying claimants," he is estopped from seeking relief by proceedings in error against the judgment in the former or principal action. *Strong v. Irwin*, 12 Neb. 446 (11 N. W. 877).

151. (1895.) Where the evidence shows that plaintiff has no interest in the land, questions of law suggested by him on error from a judgment in favor of defendant will not be examined. *Wildman v. Shambaugh*, 43 Neb. 371 (61 N. W. 578).

152. (1903.) Error in sustaining a demurer to an allegation of taxes paid, made by way of cross-demand, is without prejudice where plaintiff subsequently remits from the amount of her recovery the full alleged amount of such taxes. *White v. Whitney*, 68 Neb. 739 (94 N. W. 1012).

153. (1903.) Error in sustaining a demurrer to a counter-claim for improvements in an action for rents and profits as well as for possession of land, is without prejudice where it appears from the record that all such improvements were permitted to be shown to the jury under the name of necessary repairs, and the jury were instructed to allow a reduction of damages in the amount of all necessary repairs. *White v. Whitney*, 68 Neb. 739 (94 N. W. 1012).

V. DAMAGES, MESNE PROFITS, IMPROVEMENTS AND TAXES.

Rents and profits.

154. (1888.) In an action in ejertment, where the evidence shows that the defendant was not in the actual possession of the real estate in dispute, receiving no profits therefrom, and that it was uninclosed and unimproved prairie land, no damages can be awarded for use and occupation. *Griffey v. Kennard*, 24 Neb. 174 (38 N. W. 791).

155. (1892.) Damages for rents and profits may be recovered in an action of ejectcent for the statutory period, prior to service of summons. The special provision of the occupying claimants' act, chapter 63, Compiled Statutes, applies only to rents and profits subsequent to service of summons in ejectment. *Fletcher v. Brown*, 35 Neb. 660 (53 N. W. 577).

Rights as to improvements and taxes in general.

156. (1882.) When the occupying claimant is a vendee of the land under a contract, providing for a forfeiture of all his improvements in case of non-performance on his part, he is not, in case of eviction at the suit of the vendor, entitled to the benefits of the act for the relief of occupying claimants. *Vance v. Burlington & M. R. R. Co.*, 12 Neb. 285 (11 N. W. 334).

157. (1889.) In an action of ejectment, where there is proof tending to show that the defendants were in possession under an execution sale made several years before the bringing of the suit, and that they had made certain improvements on the real estate, paid taxes thereon, etc., *held*, that before a writ of restitution will be issued the plaintiffs below must pay the value of such improvements and the amount paid for taxes, with interest thereon. *Dvorak v. More*, 25 Neb. 735 (41 N. W. 777).

158. (1889.) Occupying claimants of land who have made lasting and valuable improvements thereon, but have afterwards been evicted, are entitled to compensation for such improvements in all cases where they, or the persons under whom they claim title, derived the same from lawful public authority. *Page v. Davis*, 26 Neb 670 (42 N. W. 875).

159. (1892.) Where one goes into possession of land under a title bond, whereby the grantor agreed to convey by a good and sufficient deed upon the payment of the last installment of the purchase money ten years later, and before such payment a third party brings ejectment against him to recover possession of the premises, the purchaser cannot recover from the plaintiff taxes paid by his own grantor. *Fletcher v. Brown*, 35 Neb. 660 (53 N. W. 577).

160. (1892.) One who goes into possession of property under a title bond, with an agreement by the maker who holds under a void tax certificate, must show affirmatively that improvements made by him were so done in good faith, relying upon such title bond to acquire a title to the premises, before he can recover, upon eviction for such improvements as an occupying claimant. *Carter v. Brown*, 35 Neb. 670 (53 N. W. 580).

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161. (1892.) To entitle defendant on eviction to recover under the occupying claimants' act for improvements and taxes paid while in possession, it must appear that the improvements were made and money expended while he was in good faith claiming title derived from some public office, or from the state or the United States. *Carter v. Brown*, 35 Neb. 670 (53 N. W. 580).

162. (1895.) The statute of limitations relating to the foreclosure of tax liens is no bar to the recovery of taxes under the provisions of the occupying claimants' act. *Lothrop v. Michaelson*, 44 Neb. 633 (63 N. W. 28).

Statutory provisions.

163. (1889.) The words, "such tax titles," and "such tax deeds," in the proviso of section 11, chapter 63, Compiled Statutes 1887, do not relate to words of like import previously occurring in the chapter; and the word "such" being restrictive in its meaning, was evidently designed to apply to a particular class of tax deeds not described, and not to tax deeds generally. A person claiming title under a tax deed and making lasting and valuable improvements on the land, paying taxes, etc., is entitled to compensation for the same. *Page v. Davis*, 26 Neb. 670 (42 N. W. 875).

164. (1899.) Defendant cannot avail himself of the provisions of the occupying claimants' act (Comp. Stats., ch. 63) where all his interests in the improvements have been divested by judicial sale prior to the request for a jury to assess the value of the improvements. *La Bonty v. Lundgren*, 58 Neb. 648 (79 N. W. 551).

Measure of compensation.

165. (1892.) Where an occupant of real estate is allowed for valuable and lasting improvements, the measure of his recovery is the amount such improvements add to the value of the premises. Evidence of cost of improvements, irrespective of their effect upon the value of the land, is inadmissible. *Fletcher v. Brown*, 35 Neb. 660 (53 N. W. 577).

166. (1895.) Where an occupying claimant is allowed for valuable and lasting improvements made while in possession, the measure of his recovery is the amount the real estate increased in value by reason of such improvements, and not the cost of making the same. *Lothrop v. Michaelson*, 44 Neb. 633 (63 N. W. 28); (1904) *Gombert v. Lyon*, 72 Neb. 319 (100 N. W. 414).

167. (1899.) In proceedings under the occupying claimants' act the successful claimant may recover rents and profits subsequent to the commencement of ejectment suit, but not those which accrued prior to that time. *La Bonty v. Lundgren*, 58 Neb. 648 (79 N. W. 551).

Evidence as to value.

168. (1892.) In an action of ejectment a finding of the value of improvements erected by the occupying claimant is sustained by the evidence. *Fletcher v. Brown*, 35 Neb. 660 (53 N. W. 577).

Proceedings for allowance.

169. (1881.) To proceed regularly under the "act for the relief of occupying claimants," no step should be taken until final judgment in the action against such claimant has been entered. *Buchanan v. Dorsey*, 11 Neb. 373 (9 N. W. 546).

170. (1882.) The fourth section of the occupying claimants' act does not repeal the law authorizing a recovery for rents and profits in an action for the recovery of real property. If, in the ejectment trial, a recovery is had for rents and profits up to the time of trial, the jury selected to appraise the improvements should not include in its estimate rents and profits for the period after the action commenced. *Harrall v. Gray*, 12 Neb. 543 (11 N. W. 851).

171. (1885.) Whether in case of the assessment of the value of improvements under section 5 of the act of 1883, the remedy is exclusive and the failure to object to the verdict of the appraisers within the time fixed by said section is a waiver of the right, *quære*. *Burlington & M. R. R. Co. v. Dobson*, 17 Neb. 450 (23 N. W. 353).

172. (1885.) Where one in possession has been ejected from real estate and, after affirmation of the judgment on appeal a request for jury to assess the value of lasting improvements filed in the district court at the first term thereafter is in time, and the district court should order such jury impaneled. *Burlington & M. R. R. Co. v. Dobson*, 17 Neb. 455 (23 N. W. 511).

173. (1889.) While the intention of the law is that compensation shall be made for improvements before a writ of restitution will be issued, yet where the application was properly filed, and an amended application made within six months afterwards, it will not debar a party from recovering. *Page v. Davis*, 26 Neb. 670 (42 N. W. 875).

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174. (1895.) The appraisers appointed under the occupying claimant law are required to make their appraisement from a view of the premises. They have no authority to take the testimony of witnesses. *Lothrop v. Michaelson*, 44 Neb. 633 (63 N. W. 28).

175. (1895.) The court may permit objections against appraisers' report to be filed out of time, but it is not reversible error to refuse so to do, where no abuse of discretion is shown. *Lothrop v. Michaelson*, 44 Neb. 633 (63 N. W. 28).

176. (1895.) Objections to appraisers' report made under the occupying claimants' act (Comp Stats., ch. 63), should be filed on on before the second day of the term of the district court next after the filing of the appraisement, where such report is made and filed in vacation. *Lothrop v. Michaelson*, 44 Neb. 633 (63 N. W. 28).

ELECTION OF REMEDIES.

ANALYSIS.

Right of election, §§ 1, 2.
Compelling election, § 3.
Inconsistent remedies, §§ 4-9.
Finality of election.
——— In general, §§ 10-24.
——— Mistake or ignorance of fact, §§ 25-27.

CROSS-REFERENCES.

Election of remedies in particular actions, see specific topics.

Election between modes of review, see *Appeal and Error*, §§ 40-51.

Estoppel of creditor to attack assignments for creditors by participating in benefits, see *Assignments for Benefit of Creditors*, § 136.

Between several counts in indictment for embezzlement, see *Embezzlement*, § 45.

Election of defense by executor, see *Executors and Administrators*, § 267.

Election of counts in information or indictment, see *Indictment and Information*, §§ 93-107.

Election between inconsistent counts, see *Pleading*, §§ 472-475.

Election of remedies on contract of sale, see *Sales*, §§ 305, 306; 451, 452.

Replevin or conversion, see *Trover and Conversion*, §§ 36-38.

Election of devisee to take under will, see *Wills*, §§ 242-245.

Right of election.

1. (1875.) A party who has been damaged by the location of a railroad through his premises, where the damages awarded have not been deposited with the probate judge, as provided by section 97, General Statutes, 191, may bring his action for the amount of the award, to enjoin the operating of the road across his premises until payment is made, or he may sue in trespass for the unauthorized entry thereon. *Omaha & N. W. R. Co. v. Menk*, 4 Neb. 21.

2. (1890.) Where a party hires a boar under a contract to return it within a short time, but fails to do so and sells the animal, the owner may elect to bring his action either in tort or on the contract. *Reeves v. Nye*, 28 Neb. 571 (44 N. W. 736).

Compelling election.

3. (1892.) In case stated there was not sufficient cause shown to justify the court to require a cross-appellant to elect as to the form of his action. *Shickle v. Kent*, 34 Neb. 568 (52 N. W. 286).

Inconsistent remedies.

4. (1899.) The doctrine of election between inconsistent remedies has no application to a case where a party declares upon an express contract and demands whatever relief he may be entitled to thereunder. *Henry & Coatsworth Co. v. Halter*, 58 Neb. 685 (79 N. W. 616).

5. (1900.) Before a case can arise for the application of the principle of election of remedies, there must be two co-existing remedies inconsistent with each other. *State v. Bank of Commerce of Grand Island*, 61 Neb. 22 (84 N. W. 406).

6. (1901.) The principle of election of remedies applies only where there are two or more co-existing remedies so inconsistent that a party cannot choose one without re-

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nouncing all others. *City of Omaha v. Redick*, 61 Neb. 163 (85 N. W. 46).

7. (1904.) An action for the conversion of chattels and one for the possession thereof are not inconsistent remedies; and one who has sued for conversion may dismiss such action and recover in replevin, if his right is otherwise good. *Moss v. Marks*, 70 Neb. 701 (97 N. W. 1031).

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8. (1906.) The doctrine of election of remedies applies when a party who actually has at hand two inconsistent remedies, with full knowledge of such fact, proceeds to enforce one of these remedies. *Turner v. Grimes*, 75 Neb. 412 (106 N. W. 465).

9. (1906.) The doctrine of election of remedies cannot be successfully invoked against a party, unless it appear that he has pursued one of two co-existing remedies, so inconsistent that the choice of one necessarily amounts to an abandonment of the other. *Schlitz Brewing Co. v. Nielsen*, 77 Neb. 868 (110 N. W. 746).

Finality of election.

——In general.

10. (1895.) A grantee who received a conveyance and agreed to pay a debt of the grantor cannot defend a suit by the latter's creditor on the ground that plaintiff previously sued the grantor for the debt and attached the property conveyed as belonging to him. *Davis v. National Bank of Commerce*, 45 Neb. 589 (63 N. W. 852).

11. (1897.) Where an owner whose property has been condemned and taken for street purposes sues for the value of the property he thereby elects to pursue that remedy and is estopped to call in question the title of the city to the street. *Hawver v. City of Omaha*, 52 Neb. 734 (73 N. W. 217).

12. (1900.) In a suit against the auditor and the sureties on his official bond the state recovered a judgment for a sum which was inclusive of the fees paid to him by insurance companies which should have been paid directly to the state treasurer instead, the subject of the present litigation. In an error proceeding to the supreme court on behalf of the sureties the judgment was reversed, and it was decided that they were not liable; that the reception of the fees by Moore was not an official act, and, if it be conceded (it is not decided) he became a bailee or trustee of the money for the company, the suit by the state against him cannot be treated as an election to consider him as the debtor and to seek a recovery against him to the exclusion of any remedy against the company, the one primarily liable. *State v. Home Ins. Co.*, 59 Neb. 524 (81 N. W. 443).

13. (1901.) If the law affords but a single remedy, a party is not precluded from resorting thereto merely because he sought to avail himself of another remedy to which he was not entitled. *State v. Bank of Commerce of Grand Island*, 61 Neb. 22 (84 N. W. 406); *City of Omaha v. Redick*, 61 Neb. 163 (85 N. W. 46).

14. (1901.) 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*, 62 Neb. 287 (87 N. W. 21).

15. (1901.) One who is entitled to a choice of remedies, and takes such action as in law amounts to an election, is by such election precluded from pursuing the other remedy, but a mistaken and unsuccessful attempt to do so will not annul the former election nor bar the right to pursue the remedy first selected. *Chicago, B. & Q. R. Co. v. Bigley*, 1 Unof. 225 (95 N. W. 344); (1903) *Chicago, B. & Q. R. Co. v. Olsen*, 70 Neb. 559 (97 N. W. 831).

16. (1902.) Prosecution to final judgment of a suit against the person to whom money on deposit was paid by a bank is an election to treat the payment by the bank as proper and authorized, and will bar a subsequent suit against the bank for the amount of the deposit. *Jones v. First Nat. Bank of Lincoln*, 3 Unof. 73 (90 N. W. 912).

17, 18. (1903.) The right given a member, by the regulations of the relief department of the defendant company, to "elect to accept the benefits in pursuance of these regulations, or to prosecute such claims as he may have at law against the company," when construed with the contract and regulations as a whole, requires the application of the well settled rule of law in regard to election of remedies. *Chicago, B. & Q. R. Co. v. Olsen*, 70 Neb. 559 (97 N. W. 831).

19. (1903.) A party cannot adopt one theory of his case, proceed to judgment thereon, and if such judgment is adverse, relitigate his case upon a new theory; but this principle does not apply to a suit in equity on the ground that the plaintiff has commenced an action at law, where the ob-

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ject and purpose of the equity suit are to stay the prosecution of the law action until the contract there sued upon can be reformed on account of mistake; the two actions not being inconsistent, but one is auxiliary to and dependent upon the other. *Lansing v. Commercial Union Assurance Co.*, 4 Unof. 140 (93 N. W. 756).

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20. (1905.) When the certificate of membership in a railway relief department expressly provides that the indemnity therein provided shall be waived or forfeited by an action for damages against the railway company itself, the terms of the contract, and not the general rules of law relative to the election of remedies, will determine the consequences of such an election. *Walters v. Chicago, B. & Q. R. Co.*, 74 Neb. 551 (104 N. W. 1066).

21. (1906.) A suit by an administrator of a deceased employee of the Chicago, Burlington & Quincy Railroad Company, who was a member of the relief department of that company, to recover damages, under the statute, for wrongfully or negligently causing the death of such emplyee, is a bar to a subsequent action upon the membership certificate in said department, when the administrator is the same person named as beneficiary in the contract. *Chicago, B. & Q. R. Co. v. Healy*, 76 Neb. 783 (107 N. W. 1005).

22. (1906.) Under a contract of membership in the relief department of the Chicago, Burlington & Quincy Railroad Company, which provided that the receipt of benefits by the beneficiary should bar all actions for damages arising from the death of the member, the beneficiary, after receiving the benefit provided for in the certificate of membership, cannot maintain an action to recover damage for herself caused by such death; but the receipt of such benefit will not bar her action as administratrix of the estate of the deceased for the benefit of her minor children. *Chicago, B. & Q. R. Co. v. Healy*, 76 Neb. 786.

23, 24. (1906.) Where a plaintiff sets up a conversion of a team of horses by a bailee, and pleads the execution of a bill of sale by him to the bailee for such team upon the agreement of the bailee to pay a fixed and definite amount therefor, he cannot afterwards, if unsuccessful in this action, in another action claim that the title to the horses never passed from him, and that they were killed by the negligence of the bailee. He had the right to elect as to whether he would treat the title to the property as having passed and sue in assumpsit upon the promise, or he had the right, upon the theory that the title never passed, to sue for the wrong. He did not have the right to do both. *Turner v. Grimes*, 75 Neb. 412 (106 N. W. 465).

——— Mistake or ignorance of fact.

25. (1902.) If, in attempting and designing to make an election, one puts forth an act or commences an action in ignorance of substantial facts which proffer an alternate remedy, and the knowledge of which is essential to an intelligent choice of procedure, his act or action is not binding; but he may, when informed, adopt a different remedy. *Pekin Plow Co. v. Wilson*, 66 Neb. 115 (92 N. W. 176).

26. (1904.) One who by action pursues one remedy without being chargeable with notice of facts entitling him to a different one, is not thereby estopped to pursue the latter upon discovery of such facts, if he then discontinues his action for the former. *Moss v. Marks*, 70 Neb. 701 (97 N. W. 1031).

27. (1904.) If, in attempting and designing to make an election, one puts forth an act or commences an action in ignorance of substantial facts which proffer an alternate remedy, and the knowledge of which is essential to an intelligent choice of procedure, his act or action is not binding. He may, when informed, adopt a different remedy. *Lamb v. Rooney*, 72 Neb. 322 (100 N. W. 410; 117 Am. St. Rep. 795).

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ELECTIONS.

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I. ORDERING OR CALLING ELECTION, AND NOTICE.

Special election.

Compelling call of special election, see *Mandamus*, §§ 175, 176.

1. (1889.) Where a county board calls a special election, in a township, for the purpose of voting bonds in aid of a railroad, it acts as agent for the county and not the township. *Kearney County v. Stein*, 26 Neb. 132 (40 N. W. 1071).

Petition and proceedings thereon.

2. (1887.) A finding of a board of county commissioners, that a petition for a special election for the relocation of a county seat was not signed by the requisite number of lawful petitioners for the reason that a portion of the signers were minors and non-residents, is not subject to collateral attack, but if erroneous must be reviewed on error. *State, ex. rel. Hymer, v. Nelson*, 21 Neb. 572 (32 N. W. 589).

3. (1887.) Under the provisions of section 14, chapter 45, Compiled Statutes of 1885, to authorize the county commissioners to call a special precinct election for the purpose of voting bonds in a precinct in aid of works of internal improvements, etc., a petition signed by not less than fifty freeholders of such precinct must be presented to such county commissioners, setting forth the nature of the work contemplated, the amount of bonds sought to be voted, the rate of interest, and the date when the principal and interest shall become due. An election called and held without such petition is of no validity. *State v. Babcock*, 21 Neb. 187 (31 N. W. 682).

4. (1893.) To entitle a county board to call an election for the removal of a county seat a petition must be presented to it by resident electors of the county equal in number to three-fifths of all the votes cast in the county at the last general election. *Crews v. Coffman*, 36 Neb. 824 (55 N. W. 265).

5. (1893.) Where objections are made to a petition for an election for the relocation of a county seat, by any resident elector on oath charging that a certain number of the petitioners are minors, certain other number are not electors, certain names are fictitious, a certain number have been bribed, the aggregate of which will reduce the number of petitioners below three-fifths of the votes cast at the preceding general election, it is the duty of the board to set a reasonable time for a hearing of said objections to enable parties to offer proof in support of their charges. *Crews v. Coffman*, 36 Neb. 824 (55 N. W. 265).

6. (1893.) Persons interested in the removal of a county seat are entitled to examine the original petition in the office of the county clerk before the election is called and should have a reasonable time for that purpose. It is not sufficient to furnish a certified copy as such parties have the right to see the purported signature of the petitioners. *Crews v. Coffman*, 36 Neb. 824 (55 N. W. 265).

7. (1893.) The petition for an election for the relocation of a county seat must show the section, township and range on which, or the town or city in which a petitioner resides, together with his age and time of residence in the county. *Crews v. Coffman*, 36 Neb. 824 (55 N. W. 265).

8. (1904.) Where the law requires a petition of a certain character in order to confer power upon a board to call an election for the purpose of issuing bonds or authorizing a tax, the determination of that board is not conclusive as to the sufficiency of the petition or the qualifications of the petitioners. But these subjects are open to inquiry in judicial proceedings to nullify the action, where the parties complaining have not, by acquiescence or laches, estopped themselves from contesting the question. *Fullerton v. School District*, 41 Neb. 593 (59 N. W. 896).

9. (1895.) Under section 14, chapter 45, Compiled Statutes, it is necessary, to confer jurisdiction upon county commissioners to order the holding of an election on a proposition to vote bonds by a township in aid of a work of internal improvement, that a petition should be presented to such commissioners signed by not less than fifty freeholders of such township. *Hoxie v. Scott*, 45 Neb. 199 (63 N. W. 387).

Time for holding election.

10. (1905.) Sections 4, 10, 15, 20 and 21, article VI, constitution, and sections 13 and 20, article XVIII, fixing the terms of office of supreme judges, district judges, and regents of the university, provide for a regular succession of and continuity in such terms of office, the force and effect of which are to make it mandatory that a general election shall be held in each of the odd

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numbered years. *State, ex rel. Polk, v. Galusha*, 74 Neb. 188 (104 N. W. 197).

11. (1905.) The provision of section 13, article XVI of the constitution, wherein it is provided, "The general election of this state shall be held on the Tuesday succeeding the first Monday of November of each year, except the first general election, which shall be on the second Tuesday in October, 1875," construed, and *held*, that it is not of itself an imperative command that general elections shall be held annually at the time stated. Whether annual elections are required depends upon the offices created by the fundamental law, and the time as therein provided at which an election must be held to fill such offices. *State, ex rel. Polk, v. Galusha*, 74 Neb. 188 (104 N. W. 197).

12. (1905.) Where by the fundamental law certain offices are created, the terms of office of which are fixed at certain definite periods of time, and the beginning and termination thereof prescribed, as well as the time for the election of a successor, the legislature is without authority to postpone the election of such successors until the succeeding general election held in the next year, and to extend the term of office of the incumbents during the intervening time, and to provide for an election in a different year in which to elect such successors, and a different time for the beginning of such term of office. *State, ex rel. Polk, v. Galusha*, 74 Neb. 188 (104 N. W. 197).

Notice or proclamation.

13. (1878.) In ordering an election on the question of the relocation of a county seat, thirty days' notice is required. But even if the notice be for a less time than this, a court of equity will not, for this reason alone, declare the election void at the suit of a party who participated therein, especially where it is not shown that a different result would probably have been obtained if the full statutory notice had been given. *Ellis v. Karl*, 7 Neb. 381.

14. (1882.) In April, 1881, one M. was elected treasurer of the city of Omaha for the term of two years. In December of the same year M. died, whereupon the mayor of said city appointed B. to fill the vacancy. The appointment was confirmed by the council. B. qualified, and took possession of the office. At the city election in April, 1882, certain voters of said city, without any resolution of the city council or proclamation of the mayor, cast their ballots for S. and D., S. having a majority of all the votes cast. In a proceeding by *quo warranto* to oust B. from the office of treasurer and install S. therein *held*, that as the city election in April, 1882, was not a general election in said city, votes cast to fill a vacancy in the office of treasurer, without a resolution of the city council or proclamation of the mayor were nugatory. *State, ex rel. Sexauer, v. Buck*, 13 Neb. 273 (13 N. W. 406).

15. (1889.) Where a county board calls a special election, in a township of the county, for the purpose of voting upon a proposition for the issuance of the bonds of such township in aid of the construction of a railroad, and gives notice of the election in a newspaper published in the county, the county is liable for the expenses of publishing the notice for the special election. *Kearney County v. Stein*, 26 Neb. 132 (40 N. W. 1071).

16. (1890.) The provision of law requiring the governor, thirty days previous to an election at which any state officer is to be chosen, to issue his proclamation therefor is directory merely. Under our constitution and laws the elective franchise is vested in the electors, and its exercise regulated by law. It is not deposited in the executive to be doled out by proclamation. *State, ex rel. Bates, v. Thayer*, 31 Neb. 82 (47 N. W. 704).

17. (1895.) The validity of an election does not depend upon the publication of the election notice. If, under existing circumstances, a particular office is to be filled, an election for that office is not invalid because the filing thereof was not included in the published notice of election, at least where it appears that the electors generally were apprised of the fact and voted on the question. *State, ex rel. Berge, v. Lansing*, 46 Neb. 514 (64 N. W. 1104; 35 L. R. A. 124).

Effect of unauthorized election.

18. (1886.) Votes cast at an election unauthorized by law are nullities. *State, ex rel. Osgood, v. Kinzer; State, ex rel. Lichty, v. Musselman*, 20 Neb. 174 (29 N. W. 307).

II. ELECTION DISTRICTS AND OFFICERS.

Creation and alteration of districts.

19. (1892.) It is not within the power of the board of county commissioners to disfranchise legal voters by subdividing a county for election purposes in such manner as to leave them without any opportunity to participate in the election of county off-

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cers. *Peard v. State, ex rel. Huering*, 34 Neb. 372 (51 N. W. 828).

20. (1893.) Boundaries of Holt county being clearly defined by law and not including any part of the territory organized as Boyd county, there could be no *de facto* attachment of the latter to the former so as to entitle the voters thereof to participate in elections in Holt county. *State, ex rel. Norton, v. Van Camp*, 36 Neb. 91 (54 N. W. 113).

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Qualifications of officers.

21. (1892.) While under section 2, chapter 54, laws 1889, a candidate for office is not eligible to be supervisor of registration, yet one who holds the latter position is not thereby disqualified from election to office. *State, ex rel. Roche, v. Cosgrove*, 34 Neb. 386 (51 N. W. 974).

Compensation for serving election notices.

22. (1892.) The only compensation for serving election notices, to which a sheriff is entitled, is five cents a mile for each mile actually and necessarily traveled. *Logan County v. Doan*, 34 Neb. 104 (51 N. W. 598).

23. (1892.) Where a sheriff at the same time and places posts notices of two elections, he is only entitled to mileage for one trip. *Logan County v. Doan*, 34 Neb. 104 (51 N. W. 598).

III. QUALIFICATIONS OF VOTERS.

Statutory provisions.

23*a*. (1908.) After the county board has fixed the boundaries of a drainage district the reclamation or protection of which would be of public utility, it is competent for the legislature to permit the property owners within the proposed district to determine by vote whether or not they will avail themselves of the benefits of the act, and the provisions permitting none but property owners to vote, and authorizing each owner of real estate to cast a vote for every acre of land or town lot which he owns within the proposed district, and permitting non-resident owners and foreign corporations owning real estate therein to vote upon the question of organization and for the officers of the district are not unlawful, nor does such election call for the exercise of the elective franchise secured to all electors by section 22 of the bill of rights. *State, ex rel. Harris, v. Hanson*, 80 Neb. 738 (117 N. W. 412).

Race or color.

24. (1889.) Under the provisions of the first clause of section 6 of the act of congress entitled "An act to provide for the allotment of lands in severalty to Indians," etc., approved February 8, 1887, in order to establish an Indian's right to citizenship, and hence to vote at an election in this state, it must be proven that such Indian was born within the territorial limits of the United States, and that an allotment of land, in fact, has been made to such Indian by the government of the United States in pursuance of said act, or of like authority of law, or treaty of the United States. *State, ex rel. Fair, v. Frazier*, 28 Neb. 438 (44 N. W. 471).

Sex.

25. (1884.) The act allowing women possessing the qualifications therein prescribed to vote at school meetings is not in conflict with the constitution, and is valid. Women are eligible also to the office of school trustees. *State, ex rel. Crosby, v. Cones*, 15 Neb. 444 (19 N. W. 682).

Residence.

26. (1876.) Persons residing in an unorganized county are not legal voters in an adjoining organized county, and such votes are illegal. *State, ex rel. Valentine, v. Griffey*, 5 Neb. 161.

27. (1876.) The military post in Valley county is not a military reservation reserved by the United States on the admission of Nebraska as a state, nor is the land ceded by the state since its admission, but is a part of and subject to the laws of the state, and persons who remove to such lands are residents of the county in which it is located and are entitled to the rights of suffrage therein. *State, ex rel. Valentine, v. Griffey*, 5 Neb. 161.

28. (1888.) A single man who had a room within the city limits, and took his meals with a family also living within the city limits, but who, a few days before a city election temporarily removed his boarding place to that of a family living outside the limits by reason of the fact that he could not for the time being be accommodated at his usual boarding place, is not disqualified to vote at the election. *State, ex rel. Crawford, v. Graham*, 23 Neb. 68 (36 N. W. 372).

29. (1888.) One who owns and lives upon a farm during the summer and who considers that his home, but who comes into a village during the winter, and had been boarding within the village limits for more than ninety days prior to a village election, is not qualified to vote at such election. *State, ex rel. Crawford, v. Graham*, 23 Neb. 68 (36 N. W. 372).

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30. (1895.) One's residence is where he has his established home, the place where he is habitually present, and to which, when he departs, he intends to return. *Berry v. Wilcox*, 44 Neb. 82 (62 N. W. 249; 48 Am. St. Rep. 706).

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——— Students.

31. (1895.) The fact that one is a student in a university does not entitle him to vote where the university is situated, nor does it of itself prevent his voting there. He may vote at the seat of the university if he has his residence there and is otherwise qualified. *Berry v. Wilcox*, 44 Neb. 82 (62 N. W. 249; 48 Am. St. Rep. 706).

32. (1895.) Persons otherwise qualified as voters who come to the seat of a university mainly for the purpose of obtaining an education, who are not dependent upon their parents for support, who have not the intention of returning to their parental home upon the completion of their studies are entitled to vote at the seat of the university. *Berry v. Wilcox*, 44 Neb. 82 (62 N. W. 249; 48 Am. St. Rep. 706).

Property qualifications.

33. (1900.) Under the provisions of section 4, subdivision 2, chapter 79, Compiled Statutes 1899, defining the qualifications of voters at a meeting of the voters of a school district as follows, "Every person, male or female, who has resided in the district forty days and is twenty-one years old, and who owns real property or personal property that was assessed in the district in his or her name at the last annual assessment, in the district, * * * shall be entitled to vote at any district meeting," *held*, that the wife of a person owning a homestead on which the family were residing was not, by reason of her homestead interest, or "estate of homestead" in said land, an owner of real estate in said district within the meaning of said section. *McLain v Maricle*, 60 Neb. 353 (83 N. W. 85).

Forfeiture of citizenship.

34. (1880.) A person convicted of a felony under the laws of the state, or the United States, is not a qualified voter. *Gandy v. State*, 10 Neb. 243 (4 N. W. 1019).

IV. REGISTRATION OF VOTERS.

Constitutional and statutory provisions.

35. (1887.) Under the constitution of Nebraska, which prescribes the qualifications of voters, and provides that all elections shall be free, and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise, a registration law which absolutely deprives an elector of the right to vote unless registered on one of the four days, the last one being ten days prior to the election, is void. *State, ex rel. Stearns, v. Corner*, 22 Neb. 265 (34 N. W. 499; 3 Am. St. Rep. 267).

36. (1887.) A registry law, so far as it provides for a register of qualified electors to be made, and which constitutes such registration one mode of proof of the elector's right, and so far as it might require an elector whose name is not upon such register to make other reasonable proof of his right to the judges of election at the time of offering his vote, would be valid. But where it absolutely deprives the elector of his vote unless previously registered upon certain days named in the law, it is void. *State, ex rel. Stearns, v. Corner*, 22 Neb. 265 (34 N. W. 499; 3 Am. St. Rep. 267).

Validity of votes without registration.

37. (1885.) The registration law is to be used as a shield and not as a sword; as a means to prevent illegal voting, and not to disfranchise the voters of a county or its subdivisions; therefore, where a statute limits the time for holding an election to a less number of days than is required for the registration of voters, and no registration is had, the votes cast at such election will not on that account be illegal. *State, ex rel. Harvey, v. Piper*, 17 Neb. 614 (24 N. W. 204).

V. NOMINATIONS AND PRIMARY ELECTIONS.

Constitutional and statutory provisions.

38. (1902.) Chapter 27, Session Laws 1899—the primary election law—being an original enactment and complete in itself, does not contravene section 11, article III of the constitution, although section 6 operates indirectly as an amendment of section 1 of the general registration law. *De France v. Harmer*, 66 Neb. 14 (92 N. W. 159).

39. (1905.) The provisions of the primary act (laws 1905, ch. 66), which are found to be invalid, are *held* not to affect the remainder of the act. *State, ex rel. Adair, v. Drexel*, 74 Neb. 776 (105 N. W. 174).

40. (1905.) The title of the act (laws 1905, ch. 66) providing for the selection of certain candidates for public office and certain delegates at a primary election, and regulating such primary, does not embrace

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nor comprehend legislation concerning the registration of voters for general elections, and which is, in substance and effect, amendatory of existing registration laws, and is not broad enough to permit legislation concerning the form and makeup of the official ballots provided for by law to be used at a general election. *State, ex rel. Adair, v. Drexel*, 74 Neb. 776 (105 N. W. 174).

41. (1906.) Section 118*h*, chapter 26, Compiled Statutes 1907, of the "Australian ballot law" is not in conflict with the constitution, and confers power upon county courts and upon judges of the district and supreme courts at chambers to summarily review the action of the officer with whom an original certificate of nomination is filed, and to make such order therein as the law requires. *State, ex rel. Offill, v. Hallowell*, 77 Neb. 610 (110 N. W. 717).

Party divisions and conflicting nominations.

42. (1895.) It is not the province of the secretary of state to determine which of two rival state conventions of the same party is entitled to recognition as the regular convention. *State, ex rel. Sturdevant, v. Allen*, 43 Neb. 651 (62 N. W. 35); (1896) *Phelps v. Piper*, 48 Neb. 724 (67 N. W. 755; 33 L. R. A. 53); (1896) *State, ex rel. Dahlman, v. Piper*, 50 Neb. 25, 39 (69 N. W. 378).

43. (1896.) The question as to which one of two factions of a political party is the true representative of such political party is rather a political than a judicial question. *Phelps v. Piper*, 48 Neb. 724 (67 N. W. 755; 33 L. R. A. 53).

Nominations by primary election.

44. (1905.) The provisions found in the primary act (laws 1905, ch. 66) limiting the right of parties to participate in a primary election and to have the names of candidates for nomination to appear on the primary ballots to those casting at least one per cent. of the total vote cast at the last election, is a reasonable classification of parties and does not conflict with the constitution guaranteeing freedom in the exercise of the elective franchise. *State, ex rel. Adair, v. Drexel*, 74 Neb. 776 (105 N. W. 174).

45. (1905.) It is not competent for the legislature to provide in a primary election law that, before a person eligible to office can be voted for at a primary and have his name appear on a primary ballot, he shall pay a fee for filing nomination papers, computed at one per cent. of the emoluments authorized by law for the office to which such candidate aspires during the term for which he would serve, if elected, since such provisions are an unwarranted hindrance and impediment to the exercise of the elective franchise, and in conflict with section 22, article I of the constitution. *State, ex rel. Adair, v. Drexel*, 74 Neb. 776 (105 N. W. 174).

46. (1905.) The provisions of the primary act (laws 1905, ch. 66) making the right of an elector to participate in a primary election to depend upon his party affiliation, is a legitimate exercise of legislative power, in no way conflicting with the fundamental law guaranteeing freedom in the exercise of the elective franchise. *State, ex rel. Adair, v. Drexel*, 74 Neb. 776 (105 N. W. 174).

46*a*. (1907.) If an individual has filed the application required by section 5 of the primary election law (laws 1907, ch. 52) and has duly qualified himself to be the candidate of a political party, and the requisite number of members of another party file a petition complying with section 45 of that act, asking that the name of the same person be also placed upon the ballot of their party, it is the duty of the officer making up the ballot to place the name of the person so designated upon the ballots of both political parties. *State, ex rel. Sundean, v. Junkin*, 80 Neb. 1 (113 N. W. 801).

46*b*. (1907.) The same person may be the candidate of more than one political party for nomination at a primary election, but he cannot be the nominee of any party unless he receives the requisite number of votes cast by that party. *State, ex rel. Dickinson, v. Sheldon*, 80 Neb. 4 (113 N. W. 802).

Nomination by convention.

47. (1898.) A nomination to public office made by four out of twenty-eight members of a county committee chosen by a political party is invalid, where previous notice of the time and the place of the meeting of the meeting of the committee has not been given to the other members thereof. *State, ex rel. Whedon, v. Smith*, 57 Neb. 41 (77 N. W. 384).

Certificate of nomination.

48. (1898.) Failure of the secretary of a county convention to certify the name of a nominee, creates a vacancy which the county central committee of the party was authorized to fill under the provisions of the Australian Ballot Law. *State, ex rel. Fox, v. Clark*, 56 Neb. 584 (77 N. W. 87).

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49. (1905.) In the absence of a special provision in the election laws the general statute applies, and under section 136, chapter 26, Compiled Statutes, the eight days' time should be computed by excluding the day of filing the certificate of nomination and including the day of election. *State, ex rel. Eastham, v. Dewey*, 73 Neb. 396 (102 N. W. 1015).

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Nominations to fill vacancies.

50. (1905.) If all the parties interested agree that one nominated for office by a political convention shall decline such nomination and the committee appoints another in his place, eight days before the election, it is a compliance with section 136, chapter 26, Compiled Statutes, and the person so selected for the vacancy is entitled to a place on the ballot. *State, ex rel. Eastham, v. Dewey*, 73 Neb. 396 (102 N. W. 1015).

Objections and contests.

51. (1893.) An objection that the "convention," "primary meeting," "committee," or "electors" nominating a candidate for a public office had not the legal authority to make such nomination, must be made before the election and in the manner provided by section 136, chapter 26, of the Compiled Statutes; and if not so made, the legal authority of such "convention," etc., to make such nomination—the certificate thereof being in apparent conformity with the provisions of the election law—will, in the absence of fraud, be conclusively presumed. *State, ex rel. Crawford, v. Norris*, 37 Neb. 299 (55 N. W. 1086).

52. (1896.) The provisions of the statute (Comp. Stat., ch. 26, sec. 136) known as the "Australian Ballot Law," requiring objections to a certificate of nomination of candidates for office to be filed within three days after the filing of such certificate, are mandatory, and must be strictly followed, else said certificate, if in conformity with law, will be deemed valid. *State, ex rel. Casper, v. Piper*, 50 Neb. 40 (69 N. W. 383).

——— Determination by public officers.

53. (1895.) It is provided by the Australian Ballot Law, act of March 4, 1891, that all certificates of nomination which are in apparent conformity therewith shall be deemed valid unless objection is made thereto; that in case objections are made candidates shall be notified and the officer with whom the certificate is filed shall pass on such objections, and his decision will be final unless a further order is made by the county court, a judge of the district court, or a justice of the supreme court. *Held*, That such officer, in the consideration of objections, is not confined to mere formal matters relating to the certificate of nomination, but may determine from extrinsic evidence whether the candidates therein named were in fact nominated by the convention or assemblage of voters or delegates claiming to represent a party which cast the requisite number of votes at the last election. *State, ex rel. Sturdevant, v. Allen*, 43 Neb. 651 (62 N. W. 35); (1896) *State, ex rel. Dahlman, v. Piper*, 50 Neb. 25, 39 (69 N. W. 378).

54. (1896.) An appeal or proceeding in error will not lie directly to the supreme court to review the decisions of the secretary of state under the Australian Ballot Law. *State, ex rel. Dahlman, v. Piper*, 50 Neb. 25, 39 (69 N. W. 378).

55. (1896.) The secretary of state in passing upon objections to a certificate of nomination for a public office is not confined alone to the consideration of objections as to matters of form, but has the power to decide from extrinsic evidence whether the candidate named in such certificate was in fact nominated by a convention called and held in accordance with the precedents and usages of a political party which cast one per centum of the votes of the state at the last general election, or by a faction in good faith claiming to represent a party casting such a percentum of the vote of the state. *State, ex rel. Rose, v. Piper*, 50 Neb. 42 (69 N. W. 384).

Certification of nomination by public officer.

56. (1895.) Where two factions of a political party nominate candidates and certify such nominations to the secretary of state in due form of law, the latter will not inquire into the regularity of the convention held by either faction, but will certify to the several county clerks the names of the candidates nominated by each, such practice being in harmony with the rule which requires courts, in case of doubt, to adopt that construction which affords the citizen the greater liberty in casting his ballot. *State, ex rel. Sturdevant, v. Allen*, 43 Neb. 651 (62 N. W. 35); (1896) *Phelps v. Piper*, 48 Neb. 724 (67 N. W. 755; 33 L. R. A. 53); (1896) *State, ex rel. Dahlman, v. Piper*, 50 Neb. 25, 39 (69 N. W. 378).

57. (1896.) The finding of facts made by the secretary of state in passing upon objections filed against certificates of nomina-

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tion, if not conclusive, are at least *prima facie* right. *State, ex rel. Dahlman, v. Piper*, 50 Neb. 25, 39 (69 N. W. 378).

58. (1896.) Upon the facts in this case it was *held* that the secretary of state properly refused to certify to the county clerks the names of certain candidates for office. *State, ex rel. Rose, v. Piper*, 50 Neb. 42 (69 N. W. 384).

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VI. BALLOTS.

Compelling placing names on ballot, see *Mandamus*, §§ 171-173.

Constitutional and statutory provisions.

59. (1893.) Provisions of the election law which are not essential to a fair election will be held to be formal and directory only unless declared to be mandatory by the law itself. *State, ex rel. Norton, v. Van Camp*, 36 Neb. 91 (53 N. W. 113).

Form and contents.

60. (1893.) Votes for representative will not be rejected because the number of the district is not designated upon the official ballot in counties included in one district only. *State, ex rel. Norton, v. Van Camp*, 36 Neb. 91 (53 N. W. 113).

61. (1901.) The form of ballots should be uniform throughout the state. *State, ex rel. De France, v. Frye*, 62 Neb. 817 (88 N. W. 149).

——— Order and arrangement of tickets and names.

62. (1895.) An officer charged with the preparation of official ballots is allowed some discretion in the arrangement of party names. *Woods v. State, ex rel. McNerney*, 44 Neb. 430 (63 N. W. 23).

63. (1895.) In the absence of an abuse of discretion on the part of the officer preparing the arrangement of the names of the candidates for office, the courts will not interpose. *Woods v. State, ex rel. McNerney*, 44 Neb. 430 (63 N. W. 23).

——— Party names.

64. (1900.) The People's Independent party having been generally and popularly known in this state as the "Populist Party," that name cannot be adopted and used by a new political organization. *Porter v. Flick*, 60 Neb. 773 (84 N. W. 262).

65. (1900.) Section 131 of the Australian Ballot Law (Comp. Stat., 1899, ch. 26) forbids a new political organization from using an old party name, although such name is the one by which it is generally and popularly known, and not the name which the officers of its convention have certified to the secretary of state for use upon the official ballot. *Porter v. Flick*, 60 Neb. 773 (84 N. W. 262).

66. (1900.) The authority given by the Australian Ballot Law (Comp. Stat. 1899, ch. 26, sec. 137) to the county court and to the judges of the district and supreme courts is, in its nature, judicial; and the orders made by such court or judge may be reviewed by error proceeding. *Porter v. Flick*, 60 Neb. 773 (84 N. W. 262).

67. (1900.) The legislative purpose in forbidding the adoption and use of an old party name by a new political organization (Comp. Stats. 1899, ch. 26, sec. 131) was to avoid confusion in voting and to prevent fraud at elections; to enable the elector to express, with certainty, his real choice of candidates, and to eliminate, as far as possible, from the ballot, whatever might tend to deceive him into casting a vote contrary to his intention and for persons to whom he is opposed. *Porter v. Flick*, 60 Neb. 773 (84 N. W. 262).

68. (1901.) 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. *State, ex rel. De France, v. Frye*, 62 Neb. 817 (88 N. W. 149).

——— Names and designation of offices.

69. (1876.) A ballot voted at a legal election without any designation of an office, and also a ballot voted with two or more names on it, when the tenure of the office is limited to one person only, are illegal and void. *State, ex rel. Valentine, v. Griffey*, 5 Neb. 161.

——— Names and designation of candidates.

70. (1890.) Ballots cast at an election for justice of the peace, in the Third district of the city of Lincoln for P. for the office of justice of the peace are not invalidated as to him because they also contain the name of B. "For justice of the peace of the First district" and that of C. "For justice of the peace of the Second district." *State, ex rel. Stearns, v. Foxworthy*, 29 Neb. 341 (45 N. W. 632).

71. (1890.) Ballots cast at an election

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for justice of the peace in the Third district of the city of Lincoln containing the names of three persons, when but one person is to be elected to that office, are, under section 40, chapter 26, Compiled Statutes, void, and cannot be counted for any one for that office. *State, ex rel. Stearns, v. Foxworthy*, 29 Neb. 341 (45 N. W. 632).

72. (1893.) The vote of B. county for the relator as representative should not be rejected, for the reason that his name was written on the sample and official ballots by the clerk after they had been printed and were ready for distribution. *State, ex rel. Norton, v. Van Camp*, 36 Neb. 91 (53 N. W. 113).

73. (1895.) The act approved March 4, 1891, commonly called the "Australian Ballot Law," contemplates that the name of each candidate shall be printed once only on the official and sample ballot, accompanied by such political or other designations as correspond to the nomination papers on file with the officers charged with the duty of printing and distributing such ballots. *State, ex rel. Sturdevant, v. Allen*, 43 Neb. 651 (62 N. W. 35.

——— **Proposed constitutional amendment.**

74. (1907.) It is not necessary that the entire proposed amendment be printed upon the official ballot. If enough is printed upon the ballot to identify the amendment and show its character and purpose, it is sufficient. *State, ex rel. Thompson, v. Winnett*, 78 Neb. 379 (110 N. W. 1113).

——— **Indorsement.**

75. (1899.) The requirement of the Australian ballot law, that the names of two judges of election shall be written on the back of each ballot used, and the provision that a ballot not indorsed as aforesaid shall not be counted are mandatory, and are not inimical to the constitution. *Orr v. Bailey*, 59 Neb. 128 (80 N. W. 495).

76. (1899.) The statutory provision requiring the names of two judges to be indorsed upon a ballot is mandatory and is not sufficiently complied with by the indorsement of the name of one judge. *Mauck v. Brown*, 59 Neb. 382 (81 N. W. 313).

77. (1905.) A voter who has complied with the statute by obtaining from the election board a ballot indorsed in writing with the names of two members of the board, both of whom are ostensibly and, as he honestly supposes, are really judges, will not be deprived of his vote by the mere fact that one of such names is that of a clerk of the election. *Bingham v. Broadwell*, 73 Neb. 605 (103 N. W. 323).

——— **Objections.**

78. (1893.) By the provisions of section 141, chapter 26 of the Compiled Statutes, a candidate may make objections to the ballots as printed by the county clerk, and invoke the power of the courts to correct any error or omission in the name or description of his competitor; but if such candidate neglects to make such objection until after the election, he cannot then object to the result because of any error in the political designation of his competitor on said ballots, without a showing of fraud and that the error by deceiving the electors prevented a full and fair expression of the voters' will. *State, ex rel. Crawford, v. Norris*, 37 Neb. 299 (55 N. W. 1086).

Indication of choice of voter.

79. (1893.) The provision in section 20 of the act approved March 4, 1891, known as the "Australian Ballot Law," for the marking of ballots with ink, is directory only, and ballots, if in other respects regular, will, in the absence of fraud, be counted, although marked with a pencil. *State, ex rel. Waggoner, v. Russell*, 34 Neb. 116 (51 N. W. 465; 33 Am. St. Rep. 625; 15 L. R. A. 740).

80. (1893.) While the statute requires that the cross which signifies the preference of the elector shall, in ink, be placed in a space designated for that purpose, a ballot upon which such preference is indicated by a cross made with a lead pencil, outside the space designated, but opposite the name of the choice of the elector, should be counted according to such manifest intention. *Spurgin v. Thompson*, 37 Neb. 39 (55 N. W. 297).

81. (1896.) The provision of section 20, act of 1891 ("Australian Ballot Law"), for the expressing of the voter's intention by a mark opposite the name of the candidate of his choice, is mandatory, and the manner thus prescribed is exclusive of all others; and such is the rule whether the names of candidates be printed on the ballot or written thereon by the voter. *Martin v. Miles*, 46 Neb. 772 (65 N. W. 889).

82. (1899.) That the cross be in the circle or square is not of the essentials of a valid ballot or vote. If the proper mark is made either on the right or left of, and opposite to, the name of a candidate, it may

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indicate the choice of an elector. And on a straight party ticket, if the cross is placed within the space which contains the circle, although not within or touching the latter, it may suffice to indicate the intention of the voter. *Mauck v. Brown*, 59 Neb. 382 (81 N. W. 313).

Irregularities.

83. (1897.) The intention of an elector must be ascertained from his ballot, and any inaccuracies in the preparation thereof cannot be urged for the first time after election, to defeat the clearly expressed intention of the voter. *Tutt v. Hawkins*, 53 Neb. 367 (73 N. W. 692).

Distinguishing marks.

84. (1893.) The indorsement of the name "Eagleham," he not being one of the election judges, upon a ballot, was within the inhibition of the statute forbidding the marking of a ballot by an elector, and vitiates said ballot. *Spurgin v. Thompson*, 37 Neb. 39 (55 N. W. 297).

85. (1899.) That an elector shall place no mark upon his ballot by which it may afterwards be identified as the one voted by him, and that he shall not make any mark on the ballot except as directed in the law, are mandatory provisions, and a violation of either will invalidate the ballot as to which it occurs. *Mauck v. Brown*, 59 Neb. 382 (81 N. W. 313). [Overruled. 73 Neb. 605; 73 Neb. 622.]

86. (1905.) Irregular and defective or unauthorized markings of a ballot, apparently the result of innocent awkwardness, inattention or ignorance, and apparently not intended or made use of for the purpose of subsequent identification, will not justify the rejection of such ballots, if the intent of the voter can be ascertained therefrom. *Bingham v. Broadwell*, 73 Neb. 605 (103 N. W. 323).

87. (1905.) On the trial of a contested election ballots will not be treated as void simply because of irregular or unauthorized markings or mutilations which appear to have been innocently made as the result of awkwardness, inattention, mistake or ignorance, if the lawful intent of the voter can be ascertained therefrom. *Griffith v. Bonawitz*, 73 Neb. 622 (103 N. W. 327).

VII. CONDUCT OF ELECTION.

Constitutional and statutory provisions.

88. (1887.) The act "To amend the election laws for metropolitan cities, and cities of the first class in the state of Nebraska," being in contravention of that clause of the constitution that "no bill shall contain more than one subject, which shall be clearly expressed in its title, and no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed," is void. *State, ex rel. Stearns, v. Corner*, 22 Neb. 265 (34 N. W. 499; 3 Am. St. Rep. 267).

89. (1903.) An election provided for and required to take place by the constitution may be held at the required time without special legislation providing therefor. *State, ex rel. Gordon, v. Moores*, 70 Neb. 48 (96 N. W. 1011).

89*a*. (1908.) Section 22 of the bill of rights (const., art. I), providing that "all elections shall be free, and there shall be no hindrance or impediment of the right of a qualified voter to exercise the elective franchise," does not apply to an election upon the formation of a drainage district, nor one for the election of officers therefor. *State, ex rel. Harris, v. Hanson*, 80 Neb. 724 (115 N. W. 294).

Polling places.

90. (1886.) Where a city is under control of county organization and the wards of the city are established under the town's organization, the county has control over the voting places at a general election. *State, ex rel. Wagner, v. Emery*, 20 Neb. 301 (30 N. W. 57).

91. (1891.) It is the duty of the county board to provide a suitable number of polling places to accommodate the voters of the county, and no doubt the board may be compelled, in a proper proceeding, to provide proper facilities. *State, ex rel. Eble, v. Leavitt*, 33 Neb. 285 (49 N. W. 1097).

92. (1891.) Every legal voter of the precinct is entitled to vote at the place provided for that purpose by the county board, although such place may be within the limits of a city of the second class; and where there is more than one voting place in such city he may vote at any one of them. *State, ex rel. Eble, v. Leavitt*, 33 Neb. 285 (49 N. W. 1097).

93. (1891.) A legal voter in a precinct containing a city of the second class over 2,500, but who resides outside the city limits, cannot be registered by the board of registration in such city, but where no polling places are provided for such precinct, outside the city limits, such voter is entitled

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to vote at any one of those situated within the city. *State, ex rel. Eble, v. Leavitt*, 33 Neb. 285 (49 N. W. 1097).

94. (1892.) Where a county commissioner district includes part of a city ward whose polling place is outside the district, the votes of resident electors of both district and ward, cast at such polling place for commissioner, should be countd, since the voting by said electors outside of the commissioner district is a mere irregularity not affecting the merits of the case. *Peard v. State, ex rel. Huering*, 34 Neb. 372 (51 N. W. 828).

95. (1893.) The vote of a precinct should not be rejected because the polling place was located within an Indian reservation. *State, ex rel. Crawford, v. Norris*, 37 Neb. 299 (55 N. W. 1086).

Time for voting.

96. (1900.) Where it affirmatively appears that an election was fairly conducted; that it was held on the day and within the hours fixed by law; that due notice was given and that a majority of the electors entitled to vote voted in favor of the proposition submitted, the failure to keep the polls open for the entire time required by the statute will be deemed a harmless irregularity. *Baltes v. Farmers Irrigation District*, 60 Neb. 310 (83 N. W. 83).

Use of voting machines.

97. (1906.) An inscription on the ballot label of a voting machine used in elections upon questions may be abbreviated to meet the requirements of the limited space. The inscription, "Shall the city issue $60,000 fire-engine house bonds to run 20 years at 4%?" upon the ballot label of the voting machines used at the election in controversy, as an abbreviation of the proposition quoted in the last paragraph, is a sufficient statement of the question submitted. *Linn v. City of Omaha*, 76 Neb. 553 (107 N. W. 983).

Irregularities and errors.

98. (1893.) Innocent irregularities of election officers which are free from fraud and have not prevented a free and fair expression of the popular choice, will not vitiate the result of an election unless the legislature has expressly so declared. *State, ex rel. Crawford, v. Norris*, 37 Neb. 299 (55 N. W. 1086).

99. (1905.) Minor irregularities by members of an election board, voters and bystanders at a polling place, unaccompanied by fraud or conduct affecting the integrity of the ballot, will not operate to quash the election. *Bingham v. Broadwell*, 73 Neb. 605 (103 N. W. 323).

Bribery.

100. (1892.) No form of bribery to secure votes will be sanctioned by the courts This rule is equally as important in county seat elections as in other cases. The design of the law is to secure the free and voluntary expression of each voter of his choice for the county seat. *Ayers v. Moan*, 34 Neb. 210 (51 N. W. 830).

VIII. COUNT OF VOTES, RETURNS, AND CANVASS.

Parol evidence to contradict election returns, see *Evidence*, § 393.

Compelling canvass of returns, see *Mandamus*, §§ 179-188.

Sufficiency of petition in mandamus to compel canvass of returns, see *Mandamus*, § 260.

Number of votes necessary to choice.

101. (1897.) The requirements of section 30, article I, chapter 18, Compiled Statutes, in regard to the proportion of votes which must have been cast in favor of a proposition submitted at an election, to work its adoption, *held* applicable to the submission of a proposition to sell the public grounds of a county. *Sternberg v. State, ex rel. Keller*, 50 Neb. 127 (69 N. W. 849).

102. (1897.) A proposition to authorize the issuance of funding bonds was submitted to the electors of a city, pursuant to the provisions of such section of the statutes, at the same time and place as the general city election. *Held*, Under the facts shown, to be but one election; that the presumption is that all the electors voted at such election; and the proposition, to work its adoption, must have received a majority of all the votes cast at such election. *Bryan v. City of Lincoln*, 50 Neb. 620 (70 N. W. 252; 35 L. R. A. 752).

Tie votes.

103. (1888.) In an application for a mandamus against the incumbent of a county office, requiring him to deliver the books, papers, and moneys of the office to the relator, who claimed the office by virtue of a tie vote at the election, and a determination of such tie in his favor by lot, *held* that the certificate should show specifically the manner in which such lot was deter-

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mined; and where it is shown that the respondent was not present, and took no part in such determination, the certificate should show that the county clerk drew for him, and that in such drawing and the determining of such lot, the said clerk, for the respondent, was an actor, equally with the relator, and that such lot was conducted and determined in such manner as to preclude the possibility of forethought or design on the part of any of the actors or canvassers by which the determination of the lot might have been influenced to the disadvantage of the respondent. *State, ex rel. Davey, v. Wilkinson*, 23 Neb. 710 (37 N. W. 617).

104. (1895.) A petition for mandamus to compel judges of election to assemble and determine a tie vote by lot, under section 45, chapter 26, Compiled Statutes, must allege that the city clerk has notified the candidate to appear at his office for that purpose. *State, ex rel. Shaffer, v. Bowman*, 45 Neb. 752 (64 N. W. 223).

Votes to be counted.

105. (1892.) A peremptory mandamus will not be allowed, requiring the judges and clerks of election to count ballots rejected by them, after such ballots have been returned to the county clerk and are beyond their control. *State, ex rel. Waggoner, v. Russell*, 34 Neb. 116 (51 N. W. 465; 33 Am. St. Rep. 625; 15 L. R. A. 740).

106. (1896.) Where there were cast upon the question of relocation of the county seat of Red Willow county 867 votes for Indianola, and for McCook 1,339 votes, and the return of county canvassers showed ballots to have been rejected or not to have been voted or accounted for, *held*, that McCook, having received more than three-fifths of the numbers above given, became the county seat of said county. *State, ex rel. Hocknell, v. Roper*, 47 Neb. 417 (66 N. W. 539).

107. (1896.) Under the provisions of the act for the relocation of county seats, there being no requirement that abortive ballots shall be certified to the county canvassing board, such ballots cannot be counted for the purpose of making up the grand total, of which a place other than the existing county seat must receive three-fifths to be entitled to the relocation of the county seat, merely because in the certified return of the county election board such ballots were referred to as "ballots not reported or accounted for," or as "rejected" or "blank ballots." *State, ex rel. Hocknell, v. Roper*, 47 Neb. 417 (66 N. W. 539).

108. (1907.) The act of 1901 (laws 1901, ch. 29), amending various sections of the general election law so as to provide for counting straight party votes for a constitutional amendment, when such party has indorsed such amendment, does not violate the constitution, and it is within the power of the legislature to provide such regulations. *State, ex rel. Thompson, v. Winnett*, 78 Neb. 379 (110 N. W. 1113).

Returns.

109. (1876.) Extrinsic evidence of a public nature, including the circumstances surrounding an election, may be received in evidence to correct a mistake in the return of the canvassers of the vote, in respect to the designation of an office voted for at such election. *State, ex rel. Valentine, v. Griffey*, 5 Neb. 161.

110. (1892.) Under the provisions of section 20, chapter 26, Compiled Statutes, it is the duty of judges and clerks of election to return a true list of the persons voting at that election and certify the same. It is also the duty of the judges and clerks to certify the aggregate number of votes cast for each person voted for, but it is no part of their duty to certify that certain persons received a specified number of votes as democrat and a certain number as people's independent, or otherwise, and such certification has no force or effect. *State, ex rel. Christy, v. Stein*, 35 Neb. 848 (53 N. W. 999).

111. (1896.) Election returns consist of the certificate of election officers, the list of those voting, and the tally list of the number of votes cast for the different persons. *State, ex rel. Welty, v. McFadden*, 46 Neb. 668 (65 N. W. 800).

112. (1896.) Where it appears that an unauthorized alteration has been made in the return of the vote after the return has been delivered to the county clerk, the canvassers should disregard the alteration, and make the count according to the original and true return. *State, ex rel. Welty, v. McFadden*, 46 Neb. 668 (65 N. W. 800).

——— Publication.

113. (1891.) The publication of the returns of the election of officers of the executive department, by the speaker of the house of representatives, immediately upon the organization of the house, is a ministerial duty in regard to which he has no discretionary power, and can be enforced by mandamus. *State, ex rel. Benton, v. Elder*, 31 Neb. 169 (47 N. W. 710; 10 L. R. A. 796).

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114. (1891.) The joint convention provided for in section 4, article V, constitution, cannot relieve the speaker of the house of his duty to open and publish the returns of election of officers of the executive department immediately, and mandamus lies to compel the performance of such duty. *State, ex rel. Benton, v. Elder*, 31 Neb. 169 (47 N. W. 710; 10 L. R. A. 796).

115. (1891.) The speaker of the house of representatives may be compelled by mandamus to publish election returns as prescribed by section 4, article V, constitution, notwithstanding a resolution of the joint convention directing him to postpone such duty pending a contest of such election. *State, ex rel. Benton, v. Elder*, 31 Neb. 169 (47 N. W. 710; 10 L. R. A. 796).

Preservation or disposition of ballots.

116. (1892.) In a contest of election the ballots at the election constitute the primary evidence to determine the rights of the respective parties. It must appear, however, that they have been preserved substantially in the manner and by the officers prescribed by the statute. If they have been placed in a position to be tampered with by interested parties, the burden of proof is on the party offering them in evidence to show that they are in the same condition as when sealed up by the several election boards. *Albert v. Twohig*, 35 Neb. 563 (53 N. W. 583); (1894) *Martin v. Miles*, 40 Neb. 135 (58 N. W. 732).

117. (1894.) Where the testimony in a contested case showed that the ballots offered in evidence had been by the county clerk sent to the secretary of state, by whom, about a month afterwards, they had been returned to such county clerk in a grain sack tied with a string and not sealed or in any other way fastened so as to afford evidence that the same had not been tampered with, and there was no evidence negativing the possibility that the string fastening said grain sack might have been untied and its contents altered, *held*, that such ballots should not have been considered. *Martin v. Miles*, 40 Neb. 135 (58 N. W. 732).

Canvass of returns.

118. (1888.) It is the duty of the board of canvassers to canvass the returns as they found them, in the absence of any proof that they had been mutilated or changed after being certified by the election board. *State, ex rel. Romig, v. Wilson*, 24 Neb. 139 (38 N. W. 31).

119. (1891.) The canvass of the votes in a county is to be made within six days after the closing of the polls. *Sawyer v. Sweet*, 33 Neb. 630 (50 N. W. 954).

120. (1896.) Where there is a discrepancy between the certificate of the election board and the tally list as to the number of votes cast for a candidate, the canvassers should determine which is correct, after comparing them with the list of voters returned, and declare the result accordingly. *State, ex rel. Welty, v. McFadden*, 46 Neb. 668 (65 N. W. 800).

121. (1896.) The tally list required to be sent to the county clerk is a part of the election returns and is proper to be considered by the canvassing officers, and where there is a discrepancy between the certificate of the election board and tally list as to the vote cast for any person, it is for the canvassers to determine which correctly states the vote, after making comparisons with the list of those purporting to have voted, and they should make the abstract of the vote and declare the result accordingly. *State, ex rel. Bartow, v. Eastman*, 46 Neb. 675 (65 N. W. 805).

122. (1904.) The duty of an election board to canvass the votes cast at the election is a political duty plainly prescribed by a positive statute, and cannot be enjoined by the courts. *State, ex rel. Ellingsworth, v. Carlson*, 72 Neb. 837 (101 N. W. 1004).

123. (1906.) A city election will not be annulled by the courts because the city council delegated to persons not members thereof the ministerial duty of assisting the city clerk in tabulating the election returns, in the absence of fraud or mistake. *Linn v. City of Omaha*, 76 Neb. 552 (107 N. W. 983).

——Powers and proceedings of canvassers.

124. (1879.) No power is given by statutes to the canvassers of an election to reject or throw out votes for the reason that non-residents had voted at the election. *State, ex rel. Reed, v. Ramsey*, 8 Neb. 286.

125. (1880.) A board of canvassers have no judicial power whatever under the law of 1873 (G. S., 352), and their duty is simply to count the votes returned and declare the result. They cannot look beyond the returns. *Hagge v. State*, 10 Neb. 51 (4 N. W. 375).

126. (1880.) Election canvassers have

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no power to inquire into the qualifications of judges or clerks of election or to reject or throw out returns actually received. *State, ex rel. Townsend, v. Hill*, 10 Neb. 58 (4 N. W. 514).

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127. (1881.) On the organization of N. county, the special commissioners appointed by the governor called an election for the election of officers and the location of the county seat, and in canvassing the votes cast at such election threw out forty votes cast for a certain point as county seat, thereby giving F. a majority of all the votes cast. *Held*, That the commissioners had no authority to reject votes, and that a mandamus would lie to compel them to canvass all the votes cast, and that the remedy by contest was not exclusive and in many cases was not an adequate remedy. *State, ex rel. Willard, v. Stearns*, 11 Neb. 104 (7 N. W. 743).

128. (1884.) A board of canvassers of the returns of an election possess no authority to throw out the returns of election from certain precincts and refuse to canvass such votes, and if they do so, they may be compelled by mandamus to reassemble and complete the canvass. *State, ex rel. Whittemore, v. Peacock*, 15 Neb. 442 (19 N. W. 685).

129. (1886.) It is the duty of board of canvassers to canvass votes returned and to correct error in adding up the votes cast for a candidate. *State, ex rel. Wood, v. Hill*, 20 Neb. 119 (29 N. W. 258).

130. (1893.) The canvassing board has no authority to go behind the returns and inquire into legality of votes. *State, ex rel. Norton, v. Van Camp*, 36 Neb. 91 (53 N. W. 113); (1886) *State, ex rel. Wood, v. Hill*, 20 Neb. 119 (29 N. W. 258).

131. (1896.) The duties of canvassers of election returns are ordinarily ministerial, and as a general rule they are not clothed with either discretionary or *quasi*-judicial powers. *State, ex rel. Welty, v. McFadden*, 46 Neb. 668 (65 N. W. 800).

132. (1900.) A county canvassing board has no authority to find and declare the total vote polled at an election; and a finding in that respect, made by it, will be rejected as surplusage. *State, ex rel. Saunders, v. Clark*, 59 Neb. 702 (82 N. W. 8).

——— Compelling canvass.

133. (1876.) If the canvassers of the vote of an election neglect or refuse to count all the votes and fully perform their duty, they may be compelled by mandamus to discharge that duty. *State, ex rel. Birmingham, v. Dinsmore*, 5 Neb. 145.

134. (1880.) A county clerk may be compelled by mandamus to complete the canvass of an election. *State, ex rel. Townsend, v. Hill*, 10 Neb. 58 (4 N. W. 514).

135. (1886.) If sections 64 *et seq.* of the statute (1879, p. 240) be held to apply to cases where the canvassers have neglected to make correct and proper returns, etc., and be further held to be a complete remedy at law, said provisions could only apply to a case where the relator has an opportunity to avail himself of the benefit of the said act, with all of its privileges as to time. *State, ex rel. Townsend, v. Hill*, 10 Neb. 58 (4 N. W. 514).

136. (1881.) A citizen of the county, being interested in the execution of the laws, may apply for a writ of mandamus to compel commissioners to canvass votes cast at one election to locate a county seat. *State, ex rel. Willard, v. Stearns*, 11 Neb. 104 (7 N. W. 743).

137. (1885.) Where there are but one set of papers purporting to be the returns of an election from a given precinct delivered to the county clerk, or his deputy, or in his office, within the time limited by law for the canvassing of the returns, it is the duty of such clerk to canvass such returns in the manner provided by statute, although such returns may not have been sealed up, marked, bound together or directed as provided by law. And such duty will be enforced by mandamus. *Long v. State, ex rel. Hoxie*, 17 Neb. 60 (22 N. W. 120).

138. (1896.) Mandamus will lie to compel a canvassing board to reconvene and make a correct canvass of the election returns, where it adjourned without fully performing its duty. *State, ex rel. Welty, v. McFadden*, 46 Neb. 668 (65 N. W. 800).

——— Irregularities and errors.

139. (1880.) An error, if any, by the county commissioners in rejecting certain votes cast at an election for the relocation of a county seat, cannot be reviewed by proceedings in mandamus. *State, ex rel. Morgan, v. Nemaha County*, 10 Neb. 32 (4 N. W. 373).

——— Recanvass.

140. (1879.) Mandamus will not lie to compel county commissioners to recanvass

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an election for alleged illegal votes cast at such election, as such commissioners were not in default. *State, ex rel. Reed, v. Ramsey*, 8 Neb. 286.

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——— **Enforcing right established by canvass.**

141. (1896.) In an appropriate case the court will by mandamus enforce the *prima facie* right established by the canvass, but it will not determine the ultimate right. *State, ex rel. Hocknell, v. Roper*, 46 Neb. 730 (65 N. W. 802).

Certificate of election.

142. (1892.) It is the duty of a county clerk to issue a certificate of election to the person receiving the highest number of votes cast at an election, and he has no authority to classify the votes cast for a candidate as people's independent, democratic, or otherwise. *State, ex rel. Christy, v. Stein*, 35 Neb. 848 (53 N. W. 999).

143. (1892.) By section 46, chapter 26, Compiled Statutes, it is made the duty of a county clerk, upon the reception of the returns from each election precinct, ward, etc., and within six days after the closing of the polls, together with two disinterested electors chosen by himself, to open the poll books and make abstracts of the votes cast * * * for members of the legislature from the county alone on one sheet, and "of votes for members of the legislature by districts comprising more than one county, on another sheet," and by section 48 the clerk is required to make out a certificate of election to the person having the highest number of votes. *State, ex rel. Christy, v. Stein*, 35 Neb. 848 (53 N. W. 999).

144. (1893.) While each house of the legislature is, by the constitution, made the judge of the election and qualification of its members, the courts will, by mandamus, compel the proper canvassing officers to discharge their duties and issue certificates of election to the parties who, from the returns, appear to have been elected thereto, but the awarding of a certificate of election in obedience to the mandate of the court will not conclude the legislature in determining the question in proceedings by contest. *State, ex rel. Norton, v. Van Camp*, 36 Neb. 91 (53 N. W. 113).

145. (1893.) Court in mandamus proceeding to require county clerk to issue certificate of election will not inquire into the regularity of the nomination, or certificates of nomination of the candidates. *State, ex rel. Norton, v. Van Camp*, 36 Neb. 91 (53 N. W. 113).

146. (1898.) Where a candidate for a public office has received and holds the certificate of election, such certificate is conclusive evidence of his right to the office until it is judicially determined that some other person has a better title. *State, ex rel. Barton, v. Frantz*, 55 Neb. 167 (75 N. W. 546).

147. (1898.) In an action of mandamus to force the proper officer to issue to the relator a certificate of his election to fill an office, the question of the propriety or validity of an election at the alleged time to fill the office may be litigated. *Kokes v. State, ex rel. Koupal*, 55 Neb. 691 (76 N. W. 467).

IX. CONTESTS.

Compelling taking depositions in contest of, see *Mandamus*, § 178.

Nature and form of remedy.

148. (1885.) A proceeding to contest an election is substantially an action, and must be exhausted before relief by mandamus will be granted. *State, ex rel. Graber, v. Matley*, 17 Neb. 564 (24 N. W. 200).

149. (1889.) The statute has provided an adequate remedy, either by contest or *quo warranto*, for the settlement of the rights of parties in election cases, and those remedies are exclusive. *State, ex rel. Hunt, v. City of Kearney*, 28 Neb. 103 (44 N. W. 90).

150. (1889.) In an action upon an information, in the nature of *quo warranto*, wherein it is claimed that the relator and plaintiff was elected to the office of county attorney, and the defendant had, during the term, intruded and usurped the said office, *held* that the provision of the election law entitled "Contesting Elections" is cumulative and is not an exclusive remedy. *State, ex rel. Fair, v. Frazier*, 28 Neb. 438 (44 N. W. 471).

Constitutional and statutory provisions.

151. (1891.) The last clause of section 4 and section 15 of article V of the constitution, and the last clause of section 77, chapter 26, Compiled Statutes, *held*, applicable to the procedure contesting the election of persons declared elected to the offices of governor and lieutenant governor, who have qualified and entered upon their duties, and applicable to all other executive officers. *In re Contest Proceedings*, 31 Neb. 262 (47 N. W. 923; 10 L. R. A. 803).

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152. (1907.) Section 10 of the general election law of 1879 (laws 1879, p. 240) providing that "A county treasurer shall be ineligible to office for more than two consecutive terms" is not unconstitutional, since the subject of the section is germane to the act and is sufficiently expressed in the title, "An act to provide a general election law," the procedure relative to contested elections, and the filling of vacancies in office. *Dodson v. Bowlby*, 78 Neb. 190 (110 N. W. 698).

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Persons entitled to bring proceedings.

153. (1889.) In an action in the nature of *quo warranto* to contest the right to the office of county attorney, the information may be filed by the complaining party when, if brought in the supreme court, the attorney general, or, if in the district court, the county attorney, having been requested, shall refuse to appear and file it. *State, ex rel. Fair, v. Frazier*, 28 Neb. 438 (44 N. W. 471).

154. (1894.) Chapter 26, Compiled Statutes, confers no authority upon an elector of a county to contest in his own name an election for the relocation of the county seat, and such a proceeding should be dismissed. *Thomas v. Franklin*, 42 Neb. 310 (60 N. W. 568).

155. (1894.) The proceeding for contesting an election provided for by chapter 26, Compiled Statutes 1893, is, strictly speaking, neither an action at law nor in equity. It is a summary proceeding of a political character, and the proceeding cannot be maintained by any person unless authority therefor is found in the statute itself. *Thomas v. Franklin*, 42 Neb. 310 (60 N. W. 310).

Jurisdiction.

156. (1882.) A county court has no jurisdiction of election contest held in city on question of voting aid to works of internal improvement. *Foxworthy v. Lincoln & F. R. Co.*, 13 Neb. 398 (14 N. W. 394).

157. (1889.) A county attorney is a county officer, and the county court of the proper county has original jurisdiction in a proceeding to contest the election of such attorney, and the supreme court has not original jurisdiction. *Bell v. Templin*, 26 Neb. 249 (41 N. W. 1093).

158. (1892.) There is no power in the legislature to constitute the supreme court a board to try contests of elections, as the powers and duties of the court are essentially judicial in their nature and cannot be perverted from that purpose. *Miller v. Wheeler*, 33 Neb. 765 (51 N. W. 137).

159. (1892.) In an action to contest the election of certain judges of the district courts. *Held*, That the limitation in section 2, article VI of the constitution, of the original jurisdiction of the supreme court to cases relating to the revenue, civil cases in which the state shall be a party, mandamus, *quo warranto*, and *habeas corpus* was a prohibition upon the power of the court to entertain original jurisdiction in other cases, and that a contest of election is essentially a judicial proceeding. *Miller v. Wheeler*, 33 Neb. 765 (51 N. W. 137).

160. (1892.) The district court has jurisdiction in case of contested election in relation to township organization. *Albert v. Twohig*, 35 Neb. 563 (53 N. W. 582).

161. (1894.) The jurisdiction conferred upon county courts in section 71, chapter 26, Compiled Statutes of 1893, to hear and determine contests of election of certain officers therein stated, does not include an action to contest the election of a school district officer. *Laird v. Leap*, 42 Neb. 834 (60 N. W. 1043).

162. (1899.) The jurisdiction of statutory contests of election of county officers is placed in the county courts, and as term cases. The prescriptions of the code of civil procedure in regard to time within which a justice of the peace must render judgment are not applicable, and judgments may be announced in contests in the county courts at any time during the term at which the trials occur. *Orr v. Bailey*, 59 Neb. 128 (80 N. W. 495).

Joint meeting of legislative houses to determine contests.

163. (1891.) The last clause of section 4, and section 15 of article V of the constitution, and the last clause of section 77 of chapter 26 of Compiled Statutes construed, and *held*, that the passage and adoption by the legislature, in the manner provided by law, of a concurrent resolution fixing a day for the uniting of both houses to determine by joint vote contested elections for officers of the executive departments, its signing by the presiding officer of each house, its presentation to and approval by the governor, or in case of his return of the same with objections within five days, Sundays excepted, its reconsideration and approval by three-fifths of the members elected to each

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house, are indispensable proceedings to the legality of a joint meeting of the two houses to determine contested elections. *In re Contest Proceedings*, 31 Neb. 262 (47 N. W. 923; 10 L. R. A. 803).

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Limitations.

164. (1891.) Where neither the pleading nor proof shows an earlier date, the twenty days in which to file a complaint in the county court will not commence until the expiration of the time limited in which the canvass may be made. *Sawyer v. Sweet*, 33 Neb. 630 (50 N. W. 954).

165. (1891.) In a contest of election for a county office the complaint may be filed at any time within twenty days after the votes of the county are canvassed. The county clerk is required, with two disinterested electors of the county, to canvass the votes within six days after the closing of the polls. *Sawyer v. Sweet*, 33 Neb. 630 (50 N. W. 954).

Parties.

166. (1889.) In a contest of an election to locate the county seat, those having interests may intervene and be made parties, or the district court may order them brought in. *Burke v. Perry*, 26 Neb. 414 (42 N. W. 401).

167. (1889.) A contest of an election is an adversary proceeding, and, where the election to be contested is one upon the question of relocating a county seat, persons or localities having an interest adverse to the contestant, or some of them, are necessary parties to the contest, and such interests must be shown by the complaint. *Burke v. Perry*, 26 Neb. 414 (42 N. W. 401).

Notice of contest.

168. (1881.) A notice of contest of election which states that the contestant was an elector of the district, the points of contest, the office contested, and the date at which its duties commenced, the person selected to take depositions, and the time and place of taking the same, is sufficient. *State, ex rel. Ballentine, v. Peniston*, 11 Neb. 100 (7 N. W. 753).

Pleading.

169. (1884.) In a proceeding in the district court to contest an election held for the purpose of locating a county seat, it is competent for the contestee or any other party to the action to plead by way of answer any facts which would show a want of jurisdiction on the part of the county commissioners to call said election. *Laws v. Vincent*, 16 Neb. 208 (20 N. W. 213).

170. (1889.) A complaint filed in an election contest will be *held* sufficient in substance if the statute which prescribes what its contents shall be, is followed. *Burke v. Perry*, 26 Neb. 414 (42 N. W. 401).

171. (1890.) In contesting an election in court the allegations of the petition and proof must correspond; in other words, the plaintiff must set forth in his petition the names of the persons whose votes are claimed to be illegal, in order that issue may be taken thereon. If such names are unknown at the time of bringing the action, the contestant afterward should obtain leave of court to amend his petition, giving a list of the names of voters claimed to be illegal, and it is the duty of the court to designate from the evidence the particular persons who have voted unlawfully. *Todd v. Cass County*, 30 Neb. 823 (47 N. W. 196).

172. (1893.) In an election contest the incumbent, having dismissed before judgment a paragraph of his answer alleging the improper refusal to count certain ballots, cannot by an original amendment in the district court, over the contestant's objection, set up the same matters as to which he had entered a dismissal in the county court. *Spurgin v. Thompson*, 37 Neb. 39 (55 N. W. 297).

173. (1907.) In a contest of an election to the office of county treasurer under sections 80 and 81, chapter 26, Compiled Statutes 1907, it is necessary to allege and prove that the contestant is an elector of the county in and for which the contestee is declared elected. *Dodson v. Bowlby*, 78 Neb. 190 (110 N. W. 698).

Evidence.

——— Presumptions.

174. (1879.) All votes cast and received at an election are presumed to be legal until their illegality is proved in some manner provided by law. *State, ex rel. Reed, v. Ramsey*, 8 Neb. 286.

——— Admissibility.

175. (1876.) In a contested election where it appeared from the poll books and returns of the judges that the relator had a majority of all the votes cast, but that the canvassers had opened the ballot boxes and made a pretended recount, and declared respondent elected, an abstract of the recount and packages of ballots so opened is inadmissible in evidence, as the canvassers

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had no authority to open the books or ballot boxes. *Kane v. People*, 4 Neb. 509.

176. (1890.) Under section 40, chapter 26, Compiled Statutes, extrinsic evidence is not admissible to explain a ballot containing a greater number of names for an office, than the number of persons required to fill the office. *State, ex rel. Stearns, v. Foxworthy*, 29 Neb. 341 (45 N. W. 632).

177. (1891.) One of the modes of proving that illegal or fraudulent votes were cast in a ward of a city or other subdivision is to call a resident of one of the blocks in said ward and prove by him who were residents and voters residing on the lot on which he resides. If he is acquainted with all the residents and voters on such or other blocks, he may testify thereto. Otherwise witnesses from the several houses, lots, or blocks must be called to show who are occupants and voters in the several buildings on said block or blocks at the time of the election. The proof may be extended in this manner over the disputed territory, and the fraudulent names deducted from the whole vote cast in such ward or other division. *Held*, Insufficient in case under discussion. *Todd v. Cass County*, 31 Neb. 150 (47 N. W. 748).

178. (1894.) In a contest of an election of a county judge where it appeared there were fourteen spoiled and unused ballots that had been tied on a string and separated from the good ballots, but on the recount such ballots had been counted with the good ones and so mixed as to be indistinguishable, the recount did not establish the result of the election, and the intermingling of the spoiled ballots rendered them incompetent as evidence of the election result, the returns made to the county clerk, being *prima facie* evidence of the choice of the voters, were competent and should have been considered by the court. *Hendee v. Hayden*, 42 Neb. 760 (60 N. W. 1034).

179. (1898.) In an election contest declarations made by illegal voters as to the nature of votes cast by them are not admissible unless the declarations are part of the *res gestæ* or fall within an exception to the rule excluding hearsay evidence. *Dean v. State, ex rel. Miller*, 56 Neb. 301 (76 N. W. 555).

——— Weight and sufficiency.

180. (1890.) Where ballots have been cast in the mode provided by law, the presumption is that they are legal, and this presumption cannot be overturned by vague, indefinite, and uncertain testimony. *Todd v. Cass County*, 30 Neb. 823 (47 N. W. 196).

181. (1890.) In order to establish the fact that illegal votes were cast at an election in a specified voting precinct, proof must be offered by one or more witnesses having actual knowledge of such fact that persons who were not legal voters did actually vote at such election, and such witness or witnesses must designate such illegal voters. When the proof merely tends to show that the witnesses do not know all the legal voters in the precinct, and therefore fails to designate certain voters as illegal, it is insufficient to authorize the rejection of such votes as illegal. *Todd v. Cass County*, 30 Neb. 823 (47 N. W. 196).

182. (1891.) Where it is sought to have an election declared fraudulent because the votes cast are grossly in excess of those cast at previous and succeeding elections, the proof should show the number of votes cast at the last two general elections preceding, as well as those cast at the elections following, together with any explanation tending to show the cause, or the want of it, for the increase, and if fraud is clearly established in the excessive votes the court may reduce the vote to the average number theretofore cast or in case of gross fraud reject it altogether. *Todd v. Cass County*, 31 Neb. 150 (47 N. W. 748).

183. (1891.) An election was held in the county of C. to issue the bonds of the county, at which the city of P. cast more than 2,200 votes. The election was held in June, 1889, and to prove that the election was fraudulent the contestant introduced the number of votes cast at the city election in said city in the spring of 1889 and also at the election in November, 1889, being about 1,300 votes; but did not introduce the number of votes cast at the general election in 1888, nor at the general election in 1887. The court found the number of legal voters in the city at the time of the bond election to be 1,928. *Held*, That without proof that the votes cast at the general elections of 1888 and 1887 were greatly less than the number of votes cast at the bond election, the court could not reject votes at the latter election as being excessive and therefore fraudulent and unknown voters. *Todd v. Cass County*, 31 Neb. 150 (47 N. W. 748).

Dismissal.

184. (1903.) The contestant in a proceeding to contest an election may volun-

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tarily dismiss the proceedings at any time before issue is joined. *Moore v. Waddington*, 69 Neb. 615 (96 N. W. 279).

185. (1903.) After a motion to set aside a voluntary dismissal of an election contest, and an application for leave to intervene was made by the plaintiff in error, the incumbent challenged the jurisdiction of the court to set aside the dismissal, or to allow the intervention. *Held*, that contestant is a necessary party to proceedings in error to review such order. *Moore v. Waddington*, 69 Neb. 615 (96 N. W. 279).

186. (1903.) When a voluntary dismissal of an election contest has been entered, the trial court has no authority to set aside the dismissal without notice to the contestant. *Moore v. Waddington*, 69 Neb. 615 (96 N. W. 279).

187. (1903.) When a voluntary dismissal of an election contest has been entered, the court, until it is set aside, is without jurisdiction to allow another party to intervene and be substituted as contestant. Whether such dismissal can be set aside, *quære*. *Moore v. Waddington*, 69 Neb. 615 (96 N. W. 279).

Scope of inquiry and powers of court.

188. (1891.) The stipulation of the parties set out in the opinion, *held*, to have submitted to the trial court only the twenty-one scratched ballots, and the questions arising as to counting or rejecting them, confined to the form and substance of the ballots at the time of filing the stipulation by the parties. *Barnd v. Hunt*, 32 Neb. 116 (49 N. W. 222).

189. (1894.) Where spoiled and unused ballots have, on the recount, been counted and so mixed with the good ballots as to be indistinguishable, it is error, on a contest to apportion the "spoiled" ballots between the contestant and contestee and deduct from the vote of each one a share of such ballots, proportioned according to the whole number of votes cast for him. *Hendee v. Hayden*, 42 Neb. 760 (60 N. W. 1034).

190. (1905.) The record of a popular election is made up and finally completed at the polls and nothing can afterwards be taken therefrom or added thereto, and a trial judge cannot exclude any part of it from evidence in the trial of an election contest. *Mauck v. Brown*, 59 Neb. 382, so far as inconsistent herewith, overruled. *Griffith v. Bonawitz*, 73 Neb. 622 (103 N. W. 327).

Trial or hearing.

191. (1881.) The persons selected to take depositions in an election contest, if they refuse to take testimony offered relating to the points of contest, may, after entering upon their duties, be compelled by mandamus to proceed. *State, ex rel. Ballentine, v. Peniston*, 11 Neb. 100 (7 N. W. 753).

Judgment.

192. (1889.) Where, in a contest of election, the district court declares the party contesting entitled to the office of councilman of a city, a supersedeas bond, although duly filed and approved, will not stay the judgment, there being no provision of statute for such suspension of judgment. *State, ex rel. Hunt, v. City of Kearney*, 28 Neb. 103 (44 N. W. 90).

193. (1891.) The finding and judgment of the trial court *held* to be in accordance with the provisions of sections 80 to 100, inclusive, chapter 26, Compiled Statutes, in the absence of any record evidence to the contrary. *Barnd v. Hunt*, 32 Neb. 116 (49 N. W. 222).

194. (1903.) A judgment establishing the invalidity of an election attempted to be made at the general election in 1899, does not render *res judicata* between the same parties the power to make such an election at the general election in 1901, even if there be no change in the law affecting the validity of such election. *State, ex rel. Gordon, v. Moores*, 70 Neb. 48 (96 N. W. 1011).

——— Review.

195. (1875.) A party aggrieved by any alleged error of the board of justices, chosen to hear contests relative to the election of any county officer, has his remedy by appeal to the district court, and a writ of mandamus from the supreme court, to compel the correction of such error, does not lie against them. The statute regulating appeals in ordinary civil actions governs such appeal, and the appellate court has ample jurisdiction, though the cause must be tried by the judge without the aid of a jury. *People v. Martin*, 4 Neb. 49.

196. (1875.) The board of justices chosen under section 26 of the general election law (Gen. Stat., 359), in case of the contested election for any county office, should reduce all the evidence given before them to writing, in order to make the same available in case of an appeal to the district court; and though the statute is silent as to whom the custody and control of such testimony shall

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be entrusted, there is ample inherent power in the appellate court, to compel its production upon consideration of the case there. The trial in the appellate court should be confined to the testimony so taken, though in case of its loss or destruction, neither party would be debarred from introducing necessary evidence to supply such omission. *People v. Martin*, 4 Neb. 49.

197. (1879.) The supreme court has jurisdiction to correct errors of the district court in administering the law for contesting elections. *Miller v. Rolph*, 8 Neb. 438.

198. (1883.) In an appeal in a contested election suit it is error to dismiss because the appeal bond was not signed by the appellant. *Clark v. Strong*, 14 Neb. 229 (15 N. W. 236).

199. (1889.) Where, in a contest of election, the district court declares the party contesting entitled to the office of councilman of a city, a supersedeas bond, although duly filed and approved, will not stay the judgment, there being no provisions of statute for such suspension of judgment. *State, ex rel. Hunt, v. City of Kearney*, 28 Neb. 113 (44 N. W. 90).

200. (1891.) An election contest brought to the supreme court on petition in error, which is in fact an appeal, will not be remanded for want of a motion for a new trial. *Barnd v. Hunt*, 32 Neb. 116 (49 N. W. 222).

201. (1892.) Proceedings in district court, to contest an election to locate county seat, will not be reviewed by the supreme court in the absence of bill of exceptions. *Peters v. Morey*, 34 Neb. 82 (51 N. W. 312).

202. (1894.) In a special proceeding founded solely upon a statute it is not only the privilege, but it is the duty, of the supreme court, on its own motion, to look into the record of the proceeding and determine whether such proceeding is authorized by such statute, and whether the party prosecuting the proceeding is by the statute authorized to do so. *Thomas v. Franklin*, 42 Neb. 310 (60 N. W. 568).

203. (1899.) The word "appeal" in section 98, chapter 26, Compiled Statutes 1899, is used in a distinctive and not generic sense and indicates an appeal and not a proceeding in error. *Mauck v. Brown*, 59 Neb. 382 (81 N. W. 313).

204. (1899.) Ballots which have been used in evidence, in an election contest, can be made part of a bill of exceptions though not physically attached to such bill at the time of the settlement. *Mauck v. Brown*, 59 Neb. 382 (81 N. W. 313).

205. (1899.) The questions presented on an election contest based on irregularity of ballots, determined not to be those for the presentment of which a petition in error is the exclusive remedy, but of the weight and sufficiency of evidence to sustain findings of the trial court and proper in an appeal. *Mauck v. Brown*, 59 Neb. 382 (81 N. W. 313).

206. (1905.) On appeal from the decision of a district court in a contested election, the entire record should be brought up, and it will be considered by the supreme court *de novo*. *Griffith v. Bonawitz*, 73 Neb. 622 (103 N. W. 327).

207. (1905.) On an appeal from the decision of a county court in a contested election, it is not requisite to file new pleadings in the district court. *Griffith v. Bonawitz*, 73 Neb. 622 (103 N. W. 327).

X. VIOLATIONS OF ELECTION LAWS.

Illegal voting.

208. (1891.) Illegal voting at village elections is not a crime in this state and is not punishable under sections 181 and 182 of the criminal code. *State v. Chichester*, 31 Neb. 325 (47 N. W. 934; 11 L. R. A. 104).

Offenses by officers.

209. (1901.) It is official misconduct for a county clerk to permit ballots committed to his official care to be abstracted from his office. He cannot urge as a defense to a proceeding to remove him from office that the ballots so abstracted possessed no evidential value. *Stewart v. Bole*, 61 Neb. 193 (85 N. W. 33).

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ELECTRICITY.

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ANALYSIS.

Regulation of rates and charges, § 1.
Injuries from electric current, §§ 2-11.
——— Evidence as to negligence, §§ 12-14.

CROSS-REFERENCES.

Right of cities to maintain electric light systems, see *Municipal Corporations*, §§ 92-95.

Liability of cities for injuries from defective electric wires, see *Municipal Corporations*, § 752.

Regulation of rates and charges.

1. (1900.) A city of the second class, having less than 5,000 inhabitants, has no authority to regulate the rates and charges which an electric light company may charge its customers for lights. *Wabaska Electric Co. v. City of Wymore*, 60 Neb. 199 (82 N. W. 626).

Injuries from electric current.

See, also, *Negligence*.

2. (1903.) An electric light company is under the duty to exercise all reasonable precautions against passing a dangerous current of electricity through a guy-wire attached to a pole on a vacant and uninclosed lot in a densely peopled part of a city. *New Omaha Thomson-Houston Electric Light Co. v. Johnson*, 67 Neb. 393 (93 N. W. 778).

3. (1905.) A lineman of the electric light company, while acting at fires under the direction of the city authorities in pursuance of an ordinance, cannot render the company liable by his words or acts in the absence of special authority. *New Omaha Thomson-Houston Electric Light Co. v. Anderson*, 73 Neb. 84 (102 N. W. 89).

4. (1905.) The furnishing of electric currents for power and lighting purposes is a recognized business which must be conducted with due regard to the safety of both employees and the public in view of the dangerous character of such currents, but their furnishers are not insurers against all dangers from them. Blameless casualties may arise from their operation. *New Omaha Thomson-Houston Electric Light Co. v. Anderson*, 73 Neb. 84 (102 N. W. 89).

5. (1905.) Section 1 of ordinance numbered 4363 of the city of Omaha, *held* to impose no duty on the defendant light company except to furnish a competent lineman to act under the city authorities' direction in disconnecting wires. *New Omaha Thomson-Houston Electric Light Co. v. Anderson*, 73 Neb. 84 (102 N. W. 89).

6. (1905.) A claim for injury by an electric shock cannot be sustained by a mere hypothetical claim that such shock was only rendered possible by a ground current negligently permitted at some other point in the circuit by defendant, it not appearing that any usual precautions to prevent such "grounding" had been omitted or that defendant had or under the circumstances ought to have had knowledge of it. *New Omaha Thomson-Houston Electric Light Co. v. Anderson*, 73 Neb. 84 (102 N. W. 89).

7. (1905.) A member of a truck company, who assists to hoist a ladder with metallic corners against an electric light wire, cannot, in the absence of invitation or permission of the owner, complain that the wires were not properly insulated and that he was injured because of such lack of insulation. *New Omaha Thompson-Houston Electric Light Co. v. Anderson*, 73 Neb. 84 (102 N. W. 89).

8. (1907.) Where a city is engaged in the operation of an electric lighting plant for commercial purposes, and one of its wires is negligently left in a position to cause injury to one who is without fault on his part, the fact that such wire was not in use at the time the accident occurred constitutes no defense to an action for damages. *Todd v. City of Crete*, 79 Neb. 671 (113 N. W. 172).

9. (1907.) Where an electric light company places highly charged wire through the branches of a tree and within 26 inches of low potential wires, when it is undisputed that such wires should be at least five feet apart, the company is guilty of negligence. *Grimm v. Omaha Electric Light & Power Co.*, 79 Neb. 387 (112 N. W. 620).

10. (1907.) An ordinarily bright and intelligent boy 12 years old, living in a city in which electric light and power wires are in constant use on nearly all of the principal

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streets and highways, who, having knowledge of the danger but not of its extent, purposely takes hold of such a wire in order to obtain a shock, and is injured thereby, is, as a matter of law, guilty of contributory negligence. *Johnston v. New Omaha Thomson-Houston Electric Light Co.*, 78 Neb. 27 (113 N. W. 526).

11. (1907.) An electric light company which had strung its wire on posts erected along the edge of a viaduct, at a height of 18 to 30 inches from the railway of such viaduct, such wire being erected in compliance with the regulations of the city authorities, the company having no notice of a defect in the insulation of the wire, was held not liable for an injury to a 12-year-old boy who climbed on the railing and touched the wire for the purpose of seeing if he would get a shock. *Johnston v. New Omaha Thomson-Houston Electric Light Co.*, 78 Neb. 24 (110 N. W. 711).

——— Evidence as to negligence.

12. (1901.) Evidence that deceased, a lad of 17 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 others in his presence, without harm. *South Omaha Water-Works Co. v. Vocasek*, 62 Neb. 710 (87 N. W. 536).

13. (1903.) Evidence in an action to recover for the death of plaintiff's husband, who was killed by coming in contact with a guy-wire of defendant company, showing that the deceased while walking through a vacant lot was killed, without evidence showing he came in contact with the live wire as charged, does not support a verdict for plaintiff. *New Omaha Thomson-Houston Electric Light Co. v. Johnson*, 67 Neb. 393 (93 N. W. 778).

14. (1903.) In an action against an electric light company to recover for the death of plaintiff's husband, evidence showing that if deceased came in contact with a guy-wire of one of defendant's poles, that was heavily charged with electricity located on a vacant lot, such contact was voluntary and he was guilty of contributory negligence. *New Omaha Thomson-Houston Electric Light Co. v. Johnson*, 67 Neb. 393 (93 N. W. 778).

ELEVATORS.

As warehouses, see *Warehousemen*, § 1

Injuries from defects, see *Negligence*, §§ 30-32.

EMANCIPATION.

Of child, see *Parent and Child*, §§ 38, 39.

EMBEZZLEMENT.

ANALYSIS.

Nature of offense, § 1.
Statutory provisions, §§ 2-8.
Defenses, § 9.
Persons liable, § 10.
Abatement, § 11.
Venue, § 12.
Elements of crime, §§ 13-17.
Embezzlement by particular classes of persons.
——— **Agent, §§ 18-22.**
——— **Public officer, §§ 23-27.**
——— **Attorneys, §§ 28, 29.**
Indictment and information.
——— **In general, §§ 30-32.**
——— **Certainty, § 33.**
——— **Fiduciary relation of attorney, § 34.**
——— **Ownership of property, §§ 35-37a.**
——— **Allegation of official capacity of defendant, §§ 37b, 37c.**

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——— Character of employer, § 38.
——— Kind of money, §§ 39, 39a.
——— Value of property, §§ 40, 41.
——— Variance, §§ 42-44.
Election of counts, § 45.
Admissibility of evidence, §§ 46-48a.
Weight and sufficiency of evidence, §§ 49-60.
Instructions, §§ 61-63.
Verdict, §§ 64, 65.
Sentence and punishment, §§ 66-68.

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CROSS-REFERENCES.

Prosecution of state treasurer for, by county attorney, see *County Attorney*, § 14.

Right of private citizen to sue on behalf of city for embezzlement, see *Municipal Corporations*, §§ 1073, 1074.

Instruction defining embezzlement in slander suit, see *Libel and Slander*, § 122.

Nature of offense.

1. (1895.) Embezzlement is the fraudulent appropriation by an agent of the property of another. *Hamilton v. State*, 46 Neb. 284 (64 N. W. 965).

Statutory provisions.

2. (1895.) The terms "shall embezzle" and "convert to his own use," found in section 121 of the criminal code, are synonymous. *Hamilton v. State*, 46 Neb. 284 (64 N. W. 965).

3. (1895.) Under section 121, criminal code, providing for the crime of embezzlement, the exception as to the persons within the act relating to apprentices and those within the age of eighteen does not apply to officers, agents, attorneys, clerks, or servants of incorporated companies. *McAleer v. State*, 46 Neb. 116 (64 N. W. 358).

4. (1896.) The term "loan" is employed in a restricted sense in section 124, criminal code 1873, and includes those transactions only in which the conventional relation of borrower and lender exists, and has no application to the deposit in bank, for safe-keeping, of public funds by the custodian thereof who so far retains his control over them that they may be by him at any time reclaimed. *State v. Hill*, 47 Neb. 456 (66 N. W. 541).

5. (1896.) So much of section 124, criminal code 1873, defining embezzlement of public funds, as provides that if any officer charged with the collection, safe-keeping, or disbursement of public funds "shall loan, with or without interest, * * * any portion of the public money, * * * every such act shall be deemed * * * an embezzlement of so much of the said moneys * * * as shall be thus * * * loaned" (Gen. Stats. 1873, p. 749, sec. 124), was intended to prevent the unlawful use by officers, and others with their knowledge and consent, of money committed to their custody, and not as an amendment of existing statutes regulating the means of preserving and accounting for of public funds. *State v. Hill*, 47 Neb. 456 (66 N. W. 541).

6. (1896.) The act of the legislature of 1891, entitled "An act to provide for the depositing of state and county funds in banks" (Session Laws 1891, p. 347, ch. 50), did not repeal so much of section 124 of the criminal code as is in relation to loaning county funds, and constitutes such loaning by an officer entrusted with their care and disbursement an embezzlement. *Korth v. State*, 46 Neb. 631 (65 N. W. 792).

7. (1897.) The law for depositing state and county funds in banks (Session Laws 1891, p. 347, ch. 50) did not repeal section 124 of the criminal code relating to the embezzlement of public money. *Whitey v. State*, 53 Neb. 287 (73 N. W. 696).

8. (1898.) Section 124 of the criminal code, relating to embezzlement of public moneys, applies only to officers or persons charged by law with the collection, receipt, safe-keeping, transfer, or disbursement of such moneys and to those who aid or abet such officers or persons. *Moore v. State*, 53 Neb. 831 (74 N. W. 319).

Defenses.

9. (1897.) One who served his entire term cannot be heard to urge as a defense to the charge of embezzlement of public moneys that when the embezzlement took place he was not an officer *de jure*. *Bartley v. State*, 53 Neb. 310 (73 N. W. 744).

Persons liable.

10. (1897.) Under section 124 of the criminal code, any person who advises, aids, or participates in an officer's embezzlement of public money is himself guilty of embez-

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zlement. *Mills v. State*, 53 Neb. 263 (73 N. W. 761).

Abatement.

11. (1897.) In a prosecution for embezzlement, the pendency of a former information in another county, charging accused with the embezzlement of the same property, within that county, is no ground for abatement. *Bartley v. State*, 53 Neb. 310 (73 N. W. 744).

Venue.

12. (1905.) The venue is properly laid in the county where the purpose is formed to convert the right in action, and the decisive steps taken to carry out that purpose, although the subject of the right in action is situated in another county. *Higbee v. State*, 74 Neb. 331 (104 N. W. 748).

Elements of crime.

13. (1885.) To constitute embezzlement it is essential that the owner should be deprived of the property alleged to be embezzled by an adverse use or holding. *Chaplin v. Lee*, 18 Neb. 440 (25 N. W. 609).

14. (1895.) To constitute embezzlement the owner must be deprived of his property by an actual adverse use or holding. *McAleer v. State*, 46 Neb. 116 (64 N. W. 358).

15. (1895). To constitute embezzlement under section 121, criminal code, it is essential that the money or thing charged to have been embezzled should have come into the possession or care of the defendant by virtue of his employment. *McAleer v. State*, 46 Neb. 116 (64 N. W. 358).

16. (1896.) It is essential to the crime of embezzlement that the owner be deprived of the property alleged to have been embezzled. *State v. Hill*, 47 Neb. 456 (66 N. W. 541).

17. (1905). Under section 121, criminal code, converting rights in action to one's own use is an essential element of the crime of embezzlement. *Higbee v. State*, 74 Neb. 331 (104 N. W. 748).

Embezzlement by particular classes of persons.

——— Agent.

18. (1884.) Plaintiff in error was indicted or the embezzlement, as agent, of certain noneys belonging to the M. M. company, a orporation, received by him on sales of heir machinery. The contract of agency, ntroduced in evidence on the part of the tate, contained the following clause: "To remit to the said party of the first part the proceeds of each and every sale as early as the day following the delivery of the machinery to the purchaser. If the said sale was for all cash, the full commissions, as per article 3d, may be retained; or if a time sale, the full settlement for the same shall be remitted less the proportion of commissions due on the cash received; the balance of the commission shall be due *pro rata* as the cash is paid on the notes. If any cash received on sales of machines is not remitted as agreed in this section, the party of the second part shall not only be legally liable, but agrees that the settlement shall be made on the time sale basis, and ten per cent. interest shall be paid on all cash so retained." *Held*, That money so retained was not embezzled, and that no conviction could be had therefor. *Miller v. State*, 16 Neb. 179 (20 N. W. 253).

19. (1892.) An agent who, having received property of another to sell on commission on certain prescribed terms, fraudulently, and without the knowledge and consent of the owner thereof, pledges it for money borrowed by the agent for his own use and benefit, with the intent to deprive the owner of his property, is guilty of embezzlement. *Morehouse v. State*, 35 Neb. 643 (53 N. W. 571).

20. (1904.) The gravamen of the crime of embezzlement by an agent is the fraudulent and felonious intent to convert the property of the principal to his own use. *State v. Culver*, 5 Unof. 238 (97 N. W. 1015).

21. (1904.) Where an agent converts property of his principal to his own use under an honest but mistaken claim of right, such act does not constitute the crime of embezzlement. *State v. Culver*, 5 Unof. 238 (97 N. W. 1015).

22. (1905.) In a prosecution for embezzlement of a "right in action" under section 121 of the criminal code, it is not necessary to show that the defendant was at the time of the alleged embezzlement in the manual possession of the money or property which was the subject of the right in action. If the agent of a corporation so uses the rights in action of his employer as to prevent his employer from asserting those rights, and so deprives the employer of the property or money involved, and by so doing appropriates the property or money to his own use, without the assent of the employer, and with the faudulent intent to so appropriate the same,

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he is guilty of embezzlement under the statute. *Higbee v. State*, 74 Neb. 331 (104 N. W. 748).

——— Public officer.

Statutory provision as to, see *ante*, §§ 2-8.

23. (1895.) A sheriff is an officer elected to an office of public trust in this state, and for the conversion to his own use of any moneys that shall come into his hands by virtue of his office may be prosecuted for embezzlement under section 121 of the criminal code. *Conley v. State*, 46 Neb. 187 (64 N. W. 708).

24. (1897.) The disbursement of public funds by a city treasurer, except upon a warrant drawn by proper authority, constitutes embezzlement. *Bolin v. State*, 51 Neb. 581 (71 N. W. 444).

25. (1897.) A state treasurer who, for an unauthorized purpose, draws a check on a state depository bank having money of the state therein, which he delivers to the payee with intent to defraud the state, and the bank on presentation of the check places the amount thereof to the credit of a third party whom the payee represents in the transaction, and at the same time charges the account of the state with a like sum, is guilty of the embezzlement of the money of the state, within the meaning of section 124 of the criminal code. *Bartley v. State*, 53 Neb. 310 (73 N. W. 744).

26. (1897.) The mere depositing of county funds in depository banks by a county treasurer in strict compliance with the requirements of section 6, chapter 50, laws 1891, is not an embezzlement of such funds by the treasurer. *Whitney v. State*, 53 Neb. 287 (73 N. W. 696).

27. (1898.) The auditor of public accounts is not as an officer charged with the collection, receipt, safe-keeping, transfer, or disbursement of any part of the public moneys, and is therefore not within the descriptive terms of section 124 of the criminal code. *Moore v. State*, 53 Neb. 831 (74 N. W. 319).

——— Attorneys.

28. (1888.) An attorney at law is not liable to a prosecution for embezzlement of his client's money in his hands, until his attorney's lien has been discharged. *Van Etten v. State*, 24 Neb. 734 (40 N. W. 289; 1 L. R. A. 669).

29. (1888.) An attorney has a lien for a general balance of compensation upon money in his hands belonging to his client, and until such lien is discharged he is not liable to a prosecution for the embezzlement of such money. *Van Etten v. State*, 24 Neb. 734 (40 N. W. 289; 1 L. R. A. 669).

Indictment and information.

——— In general.

30. (1885.) A complaint charging a treasurer of a school district with unlawfully, fraudulently, and feloniously embezzling certain school money which came into his possession by virtue of his office, sufficiently charges the crime of embezzlement. *State, ex rel. Bryant, v. Knox*, 17 Neb. 65 (24 N. W. 382).

31. (1897.) An information for embezzlement is sufficient if it sets forth the crime in the language of the state, without averring the particular acts in which the offense consisted. *Bartley v. State*, 53 Neb. 310 (73 N. W. 744).

31*a*. (1908.) An indictment for embezzlement is sufficient if it sets forth the crime in language equivalent to that contained in the statute creating and defining that crime, without averring the particular acts in which the offense consists. *Chamberlain v. State*, 80 Neb. 812 (115 N. W. 555).

32. (1897.) An indictment against a state treasurer, which charges the embezzlement to his own use of a certain sum of money belonging to the state, is sufficient without an allegation that a demand for the money was made upon him by his successor in office. *Bartley v. State*, 53 Neb. 310 (73 N. W. 744).

——— Certainty.

33. (1897.) The word "embezzle" includes within its import the "conversion to his own use" as alleged in an information against one accused of embezzlement, and it does not constitute an information fatally defective, for uncertainty as a plea that the two are joined by the copulative "and." The same is also true of the first and any other word or set of words used to express a manner of the commission of the crime. *Mills v. State*, 53 Neb. 263 (73 N. W. 761).

——— Fiduciary relation of attorney.

34. (1892.) In a prosecution under section 121 of the criminal code, for embezzlement as an attorney at law, the fiduciary character of the accused, which is the distinguishing feature of the crime of embez-

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zlement, should be distinctly charged. *Zink v. State*, 34 Neb. 37 (51 N. W. 294).

——— Ownership of property.

35. (1885.) An indictment against a treasurer of a school district sufficiently alleges ownership of the property by charging the defendant, as treasurer of such school district, with duties to collect and receipt for money, which he unlawfully and feloniously embezzled and converted to his own use. *State, ex rel. Bryant, v. Knox*, 17 Neb. 683 (24 N. W. 382).

36. (1895.) Where a sheriff by virtue of an order of sale issued upon a decree of foreclosure had sold the lands therein described and collected the amount of the bid of the purchaser, which, before an order of the court directing to whom it should be paid out had been made, he had converted to his own use, it was not essential in an information against such officer to allege to whom such money belonged, and an allegation of that kind should be rejected as surplusage when the information independently of such allegation fully stated the facts above indicated. *Conley v. State*, 46 Neb. 187 (64 N. W. 708).

36*a*. (1907.) The estate of a deceased person, pending administration, is a legal entity; and, in charging a violation of section 121 of the criminal code, it is sufficient as to the matter of ownership, to allege that the money or property embezzled belonged to such an estate. *Hendee v. State*, 80 Neb. 80 (113 N. W. 1050).

37. (1897.) Information for embezzlement of funds by a county treasurer *held* to sufficiently designate the owner of the money embezzled to be the county. *Whitney v. State*, 53 Neb. 287 (73 N. W. 696).

37*a*. (1907.) In a prosecution for embezzlement under section 124 of the criminal code it is not necessary to allege in the information that the city whose funds are embezzled is an organized city. *Bode v. State*, 80 Neb. 74 (113 N. W. 996).

——— Allegation of official capacity of defendant.

37*b*. (1907.) Information examined, its substance stated, and held not vulnerable to the objection that "it fails to allege that the accused embezzled and converted the public money in question while holding it as city treasurer." *Bode v. State*, 80 Neb. 74 (113 N. W. 996).

37*c*. (1907.) An information based on the provisions of section 121 of the criminal code, which charged, in the language of the statute, that the property in question came into the possession of the defendant "by virtue or under color of his relation as an officer," is not void for duplicity, and is sufficient in that respect to sustain a conviction. *Hendee v. State*, 80 Neb. 80 (113 N. W. 1050).

——— Character of employer.

38. (1895.) The corporate character of the employer is an essential element of embezzlement by an agent, where employment by a corporation is charged in the information. *McAleer v. State*, 46 Neb. 116 (64 N. W. 358).

——— Kind of money.

39. (1885.) It is not necessary to allege the particular kind of money with which one is charged with embezzling. *State, ex rel. Bryant, v. Knox*, 17 Neb. 683 (24 N. W. 382).

39*a*. (1907.) In charging the embezzlement of a certificate of deposit belonging to an estate, it is sufficient to describe the instrument as it appeared at the time it came into the possession of the accused, and subsequent indorsements, procured by him, need not be set forth in the information. *Hendee v. State*, 80 Neb. 80 (113 N. W. 1050).

——— Value of property.

40. (1885.) Where the money defendant is charged with embezzling is legal tender it is not necessary to allege its value. *State, ex rel. Bryant, v. Knox*, 17 Neb. 683 (24 N. W. 382).

41. (1897.) An allegation of the information that the embezzlement was of the sum of $6,000 in money, *held* a sufficient expression of value. *Mills v. State*, 53 Neb. 263 (73 N. W. 761).

——— Variance.

42. (1896.) An information for embezzlement which described defendant as "secretary of the board of education" *held* not at variance with a complaint describing him as "secretary of the school board." *Hockenberger v. State*, 49 Neb. 706 (68 N. W. 1037).

43. (1896.) The plaintiff in error was arrested on a complaint charging him with having embezzled certain money belonging to "the school district of the city of Grand Island, Hall county, Nebraska." The information on which he was tried charged him with having embezzled certain money be-

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longing to "the school district of the city of Grand Island, of the county of Hall, in the state of Nebraska." *Held*, No material variance between the complaint and the information. *Hockenberger v. State*, 49 Neb. 706 (68 N. W. 1037).

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44. (1897.) Under an information against a public officer charging embezzlement on a certain date, evidence of a continuous series of conversions of money by the defendent at different times and in different amounts before that date will support a verdict finding the aggregate sum as the amount of a single embezzlement. *Bolln v. State*, 51 Neb. 581 (71 N. W. 444).

Election of counts.

45. (1896.) Where one is charged with embezzlement of county funds while he was county treasurer, the information containing several counts charging several distinct acts of embezzlements, the withholding of a ruling on a motion requiring the state to elect under which count the complaint would proceed, until after the close of the state's evidence, when the motion was sustained, there is no error. *Korth v. State*, 46 Neb. 631 (65 N. W. 792).

Admissibility of evidence.

46. (1896.) Where one who was county treasurer and also secretary of a board of education was tried for having, as such secretary, embezzled $1,000 of school funds, his defense being that, as secretary, he receipted to himself as county treasurer for $3,000, though the actual amount was only $2,000, which sum he turned over to the proper officer, it was error to refuse to instruct that the receipts for $3,000 were only *prima facie* evidence of such payment, and that the receipts might be explained and the truth shown. *Hockenberger v. State*, 49 Neb. 706 (68 N. W. 1037).

47. (1897.) A receipt of deposit of money in a bank by a county treasurer is admissible in a prosecution for embezzlement of such treasurer when shown that the address was in the handwriting of the cashier and acknowledged by defendant. *Mills v. State*, 53 Neb. 263 (73 N. W. 761).

47*a*. (1907.) In a prosecution for embezzlement or other crime, where the books, records, papers and entries are voluminous and of such a character as to render it difficult for the jury to arrive at a correct conclusion as to amounts, an expert accountant may be allowed to examine such books, etc., and testify as to the result of his examination, and as to particular entries therein, shown to be in the handwriting of the defendant, when such books are in the court-room subject to inspection by the accused and the particular entries are also introduced in evidence. *Bode v. State*, 80 Neb. 74 (113 N. W. 996).

48. (1897.) Correspondence of a bank in negotiating for the state treasurer a warrant owned by the state *held* admissible in evidence in a prosecution against him for the embezzlement of the amount subsequently used to take up the warrant. *Bartley v. State*, 53 Neb. 310 (73 N. W. 744).

48*a*. (1908.) Under an indictment charging a bank officer with embezzling its funds on a certain date, evidence tending to show embezzlement of different amounts at different times before that date, and the manner in which he conducted the business of the bank, is admissible for the purpose of assisting the jury in determining the defendant's guilt or innocence of the charge set forth in the indictment. *Chamberlain v. State*, 80 Neb. 812 (115 N. W. 555).

Weight and sufficiency of evidence.

49. (1892.) In a prosecution for embezzlement, evidence showing that an agent for a piano factory, selling on commission, with title to all the property in the principal, executed a bill of sale on the goods in his possession, is sufficient to sustain a verdict of guilty. *Moorehouse v. State*, 35 Neb. 643 (53 N. W. 571).

50. (1895.) A secreting with intent to convert to one's own use does not prove the offense under an information charging an actual embezzlement. *McAleer v. State*, 46 Neb. 116 (64 N. W. 358).

51. (1895.) That the relation of debtor and creditor exists between a principal and his agent, and that on balancing the account the agent would be found indebted to his principal, are not alone sufficient to sustain a verdict finding the agent guilty of embezzling or converting to his own use the property of his principal. *Hamilton v. State*, 46 Neb. 284 (64 N. W. 965).

52. (1895.) To sustain the conviction of an agent for embezzling or converting to his own use the property of his principal, the facts must warrant the conclusion that such conversion was made by the agent with a felonious intent. *Hamilton v. State*, 46 Neb. 284 (64 N. W. 965).

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53. (1897.) Evidence in a prosecution for embezzlement *held* sufficient to sustain a conviction. *Mills v. State*, 53 Neb. 263 (73 N. W. 761).

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54. (1897.) Under section 124 of the criminal code the failure of any public officer to account to, or make settlement of his official accounts with, the proper legal authority within reasonable time after notice so to do, as well as the refusal of such officer to promptly pay over to his successor any public moneys or securities on the legal requirement of any authorized officer, is made *prima facie* evidence of embezzlement. *Bolln v. State*, 51 Neb. 581 (71 N. W. 444).

55. (1897.) The evidence in the case is sufficient to sustain a conviction for the embezzlement of the moneys of the state. *Bartley v. State*, 53 Neb. 310 (73 N. W. 744).

56. (1897.) Failure and refusal of a county treasurer to promptly pay to his successor any of the public moneys is *prima facie* evidence of embezzlement. *Whitney v. State*, 53 Neb. 287 (73 N. W. 696).

57. (1898.) To sustain a conviction for embezzlement of public moneys proof that specie was used in the transactions *held* unnecessary. *Bartley v. State*, 55 Neb. 294 (75 N. W. 832).

58. (1904.) That the relation of debtor and creditor exists between a principal and his agent, and that on balancing the account the agent would be found indebted to his principal, are not alone sufficient to sustain a verdict finding the agent guilty of embezzling or converting to his own use the property of his principal. *State v. Culver*, 5 Unof. 238 (97 N. W. 1015).

59. (1905.) Evidence that the party against whom the right in action existed was solvent, and actually paid the money involved as directed by the defendant in adjustment of the right in action, is sufficient *prima facie* evidence of value. *Higbee v. State*, 74 Neb. 331 (104 N. W. 748).

59*a*. (1907.) Evidence examined, and *held* sufficient to sustain the verdict. *Bode v. State*, 80 Neb. 74 (113 N. W. 996).

59*b*. (1907.) Bill of exceptions examined and evidence found sufficient to sustain the conviction. *Hendee v. State*, 80 Neb. 80 (113 N. W. 1050).

60. (1905.) The allegation of the information that the party injured is a corporation is sufficiently sustained by proof that it is a *de facto* corporation. Proof of the regularity of the proceedings to incorporate is not necessary. *Higbee v. State*, 74 Neb. 331 (104 N. W. 748).

Instructions.

61. (1896.) The defense of the defendant in error was, and the evidence offered in his behalf tended to establish it, that on said date, while secretary of the board of education, he receipted to himself as county treasurer for $3,000; that as a matter of fact on said date he, as secretary of the school board, only received from himself as county treasurer $2,000, which sum, on said date, he paid over to the city treasurer. The refusal to submit, by an instruction, this defense to the jury was error. *Hockenberger v. State*, 49 Neb. 706 (68 N. W. 1037).

62. (1897.) In a prosecution for embezzlement against one who borrowed public money from the officer having custody thereof, the instructions set out in the opinion, *held* proper. *Mills v. State*, 53 Neb. 263 (73 N. W. 761).

62*a*. (1908.) Instructions must be predicated on the evidence; and in the prosecution of a bank officer for embezzlement it is error to submit to the jury the fact of his having overdrawn an account with the bank as proof of guilt, unless the evidence is sufficient to establish every element necessary to make the transaction criminal in its nature. *Chamberlain v. State*, 80 Neb. 812 (115 N. W. 555).

63. (1905.) In a prosecution against an agent for embezzling the rights in action of his employer, an instruction that if defendant "received credit in his individual capacity" for a right in action of the employer, he would be guilty of embezzlement, is erroneous. Unless the act is done with a felonious intent, and results in depriving the employer of his money or property, it is not embezzlement. *Higbee v. State*, 74 Neb. 331 (104 N. W. 748).

Verdict.

64. (1897.) A verdict finding the amount of money embezzled to be a specified number of dollars is a sufficient finding of value, under an information charging defendant with the embezzlement of money. *Bartley v. State*, 53 Neb. 310 (73 N. W. 744).

65. (1902.) It is not necessary that a jury in a criminal case should in their verdict fix the value of money stolen or embezzled. Courts will take judicial notice of

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the worth of a dollar. *Reed v. State*, 66 Neb. 184 (92 N. W. 321).

Sentence and punishment.

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66. (1902.) The legislature has authority in a criminal action to authorize a judgment which shall operate in favor of the party whose money or effects have been embezzled, as compensation for the value of the thing embezzled, and liquidated damages for the injury sustained. *Everson v. State*, 66 Neb. 154 (92 N. W. 137).

67. (1902.) While section 124, criminal code, denominates the judgment, for double the amount embezzled, a fine, it is in reality allowed as compensation to the injured party, and is not a fine or penalty within the meaning of section 5, article VIII of the constitution. *Everson v. State*, 66 Neb. 154 (92 N. W. 137).

68. (1902.) The provision of section 124 of the criminal code, directing the assessment of a fine in double the amount embezzled, in addition to the imprisonment imposed in case of conviction, is not open to the objection that it inflicts a double penalty or punishment upon the defendant, or awards the injured party double damages. *Everson v. State*, 66 Neb. 154 (92 N. W. 137).

EMINENT DOMAIN.

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I. NATURE, EXTENT AND DELEGATION OF POWER.

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Statutory provisions.

1. (1895.) The word "if" in the first line of section 8, article II of the "Rayner Irrigation Law" (act of March 27, 1889) is evidently an interpolation, having no relation to the body of the section, without sensible meaning, and should accordingly be disregarded in giving effect to the provisions of the act. *Paxton & Hershey Irrigating Co. v. Farmers & Merchants Irrigating Co.*, 45 Neb. 884 (64 N. W. 343; 50 Am. St. Rep. 585; 29 L. R. A. 853).

2. (1904.) The provisions of the drainage law, sections 1-28, article I, chapter 89, Compiled Statutes, confer power upon the county board to provide means for raising a fund from which to compensate landowners whose property has been taken or damaged in the construction of the proposed improvement, and its provisions do not violate section 21, article I of the constitution, providing that the property of no person shall be taken or damaged for public use without just compensation therefor. *Morris v. Washington County*, 72 Neb. 174 (100 N. W. 144).

Power of state in general.

3. (1894.) The constitutional provision, "The property of no person shall be taken or damaged for public use without just compensation," prohibits, by implication, the taking of private property for any private use whatever without the consent of the owner. *Welton v. Dickson*, 38 Neb. 767 (57 N. W. 559; 41 Am. St. Rep. 771; 22 L. R. A. 496).

4. (1894.) The want of power in a legislature to transfer to one man the property of another without his consent, either with or without compensation, does not depend upon constitutional restriction, but upon the fact that it is not the exercise of the power of making laws or rules of civil conduct, which is the branch of the sovereign power committed to the legislature. *Welton v. Dickson*, 38 Neb. 767 (57 N. W. 559; 41 Am. St. Rep. 771; 22 L. R. A. 496).

5. (1898.) Property is not taken for a public use without due process of law when an opportunity is afforded the owner to have

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his damages ascertained by adequate and appropriate judicial proceedings, and provision is made for the payment of the amount thereof prior to the time the property is taken. *Howard v. Board of Supervisors of Clay County*, 54 Neb. 443 (74 N. W. 953).

6. (1903.) The power of eminent domain is an attribute of sovereignty, and, under the provision of the constitution, can only be exercised in the taking of private property for a public use, and then only after just compensation. The power is only coextensive with the necessity of the use. *McLucas v. St. Joseph & G. I. R. Co.*, 67 Neb. 603 (93 N. W. 928).

Right of leased company.

7. (1907.) A leased railroad cannot exercise the right of eminent domain on behalf of another company. *Beckman v. Lincoln & N. R. Co.*, 79 Neb. 89 (112 N. W. 348).

Taking for private use.

8. (1871.) The constitutional provision that private property shall not be taken for public use without just compensation, implies that it shall not be taken for private use at all, either with or without compensation. This is the same as the axiom of natural justice, that the state shall not take A's property and give it to B. *Bradshaw v. City of Omaha*, 1 Neb. 16.

9. (1881.) The legislature possesses no authority to take the property of one citizen and transfer it to another, even where full compensation is made. *Jenal v. Green Island D. Co.*, 12 Neb. 163 (10 N. W. 547).

10. (1899.) Neither courts nor legislatures, except on the demand of the state and for its use, can compel one citizen to sell his property, even for its full value, to his neighbor for the latter's private use. *Lowe v. Prospect Hill Cemetery Ass'n*, 58 Neb. 94 (78 N. W. 488; 46 L. R. A. 237).

11. (1894.) Sections 47, 48, 49, 50, 51, and 52 of chapter 78, Compiled Statutes 1893, authorize the taking of private property for private use, the roads therein mentioned being essentially private and beyond the public control, and said sections are therefore unconstitutional and void. *Welton v. Dickson*, 38 Neb. 767 (57 N. W. 559; 41 Am. St. Rep. 771; 22 L. R. A. 496).

Taking property for boulevards.

12. (1907.) The appropriation of private lands for boulevard purposes is governed by section 101*b*, chapter 12*a*, Compiled Statutes 1897. *State v. Several Parcels of Land*, 79 Neb. 638 (113 N. W. 248).

Rights of foreign corporations.

13. (1888.) Under article XI, chapter 72, Compiled Statutes 1887, only railroad companies organized under the laws of this state have the right to condemn right of way across lots owned by the state. *State, ex rel. Burlington & M. R. R. Co., v. Scott*, 22 Neb. 628 (36 N. W. 121).

14, 15. (1887.) Under section 8, article XI of the constitution, no foreign railroad corporation doing business in this state can exercise the right of eminent domain or have power to acquire right of way or real estate for depot or other uses unless it organize as a corporation under the laws of this state. *State, ex rel. Burlington & M. R. R. Co., v. Scott*, 22 Neb. 628 (36 N. W. 121); (1888) *Trester v. Missouri P. R. Co.*, 23 Neb. 242 (36 N. W. 502).

16, 17. (1888.) The C., B. & Q. R. Co. and the L. & N. W. R. Co. were joined as relators in an application for mandamus to compel the proper authorities to condemn and convey certain lots belonging to the state. *Held*, That the C., B. & Q. R. Co., being a foreign corporation, was not entitled to the relief, and that as a foreign corporation it is prohibited from acquiring a right of way or real estate for depot or other uses, therefore it cannot do indirectly what it is prohibited from doing directly. *State, ex rel. Burlington & M. R. R. Co., v. Scott*, 22 Neb. 628 (36 N. W. 121).

18. (1888.) Since a railroad company, not incorporated in this state, has no authority to take real estate for a right of way, neither the county court, nor the district court on appeal from the assessment of damages, has any authority or jurisdiction to take any action in the matter, and an order of the district court removing the cause to the circuit court of the United States was void, and conferred no jurisdiction on that court, and the district court erred in not reinstating the cause and dismissing it for want of jurisdiction. *Trester v. Missouri P. R. Co.*, 23 Neb. 242 (36 N. W. 502).

19. (1888.) Any proceedings instituted by a foreign railroad corporation to exercise the right of eminent domain, in the condemnation of real estate for the purpose of right of way, are void, and even if prosecuted to a termination can confer no rights to such real estate upon such corporation. In such case, as soon as it is made to appear

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that the corporation is not incorporated "pursuant to and in accordance with the laws of this state," it is the duty of the court wherein the proceeding is pending to dismiss the same for want of jurisdiction. *Trester v. Missouri P. R. Co.*, 23 Neb. 242 (36 N. W. 502).

20. (1888.) By virtue of a consolidation of the C., B. & Q. R. Co., an Illinois corporation, and the Burlington & Missouri R. R. Co., a Nebraska corporation, in compliance with the laws of this state, the corporation so created became a body corporate in accordance with the laws of this state, and is not a foreign corporation. *State, ex rel. Leese, v. Chicago, B. & Q. R. Co.*, 25 Neb. 156 (41 N. W. 125; 2 L. R. A. 564*n*).

21. (1888.) While section 8 of article XI of the constitution of this state provides that no railroad corporation organized under the laws of another state, or of the United States, and doing business in this state shall be entitled to exercise the right of eminent domain, or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate, pursuant to, and in accordance with, the laws of this state, it does not prohibit existing railroad companies, one of which is a domestic corporation, from becoming a body corporate by consolidation, instead of by the formation of a new corporation, providing such consolidation is made pursuant to the laws of this state permitting the same, and by which it becomes "a body corporate pursuant to, and in accordance with, the laws of this state." *State, ex rel. Leese, v. Chicago, B. & Q. R. Co.*, 25 Neb. 156 (41 N. W. 125; 2 L. R. A. 564*n*); *State, ex rel. Leese, v. Missouri P. R. Co.*, 25 Neb. 164; *State, ex rel. Leese, v. Chicago, St. P., M. & O. R. Co.*, 25 Neb. 165.

22. (1889.) A foreign railroad corporation can neither exercise the right of eminent domain, nor does it possess power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of the state. And, as it cannot do indirectly what it is prohibited from doing directly, it cannot acquire and hold a leased line and thus evade a plain constitutional prohibition. *Koenig v. Chicago, B. & Q. R. Co.*, 27 Neb. 699 (43 N. W. 423).

Amount of property a railroad may take.

23. (1888.) The right of eminent domain gives the legislature control of private property for public uses, and for public uses only, and in case of a railway this right is restricted to "so much real estate as may be necessary for the location, construction, and convenient use of its road." *Forney v. Fremont, E. & M. V. R. Co.*, 23 Neb. 465 (36 N. W. 806).

24. (1907.) The railroad company seeking to condemn land can only do so when the land is necessary for the construction of its road. *Beckman v. Lincoln & N. R. Co.*, 79 Neb. 89 (112 N. W. 348).

25. (1907.) A railroad company cannot exercise the right of eminent domain, except to take, hold and appropriate so much real estate as may be necessary for the location, construction and convenient use of its own road, and it has no authority to take land for the use of another company in the construction of the road of the latter. *Beckman v. Lincoln & N. R. Co.*, 79 Neb. 89 (112 N. W. 348).

Acts constituting appropriation.

26. (1895.) To constitute an appropriation of land it is not necessary that the owner be deprived of the fee. Land is appropriated when it is so taken as to deprive the owner of the use thereof. It is only when the owner is not deprived of the occupancy of the land, but merely suffers an incidental damage thereto because of the proximity of the improvement, that benefits may be set off against such damage. *Martin v. Fillmore County*, 44 Neb. 719 (62 N. W. 863).

Person exercising right not agent of state.

27. (1905.) A railway company in condemning land for its right of way and depot grounds is not the agent of the state. The state has no ownership in the lands by virtue of condemnation proceedings. *State v. Missouri P. R. Co.*, 75 Neb. 4 (105 N. W. 983).

Exhaustion of further exercise of power.

28. (1882.) In the exercise of the right of eminent domain by a railroad company for right of way, depot and other grounds under the statute of this state, one appropriation does not exhaust its power, but new appropriations may be made from time to time as the necessities of the road may require. *Dietrichs v. Lincoln & N. W. R. Co.*, 13 Neb. 361 (13 N. W. 624).

Necessity of a hearing.

29. (1896.) "Due process of law," as the term is used in the state and federal consti-

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tutions, does not necessarily imply a hearing, by one whose property is taken or damaged for public use, according to the established practice in courts of common law or equity, but is satisfied whenever an opportunity is afforded to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be attained. *Chicago, B. & Q. R. Co. v. State, ex rel. City of Omaha*, 47 Neb. 549 (66 N. W. 624; 53 Am. St. Rep. 557; 41 L. R. A. 481).

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Particular uses or purposes.

30. (1895.) Section 8 of article II of the "Rayner Irrigation Law" confers upon irrigating companies organized under the laws of this state power to acquire the right of way for necessary canals, reservoirs, etc., by condemnation. *Paxton & Hershey Irrigating Co. v. Farmers & Merchants Irrigation Co.*, 45 Neb. 884 (64 N. W. 343; 50 Am. St. Rep. 585; 29 L. R. A. 853).

31. (1895.) The use of water for the purpose of irrigating contemplated by the act of March 27, 1889, known as the "Rayner Irrigation Law," is a public use within the meaning of the constitution. *Paxton & Hershey Irrigating Co. v. Farmers & Merchants Irrigation Co.*, 45 Neb. 884 (64 N. W. 343; 50 Am. St. Rep. 585; 29 L. R. A. 853).

Determination of necessity of appropriation.

32. (1882.) The decision of the general manager of a railroad company is *prima facie*, and in the absence of all evidence to the contrary, a just measure of what is essential to the convenient and proper conduct of its business, and sufficient to warrant the exercise the power of eminent domain in its behalf. *Dietrichs v. Lincoln & N. W. R. Co.*, 13 Neb. 361 (13 N. W. 624).

33. (1894.) When the public exigencies demand, the exercise of the power of taking private property for the public use is solely a question for the legislature, upon whose determination the courts cannot sit in judgment; but what is such a public use as will justify the exercise of the power of eminent domain is a question for the courts to decide. But if the public use be declared by the legislature, the courts will hold the use public, unless it manifestly appears from the provisions of the act that they can have no tendency to advance and promote such public use. *Welton v. Dickson*, 38 Neb. 767 (57 N. W. 559; 41 Am. St. Rep. 771; 22 L. R. A. 496).

34. (1895.) There is no arbitrary standard by which to determine whether the purpose to which property is appropriated possesses the element of public utility. Public use, in a constitutional sense, may be confined to the inhabitants of a restricted locality or neighborhood, but the use must be common, and not to a particular individual. *Paxton & Hershey Irrigating Co. v. Farmers & Merchants Irrigation Co.*, 45 Neb. 884 (64 N. W. 343; 50 Am. St. Rep. 585; 29 L. R. A. 853).

35. (1895.) To the legislature, and not to the courts, has been committed the power to determine when the exigencies of the public demand the taking of private property, the limit of judicial interference being the duty to declare void acts clearly in conflict with the constitution. *Paxton & Hershey Irrigating Co. v. Farmers & Merchants Irrigation Co.*, 45 Neb. 884 (64 N. W. 343; 50 Am. St. Rep. 585; 29 L. R. A. 853).

Public land subject to.

36. (1901.) Under the provisions of section 2477, U. S. Revised Statutes, lands of the general government not reserved for public purposes may be taken for public roads. *Streeter v. Stalnaker*, 61 Neb. 205 (85 N. W. 47).

37. (1907.) The taking of private property only is authorized by statutes providing for the exercise of the power of eminent domain, unless there is express or clearly implied authority to extend them to public property. *State v. Boone County*, 78 Neb. 271 (110 N. W. 629).

38. (1907.) The statutes of this state relating to the establishment of public roads do not authorize the taking of public lands for road purposes not on section lines. *State v. Boone County*, 78 Neb. 271 (110 N. W. 629).

Rights in waterways.

39. (1896.) A county or city in exercising the right of eminent domain may divert water in a manner which would be unlawful if done by an individual; but, in such case, just compensation must be made for all damage inflicted. *Churchill v. Beethe*, 48 Neb. 87 (66 N. W. 992; 35 L. R. A. 442).

40. (1903.) Under the constitution and statutes of this state, condemnation is authorized of the right of the private riparian proprietor to the use and enjoyment of a

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natural stream flowing past his lands, or its impairment by an appropriation of such water for irrigation purposes, and such riparian proprietor may recover damages in the same way and subject to the same rules as a person whose property is affected injuriously by the construction and operation of a railroad. *McCook Irrigation & Water Power Co. v. Crews*, 70 Neb. 115 (102 N. W. 249).

41. (1903.) The statute governing the subject of the appropriation of water flowing in the streams, for the purposes of irrigation, is constitutional. *McCook Irrigation & Water Power Co. v. Crews*, 70 Neb. 115 (102 N. W. 249).

42. (1903.) The property right in water by a riparian owner is subject to condemnation and appropriation for public use in the manner provided by law. *Crawford Co. v. Hathaway*, 67 Neb. 325 (93 N. W. 781; 108 Am. St. Rep. 647; 60 L. R. A. 889).

43. (1903.) The provisions of section 41, article II, chapter 93*a*, Compiled Statutes 1901, and of section 21, article I of the constitution, authorize the condemnation of the right of a private riparian proprietor to the use and enjoyment of a natural stream flowing past his land, or its impairment by an appropriation of such water for irrigation purposes; and such riparian proprietor may recover damages in the same way and subject to the same rules as a person whose property is affected injuriously by the construction and operation of a railroad. *Crawford Co. v. Hathaway*, 67 Neb. 325 (93 N. W. 781; 108 Am. St. Rep. 647; 60 L. R. A. 889).

II. COMPENSATION.

A. Necessity and Sufficiency.

Liability in general.

44. (1891.) Where the county board appropriates a private bridge and locates a road over it upon petition duly signed, the county is liable to the owner for compensation. *Blaine County v. Brewster*, 32 Neb. 264 (49 N. W. 183); *Douglas County v. Taylor*, 50 Neb. 535 (70 N. W. 27).

45. (1896.) In this state, private property cannot be taken or damaged for public use without compensation therefor, and this rule applies to municipalities and counties exercising the right of eminent domain. *Hodges v. Board of Supervisors of Seward County*, 49 Neb. 666 (68 N. W. 1027).

46. (1906.) Under the provisions of the charter of South Omaha in force in 1901, that city was entitled to at least nominal damages in an action by a railway corporation to condemn a right of way over portions of its streets and alleys. *City of South Omaha v. Omaha B. & T. R. Co.*, 76 Neb. 718 (107 N. W. 988).

47. (1906.) Under the constitutional provision that "the property of no person shall be taken or damaged for public use without just compensation therefor," where there has been a disturbance of a right which the owner of real estate possesses in connection with his estate and which gives to it an additional value, by reason of which disturbance he sustains special damages in respect to such property in excess of that sustained by the public at large, he is entitled to recover damages. *Stehr v. Mason City & Ft. D. R. Co.*, 77 Neb. 641 (110 N. W. 701).

Necessity of payment before taking.

48. (1881.) The law guarantees to everyone the free use and enjoyment of his property, and he can be required to surrender it only when it is required for public use, and upon full compensation being made *Jenal v. Green Island Draining Co.*, 12 Neb. 163 (10 N. W. 547).

49. (1885.) While the statute authorizes a railroad corporation to go upon the land of an individual, if need be, and locate its line of road over such land, and permits either the corporation or the landowner to institute proceedings to condemn the right of way, yet, before the corporation can appropriate such right of way by entering upon the land and constructing its road across the same, the damages must have been appraised and the amount thereof paid to the landowner or deposited with the county judge. *Republican V. R. Co. v. Fink*, 18 Neb. 82 (24 N. W. 439); (1887) *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb. 371 (32 N. W. 162).

50. (1891.) Before a county can appropriate lands to public use for a public road it must provide for the payment of damages for the right of way either by the appropriation of money from the proper fund for that purpose, or the levy of sufficient taxes to pay the damages upon which a warrant may be drawn. In either case the compensation must be sure, and the landowner may enjoin the use of his property by the public until such compensation is made. *Zimmerman v. Kearney County*, 33 Neb. 620 (50 N. W. 1126).

51. (1894.) The just compensation re-

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quired to be made for taking private property for public use, by section 21 of article I of the constitution, must, before such taking, be ascertained and payment made accordingly, whether the appropriation of such property is by municipal or other corporation. *Livingston v. County Commissioners of Johnson County*, 42 Neb. 277 (60 N. W. 555).

52. (1896.) The proceedings by which a highway is opened call for settlement and payment of all damages which may arise from the proper construction and maintenance of the highway. *Churchill v. Beethe*, 48 Neb. 87 (66 N. W. 992; 35 L. R. A. 442).

53. (1896.) An action will lie at the suit of a landowner to enjoin the opening of a public road across his premises, where the damages resulting from the appropriation have not been ascertained, and no provision has been made for the payment thereof. *Hodges v. Board of Supervisors*, 49 Neb. 666 (68 N. W. 1027).

54. (1898.) Under section 21 of article I of the constitution, declaring that "the property of no person shall be taken or damaged for public use without just compensation therefor," a landowner cannot be required to surrender his land for public use until his damages are first ascertained and either paid or proper provision made for their payment. *Lewis v. City of Lincoln*, 55 Neb. 1 (75 N. W. 154); (1903) *Hogsett v. Harlan County*, 4 Unof. 310 (97 N. W. 316).

55, 56. (1901.) Before a section line road can be opened and worked, the damages suffered by the owners whose lands are taken must be ascertained and paid. *Chicago, B. & Q. R. Co. v. Douglas County*, 1 Unof. 247 (95 N. W. 339).

57, 58. (1903.) The fact that the person who owned the land when the resolution was adopted by a board of county commissioners establishing a highway, without proper notice, asked leave to present a claim for damages, which request was refusal by the board, and an attempted appeal from such refusal has been dismissed, is no defense to an action, by the owner of the land at the time the road was actually opened, to recover his damages therefor. *Hogsett v. Harlan County*, 4 Unof. 310 (97 N. W. 316).

59. (1904.) The owner of land attempted to be taken for a public road may enjoin the use of the same for such purpose until his damages for the taking have been ascertained and paid, or provision made for their payment, provided such injunction is sought before the public have acquired a prescriptive right to the land taken. *Kime v. Cass County*, 71 Neb. 677 (99 N. W. 546).

60. (1905.) Real estate cannot be taken by condemnation proceedings unless payment therefor to the owners is first made or secured. All parties having an interest in the land are "owners" within the meaning of the statute. *State v. Missouri P. R. Co.*, 75 Neb. 4 (105 N. W. 983).

61. (1907.) Section 21, article I of the constitution, does not require that payment shall precede the taking of the land for public use. It is left to the legislature to determine the manner of the taking and the time and manner of payment. *State v. Several Parcels of Land*, 79 Neb. 638 (113 N. W. 248).

Waiver of compensation, and damages from construction.

62. (1896.) A lot owner by signing the petition set out in the opinion waived his right to payment of an award at the time his property was taken for a street, and also waived his right to collect interest on the award. *West v. City of Omaha*, 48 Neb. 466 (67 N. W. 439).

63. (1897.) A release sufficient to estop the landowner from claiming damages resulting from an exercise of the right of eminent domain would also estop one claiming under him. *Fremont, E. & M. V. R. Co. v. Harlin*, 50 Neb. 698 (70 N. W. 263; 61 Am. St. Rep. 578; 36 L. R. A. 417).

64. (1890.) Where a landowner files a claim for damages caused by the location of a public road over his land, he thereby waives all objections on the ground of irregularities in locating the road. *Davis v. Boone County*, 28 Neb. 837 (45 N. W. 249)

65. (1904.) Under the constitution of 1866, as well as that of 1875, mere passive acquiescence by a landowner in the taking of his property for a public use, unaccompanied by any conduct indicative of an affirmative assent thereto, and not continued for the statutory period of limitations, is not a waiver of his right to compensation therefor and cannot be made so by statute. *Kime v. Cass County*, 71 Neb. 680 (101 N. W. 2).

66. (1904.) Where one files a claim for damages caused by the location of a public road, and accepts the allowance made him by the county board, he cannot thereafter maintain an action against the county for

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damages caused by opening such road, unless the same be negligently and unskillfully constructed and maintained. *Stocker v. Nemaha County*, 72 Neb. 255 (100 N. W. 308).

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67. (1905.) A landowner who has united in a petition for the establishment of a public road, expressly waiving compensation for damages arising therefrom, may withdraw such waiver by filing a claim for compensation before the establishment of the road. *Ashley v. Burt County*, 73 Neb. 159 (102 N. W. 272).

B. Taking or Injuring Property as Grounds for Liability.

Damage for placing electric railway poles in street, see *Street Railroads*, §§ 12, 13.

Elements of compensation.

——— In general.

68. (1881.) Damages incident to the taking of land for right of way for a railroad, and for which compensation must be made to the owner, independently of the portion actually appropriated, are the result of facts and circumstances susceptible of proof, and they must be proved before the damages are allowed. *Fremont, E. & M. V. R. Co. v. Lamb*, 11 Neb. 592 (10 N. W. 493).

69. (1889.) Where there is a stone quarry upon the right of way which will be destroyed by reason of the grading and roadbed, witnesses familiar with the value of such quarry may be interrogated in regard to the same, as its value is a proper element of damages for the consideration of the jury. So where a dwelling house is situated on the right of way and will become the property of the company condemning the land. *Burlington & M. R. R. Co. v. White*, 28 Neb. 166 (44 N W 95).

——— Excavations, embankments, and inconvenience in general.

70, 71. (1883.) In making an assessment for damages for right of way of a railroad, it is proper to consider the way in which the road cuts the land, the inconvenient shape in which the residue is left, the excavations and embankments, and the exposure of the owner's property to particular injuries from its proximity to the road, which may result from its proper construction and operation. *Missouri P. R. Co. v. Hays*, 15 Neb. 224 (18 N. W. 51); (1889) *Fremont, E. & M. V. R. Co. v. Meeker*, 28 Neb. 94 (44 N. W. 79).

72. (1899.) The jury in fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property. *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239 (78 N. W. 521).

——— Diversion of waters.

73. (1884.) In condemnation proceedings by a railroad company, to obtain a strip of land along its right of way to dig a channel for the waters of a stream already diverted by the railroad embankment, such embankment having already been constructed on a right of way granted by the owner of the condemned land, damages for the diversion of the water by the embankment cannot be allowed, but only the value of the land taken for the channel. *Jackman v. Missouri P. R. Co.*, 15 Neb. 524 (19 N. W. 497).

——— Necessity for crossings.

74. (1881.) The want of means for crossing a railroad, the watching of cattle to keep them from the danger of passing trains, being provided for by statute, have no proper place in a trial of the question of damages for the right of way. *Fremont, E. & M. V. R. Co. v. Lamb*, 11 Neb. 592 (10 N. W. 493).

——— Abutting property.

75. (1883.) Where a lot abuts upon an alley in which a railroad is built with the consent of the city authorities, if the owner of the lot is thereby deprived of a public right which he has enjoyed in connection with his premises, and in consequence thereof he sustains damage in excess of that shared by the public generally, he may recover for such excess. *Gottschalk v. Chicago, B. & Q. R. Co.*, 14 Neb. 550 (16 N. W. 475).

76. (1886.) In awarding damages for appropriating land for a highway, the jury cannot consider the possible injuries to the landowner's fences from runaway teams. *Otoe County v. Heye*, 19 Neb. 289 (27 N. W. 145).

77. (1893.) Where a railroad is built upon a public road the landowner cannot recover damages to his land by reason of the additional burden placed thereon. *Hastings & G. I. R. Co. v. Ingalls*, 15 Neb. 123 (16 N. W. 762).

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78. (1907.) In determining the amount of damages to abutting property for erecting a viaduct in a street, the jury may consider diversion of travel, inconvenience of access, and diminution of business carried on upon said property, not as independent items of damage, but for the purpose of determining the market value of the property before and after the construction of such improvement. *Gillespie v. City of South Omaha*, 79 Neb. 441 (112 N. W. 582).

——— Danger of personal injuries.

79. (1896.) Such contingencies as frightening horses and injury to persons and property by passing trains are proper subjects of inquiry in determining to what extent the value of the property has been impaired by the construction and operation of a railroad, but should not be considered as distinct elements of damage. *Chicago, B. & Q. R. Co. v. Shafer*, 49 Neb. 25 (68 N. W. 342).

——— Obstruction of access to property.

80. (1889.) Where town lots abut upon a street, along which a railroad is constructed so near as to cause an embankment in the street upon either side of the lot, so as to deprive the lot owner of the free use of the streets adjacent to and abutting on the lot, the lot being thereby depreciated in value to the damage of the owner, he may recover his damages from the railroad company, even though no part of the lot be taken, and no part of the street in front thereof be occupied by the railroad. *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364 (42 N. W. 93).

——— Expense of filling lots.

81. (1897.) The necessary expense of filling residence lots to grade is a proper subject of inquiry in condemnation proceedings. *Farwell v. Chicago, R. I. & P. R. Co.*, 52 Neb. 614 (72 N. W. 1036).

Improvements by company during temporary occupancy.

82. (1903.) Where the railway company, before constructing its track, has settled a dispute as to the boundaries with the owner of the land, by the terms of which settlement deeds are to be made by each party to the other of their respective holdings, the fact that the deed executed by the company is not made until after the construction of the track, and by its terms conveys the land "and all appurtenances thereto belonging," will not prevent the railway company or its grantees with notice of the true state of the title when the track was built; nor will such deed carry the ownership of the tracks, they not being expressly mentioned, and not being legally appurtenant to the owner's estate, and hence in subsequent condemnation proceedings by the company to acquire the right of way, the value of the track should not be added to the amount awarded to the grantee. *Omaha B. & T. R. Co. v. Whitney*, 68 Neb. 389 (94 N. W. 513). [Modified on rehearing. 68 Neb. 399.]

83. (1903.) Where a railroad company constructs a road-bed and tracks upon the land of another under a contract, arrangement or agreement with third parties, to be used for private purposes, the law relative to the seizure of property for a public use does not apply, and the rights of the parties are to be measured and determined by legal principles generally applicable to improvements in the nature of trade fixtures by a tenant or licensee in the possession and use of the real estate on which the improvements are made. *Omaha B. & T. R. Co. v. Whitney*, 68 Neb. 399 (99 N. W. 525).

84. (1903.) Ordinarily, when a railroad company enters upon land of another and constructs a road-bed and tracks thereon, and occupies the land for right of way purposes, and thereafter condemnation proceedings are had to appropriate the land on which the road-bed is constructed, under the law of eminent domain the landowner cannot in such proceedings have the value of such improvements included in his award. *Omaha B. & T. R. Co. v. Whitney*, 68 Neb 399 (99 N. W. 525).

New and additional use.

85. (1890.) Where one executes a deed to a railroad to property for right of way purposes, upon representations that only the main line would be built thereon, he may recover for any excess of damages sustained by reason of the construction of side tracks. *Donisthorpe v. Fremont, E. & M. V. R. Co.*, 30 Neb. 142 (46 N. W. 240; 27 Am. St. Rep. 387).

C. Measure and Amount.

Damages for opening public road, see *Highways*, §§ 88-121.

Measure of damage for taking property by cities, see *Municipal Corporations*, §§ 370-379.

In general.

86. (1881.) The damages for which the law provides, and proper to be included in the assessment for right of way, are simply

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those which it can be said with reasonable certainty the owner of the land will sustain by reason of its appropriation; in other words, such damages as are necessarily incident to the proper construction and careful management of the road, leaving injuries resulting from negligence to be compensated for by actions whenever they occur. *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb. 585 (10 N. W. 491); *Fremont, E. & M. V. R. Co. v. Lamb*, 11 Neb. 592 (10 N. W. 493); *Fremont, E. & M. V. R. Co. v. Ward*, 11 Neb. 597 (10 N. W. 524).

87. (1874.) The measure of damages to be awarded a landowner, on account of the location of a public highway through his land, is the fair market value of the land actually taken, while special benefits may be set off against incidental damages to the residue of the tract. *Wagner v. Gage County*, 3 Neb. 237.

88. (1883.) An award of damages, under the statute, for right of way for a railroad, embraces only those damages which may reasonably be anticipated upon the assumption that the road will be built and operated with due care and skill, and with no unnecessary injury to property outside of the right of way. *Burlington & M. R. R. Co. v. Schluntz*, 14 Neb. 421 (16 N. W. 439).

89. (1888.) The right of a railway company to condemn buildings situated on real estate necessary for its use is an incident to such right to condemn, and the owner must be paid full value for the land and the buildings *Forney v. Fremont, E. & M. V. R. Co.*, 23 Neb. 465 (36 N. W. 806).

90. Where property has been taken or damaged for a public use, the owner is entitled to recover as compensation the difference between the value of such property immediately before and immediately after the completion of the improvement from which the injury results. (1895) *Atchison & N. R. Co. v. Boerner*, 45 Neb. 453 (63 N. W. 787); (1899) *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239 (78 N. W. 521).

91. (1899.) The jury in fixing the damages sustained by a landowner in consequence of the appropriation of his land for railroad purposes may take into account every element of annoyance and disadvantage which will influence an intending purchaser's estimate of the market value of such property. *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239 (78 N. W. 521).

92. (1904.) The measure of damages to property taken on eminent domain proceeding is the fair market value thereof, which is the highest price the property will bring, at the time of the taking, for any and all uses for which it is available. *Union P. R. Co. v. Stanwood*, 71 Neb. 150 (91 N. W. 191).

93. (1906.) Compensatory damages should be allowed for the land taken from the right of way for a public road. *Missouri P. R. Co. v. Cass County*, 76 Neb. 396 (107 N. W. 773).

Taking part of tract.

See *post*, §§ 96-116.

94. (1881.) Where land is condemned for railroad purposes the owner is entitled to have as one item of damage the fair market value of the part actually taken. *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb. 585 (10 N. W. 491).

95. (1892.) The rule for assessing damage where a railroad constructs its track in a street is, first, the value of the land actually taken (in this case twenty-five feet next to the alley); second, the depreciation in value, if any, of the remaining part of the tract caused by the construction of the railroad. *Atchison & N. R. Co. v. Forney*, 35 Neb. 607 (53 N. W. 585; 37 Am. St. Rep. 450).

——— Damage to residue.

See, also, *post*, 109-116.

96. (1881.) Where a portion of the tract remains, if it can be said with reasonable certainty that the road, properly constructed and carefully operated, will injure it, he is also entitled to recover for that. But injuries merely speculative and contingent upon the improper construction or negligent operation of the road are too remote and uncertain to be considered. *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb. 585 (10 N. W. 491).

97. (1885.) In proceedings in *ad quod damnum* the landowner is entitled to compensation for the land overflowed and rendered useless by reason of the erection of the dam; and for the diminution in the value of the residue of the land by reason of the increased depth of the stream. *Sutliff v. Johnson*, 17 Neb. 575 (24 N. W. 217).

97a. (1888.) The true rule for damages for land taken under eminent domain proceedings is to estimate the value of land actually taken with the depreciation in value of what remains. *Blakeley v. Chicago, K. & N. R. Co.*, 25 Neb. 207 (40 N. W. 956).

98, 99. (1889.) The landowner is entitled

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to full compensation for the land actually taken, and for such damages to the residue of the land as are equivalent to the diminution in value thereof, general benefits not considered. *Fremont, E. & M. V. R. Co. v. Meeker*, 28 Neb. 94 (44 N. W. 79); (1889) *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb. 542 (41 N. W. 297).

100. (1890.) The landowner is entitled to full pay for the land actually taken, and, in addition, to such damages to the residue of the land as are equivalent to the diminution of the value thereof caused by the taking, and if the value of the land actually taken is first enhanced by the value of the improvements on the remainder of the land, then to get this enhanced value and, in addition, the damages to the remainder actually improved, including the damages to the improvements, would seem to result in a multiplicity of damages uncertain to the measure of justice required. *Smith v. Crete, M. & W. R. Co.*, 29 Neb. 142 (45 N. W. 287).

101. (1892.) The measure of damages for land taken is the actual value of the part actually taken with the depreciation of the value of what remains. *Atchison & N. R. Co. v. Boerner*, 34 Neb. 240 (51 N. W. 842; 33 Am. St. Rep. 637).

102. (1894.) The damages to which a landowner is entitled by reason of the construction of a railway across his farm are (1) the actual value of the land taken at the time of the taking, without diminution on account of any benefit or other set-off whatsoever; (2) the depreciation in value of the remainder of the farm, caused by the appropriation of a part thereof for railway purposes, and the construction and permanent operation and occupation of the railroad thereon, excluding general benefits. *Omaha S. R. Co. v. Todd*, 39 Neb. 818 (58 N. W. 289).

103. (1895.) In addition to the value of the land taken, the owner should be awarded any damages sustained by that portion not taken. *Martin v. Fillmore County*, 44 Neb. 719 (63 N. W. 863).

104. (1895.) Where land is appropriated for public use the owner thereof is entitled to recover the value of the land appropriated without any deduction for benefits. In addition thereto he should recover any damages sustained by that portion of the land not appropriated and, as against the latter item, special benefits but not general benefits may be set off. *Martin v. Fillmore County*, 44 Neb. 719 (63 N. W. 863).

105. (1897.) An action for damages or injuries to the remaining portion of land, not appropriated, by the construction of a highway, will lie against a county. *Douglas County v. Taylor*, 50 Neb. 535 (70 N. W. 27).

106. (1898.) The elements of damage for the construction of a railroad across a farm are the actual value of the portion taken and the depreciation in value of the remainder, excluding general benefits. *Chicago, R. I. & P. R. Co. v. Buel*, 56 Neb. 205 (76 N. W. 571).

107. (1901.) Where a schoolhouse has been erected upon mortgaged land, the authorities may, after the erection thereof, condemn the land required for a site; and the measure of damages is the value of the land taken, exclusive of the value of the building, and the damage to the remainder. *Burns v. School District No. 18 of Rock County*, 61 Neb. 351 (85 N. W. 284).

108. (1904.) The provisions of section 21, article I of the constitution, allow a person whose property has been taken for a highway, not only the fair market value of the land actually taken, but also such additional damages as accrue to the remainder of the tract by reason of the opening of the road. *Scace v. Wayne County*, 72 Neb. 162 (100 N. W. 149).

——— Deduction of benefits.

See, also, *ante*, §§ 94-108.

109. (1874.) A landowner through whose land a highway is located is entitled to the market value of the land taken with the benefits deducted. *Wagner v. Gage County*, 3 Neb. 237.

110. (1881.) Special benefits may go to reduce the damages to what remains of the land, but cannot be set off against the value of the part taken. *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb. 585 (10 N. W. 491).

111. (1888.) In awarding just compensation for property damaged for public use, general benefits shared by the public at large cannot be considered, while special benefits to the property damaged may be. *Schaller v. City of Omaha*, 23 Neb. 325 (36 N. W. 533); (1894) *Dayton v. City of Lincoln*, 39 Neb. 74 (57 N. W. 754).

112. (1889.) The landowner is entitled to damages for the diminution in the value of the land not taken, general benefits not considered. *Fremont, E. & M. V. R. Co. v. Meeker*, 28 Neb. 94 (44 N. W. 79).

113. (1890.) Where land is condemned

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for public use, as for opening a street, the owner is entitled to the fair market value of the land actually taken, and special benefits to the residue of the tract cannot be set off against such value, but may be against incidental damages to the residue of the tract. *City of Omaha v. Howell Lumber Co.*, 30 Neb. 633 (46 N. W. 919).

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114. (1890.) Where land is taken by a municipality for the opening of a street, the owner is entitled to the value of the land taken, without a deduction for benefits. *City of Omaha v. Cochran*, 30 Neb. 637 (46 N. W. 920).

115. (1894.) An owner of land taken by eminent domain may recover for depreciation in value of the land not taken, excluding general benefits. *Omaha S. R. Co. v. Todd*, 39 Neb. 818 (58 N. W. 289).

116. (1895.) Special benefits but not general benefits may be set off against damages recoverable. *Martin v. Fillmore County*, 44 Neb. 719 (63 N. W. 863); (1898) *Chicago, R. I. & P. R. Co. v. Buel*, 56 Neb. 205 (76 N. W. 571).

Depreciation of value.

117. (1888.) It is competent for the witness, in estimating the value of the real estate after the location of the road, to take into consideration all elements caused by the construction of the road which would tend to diminish the value of the property. *Blake'ey v. Chicago, K. & N. R. R. Co.*, 25 Neb. 207 (40 N. W. 956); (1895) *Atchison & N. R. Co. v. Boerner*, 45 Neb. 453 (63 N. W. 787).

118. (1889.) The words "or damage," in section 21, article I of the constitution, include all damages arising from the exercise of the right of eminent domain which causes a diminution in the value of private property. *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364 (42 N. W. 93).

119. (1889.) Damages arising from the exercise of the right of eminent domain include all damages which cause a diminution in value of property taken. *City of Omaha v. Kramer*, 25 Neb. 489 (41 N. W. 295; 13 Am. St. Rep. 504).

120. (1889.) The measure of damages recoverable for the construction of a railroad contiguous or adjacent to lands is the difference in the value before and after the construction, regardless of the increase or depreciation of its general value. *Omaha Belt R. Co. v. McDermott*, 25 Neb. 714 (41 N. W. 648).

121. (1889.) For the purpose of arriving at the diminution of the value of real estate damaged by the construction of a railroad, in estimating the value of the property after the construction of such road, it is proper to take into consideration all elements of damage caused by such construction, which tend to diminish the value of the property. *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364 (42 N. W. 93).

122. (1891.) A city is not liable to a lot owner for the diminution in value of his property by reason of the construction of a sewer, built by the city near his lot, on which a brick building was erected before the sewer grade was established. *City of Plattsmouth v. Boeck*, 32 Neb. 297 (49 N. W. 167).

123. (1904.) Where a highway is laid out by which a tract of land is divided into two parts, the depreciation in value, if any, of the entire tract, after deducting any special benefits which may accrue by reason of the opening of the road, is a proper element of damage. *Scace v. Wayne County*, 72 Neb. 162 (100 N. W. 149).

124. (1906.) The damages recoverable for property taken on eminent domain proceedings properly include all damages arising from the exercise of eminent domain which cause a diminution in the value of the property. *Stehr v. Mason City & Ft. D. R. Co.*, 77 Neb. 641 (110 N. W. 701).

125. (1907.) The word "damage" in the constitution includes all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. *Gillespie v. City of South Omaha*, 79 Neb. 441 (112 N. W. 582).

126. (1907.) The measure of damage to an abutting property owner for diminishing the convenience of access to his property by reason of vacating a street and erecting a viaduct on such street, is the difference in value of the property before and immediately after such change, unaffected by any change in value of property values in general in the same vicinity. *Gillespie v. City of South Omaha*, 79 Neb. 441 (112 N. W. 582).

Deducting liens.

126*a*. (1907.) A city is estopped to deny the validity of liens deducted from the appraisement of property taken on eminent domain where it is provided in the judgment of appraisal that there shall be no de-

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ductions from the award "for taxes or special assessments, the said land being taken by the city subject to all special and general taxes against the property." *City Safe Deposit & Agency Co. v. City of Omaha*, 79 Neb. 446 (112 N. W. 598).

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Land constituting a single tract.

127. (1888.) Where a number of tracts of land as described by the government surveys are used together as one farm or body of land, in determining the owner's damage by reason of the location of a railway across one or more of the tracts, the injury to the whole farm or body of land should be considered. *Northeastern N. R. Co. v. Frazier*, 25 Neb. 42 (40 N. W. 604).

128. (1892.) Where several contiguous town lots are used and treated by the owner as one property, in estimating his damages occasioned by the appropriation by a railroad company of one of such lots and parts of two others for its right of way, the injury to the entire property should be considered, although the petition filed by the railroad company for the appointment of commissioners only describes the lots across which the railroad is located. *Atchison & N. R. Co. v. Boerner*, 34 Neb. 240 (51 N. W. 842; 33 Am. St Rep. 637).

129. (1894.) Where a number of tracts of land, as described by government surveys, are used together as one farm or body of land, in determining the owner's damage by reason of the location of a railway across one or more of the tracts the injury to the whole farm or body of land should be considered. *Omaha S. R. Co. v. Todd*, 39 Neb. 818 (58 N. W. 289).

Time with reference to which compensation to be made.

130, 131. (1883.) The valuation of property taken for right of way for a railroad should be made as of the time of the filing of the petition for the assessment of damages to the land. *Missouri P. R. Co. v. Hays*, 15 Neb. 224 (18 N. W. 51); (1894) *Fremont, E. & M. V. R. Co. v. Bates*, 40 Neb. 381 (58 N. W. 959).

132. (1881.) While the date of filing a petition to condemn real estate for right of way of a railroad is deemed the time when the appropriation takes place for the purpose of assessing damages, yet proof is not limited to that particular day; and where the petition was filed in June, and a witness testified to the value in the following August, the evidence was held admissible. *Northeastern N. R. Co. v. Frazier*, 25 Neb. 53 (40 N. W. 609).

Excessiveness of award.

133. (1884.) When testimony shows that land taken by a railroad, for a right of way, was of the value of $261.75, a verdict for defendant, whose land was rendered inaccessible by reason of cuts and fills, for $400 is sustained. *Sioux City & P. R. Co. v. Weimer*, 16 Neb. 272 (20 N. W. 349).

134. (1888.) When it is shown that land taken under the right of eminent domain was used as a brick yard, and filled up for that purpose, a verdict for $1,000 as damages is not excessive. *Omaha Belt R. Co. v. Johnson*, 24 Neb. 707 (40 N. W. 134).

Improvements.

135 (1903.) Where a railroad company enters into an agreement with a land company to furnish the latter with certain trackage facilities and the company enters upon lands of another in pursuance of such agreement and builds road-beds and tracks, in subsequent condemnation proceedings the road-beds so constructed are a part of the land and an element of compensation, but the tracks laid thereon are not and should not be included in the award. *Omaha B. & T. R. Co. v. Whitney*, 68 Neb. 399 (99 N. W. 525).

Rental value.

136. (1893.) When rented property is injured by a public improvement it is proper in estimating the damages to inquire to what extent, if any, the rental value is affected. *City of Omaha v. Hansen*, 36 Neb. 135 (54 N. W. 83).

137. (1898.) In estimating the value of real estate taken on eminent domain proceedings, its rental value may be taken into consideration. *Chicago, R. I. & P. R. Co. v. Sturey*, 55 Neb. 137 (75 N. W. 859).

D. Persons Entitled, and Payment.

In general.

138. (1902.) The constitutional provision that the property of no person shall be taken or damaged for public use without just compensation is mandatory; and this right cannot be impaired or modified by legislation or otherwise. It is not competent for either the legislature or the courts to appoint some person without his consent to receive the money in payment. The right of the property owner to payment is unqualified. *Brown v. Chicago, R. I. & P. R. Co.*, 64 Neb. 62 (89 N. W. 405).

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139. (1897.) Where an inebriate husband conveyed realty to his wife to be preserved for the benefit of the family, it was *held* that the title was in her, and that there was no trust relation created under which he could release the damages for a portion of the land subsequently taken by a county for a highway. *Propst v. Cass County*, 51 Neb. 736 (71 N. W. 748).

140. (1888.) Where the interest in certain lands across which a right of way is sought by a railway company is in two persons, and before the appraisement of damages takes place, but after the filing of the petition one of such persons acquires the interest of the other, and the award is made to the former, he will be entitled to the full amount thereof. *Northeastern N. R. Co. v. Frazier*, 25 Neb. 42 (40 N. W. 604).

Funds liable for payment.

141. (1907.) The provisions of section 101*b*, chapter 12*a*, Compiled Statutes 1897, providing for the payment for property appropriated for parks, parkways and boulevards, are not exclusive, and the provisions of said section, together with the general liability of the municipality, provide for a safe and adequate fund, to which the owners of property appropriated for boulevard purposes in cities of the metropolitan class may look for payment. *State v. Several Parcels of Land*, 79 Neb. 638 (113 N. W. 248).

Rights of lienholders.

142. (1903.) In proceedings for the condemnation of land under the power of eminent domain, the money awarded by the freeholders, or by the district court on appeal, stands in place of the land and belongs to lienholders to the extent of the value of their liens. *Omaha B. & T. R. Co. v. Reed*, 69 Neb. 514 (96 N. W. 276).

143. (1905.) One holding a tax lien holds such an interest in the land as entitles him to compensation where taken on eminent domain proceedings. *State v. Missouri P. R. Co.*, 75 Neb. 4 (105 N. W. 983).

Sufficiency of payment.

144. (1902.) An agreement duly carried out that the county shall expend a stipulated sum in improving a road at the claimant's request and for his benefit in lieu of damages, constitutes due compensation for land taken in laying out the road. *Welch v. Tippery*, 66 Neb. 604 (92 N. W. 582).

145. (1902.) The deposit of money by a railway company with a county judge, during the progress of proceedings to obtain a right of way, does not, unless it is withdrawn by the property owner, discharge the obligation of the company to make just compensation for the property taken or damaged. *Brown v. Chicago, R. I. & P. R. Co.*, 64 Neb. 62 (89 N. W. 405).

146. (1902.) Nothing short of actual payment, or its equivalent, to the owner, of damages assessed, constitutes compensation for property wrested from him under the power of eminent domain, and a deposit with the county judge will not discharge the obligation. *Brown v. Chicago, R. I. & P. R. Co.*, 66 Neb. 106 (92 N. W. 128).

147. (1905.) County authorities in laying out and establishing a public road may proceed against one in possession and apparent sole ownership of the land sought to be taken, and will be discharged from liability upon making compensation to such person in good faith and pursuant to a judgment of the court. *Cedar County v. Lammers*, 73 Neb. 744 (103 N. W. 433).

Apportionment of payment.

148. (1886.) Condemnation money found due to the owner of land should be applied first, to the payment of amount due upon a mortgage, and the remainder to the holder of the legal title. *Dodge v. Omaha & S. W. R. Co.*, 20 Neb. 276 (29 N. W. 936).

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

In general.

149. (1897.) If private property is to be appropriated to public use, steps must be taken in the manner prescribed by law to appraise the damages and provide for their payment. *Propst v. Cass County*, 51 Neb. 736 (71 N. W. 748).

Exclusiveness of remedy.

150. (1892.) Where the statutory remedy for the condemnation of land is once instituted it is exclusive as to all damage for the proper construction of the road. *Atchison & N. R. Co. v. Forney*, 35 Neb. 67 (53 N. W. 585; 37 Am. St. Rep. 450).

151. (1892.) In this state the special remedy provided by statute for determining by condemnation proceeding, the damage to land when a part thereof is taken for right of way purposes by a railroad company is exclusive. *Fremont, E. & M. V. R. Co. v. Mattheis*, 35 Neb. 48 (52 N. W. 698).

Parties.

152. (1882.) Where a lease of a railroad expressly provides that the defendant shall

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"do and perform any and every corporate act which may be necessary, useful or appropriate to" secure to its lessee "the full enjoyment of * * * every franchise, right, easement, power, and privilege" which it then possessed or might thereafter acquire, and that it would also to this end "maintain its corporate organization," a condemnation proceeding is properly brought in the name of the lessor. *Dietrichs v. Lincoln & N. W. R. Co.*, 13 Neb. 361 (13 N. W. 624).

153. (1882.) Where one of the grounds upon which it was sought to enjoin the condemnation of land was that the company, in whose name the proceedings were conducted, had leased its road for a term of years not yet expired, *held* that the proceedings were properly taken in the name of such company. *Dietrichs v. Lincoln & N. W. R. Co.*, 13 Neb. 361 (13 N. W. 624).

154. (1883.) The word "owner" as used in the statute applies to any person having an interest in the estate. *Gerrard v. Omaha, N. & B. H. R. Co.*, 14 Neb. 270 (15 N. W. 231).

155. (1883.) The fact that proceedings to condemn land to the use of a railroad were taken and prosecuted by direction of the lessee of the road, but in the name of the lessor, is a sufficient ground for enjoining them at the suit of the owner. *Gottschalk v. Lincoln & N. W. R. Co.*, 14 Neb. 389 (15 N. W. 695).

156. (1886.) Where a railroad company, in the exercise of its right of eminent domain, seeks to appropriate private property to its own use for the purpose of right of way, by condemnation and appraisement, all persons having an interest in the property, including mortgagees, should be made parties to the proceeding by proper notice, and if such company fail so to do, and pay the money to a person not entitled thereto, such proceeding and payment are void as to all persons not parties thereto. *Dodge v. Omaha & S. W. Ry. Co.*, 20 Neb. 276 (29 N. W. 936).

157. (1903.) If the landowner is not brought into the district court by the mortgagee's appeal in condemnation proceedings, the corporation, at whose instance the condemnation proceeding was initiated, may bring him in, if it is necessary to do so for the protection of its rights. *Omaha B. & T. R. Co. v. Reed*, 69 Neb. 514 (96 N. W. 276).

158. (1907.) A railroad company which has leased its lines may, if the lease so provide, extend its lines for the benefit of its lessee, and for this purpose may maintain condemnation proceedings in its own name *Beckman v. Lincoln & N. R. Co.*, 79 Neb. 89 (112 N. W. 348).

——— Substitution of indemnitor.

159. (1893.) A railroad company which has appropriated private property for right of way purposes, on appeal to the district court from an award of damages, is not entitled to have a third party substituted and made a party in its stead, on the ground that such person has agreed to indemnify it for money expended for right of way. *Omaha S. R. Co. v. Beeson*, 36 Neb. 361 (54 N. W. 557).

Process or notice.

——— Necessity of notice.

160. (1891.) The statute does not provide for the giving of notice except where the proposed line runs through the land of non-resident owners. *State, ex rel. Farmer, v. Grand Island & W. C. R. Co.*, 31 Neb. 209 (47 N. W. 857).

161. (1891.) Before a railroad company can have the damages of a resident landowner appraised, ten days' notice in writing must be given the owner or guardian, either by personal service, or by leaving a copy thereof, at his usual place of residence, unless waived. *Trester v. Missouri P. R. Co.*, 33 Neb. 171 (49 N. W. 1110).

162. (1893.) The word "non-resident," in section 100, chapter 16, Compiled Statutes, relating to condemnation proceedings for right of way for a railroad, means a non-resident of the state and not of the land affected, or of the county where it is situate. *Pacific R. Co. v. Perkins*, 36 Neb. 456 (54 N. W. 845).

163. (1894.) Any exercise of the power of eminent domain which damages property must be with the same formalities and requirements in regard to notice, etc., of the different steps taken, as in cases where the whole of the property is to be, or is, subjected to public use. *McGavock v. City of Omaha*, 40 Neb. 64 (58 N. W. 543).

——— Service by publication.

164. (1887.) Where, in a proceeding to condemn the right of way through or over the real estate of a non-resident, notice is given by publication in a newspaper, that if the owner fails to apply for an assessment of damages by a date named, then the rail-

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road company will apply therefor, and that the appraisement will be made at the premises on a day and hour named in the notice, such publication will give no authority for the assessment of damages nine months after the day fixed therefor in the notice. *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb. 371 (32 N. W. 162).

165. (1887.) Where it is sought to exercise the right of eminent domain in the condemnation of the real estate of a non-resident and notice of such intention is given by publication, the publication must be made in one newspaper four successive weeks. The publication of such notice in a daily newspaper a part of the time and the remainder of the time in a weekly (the papers being sent to different sets of subscribers in different localities), will not confer jurisdiction and all proceedings thereunder will be void. *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb. 371 (32 N. W. 162).

——— **Waiver by appeal.**

166. (1891.) Where a landowner takes an appeal from the award of commissioners appointed to assess damages for right of way, he waives all objection as to notice and that the appraisers were not properly sworn. *Trester v. Missouri P. R. Co.*, 33 Neb. 171 (49 N. W. 1110).

Pleading.

——— **Sufficiency in general.**

167. (1888.) Where a railway company, in its petition to condemn real estate for right of way, sets forth the necessary facts to show that it is a corporation duly organized under the laws of this state, and there is no denial of that fact, the petition will be *prima facie* sufficient to authorize the company to condemn real estate without proof of its incorporation. *Clarke v. Chicago, K. & N. R. Co.*, 23 Neb. 613 (37 N. W. 484).

168. (1892.) A petition for the appointment of a commission to appraise damages for taking property for right of way, which sets forth that the petitioner desires to acquire a strip 100 feet wide through a particular tract, and refers to an accompanying plat for a more particular description, is sufficient. *Fremont, E. & M. V. R. Co. v. Mattheis*, 35 Neb. 48 (52 N. W. 698).

——— **Description of property.**

169. (1894.) In proceedings to condemn land of an individual for the use of a railroad, the petition must accurately describe the tract affected by the proceedings. Where the petition describes the land by government subdivision, the description is insufficient to authorize the condemnation of real estate within the limits of an incorporated city, which real estate has been laid out and platted into lots and blocks. *Omaha & R. V. R. Co. v. Rickards*, 38 Neb. 847 (57 N. W. 739).

170. (1894.) Where a petition for appraisers to assess damage on account of the appropriation for right of way purposes of a strip 100 feet wide through a particular tract of land, refers for a more specific description to an accompanying plat, which shows the location of the road through such tract, but without letters or figures to indicate courses and distances, such description will be *held* sufficient when assailed in a collateral proceeding. *Fremont, E. & M. V. R. Co. v. Mateheis*, 39 Neb. 98 (57 N. W. 987).

171. (1894.) Condemnation proceedings are not void merely because a particular fraction sought to be taken is not described with technical accuracy. Reference to plat showing location of railroad is sufficient, when assailed in action of trespass, though courses and distances are not marked thereon. *Fremont, E. & M. V. R. Co. v. Mattheis*, 39 Neb. 98 (57 N. W. 987).

——— **Requiring amendment.**

172. (1894.) A county judge, in a proceeding by a railroad company to acquire the right of way by condemnation, may require the petition presented to him to be amended so as to contain a more specific description of the property which it is sought to appropriate. *Fremont, E. & M. V. R. Co. v. Mattheis*, 39 Neb. 98 (57 N. W. 987).

Mode of assessing damages.

173. (1883.) The mode provided by statute for assessing damages for right of way does not apply where property is damaged but no portion thereof taken. *Burlington & M. R. Co. v. Reinhackle*, 15 Neb. 279 (18 N. W. 69; 48 Am. Rep. 342).

174. (1885.) The statutory mode of acquiring the right of way and ascertaining the damages therefor is exclusive as to the manner of assessing the value of the land taken with damages to the possession caused by the wrongful entry upon the land before condemnation. *Republican V. R. Co. v. Fink*, 18 Neb. 82 (24 N. W. 439).

Assessment by commissioners.

175. (1902.) In the exercise of the right of eminent domain the statute should be

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strictly followed, and *held* that an appraisement of damages by the bridge committee of the county board which was to settle and determine the amount to be allowed was such a departure from the method of ascertaining the plaintiff's damage as to invalidate the proceeding. *Nelson v. Harlan County*, 2 Unof. 537 (89 N. W. 458).

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——— Application.

176. (1891.) Application to the county judge for the appointment of commissioners to appraise the damages sustained by a landowner by reason of the location of a railroad across his premises is required to be in writing, and should state the name of the corporation, the landowner, if known, a description of the real estate over which the road is located, the width required for right of way, and that the owner refuses to grant the same. The application must be signed by some person empowered by the corporation so to do, but it need not be dated nor verified, nor is it essential to jurisdiction that it should aver the act of incorporation of the railroad company. *Trester v. Missouri P. R. Co.*, 33 Neb. 171 (49 N. W. 1110).

——— Appointment.

177. (1891.) The duty of selecting the six freeholders to serve as a jury in the appraisement of damages, by section 97 of chapter 16, Compiled Statutes, is one to be performed by a county judge, upon the *ex parte* application, either of the railroad company or the landowner, and the statute does not provide for the giving of notice in any case except where the railroad runs through the land of nonresident owners. *State, ex rel. Farmer, v. Grand Island & W. C. R. Co.* 31 Neb. 209 (47 N. W. 857).

Assessment by county judge.

178. (1898.) A proceeding to condemn real estate for a railroad right of way is conducted by the county judge, the sheriff, and the appraisers selected by the former. These constitute a tribunal, not to try a civil action pending between the landowner and the railway company, not to pronounce a judgment, but simply to assess the damages which the landowner will sustain by reason of the appropriation of his land for the railroad's right of way. *Mattheis v. Fremont, E. & M. V. R. Co.*, 53 Neb. 681 (74 N. W. 30).

179. (1898.) The powers conferred upon the county judge and the duties required of him by section 97, chapter 16, Compiled Statutes, to assess damages are not judicial powers and duties but purely ministerial ones. *Mattheis v. Fremont, E. & M. V. R. Co.*, 53 Neb. 681 (74 N. W. 30).

Assessment by jury.

——— Question for jury.

180. (1888.) Amount of damages sustained by the owner of land taken for right of way of railroad is a question for jury. *Omaha Belt R. Co. v. Johnson*, 24 Neb. 707 (40 N. W. 134).

——— Instructions.

181. (1881.) An instruction that the jury are to allow the difference between the value of the land before the road was laid through it, and its value afterwards, is insufficient. *Fremont. E. & M. V. R. Co. v. Whalen*, 11 Neb. 585 (10 N. W. 491).

182. (1883.) The instructions copied at length in the opinion *held* to present the case fairly to the jury. *Republican V. R. Co. v. Linn*, 15 Neb. 234 (18 N. W. 35).

183. (1886.) An instruction to the jury as to incidental elements of damages without stating what constitutes the same is erroneous. *Otoe County v. Heye*, 19 Neb. 289 (27 N. W. 145).

184. (1889.) Instructions relative to damages for right of way considered, and *held* substantially correct. *Chicago K. & N. R. Co. v. Wiebe*, 25 Neb. 542 (41 N. W. 297).

185. (1889.) In an action for damages for right of way taken by a railroad company, instructions examined and discussed. *Burlington & M. R. R. Co. v. White*, 28 Neb. 166 (44 N. W. 95).

186. (1893.) Instructions set out in opinion *held* to state the law correctly. *Omaha S. R. Co. v. Beeson*, 36 Neb. 361 (54 N. W. 557).

187. (1895.) An instruction as to damages resulting to property by taking land for railroad purposes, *held* correct. *Atchison & N. R. Co. v. Boerner*, 45 Neb. 453 (63 N. W. 787).

188. (1894.) The action of the court in giving certain instructions and refusing to give others requested in eminent domain proceedings by defendants reviewed, and *held* no error in either the giving or refusing. *Fremont, E. & M. V. R. Co. v. Bates*, 40 Neb. 381 (58 N. W. 959).

189. (1898.) Where land has been appropriated for a public highway, an instruction which directs the jury to allow the owner full compensation for land actually taken and such damages to the residue of

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the tract as are equivalent to the diminution of the value thereof is not unfavorable to him. *Howard v. Board of Supervisors of Clay County*, 54 Neb. 443 (74 N. W. 953).

Evidence.

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Opinion evidence as to value and damages, see *Evidence*, XII.

——— Presumption and burden of proof.

190. (1902.) To warrant a finding and decree that an award made by the appraisers of damages caused by taking property for street purposes, should have been in favor of plaintiff's assignor instead of another who was named in it, proof of the assignor's ownership of the premises must be produced. *City of Omaha v. Clarke*, 66 Neb. 33 (92 N. W. 146).

191. (1905.) When, after the lapse of 30 years or more, the record of proceedings in the exercise of the power of eminent domain is shown to be such that they would have been valid under any circumstances, and where both parties have treated them as valid, such circumstances will, if necessary, and in the absence of evidence to the contrary, be presumed to have existed. *Roberts v. Sioux City & P. R. Co.*, 73 Neb. 8 (102 N. W. 60; L. R. A. (n. s.) 272).

——— Admissibility.

192. (1881.) To show the value of land taken for a right of way, evidence of what the owner paid for it at an administration sale three years before is inadmissible. *Dietrichs v. L. & N. R. Co.*, 12 Neb. 225 (10 N. W. 718).

193. (1883.) Evidence of the validity of a tax deed is admissible for the purpose of showing a lien on the premises, and of plaintiff's title. *Gerrard v. Omaha, N. & B. H. R. Co.*, 14 Neb. 270 (15 N. W. 231).

194. (1883.) On the trial of a right of way case a witness may state that the taking of a right of way across plaintiff's farm in a diagonal direction from the N. E. corner to the S. W. corner is a damage to the remaining and several pieces of land, and may state in what such damage consists. *Republican V. R. Co. v. Linn*, 15 Neb. 234 (18 N. W. 35).

195. (1883.) A tax deed, under which the owner claims, is admissible in a proceeding to condemn lands for a right of way. *Gerrard v. Omaha, N. & B. H. R. Co.*, 14 Neb. 270 (15 N. W. 231).

196. (1893.) On trial of a condemnation proceeding it was not error to admit evidence tending to prove that the property in question (a tract of twenty-one acres adjoining the city of Plattsmouth) was susceptible of subdivision into smaller lots, by reason of which it was more valuable, and that in consequence of the construction of the railroad track subdivision thereof was rendered impossible, whereby the value of the tract was greatly impaired. *Omaha S. R. Co. v. Beeson*, 36 Neb. 361 (54 N. W. 557).

197. (1893.) Evidence referred to in opinion in trial of a condemnation proceeding *held* to prove a mere expression of opinion of parties named in the record, and not an offer of compromise, and is therefore admissible under the issues. *Omaha S. R. Co. v. Beeson*, 36 Neb. 361 (54 N. W. 557).

198. (1893.) On trial of a condemnation proceeding proof of annoyance by smoke and ashes from passing trains is admissible where the railroad track is constructed near the dwelling of the property owner, not as an independent element of damage, but as evidence tending to prove the value of the property after the construction of the track. *Omaha S. R. Co. v. Beeson*, 36 Neb. 361 (54 N. W. 557).

199. (1894.) On the trial of an appeal in the district court, from condemnation proceedings of right of way of a railroad through a farm, testimony of the rent, which could be obtained for the farm since the appropriation of the right of way, was competent, not as a basis for damages, but as tending to show whether such appropriation had depreciated the market value of the farm; and this is the rule whether the rent is, or had been, for a money consideration or a share of the crops. *Fremont, E. & M. V. R. Co. v. Bates*, 40 Neb. 381 (58 N. W. 959).

200, 201. (1894.) In an inquiry whether, and how much, the part of a farm not taken for railroad right of way is depreciated in value by the appropriation of a part, evidence as to the size of the farm; the purpose for which it is used; the improvements thereon, and how located; the direction of the road across the farm; the cuts and fills made or to be made in the construction of the road; the width of the right of way; the height of embankments; the depth of ditches; the inconvenience of crossing the track from one part of the farm to another; the liability of stock being killed; the danger from fire from passing trains, are all facts competent

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for the jury's consideration in determining the depreciation in value of the remainder of the farm. *Fremont, E. & M. V. R. Co. v. Bates*, 40 Neb. 381 (58 N. W. 959); (1894) *Omaha S. R. Co. v. Todd*, 39 Neb. 818 (58 N. W. 289).

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202. (1894.) On the trial of an appeal from an award made by commissioners appointed to assess the damages sustained by a landowner by reason of the appropriation of a part of his land for railroad purposes, evidence as to what such landowner paid for the land is incompetent. *Omaha S. R. Co. v. Todd*, 39 Neb. 818 (58 N. W. 289).

203. (1895.) Error cannot be predicated upon the mere fact that witnesses under examination as to the value of several lots in the same immediate neighborhood in arriving at their value estimated that of one class, then, having considered wherein that class differed from another, qualified their estimates of the value of the latter class by taking into consideration the cost of removing such difference when such removal was by such witnesses deemed practicable and advisable. *Chicago, R. I. & P. R. Co. v. Griffith*, 44 Neb. 690 (62 N. W. 868).

204. (1895.) In showing the value of land taken for railroad purposes, error will not be presumed from the re-examination of a witness as to the price other land sold for, where the adverse party, on cross-examination, adopted that line of inquiry. *Chicago, R. I. & P. R. Co. v. Griffith*, 44 Neb. 690 (62 N. W. 868).

205. (1898.) On trial of an appeal from an award of damages for land appropriated for railroad purposes a correct map of the premises may be admitted in evidence. *Chicago, R. I. & P. R. Co. v. Buel*, 56 Neb. 205 (76 N. W 571).

206. (1904.) The value of real property cannot be shown by proof of independent sales. *Union P. R. Co. v. Stanwood*, 71 Neb. 158 (98 N. W. 656)

Purpose of witnesses in trial.

207. (1881.) In the trial of an action for damages incident to the taking of land for the right of way for a railroad, the use of witnesses is to acquaint the court and jury with the facts and circumstances, but not to measure their effect. *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb. 585 (10 N. W. 491); *Fremont, E. & M. V. R. Co. v. Lamb*, 11 Neb. 592 (10 N. W. 493); *Fremont, E. & M. V. R. Co. v. Ward*, 11 Neb. 597 (10 N. W. 524).

Effect of withdrawing deposit.

208. (1887.) Where a railroad company condemns private property to public use and deposits the condemnation money with the county judge of the proper county, in accordance with law, and takes possession of the condemned land, the subsequent withdrawal of the deposit from the county judge, for the reason that the proceedings were illegal, will be an abandonment of all right to claim the possession of the real estate under such proceedings. *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb. 371 (32 N. W. 162).

Abandonment after judgment.

209. (1884.) After a judgment in the district court for the value of real estate condemned by a railroad company, it can not abandon the same and in that way avoid the payment of the judgment. *Drath v. Burlington & M. R. Co.*, 15 Neb. 367 (18 N. W 717).

210. (1902.) A railway company, after having prosecuted proceedings to obtain a right of way to a final determination, is estopped to repudiate or abandon them, and is bound to pay the amount of the award to the landowner. *Brown v. Chicago, R. I. & P. R. Co.*, 64 Neb. 62 (89 N. W. 405).

Judgment or verdict on award.

211. (1875.) An award of damages for the location of right of way for a railroad, although not contemplated in the statute (Gen. Stats., p. 191, sec. 97), contained a provision that the party owning the premises, part of which were taken for right of way, might "move back his house" therefrom, is valid. *Omaha & N. W. R. Co. v. Menk*, 4 Neb. 21.

212. (1881.) In case of an appeal from the award of commissioners, appointed to assess the damages to land holders, caused by the taking of their lands for right of way, depot grounds, etc., it is the duty of the district court to render judgment on the verdict of the jury. *Dietrichs v. Lincoln & N. W. R. Co.*, 12 Neb. 225 (10 N. W. 718).

213. (1881.) While the rendition of a judgment against a railroad company for the value of an easement in real estate will not pass title thereto before payment, yet, should the company never take possession of the easement, the damage sustained by the owner, in the cloud upon his title, will be a sufficient consideration for the judgment. *Dietrichs v. Lincoln & N. W. R. Co.*, 12 Neb. 225 (10 N. W. 718).

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214. (1896.) All damages, immediate or prospective, which may flow from the proper construction and maintenance of an improvement carried on under the power of eminent domain, must be compensated in the original condemnation proceedings. *Churchill v. Beethe*, 48 Neb. 87 (66 N. W. 992; 35 L. R. A. 442).

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Setting aside verdict.

215. (1885.) Where, in a trial to recover damages for right of way across a tract of land, the jury were permitted by the court to view the premises, the verdict will not be set aside unless it is clear that the jury erred. *Omaha & R. V. R. Co. v. Walker*, 17 Neb. 432 (23 N. W. 348).

216. (1885.) Where the evidence shows the value of property condemned to be in excess of the damages awarded, an objection that the evidence does not sustain the verdict is not well taken. *Festner v. Omaha & S. W. R. Co.*, 17 Neb. 280 (22 N. W. 557).

217. (1888.) Where the principal ground for error is that the verdict is much less than it should have been from the evidence before the jury, and it appears that the jury based their verdict upon the testimony of the witnesses whose estimates were the lowest, instead of those whose estimates were the highest, the verdict ordinarily will not be set aside. *Clarke v. Chicago, K. & N. R. Co.*, 23 Neb. 613 (37 N. W. 484).

218. (1888.) Where real estate has been condemned for public use, and damages awarded to the landowner by a jury, and the only error assigned in the supreme court is that the verdict is excessive, the court ordinarily will not vacate or modify the verdict if it is based on the testimony in the case. *Omaha Belt R. Co. v. Johnson*, 24 Neb. 707 (40 N. W. 134).

219. (1898.) Where there is a conflict in the evidence as to the amount of damages sustained by a landowner by reason of the appropriation of his land for a public road, the supreme court will not interfere with the verdict on the ground that the damages awarded by the jury are inadequate. *Howard v. Board of Supervisors of Clay County*, 54 Neb. 443 (74 N. W. 953).

220. (1898.) An award of damages should not be set aside as inadequate and obtained by fraud when the application is not made until five years later, and the railroad has been constructed and operating; the money paid to and held by, the county judge; and the application does not aver want of legal nctice of the proceedings, or whether he appealed or not. *Mattheis v. Fremont, E. & M. V. R. Co.*, 53 Neb. 681 (74 N. W. 30).

221. (1898.) The county court has no jurisdiction of an action brought under section 602 of the code of civil procedure to vacate condemnation proceedings on the ground that the award of damages made therein was procured by fraud. *Mattheis v. Fremont, E. & M. V. R. Co.*, 53 Neb. 681 (74 N. W. 30).

222. (1898.) The county court has no jurisdiction of a suit in equity to vacate a condemnation proceeding. *Mattheis v. Fremont, E. & M. V. R. Co.*, 53 Neb. 681 (74 N. W. 30).

Interest on award or judgment.

223, 224. (1898.) Where, on an appeal from an award of damages for land taken for right of way purposes, the damages are found to exceed the award of the commissioners, it is proper to instruct the jury to allow interest from the time of condemnation at the rate of seven per cent per annum. *Chicago, R. I. & P. R. Co. v. Buel*, 56 Neb. 205 (76 N. W. 571); (1882) *Sioux City R. Co. v. Brown*, 13 Neb. 317 (14 N. W. 407).

225. (1889.) Where the amount of a verdict for damages exceeds the award of commissioners, a judgment for interest on the verdict from the date of condemnation, when entered with the consent of counsel for the railway company, given upon condition that the court should withhold an instruction to so compute interest, is error without prejudice. *Burlington & M. R. R. Co. v. White*, 28 Neb. 166 (44 N. W. 95).

——— Interest on dismissal of appeal.

226. (1888.) A railway company condemned certain real estate, and deposited the amount of the award with the county judge, and afterwards took an appeal from such award to the district court. After the case had been pending in the district court for more than a year, it filed a motion to dismiss the appeal, which motion was sustained. *Held*, That the motion to dismiss the appeal is equivalent to an admission of the correctness of the award, and as the company, by the appeal, has deprived the landowner of the use of the money, he is entitled to interest on the award. *Berggren v. Fremont, E. & M. V. R. Co.*, 23 Neb. 620 (37 N. W. 470).

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Conclusiveness of judgment or award.

Recovery of damages from construction of railroad after condemnation proceedings, see *Railroads*, §§ 70-72.

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227. (1892.) An assessment of damages for the appropriation of a portion of plaintiff's property should include damages for injury to the remainder of the property, and is conclusive, so that if plaintiff failed to have such damages awarded, he cannot afterwards maintain an action against the railroad company for such injuries, but he may sue for injuries from obstruction of a street at some distance from the premises. *Atchison & N. R. Co. v. Boerner*, 34 Neb. 240 (51 N. W. 842; 33 Am. St. Rep. 637).

228. (1892.) The judgment of a district court on appeal, from an award of damages in condemnation proceedings, is conclusive upon the parties as to all questions actually litigated therein, and as to all matters necessarily within the issue joined, although not formally litigated. Rule applied. *Atchison & N. R. Co. v. Boerner*, 34 Neb. 240 (51 N. W. 842; 23 Am. St. Rep. 637).

229. (1888.) Where real estate is necessary for the location, construction, and convenient use of a railway, and there is a building on such real estate, and the commissioners, in making the award of damages in condemnation proceedings, find the value of the real estate without the building, and an additional sum with the building, and give the owner an option to take the value of the real estate and the building, or the value of the real estate with the right to remove the building, the owner cannot, after receiving compensation in full for the land and the building, sue the company for the value of the building, upon the ground that it had misappropriated it by selling it to other parties who had removed it from the right of way. *Forney v. Fremont, E. & M. V. R. Co.*, 23 Neb. 465 (36 N. W. 806).

230. (1892.) The judgment of the district court on appeal from an award in a condemnation proceeding for right of way is conclusive upon the parties thereto as to all matters actually litigated therein, and also as to all matters necessarily within the issues joined, although not formally litigated. *Atchison & N. R. Co. v. Forney*, 35 Neb. 607 (53 N. W. 585; 37 Am. St. Rep. 450).

231. (1903.) A landowner who fails to appeal from the freeholders' award in a condemnation proceeding is conclusively bound by it. *Omaha B. & T. R. Co. v. Reed*, 69 Neb. 514 (96 N. W. 276).

Appeal to district court.

Saving question for review, see *Appeal and Error*, § 96.

Appeal as waiver of notice of assessment, see *ante*, § 166.

——— Appellate jurisdiction.

232. (1887.) A paper headed "Transcript," but consisting of a certified copy only of the report of the commissioners appointed by the county judge to assess the damages, etc., containing their assessment and award of damages, *held* sufficient to give the appellate court jurisdiction of the cause. *Nebraska & C. R. Co. v. Storer*, 22 Neb. 90 (34 N. W. 69).

——— Right of mortgagee to appeal.

233. (1902.) A mortgagee who is a party to condemnation proceedings for right of way over premises has a right of appeal from an award of damages for the taking of such premises independently of the owner of the fee. *Omaha B. & T. R. Co. v. Reed*, 3 Unof. 793 (92 N. W. 1021).

234. (1903.) A mortgagee is an owner within the meaning of the statute providing for the taking of land under the power of eminent domain; and as such owner he has the right to prosecute an independent appeal from the freeholders' award. *Omaha B. & T. R. Co. v. Reed*, 69 Neb. 514 (96 N. W. 276).

——— Waiver of right to appeal.

235. (1902.) The right of appeal on behalf of a mortgagee from an award in condemnation proceedings is not lost nor suspended by the filing of a claim for payment of the mortgage against the estate of the mortgagor. *Omaha B. & T. R. Co. v. Reed*, 3 Unof. 793 (92 N. W. 1021).

——— Time for filing transcript.

236. (1886.) The right of appeal from the award of commissioners in the assessment of damages sustained by an owner of real estate by the appropriation of the same to the use of a railroad corporation, may be availed of and perfected by the filing of a transcript from the county judge of the condemnation proceedings in the district court, or the office of the clerk thereof, within sixty days after the filing of the report containing such award with the county judge. *Gifford v. Republican V. R. Co.*, 20 Neb. 538 (31 N. W. 11).

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237. (1887.) Under the statute, as it stood prior to the act of March 31, 1887, in order to appeal from the assessment of damages which the owner of any real estate had sustained by the appropriation of his land to the use of any railroad corporation, it was only necessary to file in the office of the clerk of the district court of the proper county, within sixty days after the filing of the report containing the award of such damages with the county judge, a transcript of the condemnation proceedings upon which such award of damages was made. *Nebraska & C. R. Co. v. Storer*, 22 Neb. 90 (34 N. W. 69).

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——— **Parties affected by appeal.**

238. (1903.) An appeal by a mortgagee in a condemnation proceeding is not effective as to the landowner against whom no summons has been issued. *Omaha B. & T. R. Co., v. Reed.* 69 Neb. 514 (96 N. W. 276).

——— **Questions reviewable.**

239. (1882.) Where a railroad company condemns real estate as the property of a person named, it cannot on appeal from the award, at least without tendering an issue to that effect, disprove such ownership. *Republican V. R. Co. v. Hayes*, 13 Neb. 489 (14 N. W. 521).

240. (1883.) Where a railroad company has condemned certain real estate as the property of A, it cannot on appeal from the award of damages prove that he is not the owner without pleading such want of title. *Dietrichs v. Lincoln & N. W. R. Co.*, 14 Neb. 355 (15 N. W. 728).

241. (1883.) An appeal from an award of commissioners takes to the district court only those matters covered by the award. It does not include damages from negligence to crops during the construction of a road. *Burlington & M. R. R. Co. v. Schluntz*, 14 Neb. 421 (16 N. W. 439).

242. (1883.) Where a railroad company institutes proceedings and condemns a right of way across real estate, it cannot, on appeal to the district court, disprove the title of the person to whom the damages were awarded without pleading his want of title. *Gerrard v. Omaha N. & B. H. R. Co.*, 14 Neb. 270 (15 N. W. 231).

243. (1903.) On appeal by a mortgagee from an award made by freeholders in a condemnation proceeding, the question to be tried and determined is, the value of appellant's lien on the property appropriated. *Omaha B. & T. R. Co. v. Reed*, 69 Neb. 514 (96 N. W. 276).

——— **Right to open and close.**

244. (1885.) Where a railroad company has condemned real estate for right of way, and an appeal from the award of damages has been taken to the district court, the landowner on the trial is entitled to open and close. *Omaha & R. V. R. Co. v. Walker*, 17 Neb. 432 (23 N. W. 348).

——— **Dismissal.**

245. (1883). Where each party appealed to the district court from the assessment of damages by the commissioners appointed to assess the damages occasioned by the taking of the right of way over the lands of plaintiff for the railroad of defendant, *held* that a motion by defendant to dismiss the plaintiff's appeal for the want of notice of such appeal was rightfully denied. *Republican V. R. Co. v. Linn*, 15 Neb. 234 (18 N. W. 35).

246. (1885.) Where an appeal is taken from the appraisement of damages in eminent domain proceedings by a railroad company it is error to dismiss the appeal for the reason that the appellant company is in default for want of an answer, the landowner is plaintiff to the extent that he must prove his damages. *Omaha, N. & B. H. R. Co. v. Umstead*, 17 Neb. 459 (23 N. W. 350).

247. (1886.) In an appeal from a finding of commissioners in eminent domain proceedings when transcript is not filed, nor sufficient cause shown for such failure, without laches on the part of the appellant, the appeal will be dismissed. *Gifford v. Republican V. R. Co.*, 20 Neb. 538 (31 N. W. 11).

248, 249. (1888.) When a railway company appeals from an award of damages for real estate condemned for right of way, and becomes satisfied of the correctness of the award and, therefore, does not desire to prosecute such appeal, the proper motion is to affirm the award, as such motion, if sustained, will carry interest and costs. *Berggren v. Fremont, E. & M. V. R. Co.*, 23 Neb. 620 (37 N. W. 470); (1889) *Robbins v. Omaha & N. P. R. Co.*, 27 Neb. 73 (42 N. W. 905).

——— **Review in appellate court.**

250. (1888.) The question of the amount of damages sustained by a landowner for a right of way condemned across his land is peculiarly of a local nature, proper to be determined by a jury of the county, and the supreme court ordinarily will not vacate or modify the verdict, if it is based upon the testimony in the case. *Northeastern N. R. Co. v. Frazier*, 25 Neb. 42 (40 N. W. 604).

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251. (1897.) The method of bringing to the supreme court for review judgments of the district court in proceedings by railroads for the exercise of the right of eminent domain is by petition in error and not by appeal. *Nebraska Loan & Trust Co. v. Lincoln & B. H. R. Co.*, 53 Neb. 246 (73 N. W. 546).

——— Necessity of new pleadings.

252. (1882.) Where on appeal the only question is the amount of damages, no pleadings are necessary; but if other issues are involved they must be pleaded to be available. *Republican V. R. Co. v. Hayes*, 13 Neb. 489 (14 N. W. 521).

253. (1889.) In an appeal to the district court from the award of damages by commissioners, where the only question is the amount of the recovery, new pleadings need not be filed in the district court. *Fremont, E. & M. V. R. Co. v. Meeker*, 28 Neb. 94 (44 N. W. 79).

254. (1891.) On appeal to the district court from the appraisement of damages, if other issues than the question of damages are involved, they must be presented by proper pleadings. *Trester v. Missouri P. R. Co.*, 33 Neb. 171 (49 N. W. 1110).

255. (1877.) In taking an appeal from the assessment of damages for land appropriated by a railroad company, to the district court, the appellant is not required by the statute to execute an appeal bond. *Nebraska R. Co. v. Van Dusen*, 6 Neb. 160.

256. (1877.) In an appeal from the assessment of damages for land taken by a railroad company it is not necessary to file pleadings in the case in the district court—a jury is impaneled by the court to hear the proofs and assess the damages sustained by the owner of the land. *Nebraska R. Co. v. Van Dusen*, 6 Neb. 160.

Costs.

257. (1888.) In an appeal from an award for damages, for property taken for right of way, if appellant fail to obtain a more favorable judgment than was given by the commissioners who made award from which appeal is taken, such appellant will be liable for all costs occasioned by appeal. *Atchison & N. R. Co. v. Plant*, 24 Neb. 127 (38 N. W. 33).

258. (1888.) Where, on appeal from an award of damages for property taken for right of way of a railway, the verdict is less than the amount of the award, neither the railway company nor the landowner will be liable for all the costs of the appeal; but ordinarily such costs should be divided between the parties. *Burlington & M. R. R. Co. v. Spere*, 24 Neb. 125 (38 N. W. 35).

IV. REMEDIES OF OWNERS OF PROPERTY.

Recovery of possession of property.

259. (1887.) Although the remedy given by statute to landowners, for injuries sustained by taking the land for railroad purposes, is exclusive, yet where a railroad company without consent of the owner takes real estate as a part of its right of way without pursuing the statutory method of appraisement and condemnation, and thus making its possession rightful, it is a trespasser, and the common law remedies are available to the owner. *Hull v. Chicago, B. & Q. R. R. Co.*, 21 Neb. 371 (32 N W. 162).

260. (1887.) The constitutional guaranty that "the property of no person shall be taken or damaged for public use without just compensation therefor" makes it incumbent upon a railroad company, or other governmental agency, exercising the right of eminent domain, to render such compensation before the right to appropriate the property will exist; and in case of failure to agree upon the damages accruing from the taking, the railroad company must proceed to condemn under the forms of law (unless such proceedings are instituted by the landowner); and in case of failure so to do the possession of the real estate by the company for railroad or other purpose will be illegal, and ejectment may be maintained by the landowner. *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb. 371 (32 N. W. 162).

261. (1891.) In an application for mandamus to compel a railway company to deposit with the county judge the amount of an award to the relator for damages on account of the location and operation of the railway across his premises, it appeared in evidence that the right of way had been appropriated and used and the award duly made under section 97, chapter 16, Compiled Statutes, from which no appeal had been taken, and the amount not deposited as required by statute. *Held*, That the relator take his writ to enforce the duty against the railway company. *State, ex rel. Farmer, v. Grand Island & W. C. R. Co.*, 31 Neb. 209 (47 N. W. 857).

262. (1899.) The owner cannot maintain ejectment for land upon which a corporation

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has, with his prior assent or subsequent acquiescence, constructed and put in operation a railroad used by it in its business as a common carrier. *Chicago, B. & Q. R. Co v. Englehart*, 57 Neb. 444 (77 N. W. 1092).

Compelling deposit of award.

263. (1889.) Mandamus will issue to compel a railroad company to deposit with the county judge the amount of an award on eminent domain proceedings. *State, ex rel. Farmer, v. Grand Island & W. R. Co.*, 27 Neb. 694 (43 N. W. 419).

Recovery of compensation, and future damages.

264. (1899.) When a railroad has been constructed and operated an adjacent landowner may sue at once for consequential damages to his property and recover compensation for all injuries sustained, or which will afterward accrue, from a prudent and careful operation of the road. *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239 (78 N. W. 521).

265. (1901.) In the absence of a contract, one cannot maintain an action to recover the value of real estate taken for street purposes, while the legal title is in the defendant. *City of Omaha v. Redick*, 61 Neb. 163 (85 N. W. 46).

266. (1902.) One whose property has been taken by a railway company for a right of way by statutory proceedings for that purpose may, after the proceedings have terminated, recover the amount awarded to him by an action at law against the company, and he is not bound to resort to the fund deposited with the county judge during the proceedings, as required by statute. *Brown v. Chicago, R. I. & P. R. Co.*, 64 Neb. 62 (89 N. W. 405).

Right to sue for omitted damages.

267. (1892.) A landowner cannot, after an award by commissioners, maintain an action for damages omitted from the award by the commissioners. *Atchison & N. R. Co. v. Boerner*, 34 Neb. 240 (51 N. W. 842; 33 Am. St. Rep. 637).

Right of purchaser to sue.

268. (1890.) Where a municipality located and opened a street diagonally across lots that have been bought at tax sale, the value of the parts not taken by the city exceeding the lien, the purchaser cannot recover from the city for the damage done to the lots by reason of such condemnation. *Alexander v. City of Plattsmouth*, 30 Neb. 117 (46 N. W. 213).

269. (1899.) A railroad constructed upon land with the permission or acquiescence of the owner becomes a permanent structure, and the resulting right to compensation is a mere personal claim which will not pass to a purchaser of the land, except under the terms of an express grant. *Chicago, B. & Q. R. Co. v. Englehart*, 57 Neb. 444 (77 N. W. 1092).

When suit for consequential damage may be brought.

270. (1899.) An action for consequential damages to property from the construction of a railroad need not be commenced immediately after its construction. A party may wait, within the period of limitation, until the extent and character of the injury to his property has been ascertained by experience and made susceptible of absolute proof. *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239 (78 N. W. 521).

Injunction.

271. (1875.) A party who has been damaged by the location of a railroad through his premises, where the damages awarded have not been deposited with the probate judge, as provided by section 97, page 191, General Statutes, may bring his action for the amount of the award, to enjoin the operating of the road across his premises until payment is made, or he may sue in trespass for the unauthorized entry thereon. *Omaha & N. W. R. Co. v. Menk*, 4 Neb. 21.

272. (1876.) A party who is damaged by the location of a railroad across his premises, where the damages awarded have not been paid or deposited with the probate judge, may enjoin the operation of the road, even where the company have appealed from the award of the commissioners to the district court. *Ray v. Atchison & N. R. Co.*, 4 Neb. 439.

273. (1899.) Injunction will not lie, at the instance of a landowner, to enjoin the operation of a railroad across his land until a modified judgment against it has been paid, when such road has operated the road for a number of years and the judgment has become dormant. *Dillon v. Chicago, K. & N. R. Co.*, 58 Neb. 472 (78 N. W. 927).

274. (1903.) In case property is not taken directly by a public undertaking, but an owner suffers some injury in an incidental right growing out of his peculiar situation or position, so that ordinary condemnation proceedings and payment of damages in advance are not practicable, the owner

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will be left to his remedy at law and is not entitled to an injunction, unless upon proof of insolvency or some other special circumstance. *Bronson v Albion Telephone Co.*, 67 Neb. 111 (93 N. W. 201; 60 L. R. A. 609).

Conditions precedent.

275. (1902.) It is not necessary to sustain the entering of judgment against the city, as incident to a decree in an equitable action to correct an award, made and confirmed by the city authorities, of damages for the appropriation of land for street purposes, that a claim for the amount should have been filed with the city clerk and rejected by the council. *City of Omaha v. Clarke*, 66 Neb. 33 (92 N. W. 146).

Defenses.

276. (1885.) Where a railroad company applies to the county judge for the appointment of a commission to assess damages for condemning a right of way across certain land, alleging ownership in particular persons, it cannot, after an agreement to arbitrate the damages after construction of the road, deny the ownership of such persons, nor their right to damages. *Omaha, N. & B. H. R. Co. v. Gerrard*, 17 Neb. 587 (24 N. W. 279).

277. (1887.) Where proceedings to condemn real estate, instituted and carried through by a railroad company, are so defective as to be void for want of jurisdiction, such proceeding will afford no defense to an action of ejectment instituted by the landowners to recover the possession of the land taken and occupied by the railroad for right of way purposes. *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb. 371 (32 N. W. 162).

278. (1902.) While the city is in possession of and using property for street purposes, it will not be permitted to allege its own irregularities in procedure as a reason for not paying damages awarded the owner for the taking of his property. *City of Omaha v. Clarke*, 66 Neb. 33 (92 N. W. 146).

279. (1903.) The fact that the person who owned the land when the resolution was adopted by a board of county commissioners establishing a highway, without proper notice, asked leave to present a claim for damages, which request was refused by the board, and an attempted appeal from such refusal has been dismissed, is no defense to an action, by the owner of the land at the time the road was actually opened, to recover his damages therefor. *Hogsett v. Harlan County*, 4 Unof. 310 (97 N. W. 316).

Limitations and laches.

280. (1881.) The owner of the land condemned has no right to either the money or a judgment for it until such time as it may suit the convenience of the railroad company to take, or be about to immediately take, possession of the property. *Dietrichs v. Lincoln & N. R. Co.*, 12 Neb. 225 (10 N. W. 718).

281. (1890.) A cause of action for damages from opening a street across city lots accrues at the time the street is opened and the statute of limitations runs in five years thereafter. *Alexander v. City of Plattsmouth*, 30 Neb. 117 (46 N. W. 213).

282. (1900.) Damages for lands appropriated for a highway accrue at the date of the condemnation proceedings, without regard to the time when the road is actually opened. *Harlan County v. Hogsett*, 60 Neb. 362 (83 N. W. 171).

283. (1902.) An action on an award of damages for the taking of land for street purposes, is not barred before five years from the making and confirmation of the award. *City of Omaha v. Clarke*, 66 Neb. 33 (92 N. W. 146).

284. (1903.) The city of Omaha having, by the exercise of the power of eminent domain, acquired the possession of a strip of ground and an easement therein for street purposes, upon an award of damages to the landowner, and having by an order of its mayor and council refused to pay the amount of such award in money and directed it to be applied in satisfaction of special assessments for local improvements, a cause of action against the city for the recovery of the money accrued, if at all, immediately upon the termination of such proceedings. *Spalding v. City of Omaha*, 4 Unof. 447 (94 N. W. 714).

285. (1903.) The right to recover damages for the appropriation of lands for a highway accrues at the time the road is actually opened. *Hogsett v. Harlan County*, 4 Unof. 310 (97 N. W. 316).

286. (1900.) Damages for lands appropriated for a highway accrue at the date of the condemnation proceedings, without regard to the time when the road is actually opened. *Harlan County v. Hogsett*, 60 Neb. 362 (83 N. W. 171; (1903) *Hogsett v. Harlan County*, 4 Unof. 309 (93 N. W. 1001). [Overruled. 4 Unof. 310.]

287. (1905.) Under the Omaha charter of 1893, a cause of action upon an award of

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damages to one whose property was taken for a public street, did not accrue until the lapse of a time reasonably sufficient for the creation of a special fund for the payment of such damages. *Rogers v. City of Omaha*, 75 Neb. 318 (107 N. W. 212).

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Pleading.

288. (1894.) Petition for injunction to restrain a railroad company from using right of way until it obtains title or pays the damages under condemnation proceedings *held* sufficient to state a cause of action. *Blakeslee v. Missouri P. R. Co.*, 43 Neb. 61 (61 N. W. 118).

289. (1895.) Where a petition against a county for damages alleges that a county ditch has been constructed through and across plaintiff's land, and the county in its answer admits that fact without pleading payment, a verdict for defendant is contrary to law. *Martin v. Fillmore County*, 44 Neb. 719 (62 N. W. 863).

Evidence.

——— Presumptions and burden of proof.

290. (1901.) In an action to recover damages resulting from the location of a public road, the burden is on the plaintiff to show that his land has been regularly condemned, or at least that it has been physically appropriated to the use of the public by the county authorities. *Lesieur v. Custer County*, 61 Neb. 612 (85 N. W. 892).

291. (1907.) Where a plaintiff, in an action to restrain a railroad company from entering upon his land and constructing a railroad, pleads that the defendant company has instituted condemnation proceedings and deposited the damages as required by law, and that the road is being constructed across his land pursuant to such proceedings, and that the proceedings are void because the road is in fact being constructed by and for another company, the burden is upon him to prove the latter allegation. *Beckman v. Lincoln & N. R. Co.*, 79 Neb. 89 (112 N. W. 348).

——— Admissibility.

292. (1889.) In an action to recover for damages sustained to property by reason of the location of a railroad near the property in question, the defense to which was that all claims for such damage had been settled and paid, the voucher and receipt for the money paid, introduced in evidence, on offer of testimony by defendant, to show that plaintiff knew such settlement included all claim for the damage in issue, was properly excluded. *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364 (42 N. W. 93).

293. (1897.) In an action to recover damages for land taken for a highway the supervisor of the county is a competent witness. *Lane v. Harlan County*, 51 Neb. 641 (71 N. W. 302).

294. (1897.) In an action against a county for damages for the appropriation of plaintiff's land for a highway, where a supervisor who participated in the location testified on behalf of the county, the conduct of such supervisor in the premises is proper to go to the jury for the purpose of affecting the credibility of the witness or the weight to be given his evidence. *Lane v. Harlan County*, 51 Neb. 641 (71 N. W. 302).

295. (1902.) Where the record shows that a claim by a landowner for damages for land taken in laying out a road was rejected, and at the same time the sum claimed was appropriated to improving the road, parol evidence is admissible to prove an agreement to release the claim in consideration of the appropriation and improvements. *Welch v. Tippery*, 66 Neb. 604 (92 N. W. 582).

Execution and enforcement of judgment.

296. (1884.) Where a lot was condemned by a railroad company, the money deposited with the county judge, an appeal taken to the district court, and a verdict rendered in favor of the lot owner, it is the duty of the district court to render judgment on such verdict, and an execution may be issued thereon. *Drath v. Burlington & M. R. R. Co.*, 15 Neb. 367 (18 N. W. 717).

V. TITLE AND RIGHTS ACQUIRED.

In general.

297. (1901.) Where a city appropriates lands of an individual for a street and he recovers the value thereof, it invests the city with title. *City of Omaha v. Redick*, 61 Neb. 163 (85 N. W. 46).

298. (1902.) Conceding the interest acquired to lots by a railroad company by condemnation is only an easement, it could only be extinguished by adverse possession for the statutory period. *Struve v. Republican V. R. Co.*, 2 Unof. 585 (89 N. W. 604).

299. (1902.) Where property condemned by a railroad company is, after judgment on appeal, deeded to the company, the latter acquires a fee simple title, and where the former owner erects a building thereon after executing the deed, he cannot complain be-

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cause the company erects a high board fence around the lots cutting off access to such building. *Struve v. Republican V. R. Co.*, 2 Unof. 585 (89 N. W. 604).

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Liability to lienholders.

300. (1886.) When a railroad, by the exercise of its right of eminent domain, takes land upon which there is a mortgage it is subject to all the rights of the mortgagee. *Dodge v. Omaha & S. W. R. Co.*, 20 Neb. 276 (29 N. W. 936).

301. (1905.) If a railway company in condemnation proceedings for its right of way and depot grounds fails to make all parties interested in the land parties to the proceedings or to give them notice of the proceedings so that their rights may be protected, it takes the land subject to such liens as are prior to the rights of the parties to the proceedings. *State v. Missouri P. R. Co.*, 75 Neb. 4 (105 N. W. 983).

302. (1905.) When a city by the power of eminent domain acquires a strip of mortgaged land for street purposes without making the mortgagee a party to the proceedings, and pays the condemnation money to the mortgagor, in good faith and without objection, it is discharged from its obligation, but takes the land subject to the lien of the mortgage, if of record. *Rieck v. City of Omaha*, 73 Neb. 600 (103 N. W. 283).

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I. JURISDICTION, PRINCIPLES, AND MAXIMS.

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A. Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

Nature and source of jurisdiction.

1. (1876.) Although the distinction between actions at law and suits in equity have by statute been abolished, all purely legal claims must be determined by the rules of a law court, while claims of an equitable nature must be determined according to the rules of equity. *Wilcox v. Saunders*, 4 Neb. 569.

2. (1880.) Equity cannot attempt to prevent, any more than it will redress, all wrongs. It is not in ordinary but in extraordinary cases that this writ is properly invoked. *Wood v. Helmer*, 10 Neb. 65 (4 N. W. 968).

3. (1881.) All distinctions between ac-

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tions at law and suits in equity are abolished except such as inhere in the nature of the case. *Rhea v. Reynolds*, 12 Neb. 128 (10 N. W. 549).

4. (1900.) Under our system of equity jurisprudence, the powers exercised are purely judicial, derived solely from the organic law, including the common law, and the statutes. *St. James Orphan Asylum v. Shelby*, 60 Neb. 796 (84 N. W. 273; 83 Am. St. Rep. 553).

5. (1906.) Equity seeks the real and substantial rights of the parties, and applies the remedy in such manner as to relieve those having the controlling equities. *Weckerly v. Taylor*, 77 Neb. 886 (110 N. W. 738).

6. (1907.) The district courts of this state are courts of general equity jurisdiction, and are not limited in the exercise of such jurisdiction by statute. *Rhoades v. Rhoades*, 78 Neb. 495 (111 N. W. 122).

Constitutional and statutory provisions.

7. (1876.) The nature and effect of the act of 1867 abolishing the distinction between law and equity. *Wilcox v. Saunders*, 4 Neb. 569.

8. (1876.) It was not the intention of the legislative enactments to abolish the distinction between actions at law and in equity, or of the forms of such actions and suits; in other words there was no merger of the two jurisdictions of the courts. *Wilcox v. Saunders*, 4 Neb. 569.

9. (1889.) Courts of general equity and common law jurisdiction are not necessarily limited in exercise thereof by statutory provisions. *Earle v. Earle*, 27 Neb. 277 (43 N. W. 118; 20 Am. St. Rep. 667)

10. (1894.) The district courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute. *Cochran v. Cochran*, 42 Neb. 612 (60 N. W. 942).

11. (1897.) The general equity jurisdiction of the district courts, including authority to enjoin the collection of a void tax, cannot be taken away or impaired by the legislature. *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369 (70 N. W. 955).

Grounds of jurisdiction in general.

12. (1903.) A court of equity will not lend its aid to protect a suitor in maintaining a public nuisance, nor in the doing of an act punishable under the laws of the state. *Nebraska Telephone Co. v. Western Independent Long Distance Telephone Co.*, 68 Neb. 772 (95 N. W. 18).

Mistake.

13. (1891.) Equity will grant relief against a mistake in the description of land in a deed, if the mistake is established by clear and satisfactory evidence. *Gwyer v. Spaulding*, 33 Neb. 573 (50 N. W. 681).

14. (1896.) The jurisdiction of equity to relieve against mutual mistakes is, in general, confined to cases where, because of such mistake, the minds of the parties never met, and there was therefore no contract, and to cases where the contract made was not correctly expressed by the instrument evidencing it. Relief cannot be given because of misapprehensions in regard to collateral matter, as in regard to a fact incidentally affecting the value of the subject matter of the contract, there being no deception or wrongful concealment. *Moore v. Scott*, 47 Neb. 346 (66 N. W. 441).

15. (1900.) A mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake. *Farrell v. Bouck*, 60 Neb. 771 (84 N. W. 260).

16. (1904.) One who fails through culpable inertness to make inquiry when it is his duty to inquire, and by reason of such failure loses a valuable right, is not entitled to relief in equity on the ground of mistake. *Farrell v. Bouck*, 72 Neb. 875 (101 N. W. 1018).

Undue influence.

17. (1886.) Where coercion is not sufficient to amount to duress, but a social or domestic force is exerted on a party which controls the free action of his will, and prevents voluntary action in the making of a contract or execution of deed of real estate, equity may relieve against the same on the ground of undue influence. *Munson v. Carter*, 19 Neb. 293 (27 N. W. 208).

Fraud.

18. (1877.) A court of equity will relieve a party against contracts made by him while temporarily insane from the use of intoxicating liquor, where such contracts have been procured by the fraud or imposition of the other party. *Johnson v. Phifer*, 6 Neb. 401.

19. (1879.) A court of equity will not entertain a petition for relief on the ground of a fraud, from which no damage, either present or prospective, can result. *Dunn v Remington*, 9 Neb. 82 (2 N. W. 230).

19*a*. (1891.) Mere epithets and charges of fraud, etc., without stating facts showing

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fraud, do not form a basis for a court of equity to grant relief from the alleged fraud. *Kansas & C. P. R. Co. v. Fitzgerald*, 33 Neb. 137 (49 N. W. 1100).

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Conflicting rights to real property.

20. (1877.) The jurisdiction of a court of equity to determine the rights of parties in case of conflicting claims to a tract of land is undoubted. *Stalnaker v. Morrison*, 6 Neb. 364.

Political questions.

21. (1904.) Equity will not interfere to enforce a political right; a civil right is a right accorded to every member of a district, community or nation; a political right is one exercisable in the administration of government. *Winnett v. Adams*, 71 Neb. 817 (99 N. W. 681).

22. (1904.) A court of equity will not undertake to supervise the acts and management of a political party for the protection of a purely political right. *Winnett v. Adams*, 71 Neb. 817 (99 N. W. 681).

Retention of jurisdiction acquired.

23. (1886.) When a district court has gained jurisdiction of a cause for one purpose, it may, and should, retain it for general relief. *Swift v. Dewey*, 20 Neb. 107 (29 N. W. 254).

24. (1886.) A court of equity, having obtained jurisdiction of a cause, will retain it for all purposes, and render such decree as will protect the rights of the parties before it, and thus avoid unnecessary litigation. *Buchanan v. Griggs*, 20 Neb. 165 (29 N. W. 297).

25. (1893.) Where courts of equity have assumed jurisdiction of a particular class of cases their jurisdiction in such cases will continue notwithstanding, in the development of legal means, redress becomes attainable in courts of law. *Smithson v. Smithson*, 37 Neb. 535 (56 N. W. 300; 40 Am. St. Rep. 504).

26. (1895.) When a court of equity has acquired jurisdiction of a cause for any purpose, it may retain it for all purposes, and proceed to a determination of all of the matters put in issue by the pleadings. *Disher v. Disher*, 45 Neb. 100 (63 N. W. 368); (1895) *Flentham v. Stewart*, 54 Neb. 640 (63 N. W. 924); (1897) *Fowler v. Brown*, 51 Neb. 414 (71 N. W. 54); (1901) *Bank of Stockham v. Alter*, 61 Neb. 359 (85 N. W. 300).

27-30. (1895.) One who asked a court of equity to enforce his claim to the right to use his name as trustee, to the disadvantage of the beneficiary, cannot complain because the court, having taken jurisdiction of the subject matter for such purpose, administered complete relief as between all parties to the litigation. *Tulleys v. Keller*, 45 Neb. 220 (63 N. W. 388).

31. (1904.) When a court of equity has taken cognizance of a case involving the right of rival claimants to the possession of leased premises, with all parties interested in the premises in court, it has full power to do equity by placing the party whom it finds entitled thereto into possession of the premises. *Gaffey v. Northwestern Mutual Life Ins. Co.*, 71 Neb. 304 (98 N. W. 826).

Waiver of equitable relief.

32. (1905.) A mere demand for a jury to try the issues of fact is not such an act as would warrant the court in assuming that the plaintiff has abandoned his claim to equitable relief, because, where the relief sought is equitable, a court in its discretion may submit the issues of fact to a jury. *Ames v. Ames*, 75 Neb. 473 (106 N. W. 584).

B. Remedy at Law and Multiplicity of Suits.

Demurrer as means of raising question of adequacy of legal remedy, see *post*, § 82.

Existence of remedy at law and effect in general.

33. (1881.) A party must first exhaust his legal remedies, or be without an adequate remedy at law, before he can resort to a court of equity. *Palmer v. Maxwell*, 11 Neb. 598 (10 N. W. 524).

34. (1889.) Where a court of law can grant no relief a court of equity will. *Dundas v. Chrisman*, 25 Neb. 495 (41 N. W. 449).

35. (1894.) A court of equity will not interpose an objection to its own jurisdiction on the ground that the plaintiff has an adequate remedy at law, but will retain the cause for trial and award the relief to which the parties would have been entitled in a court of law. *Sherwin v. Gaghagen*, 39 Neb. 238 (57 N. W. 1005); (1896) *Taylor v. Ainsworth*, 49 Neb. 696 (68 N. W. 1045).

36. (1904.) Equity has jurisdiction to supply the omissions and defects of legal procedure, when necessary to accomplish the ends of the law and to the due administration of justice. *Wardell v. Wardell*, 71 Neb. 774 (99 N. W. 674).

37. (1904.) Where an adequate remedy exists at law equity will not assume juris-

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diction. *Brown v. Reed*, 72 Neb. 167 (100 N. W. 143).

38. (1906.) A suit in equity will not lie when the plaintiff has a plain, adequate and speedy remedy at law. *Western Union Telegraph Co. v. Douglas County*, 76 Neb. 666 (107 N. W. 985).

Adequacy of legal remedy.

39. (1888.) A, who had a contract for the construction of a bridge across the Platte river, entered into an agreement with B, as follows: "I assign one-half interest in the within bridge contract of the net proceeds from the contract after all expenses are paid for value of labor and expense and other help, etc., no unnecessary outlay to be added, cost of working own labor to be $2.50 per day and board. S. S. Gouff." *Held*, That upon the completion of the contract B could maintain an action in equity for a division of the profits, it being the settlement of a partnership transaction. *Daugherty v. Gouff*, 23 Neb. 105 (36 N. W. 351).

40. (1894.) The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction; and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed in the proceedings. It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Welton v. Dickson*, 38 Neb. 767 (57 N. W. 559; 41 Am. St. Rep. 771; 22 L. R. A. 496).

41. (1895.) A court of equity has no jurisdiction to enjoin the transfer or collection of an altered note, since the maker has an adequate remedy at law. *Erickson v. First Nat. Bank of Oakland*, 44 Neb. 622 (62 N. W. 1078; 48 Am. St. Rep. 753; 28 L. R. A. 577).

42. (1897.) An adequate remedy at law is one that is as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Bankers Life Ins. Co. v. Robbins*, 53 Neb. 44 (73 N. W. 269); (1898) *Richardson Drug Co. v. Meyer*, 54 Neb. 319 (74 N. W. 575).

43. (1901.) A suit in equity may be maintained for the purpose of reinstating a case erroneously dismissed, when there is no adequate legal remedy therefor. *Edney v. Baum*, 2 Unof. 173 (96 N. W. 167).

44. (1902.) The term "adequate remedy at law" means that the remedy at law must be plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Carter v. Warner*, 2 Unof. 688 (89 N. W. 747).

45. (1905.) It is not enough to confer jurisdiction upon equity that the plaintiff has suffered damages special and peculiar to himself and in which the public do not share, but such damages must be of such character as to be incapable of being measured and compensated in damages. *George v. Peckham*, 73 Neb. 794 (103 N. W. 664).

46. (1906.) Where a nuisance is not permanent, and the damages caused thereby are not recoverable in one action, but would require successive actions, the injured party has no adequate remedy at law. *Bischof v. Merchants Nat. Bank*, 75 Neb. 838 (106 N. W. 996).

Multiplicity of suits.

47. (1878.) A court of equity has jurisdiction to compel the proper application of a specific fund, devoted to a particular use, whenever it becomes necessary to do so in order to prevent a great or irreparable injury, or to avoid a multiplicity of suits. *Farmer v. Vollentine*, 7 Neb. 498.

48. (1892.) Where many questions are in dispute between a lessor and lessee beside the mere right of possession, a court of equity will entertain jurisdiction and thus settle all matters between the parties relating to the subject in one action, and prevent a multiplicity of suits. *Haynes v. Union Investment Co.*, 35 Neb. 766 (53 N. W. 979).

49. (1903.) Where a large number of persons claim rights to use or divert the waters of a stream by virtue of riparian rights, appropriations, prescription or otherwise, a suit in equity to determine such rights, and enjoin infringement, under color thereof, of rights acquired under the irrigation act, may be maintained to avoid multiplicity of suits. *Crawford Co. v. Hathaway*, 67 Neb. 325 (93 N. W. 781; 108 Am. St. Rep. 647; 60 L. R. A. 889).

Waiver of objections.

50. (1895.) A defendant who has answered to the merits and submits to the jurisdiction of a court of equity cannot object for the first time on appeal in the supreme court, on the ground that the plaintiff had an adequate remedy at law. *Dorsey v. Nichols*, 43 Neb. 241 (61 N. W. 584); (1897) *Stahlhut v. Bauer*, 51 Neb. 64 (70 N. W. 496).

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51. (1897.) An objection to an equitable proceeding on the ground that there is an adequate remedy by garnishment cannot be first raised on appeal. *Raymond v. Leinberger*, 50 Neb. 815 (70 N. W. 400).

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52. (1901.) The objection that an action which is begun in equity should have been in ejectment and tried by jury must be made before trial. It is too late to raise that question for the first time after the cause has been appealed to the supreme court. *De Long v. Olsen*, 63 Neb. 327 (88 N. W. 512).

C. Principles and Maxims of Equity.

Where equities are equal, the first in time will prevail.

53. (1905.) Where the equity of a person to have land purchased by his agent in his own name, charged with the trust, and that of a subsequent purchaser from the agent are equal, the former, being prior in time, will prevail. *Johnson v. Hayward*, 74 Neb. 157 (103 N. W. 1058).

He who seeks equity must do equity.

54. (1886.) He who seeks equity must do equity. *McMurtry v. Edgerly*, 20 Neb. 457 (30 N. W. 417); (1892) *Redick v. City of Omaha*, 35 Neb. 125 (52 N. W. 847).

55. (1887.) Where two heirs come into a court of equity to claim an interest in lands, which has not been conveyed, but which lands have been held adversely by other parties for a long period, they must do equity by paying a just proportion of the taxes and the interest due thereon. *Snowden v. Tyler*, 21 Neb. 199 (31 N. W. 661).

56. (1888.) The rule that he who seeks equity must do equity will be applied wherever the adverse equity grows out of the very transaction before the court, or where it is so connected with the subject matter of the action as to be presented in the pleadings and proofs, with full opportunity to the adverse party to explain or refute the claims. *Loney v. Courtnay*, 24 Neb. 580 (39 N. W. 616).

57. (1891.) Where objections are made to certain assessments on the ground of irregularities, the court, as a condition of granting relief, may require the property owner to do equity by paying the amount which his property is benefited by the improvement. *Darst v. Griffin*, 31 Neb. 668 (48 N. W. 819).

58. (1891.) A party who sees a public improvement being carried on calculated to benefit his property, cannot wait until it is completed and the expenditure has been made and his property received the benefit before proceeding to avoid the tax, but must, as a condition of relief by injunction, do equity by paying the amount thereof justly chargeable against such property. *Darst v. Griffin*, 31 Neb. 668 (48 N. W. 819).

59. (1894.) The maxim that "he who seeks equity must do equity" has no application to cases of actual fraud. *Goble v. O'Connor*, 43 Neb. 49 (61 N. W. 131).

60. (1898.) "He who seeks equity must do equity" and come into court with clean hands. *Lewis v. Holdrege*, 56 Neb. 379 (76 N. W. 890).

61. (1898.) A plaintiff who does not stand in conscientious relations towards his adversary, with reference to the claim which is the subject of the action, is not entitled to the aid of a court of equity, and will be denied affirmative relief, although such claim does not arise out of an illegal transaction and is not tainted with actual fraud. *Lewis v. Holdrege*, 56 Neb. 379 (76 N. W. 890).

62. (1898.) If the plaintiff, or his assignor, has been guilty of any misconduct in connection with the transaction out of which the claim in suit arose, so that the enforcement of such claim would be harsh, unconscionable, and oppressive, a court of equity will either decline to grant any relief whatever or grant it on such terms as may be just and equitable. *Lewis v. Holdrege*, 56 Neb. 379 (76 N. W. 890).

63. (1899.) Equity will not lend its aid to one who, in violation of an agreement, seeks to appropriate to his own use property which, according to the agreement, should be distributed among all the parties thereto. *German Nat. Bank of Hastings v. First Nat. Bank of Hastings*, 59 Neb. 7 (80 N. W. 48).

64. (1903.) Where a large number of persons claim rights to use or divert water from a stream by virtue of rights as riparian owners, a plaintiff in a suit in equity to determine such rights may offer to do equity by compensating riparian owners whose rights are affected by the construction and operation of a canal without leaving them to their actions at law; and in that way the amounts due the several parties by way of damages may become a proper subject of inquiry and adjudication therein. *Crawford Co. v. Hathaway*, 67 Neb. 325 (93 N. W. 781; 108 Am. St. Rep. 647; 60 L. R. A. 889).

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65. (1905.) The mere fact that a creditor has been persistent and determined in his efforts to collect his debt, and has resorted to unnecessary expensive and vexatious means to that end, affords no just ground for denying him equitable relief in the enforcement of his debt. *Anthes v. Schroeder*, 74 Neb. 172 (103 N. W. 1072).

66. (1907.) An offer to do equity is only required to be made in the petition in those cases where an equitable duty or obligation rests upon the plaintiff, and where such duty or obligation could not be enforced by the court except for such offer. *Platte Valley Milling Co. v. Malmsten*, 79 Neb. 730 (113 N. W. 229).

66*a*. (1908.) Where, in a suit to enforce a contract by a plaintiff who has obtained the same by means of sharp, unconscionable and fraudulent practices, the defendants claim as affirmative relief an accounting for rents received by the plaintiff, the maxim "he who seeks equity must do equity" may be applied, and there may be deducted from the amount otherwise due the defendants for such rents the amount of money expended by the plaintiff in their behalf and the reasonable value of his services performed for their benefit. *Blondel v. Bolander*, 80 Neb. 531 (114 N. W. 574).

II. LACHES AND STALE DEMANDS.

Demurrer as means of raising objection of laches, see *post*, § 83.

Grounds and essentials of bar.

67. (1892.) It is not the policy of the law to enforce stale claims which are asserted after the witnesses are dispersed or dead. *Streitz v. Hartman*, 35 Neb. 406 (53 N. W. 215).

68. (1895.) Failure of the injured party to object after knowledge of the wrong is evidence of ratification, and may, especially when long continued, be sufficient of itself to warrant a finding for the party alleging such fact. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463 (62 N. W. 899).

69. (1907.) No arbitrary rule exists for determining when a demand becomes stale, or what delay will be excused, and the question of laches is to be decided upon the particular circumstances of each case. *Harrison v. Rice*, 78 Neb. 659 (114 N. W. 151).

—— Lapse of time.

70. (1895.) Mere lapse of time will not bar the right to rescind a voidable transaction. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463 (62 N. W. 899).

71. (1902.) Laches cannot usually be charged against a party for failing to bring an action to enforce an equitable claim if he acts within the time allowed by the statute of limitations for commencing a corresponding action at law. *Michigan Trust Co. v. City of Red Cloud*, 3 Unof. 722 (92 N. W. 900).

72. (1906.) Courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute of limitations. *Hawley v. Van Lanken*, 75 Neb. 597 (106 N. W. 456).

73. (1906.) Where a party protests or objects against the erection of a proposed obstruction, to the party about to erect it, and the latter proceeds over such protest and objection to complete the obstruction, he can not complain because the former delayed ten days in bringing suit to restrain the nuisance which had been completed in the meantime. *Bischof v. Merchants Nat. Bank*, 75 Neb. 838 (106 N. W. 996).

74. (1907.) Unreasonable delay alone, independently of any statute of limitations, may operate as a bar to equitable relief. Generally, however, when a statute of limitations is applicable, lapse of time alone, short of the period of limitation, will not operate as a bar. *Harrison v. Rice*, 78 Neb. 660 (114 N. W. 151).

Excuses.

75. (1894.) The defense of estoppel by laches or unreasonable delay in bringing an equitable suit is of itself an equitable defense, and cannot be successfully maintained when it appears that the delay complained of as unreasonable has been caused by, or contributed to by, the party interposing the defense. *Richards v. Hatfield*, 40 Neb. 879 (59 N. W. 777).

76. (1901.) Laches cannot be predicated of one whose delay is occasioned by constant assurances of his resident agent that legal proceedings would be useless and by frequent promises that payment will be procured without such proceedings. *Cushing v. Schoenemann*, 1 Unof. 482 (96 N. W. 346).

Application of doctrine.

77. (1894.) Whether complainants in equity have been guilty of laches in not suing sooner should be determined from the

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facts and circumstances of each case, there being no rule of law governing such matters. *Richards v. Hatfield*, 40 Neb. 879 (59 N. W. 777).

78. (1906.) In applying the doctrine of laches the true inquiry should be whether the adverse party has been prejudiced by the delay in bringing the action and whether a reasonable excuse is offered for the delay. *Hawley v. Van Lanken*, 75 Neb. 597 (106 N. W. 456); (1907) *Harrison v. Rice*, 78 Neb. 660 (114 N. W. 151).

79. (1907.) When the suit is brought within the time fixed by the analogous statute of limitations, the burden is on defendant to show the existence of circumstances amounting to laches. When the suit is brought after the statutory time, plaintiff must plead and prove that laches does not exist. *Harrison v. Rice*, 78 Neb. 660 (114 N. W. 151).

III. PARTIES AND PLEADING.

Necessary parties.

80. (1905.) When two or more parties claim the ownership of a fund in the hands of a third, an action in equity may be maintained to recover the fund and to litigate and determine the ownership of it, and all persons claiming the fund are necessary and proper parties to the action. *Conservative Savings & Loan Ass'n v. City of Omaha*, 73 Neb. 720 (103 N. W. 286).

Time for filing answer.

81. (1871.) Under the practice in chancery, before the equity and common law jurisdiction were blended by the amendments of the code of civil procedure, a defendant had until the fifth Monday after notice of the filing thereof to answer a supplemental bill. *Orr v. Orr*, 1 Neb. 359.

Grounds for demurrer to bill.

82. (1897.) The code recognizing no distinction of form between actions at law and suits in equity, the objection that a petition praying equitable relief states a case for a legal remedy cannot be raised by general demurrer. *Lederer v. Union Savings Bank*, 52 Neb. 133 (71 N. W. 954).

83. (1906). Where the laches of the plaintiff and the staleness of his claim are apparent from the petition, objection may be taken by demurrer. *Hawley v. Van Lanken*, 75 Neb. 597 (106 N. W. 456).

Issues and proof.

84. (1871.) The plaintiff in a bill in chancery cannot go to the answer for facts which, by his bill, he did not put in issue. *Miller v. Finn*, 1 Neb. 254.

IV. DISMISSAL BEFORE HEARING.

Involuntary dismissal.

85. (1902.) Where a bill discloses nothing of equity and still less of conscience a judgment of the lower court dismissing such bill will be affirmed. *Phœnix Ins. Co. v. Boehl*, 2 Unof. 272 (96 N. W. 633).

V. HEARING AND SUBMISSION OF ISSUES TO JURY.

Submission of issues to jury.

86. (1893.) A defendant in an equity suit is not entitled, as a matter of right, to a jury for the trial of a counterclaim for damages, which he has voluntarily pleaded in the case. *Morrissey v. Broomcl*, 37 Neb. 766 (56 N. W. 383).

87. (1897.) In an equity case the trial court may, in its discretion, impanel a jury and submit such issues of fact as it deems expedient. *Omaha Fire Ins. Co. v. Thompson*, 50 Neb. 580 (70 N. W. 30); (1901) *Lewis v. North*, 62 Neb. 552 (87 N. W. 331); (1902) *Welch v. Tippery*, 66 Neb. 604 (92 N. W. 582).

88. (1897.) In an action in equity where a question as to the value of real estate arises, the court is not bound to submit that question to a jury. *Oliver v. Lansing*, 51 Neb. 818 (71 N. W. 735).

89. (1897.) The issues in equity causes are, as a rule, triable to the court without a jury. (Code, sec. 281.) *Smith v. Perry*, 52 Neb. 738 (73 N. W. 282).

90. (1897.) A district court while sitting as a court of equity is clothed with the inherent power to submit to a jury any question of fact in the case. *Alter v. Bank of Stockham*, 53 Neb. 223 (73 N. W. 667).

91. (1901.) It is not prejudicial error to submit to a jury, for its finding generally, questions of fact on purely equitable issues raised by the pleadings in the case. *Lewis v. North*, 62 Neb. 552 (87 N. W. 331).

92. (1904.) Taking the verdict of a jury as to questions of fact in case where equitable defenses are interposed is not error. *Humphrey Hardware Co. v. Herrick*, 5 Unof. 524 (99 N. W. 233).

——— Instructions.

93. (1906.) In the trial of a suit to enforce a contract to bequeath property to an adopted child the functions of a jury, if one

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is called, are advisory only, and the court cannot commit reversible error in the giving or refusal of instructions. *Peterson v. Estate of Bauer*, 76 Neb. 652 (111 N. W. 361).

——— Conclusiveness and effect of verdict.

94. (1900.) A finding in an equity cause which does not respond to the issues, and which is, at plaintiff's instance, treated as, and declared to be, advisory only, will not warrant the court in rendering a personal judgment against the defendants; and in such case mandamus will not lie to compel the court to render a personal judgment in favor of the plaintiff on such finding. *State, ex rel. Emerson, v. Dickinson*, 59 Neb. 753 (82 N. W. 16).

95. (1901.) The verdict in an equity case on a finding of fact is advisory only and not binding and conclusive on the trial court. *Bank of Stockham v. Alter*, 61 Neb. 359 (85 N. W. 300).

——— Waiver of right to jury trial.

96. (1902.) An order transferring an action in ejectment to the equity docket because of equitable defenses raised in an answer, will not preclude the moving party from demanding that the purely legal issues be tried by jury, if his request for a jury trial is timely and is insisted upon. *Schumacher v. Crane-Churchill Co.*, 66 Neb. 440 (92 N. W. 609).

97. (1902.) Where an action in ejectment has been transferred to the equity docket, going to trial upon all the issues, without demanding a jury as to any of them, it is a waiver of a jury as to that trial. *Schumacher v. Crane-Churchill Co.*, 66 Neb. 440 (92 N. W. 609).

98. (1903.) When, in a suit in equity, the plaintiff tenders issues properly triable at law and by a jury only, but which are within the jurisdiction of the court, the defendant, upon raising such issues by answer, may, if he chooses, demand a jury for their trial, but if he neglect so to do he will be deemed to have waived his right. *Horton v. Simon*, 5 Unof. 172 (97 N. W. 604).

Findings by court.

99. (1903.) A finding by a trial court "that there are no equities with the defendants and that all the equities are with the plaintiffs," is not a finding of fact, but a conclusion of law, and standing alone it is insufficient to support a judgment. *Ganow v. Denny*, 68 Neb. 706 (94 N. W. 959).

100. (1903.) In case the pleadings are sufficient to bring the subject matter before the court, the decree may not be attacked collaterally merely for want of findings; such defect goes no further than to render the decree irregular or erroneous. *Cizek v. Cizek*, 69 Neb. 797 (96 N. W. 657).

VI. DECREE.

Sufficiency of recitals.

101. (1903.) The description in the decree, of the lands in controversy, *held* not sufficiently definite and certain. *Egan v. Light*, 4 Unof. 127 (93 N. W. 859).

Interlocutory decree.

102. (1898.) Where, after an entry of an interlocutory decree finding a defendant entitled to a foreclosure against property which had been conveyed to him, he withdrew his cross-petition and without objection introduced additional evidence upon, and took part in, the trial of the issue whether or not he held the property in dispute in fraud of the rights of creditors of his grantor, he could not complain that the court had no power to enter a decree on the issue last indicated without formally setting aside the interlocutory decree first entered. *Ellis v. Harris*, 56 Neb. 398 (76 N. W. 898).

Two decrees at same term.

103. (1901.) 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. *Plummer v. Park*, 62 Neb. 665 (87 N. W. 534).

Decree on conditions.

104. (1902.) Where, on a motion to make a decree absolute, which was contingent on the payment by the plaintiff of a certain sum and the costs in a certain action, it appeared that the plaintiff had complied with the decree on his part, save that through oversight he had omitted to pay a small item of costs which he thereupon tendered, the tender should have been accepted and the rule granted. *Commercial State Bank of Crawford v. Ketchum*, 3 Unof. 839 (92 N. W. 998).

105. (1904.) When a decree in equity requires the plaintiff to deposit money or securities in court as conditions precedent to enforcing the decree against the defendant, and defendant, within the time limited for making such deposit, appeals from said decree and supersedes the same, the time allowed for making the deposit is thereby extended until a like time after the decree

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becomes again enforceable. *Ruzicka v. Hotovy*, 72 Neb. 589 (101 N. W. 328).

Conformity to pleadings and proof and verdict.

106. (1895.) Where a defendant files no pleading except a demurrer to the petition on the ground that it does not state a cause of action, other defendants answering and presenting issues, a decree reciting that the case was heard on the pleadings and evidence, then finding the facts as alleged in the petition and granting to plaintiff the relief prayed, will be treated as an order overruling the demurrer and entering judgment thereon. *Moore v. Kime*, 43 Neb. 517 (61 N. W. 736).

107. (1897.) Where issues in an equity case have been submitted to a jury, the judgment need not strictly conform to the verdict, but the court may, on determining other issues, enter such judgment as the whole case demands. *Omaha Fire Ins. Co. v. Thompson*, 50 Neb. 580 (70 N. W. 30).

108. (1898.) The findings and decree in an action in equity should respond to all the material issues presented by the pleadings. *Clark v. Neumann*, 56 Neb. 374 (76 N. W. 892).

109. (1899.) Decree in equity must conform to the pleading and proof. *Ross v. Sumner*, 57 Neb. 588 (78 N. W. 264).

110. (1903.) A prayer for general equitable relief, coupled with that of one for specific relief, can not be extended so as to warrant the granting of relief not embraced within and comprehended by the allegations of fact contained in the pleading. *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.*, 68 Neb. 233 (97 N. W. 613).

Entry.

111. (1902.) In a suit for the foreclosure of a mechanic's lien, trial was had to the court, but before making findings of fact or pronouncing judgment, the district court adjourned to a certain date several days later, and the judge returned to his home in another county. Court did not reconvene on the day named, but on that date the clerk received by express from the judge memoranda of his findings and decree in the case, which he entered of record. At the next succeeding term an application on the part of defendants in the case to correct the record to show that no decree was in fact entered was overruled. *Held*, Error. *Conover v. Wright*, 3 Unof. 211 (91 N. W. 545).

112. (1903.) The signature of the presiding judge, to a decree or the record, is not essential to the validity of the decree. *Gallentine v. Cummings*, 4 Unof. 690 (96 N. W. 178).

——— Entry nunc pro tunc.

113. (1902.) In deciding a motion for a *nunc pro tunc* order, the district court may act upon any satisfactory competent evidence in support thereof, although minutes of the proceedings, or other writing appearing in or upon the records of the court are regarded as a better class of evidence. *Harris v. Jennings*, 64 Neb. 80 (89 N. W. 625; 97 Am. St. Rep. 635).

Lien.

114. (1904.) A decree wherein a party is directed to pay a specific fund in his hands into court for distribution among claimants thereto, will not be held to be a lien upon the real estate of such party in favor of the claimants, unless it is provided by the decree that the claimants recover of the party holding the fund, and that in default of payment execution may issue. *Campbell v. Noyes, Norman & Co.*, 72 Neb. 201 (100 N. W. 205).

Collateral attack.

115. (1903.) Where the court had jurisdiction of the parties and of the subject matter, and such subject matter was brought before it by the pleadings, its decree is not open to collateral attack, although the jurisdiction may have been exercised and the subject matter dealt with erroneously or irregularly. *Cizek v. Cizek*, 69 Neb. 797 (96 N. W. 657).

Action on decree.

116. (1902.) One cannot maintain an action based solely on a decree of the district court, in a suit in equity to which he was not a party, and which decree had been superseded by an appeal to the supreme court at the time his action was commenced, where such decree was not affirmed but was reversed and the suit in which it was rendered was dismissed for want of equity. *Riley Bros. Co. v. Melia*, 3 Unof. 666 (92 N. W. 913).

EROSION.

See *Water and Watercourses*, § 70.

ERROR.

See *Appeal and Error*.

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ESCAPE.

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CROSS-REFERENCES.

See, also, *Arrest.*

Attempt to escape as admission of guilt, see *Criminal Law*, §§ 238-241.

1. (1886.) To constitute an escape there must be an actual arrest and a legal and continuing imprisonment. *Krum v. State*, 19 Neb. 728 (28 N. W. 278).

2. (1895.) A sheriff or other officer, in preventing the escape of a felon, may use such force as is reasonably necessary, even to the taking of life. *Lamma v. State*, 46 Neb. 236 (64 N. W. 956).

ESCHEAT.

1. (1876.) The administrator of the estate of a decedent with no heirs can convey no title to such lands, and has no right of possession to the same to deliver. *State, ex rel. Roberts, v. Reeder*, 5 Neb. 203.

2. (1876.) Upon the death of a tenant in fee with defect of heirs the title and right of possession to the lands, and also to his personal estate, *eo instanti* vest in the state, and by the operation of the laws of this state all such estate, real and personal, immediately becomes and constitutes a part of the general school fund of the state. *State, ex rel. Roberts, v. Reeder*, 5 Neb. 203.

3. (1876.) By the constitution the legislature is inhibited from diverting such school funds derived from escheats to any other special objects; and, therefore, the legislative act approved February 17, 1875, vesting in trustees the escheated estate of Henry Hooper, deceased, for a special purpose and object, is a nullity. *State, ex rel. Roberts, v. Reeder*, 5 Neb. 203.

4. (1904.) Lands purchased by a county, under the provisions of section 1, article IX, chapter 77, Compiled Statutes, are held in trust for itself, the state, and all other political subdivisions entitled to any portion of such delinquent taxes. Such lands are not acquired by the state by escheat or forfeiture, and do not belong to the permanent school fund. *Woodrough v. Douglas County*, 71 Neb. 354 (98 N. W. 1092).

ESCROW.

ANALYSIS.

Definition, § 1.
Sufficiency of deposit, §§ 2, 3.
Conditional delivery, §§ 4-6.
Fraudulent or unauthorized delivery, §§ 7-9.
Actions, § 10.

CROSS-REFERENCES.

See, also, *Deeds.*

Sufficiency of grantee's title to entitle him to sign for liquor license, see *Intoxicating Liquors*, § 40a.

Definition.

1. (1880.) An escrow is a conditional delivery to a stranger, to be kept by him until certain conditions are performed, and then to be delivered to the grantee. *Patrick v. McCormick*, 10 Neb. 1 (4 N. W. 312).

Sufficiency of deposit.

2. (1888.) The leaving of a deed by a grantor in the hands of his agents, awaiting the arrival of certain funds of the grantee, does not make such a deed an escrow. *Wier v. Batdorf*, 24 Neb. 83 (38 N. W. 22).

3. (1880.) Depositing a deed in escrow, pending performance of certain condition imposed upon the grantee, is a sufficient delivery of such deed. *Cotton v. Gregory*, 10 Neb. 125 (4 N. W. 939).

Conditional delivery.

4. (1880.) Where a deed is given to a stranger, to be held by him until the grantee shall perform certain conditions and the deed is delivered without the consent or knowledge of the grantor, to the grantee who wholly failed to perform any of the con-

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ditions, no title passes to such grantee. *Patrick v. McCormick*, 10 Neb. 1 (4 N. W. 312).

5. (1882.) It is only where the deed is delivered to a third person, to be held until some condition be performed on behalf of the grantee, that it can properly be said to be an escrow. If it be delivered to the grantee, although with the understanding that the wife of the grantor shall afterwards execute it also, this being solely for the benefit of the grantee, he may waive it, and the delivery is complete. *Brittain v. Work*, 13 Neb. 347 (14 N. W. 421).

6. (1893.) The finding of the trial court, that the deed executed by the plaintiff and deposited in escrow with a third person, to be delivered to the vendee on the performance by the latter of certain conditions, was delivered by the depository in escrow by instructions of the vendor before the conditions of the holding had been complied with, considered to be sustained by the evidence in the case. *Eggleston v. Pollock*, 38 Neb. 188 (56 N. W. 805).

Fraudulent or unauthorized delivery.

7. (1880.) A fraudulent delivery by, or procurement from, the depository of a deed deposited as an escrow will not operate to pass the title even in favor of a subsequent purchaser in good faith, without notice. *Cotton v. Gregory*, 10 Neb. 125 (4 N. W. 939).

8. (1901.) A deed or other similar instrument placed in the hands of a third person for delivery to the grantee when he shall perform some condition, is not legally effective, but is a mere nullity, if delivered by the depositary, or obtained from him in any way, without full compliance with the condition specified. *Matteson v. Smith*, 61 Neb. 761 (86 N. W. 472).

9. (1893.) Where a mortgage is executed and deposited in escrow with a third person to be delivered to the mortgagee on the performance by the latter of certain conditions, the delivery thereof by the custodian to the mortgagee, without the knowledge or consent of the mortgagor before the fulfillment of the conditions by the mortgagee, will not have the effect to confer any interest in the mortgaged property upon the latter, or upon an assignee with notice. A mortgage delivered to a third party in escrow, to be by him delivered upon the happening of some contingency, or upon the performance of some condition, does not become effectual as a delivered instrument until such second delivery. *Roberson v. Reiter*, 38 Neb. 198 (56 N. W. 877).

Actions.

10. (1906.) The depositary of funds in escrow is entitled to prove any facts which would defeat the plaintiff's claim thereto. *Brockway v. Reynolds*, 77 Neb. 225 (109 N. W. 154).

ESTATES.

ANALYSIS.

Nature and incidents, § 1.
Estate of inheritance, § 2.
Freehold estates, §§ 3, 4.
Derivative estates, § 5.
Estate by entirety, § 6.
Merger, §§ 7-16.
——— Mortgage and fee title, §§ 17-20.
——— Tax title and fee, § 21.

CROSS-REFERENCES.

See, also, *Curtesy; Dower; Life Estates, Remainders; Reversions.*

Decedents' estates, see *Descent and Distribution; Executors and Administrators.*

Estates of insolvents, see *Insolvency.*

Estates for years, see *Landlord and Tenant.*

Limiting estate of remainder, see *Remainders*, § 1.

Tenancy in common, see *Tenancy in Common.*

Created by wills, see *Wills.*

Nature and incidents.

1. (1891.) In its broad sense the word "estate" includes both real and personal property, but in its more limited sense it applies to land alone; and the term is used to denote the quality, quantity, and extent of the interest which the owner possesses

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in the land. Therefore estates are divided into such as are freehold and those less than a freehold. *Crawl v. Harrington*, 33 Neb. 107 (49 N. W. 1118).

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Estate of inheritance.

2. (1891.) An estate less than a freehold is not an estate of inheritance. *Crawl v. Harrington*, 33 Neb. 107 (49 N. W. 1118).

Freehold estates.

3. (1891.) All freehold estates are of inheritance except life estates. *Crawl v. Harrington*, 33 Neb. 107 (49 N. W. 1118).

4. (1898.) An estate less than a freehold is not an estate of inheritance, and a freehold estate is one of which possession, at the common law, could only be given by livery of seisin. *Hall v. Crabb*, 56 Neb. 392 (76 N. W. 865).

Derivative estates.

5. (1871.) Although it may be true, in the abstract, that a derivative title cannot be better than that from which it came, yet there are many exceptions to the rule. *McAusland v. Pundt*, 1 Neb. 211 (93 Am. Dec. 358).

Estate by entirety.

6. (1900.) The common law rule of estate by the entirety does not obtain in this jurisdiction. *Kerner v. McDonald*, 60 Neb. 663 (84 N. W. 92; 83 Am. St. Rep. 550).

Merger.

7. (1871.) There can be no merger unless a greater and a less estate meet in the same person holding in the same right; nor where intervening rights or estates interfere nor where the interests of the party in whom the estates meet so require. *Miller v. Finn*, 1 Neb. 254.

8. (1889.) Where the general owner of real property receives a deed therefor from a person holding a tax title to said property, the title conveyed by such deed will become merged in the title of such general owner. *Wygant v. Dahl*, 26 Neb. 562 (42 N. W. 735).

9. (1896.) Whenever a person acquires a greater and lesser estate in the same property and there is no intervening estate, the lesser does not further exist as a separate estate but is destroyed by or is considered in law as merged in the greater but when, in such a case, an intention that the estates remain separate and distinct is expressed or may be implied or inferred, no merger can ensue but the intention will prevail. *Mathews v. Jones*, 47 Neb. 616 (66 N. W. 622).

10. (1898.) It is a general rule that where two unequal estates vest in the same person at the same time, without an intervening estate, the smaller is thereupon merged in the greater. But merger does not always or necessarily result from such a coinciding of such estate. *Petersborough Savings Bank v. Pierce*, 54 Neb. 712 (75 N. W. 20).

11. (1898.) Whether two estates will be held to have coalesced will depend upon the facts and circumstances in the particular case, the then intention of the party acquiring the two estates, and the equities of the parties to be affected. *Petersborough Savings Bank v. Pierce*, 54 Neb. 712 (75 N. W. 20).

12. (1899.) Generally, if two unequal estates are vested in the same party at the one time, and there is no intervening estate, the inferior is merged in the superior. *Oak Creek Valley Bank v. Helmer*, 59 Neb. 176 (80 N. W. 891).

13. (1899.) The merger of an inferior in a superior estate is not an absolute effect of the vesting of the unequal titles in the one person at the same time. Whether such will be the effect may depend upon the intention of the party in whom the titles appear, either as directly expressed or as it may be inferred or implied from the facts and circumstances of the particular case. *Oak Creek Valley Bank v. Helmer*, 59 Neb. 176 (80 N. W. 891).

14. (1899.) Whether a merger results from the possession by the same person at the same time of two estates of different rank in the same property depends generally on the intention of the owner. *Longfellow v. Barnard*, 58 Neb. 612 (79 N. W. 255; 76 Am. St. Rep. 117).

15. (1902.) Where the owner of real estate, in whom apparently was merged the lesser into the greater estate, treats the two estates as having coalesced, and assumes to convey the full estate to another, this would be conclusive as to him on the question of merger, which would be held irrevocably to have taken place. *Ames v. Miller*, 65 Neb. 204 (91 N. W. 250).

16. (1906.) There can be no merger unless a greater and a less estate meet in the same person holding in the same right, nor where intervening rights or estates inter-

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fere, nor where the intention to keep the estates distinct may be inferred or has been expressed. *Topliff v. Richardson*, 76 Neb. 114 (107 N. W. 114).

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——— **Mortgage and fee title.**

17. (1896.) Where the deed of the mortgaged property to the mortgagee recited that the title was passed "subject to a mortgage of $300 which grantee hereby assumes and agrees to pay," it was evident that the intention was to continue the life of the lien of the mortgage and no merger ensued as between the parties, or against a *bona fide* purchaser of the notes secured by the mortgage, and the deed, if recorded, was notice of the fact of such intention to parties who subsequently purchased the premises, and also afforded such notice to parties to whom it was so exhibited as to bring to their knowledge the existence of the clause in the deed, and who afterwards bought the property. *Mathews v. Jones*, 47 Neb. 616 (66 N. W. 622).

18. (1898.) Where the vendee of realty reconveys to the vendor who agrees to assume a mortgage on the premises executed by the vendee to a third person, such transaction held to be a merger of the vendee's original mortgage with his fee title. *Goos v. Goos*, 57 Neb. 294 (77 N. W. 687).

19. (1902.) Ordinarily, when one having a mortgage on real estate becomes the owner of the fee, the former estate is merged in the latter. Where, however, in such a case, an intention of the holder is expressed or may be implied or inferred that the two estates shall remain separate and distinct, the intention will prevail and no merger will result. *Ames v. Miller*, 65 Neb. 204 (91 N. W. 250); (1898) *Wyatt-Bullard Lumber Co. v. Bourke*, 55 Neb. 9 (75 N. W. 241).

20. (1902.) Under the facts and circumstances as disclosed by the record in this action, *held*, that the mortgage and legal estate had merged into one while held by the grantor of appellee, and that appellee, as a *bona fide* purchaser, obtained title to the property divested of the lien of the mortgage held by appellant as assignee, who had failed and neglected to have recorded his assignment of such mortgage. *Ames v. Miller*, 65 Neb. 204 (91 N. W. 250).

——— **Tax title and fee.**

21. (1906.) Where the holder of a tax sale certificate purchases and takes from the owner a conveyance of the patent title, his tax lien becomes merged in the legal title so conveyed to him, and he cannot assert it in hostility to the claim of a third party holding another tax lien against the premises. *Mead v. Brewer*, 77 Neb. 400 (109 N. W. 399).

ESTIMATES.

For taxation, see ***Taxation***, §§ 187-190.

For city contracts, see ***Municipal Corporations***, §§ 249-251.

Of city tax, see ***Municipal Corporations***, §§ 530-532.

ESTOPPEL.

ANALYSIS.

I. BY RECORD.

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Stipulations and admissions, §§ 3, 4.

II. BY DEED.

Recitals as to estate or property conveyed, §§ 5-9.
Description of parties, § 10.
Assumption of incumbrances by grantee, §§ 11, 12.
Estates and rights subsequently acquired, §§ 13-15.

III. EQUITABLE ESTOPPEL.

(A) Nature and essentials in general.

Nature and elements of estoppel, §§ 16-22.
Intent and knowledge of facts, 23-28.
Reliance on adverse party, §§ 29-33.
Prejudice to person setting up estoppel, §§ 34-40.
Estoppel against estoppel, §§ 41-43.
Estoppel against public officer, § 44.

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(B) Grounds of estoppel.
Inconsistency of conduct and claims, §§ 45-48.
Assumption of capacity or authority, §§ 49, 49a.
Assertion of title, § 50.
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Clothing another with apparent title or authority, §§ 70-79.
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——— Assent to or ratification of acts of others in general, §§ 95-98.
——— Assent to or participation in judicial proceedings, §§ 99-104b.
——— Acceptance of benefits, §§ 105-115.
——— Permitting improvements or expenditure, §§ 116-123.
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(C) Persons affected and matters precluded.
Persons to whom estoppel is available, §§ 130, 131.
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(D) Pleading and evidence.
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Weight and sufficiency of evidence, §§ 145, 146.
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CROSS-REFERENCES.

Estoppel affecting particular rights, see specific topics.

Estoppel to allege error, see *Appeal and Error*, §§ 1509-1551.

Right of review as affected by estoppel, see *Appeal and Error*, §§ 187-207.

Of creditor to attack assignment for creditors after participating in proceedings, see *Assignments for Benefit of Creditors*, § 136.

Of creditor to impeach conveyance of debtor, by participating in insolvency proceedings, see *Fraudulent Conveyances*, §§ 340-342.

Estopped to deny infancy as defense, see *Infants*, §§ 4, 5.

To deny liability under insurance policy, see *Insurance*, §§ 276-357, 418-440.

To require adjustment of loss under insurance policy, see *Insurance*, §§ 448-453.

To have default judgment vacated, see *Judgment*, §§ 82-85.

Conclusiveness of and estoppel by judgment, see *Judgments*, §§ 549-708.

Of tenant to deny landlord's title, see *Landlord and Tenant*, §§ 28-46.

Estoppel of defendant in action on mechanic's lien to deny his title, see *Mechanics' Liens*, §§ 46, 47.

To foreclose mortgage, see *Mortgages*, § 502.

Estopped to attaching assessment for street improvement, see *Municipal Corporations*, § 517.

Of owner of agricultural land from detaching same from city, see *Municipal Corporations*, § 72.

To demand new trial, see *New Trial*, §§ 9-14.

To deny partnership, see *Partnership*, § 30.

To deny agent's authority, see *Principal and Agents*, §§ 193-201.

Of surety to deny liability, see *Principal and Surety*, §§ 61-64.

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To object to procedure to quiet title, see *Quieting Title*, §§ 56-58.

To have instrument reformed, see *Reformation of Instruments*, §§ 22-24.

To rescind contract of sale, see *Sales*, §§ 91, 92, 116, 117.

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To assert tax title, see *Taxation*, § 733.

To restrain enforcement of tax, see *Taxation*, §§ 555-558.

I. BY RECORD.

Pleadings.

1. (1894.) A party is estopped from denying the truth of averments in his own pleadings. *Foley v. Holtry*, 41 Neb. 563 (59 N. W. 781). [Overruled. 43 Neb. 133.]

2. (1898.) A defendant signing and verifying as plaintiff's attorney a petition averring that he owed plaintiff a certain sum and praying for judgment against himself cannot, on appeal from a decree as prayed, be relieved in the supreme court. *Troup v. Horbach*, 53 Neb. 795 (74 N. W. 326).

Stipulations and admissions.

3. (1895.) A party who signs in a trial court a stipulation providing that an interlocutory order may be reviewed on error, and that a judgment on the merits of the case be entered in the error proceedings, is not thereby estopped from attacking the judgment of the appellate court for want of jurisdiction. *Johnson v. Parrotte*, 46 Neb. 51 (64 N. W. 363).

4. (1901.) A party will not be heard to complain in the supreme court of the action of the lower court in the trial of a civil cause if the action of the court was by the "mutual agreement" of the parties to the suit. *Union Nat. Bank of Chicago v. Touzalin Improvement Co.*, 1 Unof. 116 (95 N. W. 489).

II. BY DEED.

Recitals as to estate or property conveyed.

5. (1884.) Where certain lands in an addition to a city, but not platted, were conveyed by metes and bounds, one of the calls in the deed being a certain number of feet to an alley, thence along said alley, etc., there being in fact no alley at the place indicated, as was well known to the purchaser, but a strip twenty feet in width was reserved for that purpose when the city in fact was extended to that point, *held*, that the alley was not a public one, and the purchaser could not enjoin the owner of the fee from erecting bars across the same. *Bushman v. Gibson*, 15 Neb. 676 (20 N. W. 106).

6. (1897.) In conveying a ward's interest in land a guardian, by a deed purporting to convey the entire estate, is estopped from afterward asserting his own interest in the land as against the purchaser at the guardian's sale. *Wells v. Steckelberg*, 52 Neb. 597 (72 N. W. 865; 66 Am. St. Rep. 529).

7. (1897.) Where a father falsely alleges that he is guardian for an infant son and obtains a license to sell the ward's realty, and executed a deed purporting to convey the fee, in an action of ejectment by the son, on attaining his majority, against the purchaser, the father is estopped from setting up his life estate as against the purchase. *Wells v. Steckelberg*, 52 Neb. 597 (72 N. W. 862; 66 Am. St. Rep. 529).

8. (1902.) When recitals in a deed are of the essence of the contract, neither party is permitted to deny them. *McNaughton v. Burke*, 63 Neb. 704 (89 N. W. 274).

9. (1903.) Whatever be the form or nature of the conveyance of real property, if the grantor therein sets forth on the face of such instrument, by way of recital or averment, either in express terms or by necessary implication, that he is seized or possessed of a particular estate in the premises conveyed, then such grantor and all persons claiming under him are ever afterward estopped from denying that he was so seized and possessed at the time he made such conveyance. *Omaha B. & T. R. Co. v. Whitney*, 68 Neb. 399 (99 N. W. 525).

Description of parties.

10. (1897.) The mere fact that a grantor in a conveyance of a family homestead is described therein as a single person, will not estop the grantor from asserting the homestead character of the premises included in the conveyance or the right of homestead therein as against a grantee or mortgagee. *France v. Bell*, 52 Neb. 57 (71 N. W. 984).

Assumption of incumbrances by grantee.

11. (1901.) Where property is conveyed "subject to incumbrances," generally, the grantee is not estopped from asserting the invalidity of an apparent lien. *Batty v. City of Hastings*, 63 Neb. 26 (88 N. W. 139).

12. (1904.) A grantee who, by valid contract, has assumed and agreed to pay an

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apparent lien upon real estate as a part of the purchase price therefor, cannot have her title quieted against such lien on the ground that it was not an enforceable lien against her grantor. *McGregor v. Eastern Bldg. & Loan Ass'n*, 5 Unof. 563 (99 N. W. 509).

Estates and rights subsequently acquired.

13. (1898.) Whatever be the form or nature of the conveyance of real property, if the grantor therein sets forth on the face of such instrument by way of recital or averment, either in express terms or by necessary implication, that he is seized or possessed of a particular estate in the premises conveyed, then such grantor and all persons claiming under him are ever afterward estopped from denying that he was so seized and possessed at the time he made such conveyance. Such an estoppel operates upon the estate and binds an after-acquired title as between parties and privies. *Hagensick v. Castor*, 53 Neb. 495 (73 N. W. 932).

14. (1898.) In 1887 the children of George H. Ohler, believing him dead, partitioned among themselves his real estate, by quitclaim deeds from one to another, each deed reciting that the grantor "being one of the three heirs of George H. Ohler." In 1891 Ohler died owning this real estate and it descended to his heirs, the three children who had already partitioned it. *Held*, That the recital in the quitclaim deeds, "being one of the three heirs of George H. Ohler," was not a mere *descriptio personæ* of the grantor, but an assertion by such grantor that he was then an heir at law of Ohler; and the grantors had by such recital estopped themselves and those claiming under them from asserting that they were not heirs of George H. Ohler in 1887, and from asserting the title to the land which they acquired by his death in 1891, against the grantees in said quitclaim deeds and those claiming under them. *Hagensick v. Castor*, 53 Neb. 495 (73 N. W. 932).

15. (1902.) Where one is entitled to a patent to land from the United States, but before it issues, conveys the land to another by deed purporting to convey the fee, and a patent subsequently issues to such grantor for the land, he will not be heard to assert title under such patent, as against such grantee. *Lyon v. Gombert*, 63 Neb. 630 (88 N. W. 774).

III. EQUITABLE ESTOPPEL.

A. Nature and Essentials in General.

Nature and elements of estoppel.

16. (1878.) Generally, whether acts or admissions of a party shall operate by way of estoppel or not, must depend upon the circumstances of each case, and therefore there can be no fixed and settled rules of general application to regulate estoppel *in pais*, as in technical estoppels. *Campbell v. Nesbitt*, 7 Neb. 300.

17. (1892.) Estoppel will not supply the want of power, or make valid an act prohibited by express provision of law. *Whitlock v. Gosson*, 35 Neb. 829 (53 N. W. 980); (1906) *Weatherington v. Smith*, 77 Neb. 363 (109 N. W. 381).

18-20. (1897.) Where one of two innocent persons must suffer it should be that one who misled the other into the contract. *Missouri P. R. Co. v. Crowell Lumber & Grain Co.*, 51 Neb. 293 (70 N. W. 964); (1897) *Porter v. Ourada*, 51 Neb. 510 (71 N. W. 52); (1904) *Humphrey Hardware Co. v. Herrick*, 72 Neb. 878 (101 N. W. 1016).

21. (1906.) The doctrine of estoppel by construction is well established in this state. *Royal Highlanders v. State*, 77 Neb. 18 (108 N. W. 183).

22. (1907.) To constitute an equitable estoppel, there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice. *Walker v. Ehresman*, 79 Neb. 775 (113 N. W. 218).

Intent and knowledge of facts.

23. (1893.) Knowledge of the existence of a right or defense, and the intention to relinquish it, must concur in order to estop a party by waiver. *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb. 207 (55 N. W. 643); (1894) *Hamilton v. Home Fire Ins. Co.*, 42 Neb. 883 (61 N. W. 93).

24. (1893.) Estoppel cannot be grounded on silence unless there is both the specific opportunity and the apparent duty to speak; the party omitting to speak must know that another is acting or about to act in reliance

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thereon. *Scharman v. Scharman*, 38 Neb. 39 (56 N. W. 704); (1901) *Smith v. White*, 62 Neb. 56 (86 N. W. 930).

25. (1894.) To constitute an equitable estoppel by silence or acquiescence, it must be made to appear that the facts, upon which it is sought to make the estoppel operate, were known to the party against whom the estoppel is urged and unknown to the party urging it. *Nash v. Baker*, 40 Neb. 294 (58 N. W. 706).

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26. (1896.) To constitute an estoppel *in pais* the person sought to be estopped must have conducted himself with the intention of influencing the conduct of another, or with reason to believe his conduct would influence the other's conduct, inconsistently with the evidence he proposes to give. *Burke v. Utah Nat. Bank*, 47 Neb. 247 (66 N. W. 295).

27. (1902.) An estoppel by representations does not arise, where there is no intention and could be no reasonable expectation, that such representation was to be acted upon. *Laing v. Evans*, 64 Neb. 454 (90 N. W. 246).

28. (1903.) An estoppel may be binding and effectual, even though there was no intention to deceive, and it is not necessary for the holder of an adverse interest to deny his interest, or expressly declare his intention to abandon it. *Lydick v. Gill*, 68 Neb. 273 (94 N. W. 109).

Reliance on adverse party.

29. (1899.) A party is not estopped by his acts or omissions which were in no manner or degree an element of or inducement to the acts of the one who seeks to invoke the estoppel. *Oak Creek Valley Bank v. Helmer*, 59 Neb. 176 (80 N. W. 891).

30. (1899.) Where credit was not obtained on the faith of property conveyed by an insolvent husband to his wife, there is, in an action by a creditor, no basis for an estoppel against her assertion of ownership of such property. *Dunn v. Bozarth*, 59 Neb. 244 (80 N. W. 811).

31. (1901.) 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*, 62 Neb. 664 (87 N. W. 533).

32. (1902.) It is of the essence of estoppel that the estoppel asserter has relied to his disadvantage upon the conduct or silence of the other party. *Decker v. Decker*, 64 Neb. 239 (89 N. W. 795).

33. (1903.) Whatever a man's real intention may be, if he so conducts himself that a reasonable man would take the act or representation to be true, and believe that it was made to be acted on, and he did act upon it as true, the party making the representations will be precluded from contesting their truth. *Lydick v. Gill*, 68 Neb. 273 (94 N. W. 109).

Prejudice to person setting up estoppel.

34, 35. (1879.) It is a firmly established rule that, when one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. *Grant v. Cropsey*, 8 Neb. 205; (1884) *Newman v. Mueller*, 16 Neb. 523 (20 N. W. 843); (1894) *Cain v. Boller*, 41 Neb. 721 (60 N. W. 7); (1896) *Brown v. Eno*, 48 Neb. 538 (67 N. W. 434); (1905) *Larson v. Anderson*, 74 Neb. 361 (104 N. W. 925).

36, 37. (1895.) To create an estoppel *in pais* the party in whose favor the estoppel operates must have altered his position in reliance upon the words or conduct of the party estopped. *Lingonner v. Ambler*, 44 Neb. 316 (62 N. W. 486).

38. (1902.) The silence of one party does not operate as an estoppel in favor of another, unless it appear that such other party has been induced thereby to change his position to his inury. *Columbus State Bank v. Carrig*, 3 Unof. 592 (92 N. W. 324).

39, 40. (1905.) Where one by his conduct induces another to act on the supposition that certain conditions exist, he will not be heard to deny the existence of such conditions where the other would be prejudiced by such denial. *Anthes v. Schroeder*, 74 Neb. 172 (103 N. W. 1072).

Estoppel against estoppel.

41. (1871.) Every estoppel ought to be reciprocal, that is, to bind both parties. *Towsley v. Johnson*, 1 Neb. 95.

42. (1882.) It is of the essence of an estoppel that it be mutual. *Van Sickel v.*

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Buffalo County, 13 Neb. 103 (13 N. W. 19; 42 Am. St. Rep. 753).

43. (1894.) The defense of estoppel by laches or unreasonable delay in bringing an equitable suit is of itself an equitable defense, and cannot be successfully maintained when it appears that the delay complained of as unreasonable has been caused by, or contributed to by, the party interposing the defense. *Richards v. Hatfield*, 40 Neb. 879 (59 N. W. 777).

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Estoppel against public office.

44. (1901.) The rule of estoppel *in pais* will not ordinarily apply to the acts of municipal officers. *Philadelphia Mortgage & Trust Co. v. City of Omaha*, 63 Neb. 280 (88 N. W. 523; 93 Am. St. Rep. 442; 57 L. R. A. 150).

B. Grounds of Estoppel.

Inconsistency of conduct and claims.

45. (1891.) A party who refuses to perform a contract for a stated reason cannot, after suit commenced, be heard to adopt a different reason. *Ballou v. Sherwood*, 32 Neb. 666 (49 N. W. 790, 50 N. W. 1131).

46. (1898.) A national bank having given a transaction the form of one with an individual for the purpose of evading the liabilities peculiar to national banks, cannot be heard to assert its true nature for the purpose of evading the liabilities attaching to individuals and of claiming the privileges of national banks. *Gadsden v. Thrush*, 56 Neb. 565 (76 N. W. 1060).

47. (1899.) Where a party gives a reason for his decision and conduct touching anything involved in a controversy, he is estopped, after litigation has begun, from changing his ground and putting his conduct on another and different consideration. *Frenzer v. Dufrene*, 58 Neb. 432 (78 N. W. 719); (1900) *State, ex rel. Seth Thomas Clock Co., v. County Commissioners of Cass County*, 60 Neb. 566 (83 N. W. 733); (1904) *Hixson Map Co. v. Nebraska Post Co.*, 5 Unof. 388 (98 N. W. 872); (1905) *First State Bank of Overton v. Stephens Bros.*, 74 Neb. 616 (105 N. W. 43).

48. (1900.) The assignor of a partly executed contract of purchase of lumber who conditions that the assignee shall at once make settlement of the account of lumber already delivered is estopped, in an action against him for an unpaid balance, to set up as a set-off a claim due from the assignee. *Blue Valley Lumber Co. v. Conro*, 61 Neb. 39 (84 N. W. 402).

Assumption of capacity or authority.

49. (1906.) One cannot attack the validity of a delegate meeting of a society where he participates in the meeting and becomes a candidate for one of the offices to be filled. *Burdick v. Sons and Daughters of Protection*, 75 Neb. 460 (106 N. W. 466).

49*a*. (1907.) By correspondence, plaintiffs, who are real estate brokers, arranged with a landowner for a sale of his land to a stranger, and during the negotiation demanded a certain sum as their commission, which, upon consummation of the sale, was paid to them. *Held*, That the plaintiffs will not be heard to say that they were not the agents of the vendor. *Northup v. Bathrick*, 80 Neb. 36 (113 N. W. 808).

Assertion of title.

50. (1888.) A bailee of sheep who, for the purpose of obtaining credit for merchandise, informs the merchant that he owns the sheep, is estopped to allege that he has no interest therein subject to levy on an execution on a judgment for the value of the merchandise furnished him. *Towne v. Sparks*, 23 Neb. 142 (36 N. W. 375).

Claim or position in judicial proceeding.

51. (1883.) When a party appeals from a judgment of a justice of the peace, his undertaking executed in conformity to the statute estops him to deny that he had taken an appeal in an action brought on the undertaking. *Gudtner v. Kilpatrick*, 14 Neb. 347 (15 N. W. 708).

52. (1892.) When the authorities of a city change the grade of a street, appoint appraisers to assess the damages of abutting owners, and confirm the award when returned, the city, on the trial of an appeal taken by the landowner from the assessment of damages, cannot urge defects and irregularities in its own proceedings in changing the grade, to defeat a recovery. *Second Congregational Church Society v. City of Omaha*, 35 Neb. 103 (52 N. W. 829).

53. (1894.) Where the owner of a judgment, that has been paid, causes an execution to issue against real estate of the debtor and a sale and conveyance of the same, no release of the judgment having been recorded, in an action for damages

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the owner of the judgment is estopped from execution sale and the proceedings subsequent thereto were void. *Pope v. Benster*, 42 Neb. 304 (60 N. W. 561; 47 Am. St. Rep. 703).

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54. (1895.) An attachment having been issued against a defendant, the plaintiff claiming to have acquired a lien by virtue of a garnishment founded upon averments that the garnishee had property of the defendant in his possession, cannot be heard to insist that the defendant is without standing to move a discharge of the attachment because in fact he had no interest in the property. *Kilpatrick-Koch Dry Goods Co. v. Bremers*, 44 Neb. 863 (62 N. W. 1105).

55. (1896.) A plaintiff who has attached property as the property of defendants and obtained writs of garnishment to issue on allegations that the garnishee named has in his possession property, etc, owned by or belonging to the defendants, will not be heard to assert that defendants have not sufficient interest to be allowed to defend the attachments. *Dayton Spice-Mills Co. v. Sloan*, 49 Neb. 622 (68 N. W. 1040).

56. (1901.) An offer to prove payment is not in every case an implied admission that the plaintiff once had an actionable demand; its purpose may be to prove that a right of action never existed. *Barker v. Wheeler*, 62 Neb. 150 (87 N. W. 20).

57. (1903.) Where appellee procured a dismissal of the appeal on the ground that the undertaking was void, he is estopped to afterwards maintain a suit on such undertaking. *United States Fidelity & Guaranty Co. v. Ettenheimer*, 70 Neb. 144 (97 N. W. 227; 113 Am. St. Rep. 783)

Failure to assert title or right.

58. (1876.) Where the purchaser of a bill of lumber of a certain "quantity and quality" receives the lumber and gives a note in settlement of the balance due therefor, he is estopped from claiming damages for want of "quantity and quality," no fraud or mistake being alleged. *Golby v. Lyman*, 4 Neb. 429.

59. (1889.) A mortgagee of chattels who stands by and knowingly permits the goods to be sold is estopped to afterwards assert his title thereto. *Gillilan v. Kendall*, 26 Neb. 82 (42 N. W. 281; 18 Am. St. Rep. 766).

60. (1896.) Failure of a city to levy taxes during three years after a plat was vacated does not estop the city from making a subsequent levy. *Kershaw v. Jansen*, 49 Neb. 467 (68 N. W. 616).

61. (1903.) Owners of land who have given quitclaim deeds to all their interest in the land, and have suffered a decree in partition against them that their grantee holds title to the land so conveyed and have allowed in such action of partition one-third of the net proceeds of the sale to be paid to the purchaser of the dower estate, to be held by him during the life of the doweress, are estopped to assert any claim accruing before the partition proceedings to the reversion of the dower. *Curtis v. Zutavern*, 67 Neb. 183 (93 N. W. 400).

Disclaimer.

62. (1877.) If the cashier, on inquiry by a surety who is not an officer of the bank, states that the note upon which he is surety has been paid by the principal, the bank is estopped from denying the truth of such statement, when to do so would entail a loss upon the surety *Merchants Bank v. Rudolf*, 5 Neb. 527.

63. (1887.) Where the president of a bank without authority disposes of the property of the bank, and the bank is thereby damaged, and for the purpose of making good the loss, either temporarily or permanently, transfers to the bank promissory notes held by him in an amount equal to the loss sustained; and where afterwards he disposes of his interest in the bank and induces others to purchase a controlling interest in the stock upon the representation that he has no demand against the bank, he cannot afterwards recover of the bank the amount of the notes transferred to it for the purpose of making up the deficiency caused by the loss resulting from the sale of the bank's property. *First Nat. Bank v. Lucas*, 21 Neb. 280 (31 N. W. 805).

64. (1889.) An attorney selling real estate for his client, and representing the title to be good, which representation is relied on, cannot thereafter assert title in himself to any of the real estate so sold. *Little v. Giles*, 25 Neb. 313 (41 N. W. 186).

65. (1889.) One who, acting as agent for his father, makes representations and statements concerning lands, whereby another is induced to purchase the father's interest, in good faith and for value, he is

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estopped from afterwards setting up a superior title in himself. *Wise v. Newatney*, 26 Neb. 88 (42 N. W. 339).

66. (1892.) One who, by wilfully stating to another that he does not own certain property, leads the latter to purchase it, is estopped from averring a different state of facts. *Blodgett v. McMurtry*, 34 Neb. 782 (52 N. W. 706).

67. (1894.) Where a seller of goods, which had been purchased from him by fraudulent representatives of the buyer that he was a member of a certain firm, told a creditor of the buyer that he had no claim on the goods but proposed to look to the firm for payment, and such creditor relying on such statement sued out an attachment, the seller is estopped to afterwards claim that he had not parted with the title. *Kirkendall, Jones & Co. v. Davis*, 41 Neb. 285 (59 N. W. 915).

68. (1894.) One who is a mere licensee without consideration of a barn to store broom corn, promising to vacate for a prospective purchaser, is, in an action of replevin by such purchaser, estopped to claim a right of possession of the barn. *Jameson v. Kent*, 42 Neb. 412 (60 N. W. 879).

69. (1905.) The owner of a remainder who induces a person to purchase the property from a life tenant, by a representation that the latter could convey a complete title, is estopped to afterwards dispute the purchaser's title. *Larson v. Anderson*, 74 Neb. 361 (104 N. W. 925).

Clothing another with apparent title or authority.

70. (1874.) When a husband and wife convey, by an absolute deed, certain lands to another to secure a debt owing by them, and the land is sold by the grantee with consent of the husband and wife, after the husband's death the wife is estopped to deny the validity of the sale. *Wamsley v. Crook*, 3 Neb. 344.

71. (1880.) Where an agent of a railroad issues a bill of lading for five cars of wheat when in fact only one or two cars were actually shipped, as against a bank that discounted and paid the bill of lading, the railroad company is estopped from denying it had received the five cars of wheat. *Sioux City & P. R. Co. v. First Nat. Bank*, 10 Neb. 556 (7 N. W. 311; 35 Am. Rep 488).

72. (1886.) Where one of two innocent persons must suffer by the fraud of a third, he who trusted the third person and placed the means in his hands to commit the wrong must bear the loss. *Hansen v. Berthelsen*, 19 Neb. 433 (27 N. W. 423).

73. (1890.) The execution of assignments of land-grant contracts in blank, no assignee being named therein, and the delivery thereof to a broker, does not estop the owner from claiming the same as against one to whom the broker wrongfully pledged them. *Folsom v. McCague*, 29 Neb. 124 (45 N. W. 269).

74. (1893.) The fact that the holder of land contracts assigned them to her son as security for a loan, such assignments not being recorded, and the mother remaining in possession of the land, does not estop her from denying that such assignment was absolute, as against a creditor of the son, although her son, without her knowledge had, before the assignment, obtained the credit by representing that he owned the land. *Scharman v. Scharman*, 38 Neb. 39 (56 N. W. 704).

75. (1896.) Where one of two innocent persons must suffer through the misfeasance of the agent of one, that one who has placed the agent in a position to perpetrate the fraud must suffer. *City Nat. Bank of Hastings v. Thomas*, 46 Neb. 861 (65 N. W. 895); (1896) *Bull v. Mitchell*, 47 Neb. 647 (66 N. W. 632).

76. (1903.) The defendant in error gave his married daughter possession of certain domestic animals for use in her family; some months thereafter the daughter and her husband separated, after which the husband sold the animals, representing to the purchaser that he was the owner. *Held*, That defendant in error was not estopped from re-claiming the animals in the absence of proof that his son-in-law was claiming to own the property and by his acts, conduct or declarations, causing the public to believe that he was such owner and that such facts were brought to the knowledge of defendant in error prior to a sale being made. *McGinley v. Brechtel*, 4 Unof. 552 (95 N. W. 32).

77. (1905.) Where an indorsee of a note consents to, and ratifies, extension of the time of payment thereof made by the indorser, who was the original payee, such indorsee is estopped to recover on such note as against the maker who has paid the endorser, not knowing the note has been transferred. *Swan v. Craig*, 73 Neb. 182 (102 N. W. 471).

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78. (1907.) Where a conveyance of real property is obtained from the owner by fraud, and a general creditor of the fraudulent grantee asserts that he gave credit upon faith in such apparent ownership, and claims that the owner should be estopped to deny the title of the fraudulent grantee, such estoppel will be denied where the reliance upon such apparent ownership is not clearly established, and the creditor appears to have been as negligent in extending credit as was the owner in the original transaction. *Rihner v. Jacobs*, 79 Neb. 742 (113 N. W. 220).

79. (1907.) In the application of the doctrine of equitable estoppel to a transaction where the true owner of property permits another to hold the legal title in trust for him, and credit is given the trustee personally upon the faith of such apparent ownership, cases, where the trust relation is between relatives and arises out of contract, distinguished from those where the trust arises *ex maleficio* and the relation is between strangers. *Rihner v. Jacobs*, 79 Neb. 742 (113 N. W. 220).

Dealing with person asserting title or exercising authority.

80. (1871.) The maker of a note which is in terms payable to a bank, cannot, in an action brought by it thereon, raise the question of its incorporation. He is estopped to deny it. *Platte Valley Bank v. Harding*, 1 Neb. 461.

81. (1873.) Where a husband conveys a tract of land to his wife, his afterwards taking a life lease from her is a conclusive recognition of his wife's title, and he is estopped from setting up any claim to the property. *Courvoisier v. Bouvier*, 3 Neb. 55.

82. (1896.) Where one enters into a contract with a body acting as a corporation, he is estopped from denying its corporate existence when sued on the contract. *Livingston Loan & Building Ass'n v. Drummond*, 49 Neb. 200 (68 N. W. 375); (1901) *Otoe County & Driving Park Ass'n v. Doman*, 1 Unof. 179 (95 N. W. 327); (1901) *Crete Bldg. & Loan Ass'n v. Patz*, 1 Unof. 768 (95 N. W. 793).

83. (1903.) A person is not estopped to deny the existence of a lawful public road by the fact that he demanded damages on account of the taking of his land therefor, which demand was wholly ignored by the public board authorized by law to ascertain such damages. *Langan v. Whalen*, 67 Neb. 299 (93 N. W. 393).

83*a*. (1907.) Where a surety company issues an indemnity policy insuring a fraternal beneficial association from loss by larceny or embezzlement of its officers, the contract not being illegal, the company will be estopped from denying the legal capacity of the association in an action on the policy by the association against the company. *Union Pacific Lodge v. Bankers Surety Co.*, 79 Neb. 801 (113 N. W. 263).

Contracts.

84. (1876.) Where a stockholder in a railroad corporation has signed a contract disposing of its assets, knowing its contents, and voting at meetings of the company to carry it into effect, he cannot afterward repudiate it, or question the *bona fides* of the transactions, no fraud being shown. *Clarke v. Omaha & S. W. R. Co.*, 4 Neb. 458.

85. (1886.) A county is estopped to deny the validity of county bonds in the hands of a *bona fide* holder. *State, ex rel. Leese, v. Wilkinson*, 20 Neb. 610 (31 N. W. 376).

86. (1892.) A mortgage on a homestead being void for want of power of the husband alone to incumber the homestead, neither the husband nor wife is estopped to deny its validity. *Whitlock v. Gosson*, 35 Neb. 829 (53 N. W. 980).

87. (1894.) Where the seller on a contract to sell a certain amount of corn at a certain fixed price, not being able to read or write, the buyer reduced the agreement to writting which the seller signed, the original agreement being to sell corn to the amount of $52 and the buyer in transcribing the same inserted 3,000 bushels, the seller is not estopped from denying his liability by reason of affixing his signature. *Ward v. Spelts*, 39 Neb. 809 (58 N. W. 426).

88. (1894.) The doctrine that the carelessness or negligence of a party in signing a writing estops him from afterwards disputing the contents of such writing, is not applicable in a suit thereon between the original parties thereto, where the defense is that such writing, by reason of fraud, does not embrace the contract actually made. *Ward v. Spelts*, 39 Neb. 809 (58 N. W. 426); (1897) *Woodbridge v. DeWitt*, 51 Neb. 98 (70 N. W. 506).

89. (1901.) One who agrees with a city to act as police matron, for a salary less than that prescribed by law, is not estopped from asserting her right to the full salary allowed by the statute. *Gallaher v. City of Lincoln*, 63 Neb. 339 (88 N. W. 505).

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90. (1903.) In an action to recover a deposit made to secure a bid for public work the plaintiff is not estopped to deny the validity of the bid and its acceptance, nor does the maxim, *Potior est conditio possidentis*, apply in such a way as to defeat a recovery. *Fairbanks, Morse & Co. v. City of North Bend*, 68 Neb. 560 (94 N. W. 537).

Stipulations.

91. (1896.) A creditor who signed a stipulation authorizing the agent of a rival creditor to sell the debtor's goods and remit the proceeds to the principal, in the absence of fraud, was estopped from asserting a superior right to the proceeds of the sale. *Commercial Nat. Bank v. Merchants Exchange Nat. Bank*, 47 Neb. 217 (66 N. W. 273).

Rendition of bill.

92. (1898.) The rendition of a bill for services does not estop the person rendering it from claiming and recovering a larger amount in a subsequent action on a *quantum meruit*, when the other party did not accept or acquiesce in the bill, but refused at once to recognize it as correct. *People's Nat. Bank v. Geisthardt*, 55 Neb. 232 (75 N. W. 582).

Admissions.

93. (1883.) Admissions, whether of law or of fact, which have been acted upon by others, are conclusive against the party making them in all cases between him and the person he has thus influenced. *Buckstaff v. Dunbar*, 15 Neb. 114 (17 N. W. 345).

94. (1895.) A landowner who states to an intending purchaser of a judgment that it is a lien on the former's land is, as against the latter, estopped from asserting the contrary. *Viergutz v. Aultman*, 46 Neb. 141 (64 N. W. 693).

Acquiescence.

——— Assent to or ratification of acts of others in general.

95. (1873.) Where a party voluntarily surrenders the legal evidence by which his claim could be supported, and directs his grantor to make a deed to another person, he is estopped from introducing secondary evidence to defeat a title made with his own knowledge and consent, and for which he received a satisfactory consideration. *Schade v. Bessinger*, 3 Neb. 140.

96. (1899.) A lent money to B & C, partners. Certain moneys were thereafter paid by B to A. A receiver was appointed to wind up the partnership, and B, without authority from A and without her knowledge, proved her whole claim against the firm and secured its allowance without deduction of the moneys paid by B. A dividend was paid A on the claim, but she did not know when she received it that her claim had been so presented and allowed, and the payment made was, together with the moneys paid by B, less than the debt to her. In a suit by B to recover the moneys paid by him as moneys lent, *held* that A was not by the foregoing facts estopped to assert that such moneys had been paid by B to her as partial payments of the firm debt and not as a loan. *Foss v. Streator*, 57 Neb. 389 (77 N. W. 764).

97. (1901.) When the lender of money upon negotiable securities sells and transfers the latter before due, and upon their maturity receives payment therefor from the maker, who pays him in good faith, and the lender subsequently executes and delivers his own obligations to the holder for the amount so received, who, after having learned of the fact of such payment, retains such obligations for more than two years, without objection and without notifying the borrower that such transaction was unauthorized by or unsatisfactory to him, the holder will be held to have ratified the receipt of the money by the lender as being the act of his own agent and will be estopped from enforcing the securities against the borrower. *Day v. Miller*, 1 Unof. 107 (95 N. W. 359).

98. (1901.) Consent by one creditor that the debtor may mortgage a stock of goods to another creditor does not estop the former from attacking the validity of such mortgage when the mortgagor is permitted to dispose of the mortgaged goods for his own benefit. *Brinker v. Ashenfelter*, 1 Unof. 793 (95 N. W. 1124).

——— Assent to or participation in judicial proceedings.

99. (1882.) Where, after a judgment for plaintiff in ejectment, defendant seeks to have the amount of taxes he has paid on certain land ascertained, and paid by plaintiff, he is estopped to afterward seek relief by proceeding in error against the judgment in the original action. *Strong v. Irwin*, 12 Neb. 446 (11 N. W. 877).

100. (1886.) Where a defendant takes a stay of execution, he thereby waives the right to apply for a new trial, and is es-

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topped to attach the judgment in any manner. *Banks v. Hitchcock*, 20 Neb. 315 (30 N. W. 56).

101. (1898.) A defendant to an action in which an accounting is prayed, who consents to an order of reference and proceeds according to the analogies of a suit in equity, cannot on appeal be heard to say that the action was essentially of a legal character, and should have been so treated. *Morris v. Haas*, 54 Neb. 579 (74 N. W. 828).

102. (1898.) A subscriber to corporate stock who has paid off a deficiency judgment against the corporation is not estopped from maintaining a suit for contribution against his co-subscribers by the fact that he participated in a distribution made of the assets of the corporation by the stockholders, the debt discharged by him not being provided for in such distribution. *Bennison v. McConnell*, 56 Neb. 46 (76 N. W. 412).

103. (1901.) When defendants in a suit to foreclose a mortgage avail themselves of the statutory stay of judgment they are estopped from attacking such judgment in any manner. *Gilbert v. Provident Life & Trust Co.*, 1 Unof. 282 (95 N. W. 488).

104. (1907.) Heirs at law of an entryman of a timber claim, the patent to which was not issued until after the death of the entryman, are not estopped from asserting claim to the same by reason of permitting a probate court to adjudge title to the land to vest in devisees. *Walker v. Ehresman*, 79 Neb. 775 (113 N. W. 218).

104*a*. (1907.) When the owner of property sold at judicial sale moves the court to deny confirmation because of inadequacy of price, and offers in event of re-sale to increase the bid thereat, he, by so doing, admits the jurisdiction of the court and confesses the justice of the decree of sale, and is estopped afterwards to dispute either. *Prudential Real Estate Co. v. Hall*, 79 Neb. 808 (116 N. W. 40).

104*b*. (1908.) When, in an action to set aside a conveyance of land as having been fraudulently procured, the plaintiff obtains a decree in his favor by means of a compromise and settlement, in which he agrees to pay and discharge a mortgage upon the premises executed by his fraudulent grantee, he is not entitled to object, in a subsequent action to foreclose that mortgage, that the same is for a sum in excess of the just indebtedness of the mortgagor to the mortgagee, or that prior to the settlement the mortgagee might have obtained a partial satisfaction from a source other than the land. *Hannan v. Rihner*, 80 Neb. 521 (114 N. W. 605).

——— Acceptance of benefits.

105. (1874.) One cannot be permitted to receive the purchase price for land and afterwards recover the land. *Wamsley v. Crook*, 3 Neb. 344.

106. (1877.) The receipt of purchase money with the knowledge that the purchaser is paying it upon an understanding that he is purchasing a good title, touches the conscience and binds the rights of the parties as effectually in a void as in a voidable proceeding; and the same principle applies when a party retains the benefits derived from an agency, and has ratified the acts of the agent. *McMurtry v. Brown*, 6 Neb. 368.

107. (1887.) A plan for the division of a tract of land among tenants in common thereof, is binding upon such tenants as have ratified it by accepting a conveyance of the portions assigned to them. *Killinger v. Hartman*, 21 Neb. 297 (31 N. W. 918).

108. (1897.) A payee suing on a note taken by his agent for the purchase price of a harvesting machine, is estopped to assert that a warranty made by the agent, as an inducement to procure the note, was unauthorized. *Osborn Co. v. Jordan*, 52 Neb. 465 (72 N. W. 479).

109. (1897.) A landowner by electing to pursue his remedy for the value of property appropriated by a city for a street, is estopped to call in question the title of the city to the land taken, in a subsequent action to restrain the city from collecting an assessment on his property for grading and improving the street. *Hawver v. City of Omaha*, 52 Neb. 734 (73 N. W. 217).

110. (1901.) A party who has received the benefits of an executed contract entered into with the county at a meeting of the county board is estopped from denying the legality of the session at which such contract was entered into. *Green v. Lancaster County*, 61 Neb. 473 (85 N. W. 439).

111. (1902.) One who, on a settlement with his principal of transactions by him as agent, writes a receipt in full of all demands and attaches it to a draft for the amount the other party has offered to pay for such a receipt, cannot, after taking the money, in the absence of fraud or mistake, renew a claim previously in dispute between the parties.

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Connor v. Etheridge, 3 Unof. 555 (92 N. W. 135).

112. (1903.) One purchasing property and retaining title to it under a decree of foreclosure, will not be permitted to challenge the validity of such decree. *City of Lincoln v. Lincoln Street R. Co.*, 67 Neb. 469 (93 N. W. 766).

113. (1906.) Where heirs accept a cash payment from the widow of a deceased in an endeavor to settle absolute title in the widow and mother to the homestead, they are, after ten years, estopped from asserting title to the homestead as against the widow's grantee. *Staats v. Wilson*, 76 Neb. 204 (107 N. W. 230).

114. (1907.) A person claiming title derived under a decree of court will not be heard to dispute the authority of the attorney to enter into the stipulation upon which the decree was based. *Peterson v. Ramsey*, 78 Neb. 235 (110 N. W. 728).

115. (1907.) A landlord is estopped to deny the authority of his attorney to compromise and settle a claim for rent, where he accepts and retains the amount received in settlement. *Fenimore v. White*, 78 Neb. 520 (111 N. W. 204).

——— Permitting improvements or expenditure.

116. (1877.) If a company, incorporated with the exclusive privilege to establish and keep a ferry and wagon bridge across a river, within a certain district, stand by and silently see and permit other parties to construct and complete another wagon bridge across the same river, within the same district—or acquiesce and consent to the erection thereof—it will, by reason of such silence or assent, be estopped from controverting, by injunction or otherwise, the right of the other parties to use and repair such bridge. *Fremont Bridge Co. v. Dodge County*, 6 Neb. 18.

117. (1884.) In an action of ejectment, where an equitable defense is pleaded, and under the allegations of the answer it is shown that the defendant bought the land in question in good faith for a valuable consideration, taking immediate possession thereof, and with the knowledge of the plaintiff made valuable and lasting improvements thereon, the plaintiff taking no steps to notify defendants of his claim, *held*, that he was estopped to set up his rights as against them. *Gillespie v. Sawyer*, 15 Neb. 536 (19 N. W. 449).

118. (1887.) If a party knowingly, though it be done passively by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his own claim, he will not afterwards be permitted to exercise his legal rights against such person. *State, ex rel. Miller, v. Graham*, 21 Neb. 329 (32 N. W. 142).

119. (1888.) A party who knowingly permits another to purchase land and expend money thereon, under the supposition that he is the owner, and without such party making known his own claim, will not be permitted afterwards to exercise his legal rights against the purchaser. *Forbes v. McCoy*, 24 Neb. 702 (40 N. W. 132).

120. (1893.) The owners of a tract of land, having platted it as an addition to an adjacent town, so as to show what appeared to be the prolongation of its streets, though not so designated, and having for the period of eight years acquiesced in the grading and public use of such apparent streets, the erection of sidewalks thereon, and the construction of costly improvements upon adjacent private property in such manner that if the existence of such streets is denied these improvements will be rendered comparatively useless; and having represented to one party, who, on the faith thereof, purchased a portion of said addition adjoining said apparent streets, that such portion would abut upon the same as streets, are estopped to deny the existence of the streets through such addition of which they have thus superinduced such belief, and the reliance thereon of the parties who have acted upon the faith of such appearances, acts, and representations. *Likes v. Kellogg*, 37 Neb. 259 (55 N. W. 878).

121. (1894.) Where stock in a corporation had been exchanged for land and the person receiving the stock learned that the representations inducing him to make the exchange were false, and thereafter, without notifying th other party of any intention to rescind, knowingly permitted such other party to make valuable improvements upon the land, and in the meantime acted as a director of the corporation and took part in its affairs, these acts constituted an election to abide by the contract and deprived him of the right to seek rescission in equity. *Foley v. Holtry*, 41 Neb. 563 (59 N. W. 781). [Overruled. 43 Neb. 133.]

122. (1903.) One who has not been guilty of laches will not be estopped to object to

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the payment of a special assessment which is void for want of jurisdiction in the taxing authorities to make the assessment. *Morse v. City of Omaha*, 67 Neb. 426 (93 N. W. 734).

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123. (1903.) Where one man knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his own claim, he will not afterwards be permitted to exercise his legal right against such person. A wilful design to mislead and deceive is not necessary in such a case. *Lydick v. Gill*, 68 Neb. 273 (94 N. W. 109).

Silence.

124. (1904.) A purchaser at a judicial sale of lands offered subject to apparent liens, who makes no attempt to have the priority, validity or amount of the latter otherwise adjudicated until after confirmation and conveyance, is estopped to impeach them. *Omaha Loan & Trust Co. v. City of Omaha*, 71 Neb. 781 (99 N. W. 650).

125. (1906.) Where one purchases land at a tax sale and there is an apparent prior lien thereon that is not questioned by such purchaser, he is estopped thereafter from questioning such prior lien. *State v. Several Parcels of Land*, 75 Neb. 497 (106 N. W. 601.)

126. (1907.) In order to constitute an equitable estoppel by silence or acquiescence, it must be made to appear that the facts upon which it is sought to make the estoppel operate were known to the parties against whom the estoppel is urged. *City of Lincoln v. McLaughlin*, 79 Neb. 74 (112 N. W. 363).

Laches.

127. (1898.) Estoppel by laches in delaying the commencement of an action is not available as a defense unless pleaded. *German Nat. Bank v. First Nat. Bank*, 55 Neb. 86 (75 N. W. 531).

127*a*. (1907.) The courts, in a proper case, will apply the doctrine of laches to a case in which the state is a party plaintiff. The state, like individuals, may be estopped by its acts or laches, and should not be allowed to oust a corporation of its rights and franchises where, for a long series of years, it has stood silent and seen the corporation expend large sums in the acquisition of property and improvements made thereon under a claimed right so to do under its charter. *State, ex rel. Caldwell, v. Lincoln Street R. Co.*, 80 Neb. 333 (114 N. W. 422).

Negligence.

128. (1904.) One who signs a release of a claim for damages for personal injuries without reading it, he having the capacity and opportunity to so do, is estopped by his own negligence from claiming that the release is not legal and binding because of fraudulent representation and deceit in obtaining his signature. *Osborne v. Missouri Pacific R. Co.*, 71 Neb. 180 (98 N. W. 685).

129. (1904.) One who fails through culpable inertness to make inquiry when it is his duty to inquire, and by reason of such failure loses a valuable right, is not entitled to relief in equity on the ground of mistake. *Farrell v. Bouck*, 72 Neb. 875 (101 N. W. 1018).

C. Persons Affected and Matters Precluded.

Persons to whom estoppel is available.

130. (1898.) In a suit against the maker on a note transferred by indorsement to plaintiffs, it was held that defendant was not estopped to deny that plaintiffs were partners. *Hoyt v. Kountze*, 54 Neb. 368 (74 N. W. 585).

131. (1899.) An estoppel *in pais* is not available to a stranger to the transaction. *Oliver v. Lansing*, 59 Neb. 219 (80 N. W. 829).

Persons estopped.

132. (1890.) A husband and wife were in charge of a millinery store in the city of C. The plaintiffs sold goods on credit to the wife on the representations of the husband that she was the owner of the business. L., S. & Co. and R., T., W. & Co., not knowing of said representations, or that the wife claimed to own the business, sold on time goods to the husband, which went into the store. Afterwards, the husband absconded and the wife gave the plaintiffs a chattel mortgage on the stock to secure the balance of their claim, and the mortgagee took possession thereunder. L., S. & Co. and R., T., W. & Co. shortly afterwards attached the goods as the property of the husband. *Held*, In an action by the mortgagee against the sheriff for conversion, that the representations of the husband made to the plaintiff do not estop the officer from showing that the husband was the owner of the property when the mortgage was given. *Oberfelter v. Kavanaugh*, 29 Neb. 427 (45 N. W. 471).

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133. (1899.) Where the subject matter in dispute is the present right of possession of real property, there is no estoppel established as against plaintiffs by merely showing that during their minority their guardian received a portion of the purchase price paid for said property by the defendant and used it for the maintenance and education of such minors. *Rowe v. Griffith*, 57 Neb. 488 (78 N. W. 20).

Extent of estoppel.

134. (1902.) An estoppel by conduct never extends beyond the reasonable inferences to be drawn from such conduct. *Hall v. Moore*, 3 Unof. 574 (92 N. W. 294).

D. Pleading and Evidence.

Necessity of pleading as defense.

135. (1888.) In an action of replevin, evidence of matter in estoppel may be given and availed of as a defense under a general denial and without being pleaded specially. *Towne v. Sparks*, 23 Neb. 142 (36 N. W. 375).

136. (1894.) An estoppel, to be available as a cause of action or defense, must be specially pleaded. *Nebraska Mortgage Loan Co. v. Van Kloster*, 42 Neb. 746 (60 N. W. 1016); (1898) *German Nat. Bank v. First Nat. Bank*, 55 Neb. 86 (75 N. W. 531).

137. (1895.) The facts constituting an estoppel *in pais* must be pleaded. *Erickson v. First Nat. Bank of Oakland*, 44 Neb. 622 (62 N. W. 1078; 48 Am. St. Rep. 753; 28 L. R. A. 577; (1895) *Scroggin v. Johnston*, 45 Neb. 714 (64 N. W. 236).

138. (1896.) A party entitled to an estoppel need not in all cases formally plead the estoppel. If the facts constituting the estoppel are in any way sufficiently pleaded, he is entitled to the benefit of the law arising therefrom. *City Nat. Bank of Hastings v. Thomas*, 46 Neb. 861 (65 N. W. 895).

139. (1879.) If an estoppel be relied on as a defense to an action, in order to be availing it must be pleaded. *Burlington & M. R. R. Co. v. Harris*, 8 Neb. 140; (1894) *Salladin v. Mitchell*, 42 Neb. 859 (61 N. W. 127); (1898) *Boales v. Ferguson*, 55 Neb. 565 (76 N. W. 18); (1900) *Burwell Irrigation Co. v. Lashmett*, 59 Neb. 605 (81 N. W. 617); (1901) *Union State Bank v. Hutton*, 1 Unof. 795 (95 N. W. 1061); (1902 *Carnahan v. Brewster*, 2 Unof. 366 (96 N. W. 590).

140. (1898.) The facts from which an estoppel *in pais* arises, to be available as such, must be pleaded, at least where there is an opportunity to so plead. *Henderson v. Keutzer*, 56 Neb. 460 (76 N. W. 881).

Joinder with general denial.

141. (1894.) A plea of estoppel may be joined with a general denial when the averments by way of estoppel are not inconsistent with such denial. *Blodgett v. McMurtry*, 39 Neb. 210 (57 N. W. 985).

Sufficiency of pleading.

142. (1887.) When a defendant in an action alleges by way of answer any matter in bar of the plaintiff's action, the plaintiff may, by way of reply, allege any fact or facts not inconsistent with the facts alleged in his petition, by reason of which the defendant may be estopped to avail himself of such defense. *Paxton Cattle Co. v. First National Bank*, 21 Neb. 621 (33 N. W. 271; 60 Am. Rep. 852).

143. (1901.) A party who pleads facts which would, if proved, preclude the assertion by his adversary of an equitable title to, or lien upon, the property in litigation, is not entitled, under such plea, to show that the party against whom the estoppel is alleged, is precluded from asserting the rights of an unsecured creditor. *Plummer, Perry & Co. v. Rohman*, 62 Neb. 145 (87 N. W. 11).

Burden of proof.

144. (1906.) Where a party pleads and relies on an estoppel, the burden of proof is upon him to establish the facts upon which the estoppel is based. *Parkins v. Missouri P. R. Co.*, 76 Neb. 242 (107 N. W. 260).

Weight and sufficiency of evidence.

145. (1896.) The evidence examined, and *held* to sustain the finding of the district court, that the appellants had by their conduct estopped themselves from claiming or asserting a mortgage lien upon certain chattel property. *Brown v. Eno*, 48 Neb. 538 (67 N. W. 434).

146. (1898.) In a suit by a bank upon a note, a wife *held* not estopped from interposing, as a defense, her coverture and her signing as surety. *Westervelt v. Baker*, 56 Neb. 63 (76 N. W. 440).

Questions for jury.

147. (1898.) An estoppel *in pais* well pleaded presents a question of fact, which, as such, should be submitted to the jury. *Gaylord v. Nebraska Savings & Exchange Bank*, 54 Neb. 104 (74 N. W. 415; 69 Am. St. Rep. 705).

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EVIDENCE.

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I. JUDICIAL NOTICE.

Judicial notice of particular matters, see specific topics.

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Judicial notice by supreme court of records of district court, see *Appeal and Error*, § 761.

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Matters of common knowledge.

1. (1892.) Courts will take notice, without proof, of events which are generally known within the limits of their jurisdiction. This will include changes in the office of the chief executive and such acts of public and general interest as may be said to be conspicuous events in the history of the state. *State, ex rel. Thayer, v. Boyd*, 34 Neb. 435 (51 N. W. 964).

2. (1901.) In the construction of a statute, courts will take judicial notice of events which are generally known, and matters of common knowledge within the limits of their jurisdiction. *Redell v. Moores*, 63 Neb. 219 (88 N. W. 243; 93 Am. St. Rep. 431; 55 L. R. A. 740).

3. (1902.) The rule that a court can take judicial notice that goods are of some value, should not be extended beyond such articles of personal property as are familiar to persons generally. *Punteney-Mitchell Mfg. Co. v. Northwall Co.*, 66 Neb. 5 (91 N. W. 863).

4. (1906.) Courts will take judicial notice of the changed conditions during the past thirty-eight years as affecting the values of real estate, and of the probability that during that time many witnesses who were of mature years and discerning judgment in the year 1865 have either died or permitted the ordinary events of that period to pass from their memory. *Hawley v. Van Lanken*, 75 Neb. 597 (106 N. W. 456).

5. (1906.) Courts will consider that money is always in the market and may be had upon real estate security at a reasonable rate of interest. *Bahr v. Manke*, 77 Neb. 552 (110 N. W. 300).

Scientific facts.

6. (1901.) Courts do not take judicial notice of the fact that the possible period of gestation exceeds ten calendar months. *Erickson v. Schmill*, 62 Neb. 368 (87 N. W. 166).

Intoxicating effect of liquors.

7. (1901.) Courts will take judicial notice that whiskey and beer are intoxicating. *Peterson v. State*, 63 Neb. 251 (88 N. W. 549); (1902) *Sothman v. State*, 66 Neb. 302 (92 N. W. 303).

Phenomena of animal and vegetable life.

8. (1902.) Courts will take judicial cognizance of the fact that in this latitude potatoes, sugar beets and turnips are not spontaneous products of the soil. *Meyers v. Menter*, 63 Neb. 427 (88 N. W. 662).

Geographical facts.

9. (1883.) Judicial notice will not be taken of the incorrectness of the government surveys of an Indian reservation, although the court as individuals, may believe it incorrect. *Minkler v. State*, 14 Neb. 181 (15 N. W. 330).

10. (1887.) The court will take judicial notice that Sioux county, as it existed at the time of this trial, was directly north of Cheyenne county. *Ex parte Carr*, 22 Neb. 535 (35 N. W. 409).

11. The court will take judicial notice of the population of a certain city and of the class to which it belongs. (1888) *State, ex rel. Grosshans, v. Gray*, 23 Neb. 365 (36 N. W. 577); (1893) *Brown v. Lutz*, 36 Neb. 527 (54 N. W. 860).

12. (1892.) The courts of this state take judicial notice of the mode of the general government of surveying public land and that there is but one meridian line in this state. *Devine v. Burleson*, 35 Neb. 238 (52 N. W. 1112).

13. (1895.) Courts take notice, without proof, that the Republican river is unnavigable *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*, 45 Neb. 798 (64 N. W. 239).

14. (1896.) The supreme court will take judicial notice of the boundaries of a judicial district and of the counties therein. *Chicago, B. & Q. R. Co. v. Hyatt*, 48 Neb. 161 (67 N. W. 8).

15. (1899.) Courts will not take judicial notice that certain land is arid and, for agricultural purposes, requires irrigation. *Slattery v. Harley*, 58 Neb. 575 (79 N. W. 151).

16. (1900.) Courts of this state will take judicial notice of the fact that the city of Omaha is situated in Douglas county. *Green v. Paul*, 60 Neb. 7 (82 N. W. 98).

Historical facts.

17. (1900.) Courts will take judicial cognizance of the political history of the state. *Porter v. Flick*, 60 Neb. 773 (84 N. W. 262).

Laws of the state.

18. (1878.) The supreme court will take judicial notice of the public laws of its

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own state or of the absence thereof. *State v. Keim*, 8 Neb. 63.

19. (1895.) Courts take judicial notice of the time of passage and approval of laws. *O'Conner v. State*, 46 Neb. 157 (64 N. W. 719).

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20. (1897.) The courts will take judicial notice of a general statute. *North Platte Water-Works Co. v. City of North Platte*, 50 Neb. 853 (70 N. W. 393).

21. (1901.) Courts will take judicial notice of legislative enactments and of legislative records. *State, ex rel. Douglas County, v. Frank*, 61 Neb. 679 (85 N. W. 956).

——Incorporation of municipality.

22. (1896.) Where a city or village is incorporated by a special act of the territorial legislature, the courts will take judicial notice of such incorporation, in case the legislature has in said act declared it to be a public law. *Hornberger v. State*, 47 Neb. 40 (66 N. W. 23).

23. (1907.) The courts will take judicial notice of the fact that a city is an incorporated city, of the time when it was incorporated, and of the salient facts of its geography and history. *Agnew v. City of Pawnee City*, 79 Neb. 603 (113 N. W. 236).

Laws of the United States.

24. (1898.) The courts of this state take judicial notice of the acts of congress providing for the appointment of a deputy comptroller of the currency and defining his powers and duties. *Davis' Estate v. Watkins*, 56 Neb. 288 (76 N. W. 575).

Laws of other states.

25. (1876.) No court takes judicial notice of the laws of a foreign country, but they must be proven as facts. *Moses v. Comstock*, 4 Neb. 516.

26. (1893.) The courts of this state will not take judicial notice of the laws of other states. *Scroggin v. McClelland*, 37 Neb. 644 (56 N. W. 208; 40 Am. St. Rep. 520; 22 L. R. A. 110); (1902) *People's Bldg., Loan & Savings Ass'n v. Backus*, 2 Unof. 463 (89 N. W. 315).

Municipal ordinances.

27. (1894.) Courts will not, as a rule, take notice of municipal ordinances, unless required to do so by special charter or general law. *Foley v. State*, 42 Neb. 233 (60 N. W. 574).

Existence and jurisdiction of courts and court officers.

28. (1888.) In an action founded upon a judgment, alleged to have been rendered by the Boone county circuit court in the state of Indiana, it was not necessary to allege in direct terms that such court was a court of general jurisdiction, since the courts of this state would take judicial notice of the fact that the circuit courts of sister states are courts of general jurisdiction. *Specklemeyer v. Dailey*, 23 Neb. 101 (36 N. W. 356; 8 Am. St. Rep. 119).

29. (1901.) A court will take judicial notice of its clerk. *Trimble v. State*, 61 Neb. 604 (85 N. W. 844).

Terms of court.

30. (1887.) The supreme court will take judicial cognizance of the time fixed under the provisions of law for holding the regular terms of the district courts in each county of the state. *Clapp v. Bauman*, 22 Neb. 198 (34 N. W. 362).

Rules of court.

31. (1907.) Rules of the district court cannot be judicially noticed by the supreme court, and where any right is claimed under such rules, they must be called to the attention of the court by being embodied in the bill of exceptions. *Case Threshing Machine Co. v. Meyers*, 78 Neb. 685 (111 N. W. 602).

Judicial records and proceedings.

32. (1894.) A former adjudication in the federal courts in the subject matter of a controversy cannot be taken notice of in the state courts unless properly presented by the pleadings and proofs. *Kilpatrick v. Kansas City & B. R. Co.*, 38 Neb. 620 (57 N. W. 664; 41 Am. St. Rep 741).

33. (1897.) A court takes notice of its own records, including the signatures of its officers and the dates of proceedings. *Fenton v. American Jewelry Co.*, 51 Neb. 395 (70 N. W. 931); (1902) *Zug v. Forgan*, 3 Unof. 149 (90 N. W. 1129).

34. (1899.) The supreme court will not take judicial notice of the rules of practice of the district court. To be considered, such rules must be made a part of the record. *Dunn v. Bozarth*, 59 Neb. 244 (80 N. W. 811); (1902) *Bush v. Tecumseh Nat. Bank*, 64 Neb. 451 (90 N. W. 236).

35. (1900.) The district court will not take judicial notice of the contents of a brief filed by one of the litigants in the supreme court when the cause was pending

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on appeal or error. *Bennett v. McDonald*, 60 Neb. 47 (82 N. W. 110).

36. (1902.) A court will take judicial notice of its own records; and the process by which it has acquired jurisdiction need not be introduced. *Stewart v. Rosengren*, 66 Neb. 445 (92 N. W. 586).

37. (1905.) Courts do not take judicial notice of the existence of judgments or decrees in cases other than the then pending case, and a decree rendered in receivership proceedings is no exception to the rule. *Allison v. Fidelity Mutual Fire Ins. Co.*, 74 Neb. 366 (104 N. W. 753).

38. (1906.) The district court may take judicial notice of the time when an action was appealed from the justice of the peace, and base instructions as to the statute of limitations thereon. *Van Burg v. Van Engen*, 76 Neb. 816 (107 N. W. 1006).

Official proclamations and orders.

39. (1902.) Where a statute authorizes executive officers to make general rules for the conduct of public business, and such rules are duly made and published, the courts will take judicial notice of them. *Larson v. First Nat. Bank of Pender*, 66 Neb. 595 (92 N. W. 729).

Notarial seal.

40. (1881.) Courts take judicial notice of the seal of a notary public, and it proves itself *prima facie*, by its appearance upon the certificate. *Green v. Gross*, 12 Neb. 117 (10 N. W. 459).

Census and election returns.

41. (1898.) Courts will take judicial notice of a United States census and its results, a school census and its results; also of an authorized election and its results, and the number of votes cast thereat. *Kokes v. State, ex rel. Koupal*, 55 Neb. 691 (76 N. W. 467).

Customs and usages.

42. (1902.) While the revenue act provides for the assessment for tax purposes of all property at its fair cash value, the court will take judicial notice of the fact that for general revenue purposes the standard of valuation generally prevailing is far below the actual cash value of the property assessed. *State, ex rel. Bee Building Co., v. Savage*, 65 Neb. 714 (91 N. W. 716).

43. (1903.) The court will take judicial notice of the fact that since the early settlements of the western portions of the state, where irrigation has been found essential to successful agriculure, a custom or practice has existed of appropriating and diverting waters from the natural channels of such waters to the soil for agricultural purposes. Whether vested rights have been acquired thereby, must depend on the facts and circumstances as disclosed in any particular case. *Crawford Co. v. Hathaway*, 67 Neb. 325 (93 N. W. 781; 108 Am. St. Rep. 647; 60 L. R. A. 889).

Earnings of railroads.

44. (1900.) The supreme court does not take judicial cognizance of the net earnings of railroad companies, and cannot assume, without proof, that the "Maximum Rate Law" (Session Laws 1893, ch. 24) is now, or was at the time of its enactment, confiscatory legislation. *Nebraska Telephone Co. v. Cornell*, 59 Neb. 737 (82 N. W. 1).

Effect of judicial notice.

45. (1899.) Facts of which the court will take judicial notice, need not be given in evidence. *State, ex rel. Bankers Reserve Life Ass'n, v. Scott*, 59 Neb. 499 (81 N. W. 305).

II. PRESUMPTIONS.

Presumptions as to particular matters or in particular proceedings, see particular topics.

Presumptions in appellate court, see *Appeal and Error*, §§ 1560-1659.

Possession of note as evidence of ownership, see *Bills and Notes*.

Of negligence of carrier from loss of goods, see *Carriers*, §§ 86-89.

Baggage check as evidence of delivery of baggage to carrier, see *Carriers*, § 369.

Failure to file chattel mortgage evidence of fraud, see *Chattel Mortgages*, § 162.

Presumption of death from absence, see *Deaths*, §§ 1-6.

That mayor attended council meeting, see *Municipal Corporations*, § 102.

Presumption that sun time is used, see *Time*, § 6.

Instructions as to presumptions, see *Trial*, §§ 439-443.

That trustee has performed duty, see *Trusts*, § 139.

Knowledge of contents of contract.

46. (1904.) In the absence of fraud or imposition, persons of mature years and ordinary intelligence and education are pre-

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sumed to have read the contracts executed by them, or to have otherwise made themselves acquainted with their contents. *Bradley & Co. v. Basta*, 71 Neb. 169 (98 N. W. 697).

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Continuance of fact or condition.

47. (1903.) Depositions given in the same action about five years previous to the final decision, showing next of kin to be then alive, carry a presumption of their existence at the time of the verdict. *Chicago, R. I. & P. R. Co. v. Young*, 67 Neb. 568 (93 N. W. 922).

Statute governing contract.

48. (1907.) In the absence of proof to the contrary, the constitution and laws in force in this state will be presumed to have been in force at the place of the making of the contract which is in issue. *Cook v. Chicago, R. I. & P. R. Co.*, 78 Neb. 64 (110 N. W. 718).

Laws of other states.

49. (1884.) The effect of national or state homestead laws that a judgment is not a lien on a homestead of the debtor until a patent is issued will not be presumed, but must be shown affirmatively. *Messick v. McCarty*, 16 Neb. 704 (21 N. W. 439).

50. (1885.) In the absence of evidence to the contrary, the statutes of Pennsylvania will be presumed to be like our own. *Lord v. State*, 17 Neb. 526 (23 N. W. 507).

51. (1892.) In the absence of pleading and proof to the contrary the laws of another state will be presumed to be like our own. *Haggin v. Haggin*, 35 Neb. 375 (53 N. W. 209); (1893) *Scroggin v. McClelland*, 37 Neb. 644 (56 N. W. 208; 40 Am. St. Rep. 520; 22 L. R. A. 110); (1902) *People's Bldg., Loan & Savings Ass'n v. Backus*, 2 Unof. 463 (89 N. W. 315); (1895) *Chapman v. Brewer*, 43 Neb. 890 (62 N. W. 320; 47 Am. St. Rep. 779); (1895) *Smith v. Mason*, 44 Neb. 610 (63 N. W. 41); (1897) *East Omaha Street R. Co. v. Godola*, 50 Neb. 906 (70 N. W. 491); (1898) *Welton v. Atkinson*, 55 Neb. 674 (76 N. W. 473; 70 Am. St. Rep. 416); (1900) *Schmitt & Bro. Co. v. Mahoney*, 60 Neb. 20 (82 N. W. 99); (1903) *Staunchfield v. Jeutter*, 4 Unof. 847 (96 N. W. 642); (1907) *Bannard v. Duncan*, 79 Neb. 189 (112 N. W. 353).

52. (1895.) In the absence of contrary evidence, laws of other states will be presumed to be the same as ours, and such presumption applies to both statutory and common law. *Stark v. Olsen*, 44 Neb. 646 (63 N. W. 37).

53. (1897.) The laws of sister states will, as a rule, in the absence of proof, be presumed to be the same as our own. There are, however, to that rule recognized exceptions, among which is that courts of general jurisdiction of other states will, unless there is proof to the contrary, be presumed to possess the authority they assume to exercise and that the methods of procedure pursued by them, although differing from the established practice of this state, are authorized by the laws of the state in which they act. *Council Bluffs Savings Bank v. Griswold*, 50 Neb. 753 (70 N. W. 376).

Official proceedings and acts.

54, 55. (1874.) The law will presume official acts of public officers to have been rightly done, unless the circumstances of the case overturn this presumption; and acts done which presupposes the existence of other acts to make them legally operative are presumptive proof of the latter. *Tierney v. Cornell*, 3 Neb. 267; (1884) *Seward v. Didier*, 16 Neb. 58 (20 N. W. 12); (1889) *Bissell v. Fletcher*, 27 Neb. 582 (43 N. W. 350).

56. (1884.) The law presumes that officers having been charged with the performance of a duty have discharged that duty correctly, and such presumption continues until the contrary is shown. *Hastings School District v. Caldwell, Hamilton & Co.*, 16 Neb. 68 (19 N. W. 470); (1885) *Taylor v. Wilson*, 17 Neb. 88 (22 N. W. 119); (1896) *Green v. Barker*, 47 Neb. 934 (66 N. W. 1032); (1898) *Spiech v. Tierney*, 56 Neb. 514 (76 N. W. 1090); (1901) *Brown v. Helsley*, 2 Unof. 69 (96 N. W. 187).

57. (1884.) The signature of the county clerk or his deputy to the jurat to an oath lawfully filed in his office is presumed to be genuine, and no proof on that point *prima facie* is required. *Merriam v. Coffee*, 16 Neb. 450 (20 N. W. 389).

58. (1899.) The law presumes that a public officer faithfully performs official duty, and that the records of his office truly represent the business transactions entered therein. *Paxton v. State*, 59 Neb. 460 (81 N. W. 383; 80 Am. St. Rep. 689).

59. (1901.) Taxing officers are presumed to have done their duty in the manner provided by law. *Carmen v. Harris*, 61 Neb. 635 (85 N. W. 848).

Judicial proceedings and records.

60. (1886.) Legal presumptions are in favor of the regularity of the proceeding of

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courts established by law in matters over which they have jurisdiction. *Van Sant v. Butler*, 19 Neb. 351 (27 N. W. 299).

61. (1886.) It is a rule of law that every presumption is in favor of the correctness of the decisions of courts of general jurisdiction until the contrary is made affirmatively to appear. *Saxon v. Cain*, 19 Neb. 488 (26 N. W. 385).

62. (1898.) Where the journal entry of a ruling recites that a party noted an exception to the order, it will be presumed that he was present in person or by counsel. *Royal Trust Co. v. Exchange Bank*, 55 Neb. 663 (76 N. W. 425).

63. (1901.) In a court of general jurisdiction jurisdictional facts and the regularity of the proceedings therein will be presumed. *Parsons v. State*, 61 Neb. 244 (85 N. W. 65).

64. (1901.) Where the clerk of a state court for a certain county has possession of the records of the territorial court for the same county, both courts being of the same description, it will be presumed his possession was rightful. *McPherson v. Commercial Nat. Bank*, 61 Neb. 695 (85 N. W. 895).

65. (1906.) When the jurisdiction of a *quasi*-judicial tribunal is once established, its subsequent proceedings are presumed to be regular. *Lancaster County v. Whedon*, 76 Neb. 753 (108 N. W. 127).

Jurisdiction.

66. (1903.) Whenever it becomes necessary to invoke the record of proceedings of an official tribunal of limited powers for the purpose of establishing a substantive right or title, it is indispensable to the success of the party relying thereupon that it be shown affirmatively that the body had acquired jurisdiction of the subject of its action. If he fails so to do, the mere lapse of time will not supply the omission. *Postal v. Martin*, 4 Unof. 534 (95 N. W. 8).

Conduct of business.

67. (1902.) The presumption, if any there be, that business is conducted according to sun time will not overcome the presumption in favor of the regularity of official action. *Iowa Loan & Trust Co. v. Estate of Devall*, 63 Neb. 826 (89 N. W. 381).

Mailing and delivery of mail matter.

68. (1895.) Whether or not a letter duly stamped and addressed reached the addressee is a question of fact for the jury. *National Masonic Accident Ass'n v. Burr*, 44 Neb. 256 (62 N. W. 466).

69. (1899.) A letter duly addressed, stamped, and posted is presumed to have reached the addressee in the usual course of mails, but the presumption may be overcome by proper evidence that the letter was not received. *National Masonic Accident Ass'n v. Burr*, 57 Neb. 437 (77 N. W. 1098).

70. (1899.) Whether a letter mailed, with postage thereon prepaid, reached its destination in the usual course of the mails is a question of fact to be determined from all the evidence adduced. *National Masonic Accident Ass'n v. Burr*, 57 Neb. 437 (77 N. W. 1098).

Sending and delivery of telegrams.

71. (1897.) A presumption of delivery results from the entrusting to a telegraph company for transmission of a message properly addressed, similar to that which follows from the posting of a letter for transmission by the United States mail. *Perry v. German-American Bank*, 53 Neb. 89 (73 N. W. 538; 68 Am. St. Rep. 593).

Failure to allege facts.

72. (1889.) Where there is a failure in an answer to state a material fact—one necessary to show that the defendant is entitled to make a certain defense—the presumption is that such fact does not exist. *Cheney v. Dunlap*, 27 Neb. 401 (43 N. W. 178; 5 L. R. A. 465*n*).

III. BURDEN OF PROOF.

Burden of proof as to particular matters or in particular proceedings, see specific topics.

Burden of showing error, see *Appeal and Error*, §§ 1568-1578.

In action against partnership, see *Partnership*, §§ 228, 229.

Nature and scope in general.

73. (1907.) To say that a party adversary has the burden of proof means only that he has the burden to introduce a certain quantum of proof. *Beckman v. Lincoln & N. R. Co.*, 79 Neb. 89 (112 N. W. 348).

Party asserting facts.

74. (1883.) Where a plaintiff admits in his reply that certain real estate was assessed, but alleges that such assessment was illegal, the burden of proof is upon him to show such illegality. *Towle v. Holt*, 15 Neb. 221 (15 N. W. 203).

75. (1892.) The burden of proof is upon

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the plaintiff to establish, by a preponderance of the evidence, every material averment in the petition which is controverted by the answer. *McEvoy v. Swayze*, 34 Neb. 315 (51 N. W. 824).

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76. (1899.) The burden of proof as to new matter pleaded by way of confession and avoidance of the allegations of an adversary's pleadings is on the party setting forth such new matter. *Home Fire Ins. Co. v. Johansen*, 59 Neb. 349 (80 N. W. 1047).

77. (1899.) Material averments in an answer, controverted by the reply, place the burden upon the defendant. *Pennsylvania Co. v. Kennard Glass & Paint Co.*, 59 Neb. 435 (81 N. W. 372).

78. (1900.) The burden is upon the plaintiff to prove the material allegations of the petition not admitted by a preponderance of the evidence. *Chamberlain Banking House v. Woolsey*, 60 Neb. 516 (83 N. W. 729).

79. (1903.) Where a material allegation in the petition is denied by the answer, the plaintiff must prove the facts alleged, by some competent evidence, and failing to do so, he cannot maintain the action. *Harker v. Burbank*, 68 Neb. 85 (93 N. W. 949).

Shifting of burden.

80. (1904.) The burden of sustaining the affirmative of an issue involved in an action, does not shift during the progress of the trial, but is upon the party alleging the facts constituting the issue, and remains there until the end. *Rapp v. Sarpy County*, 71 Neb. 382 (98 N. W. 1042); (1905) *Vertrees v. Gage County*, 75 Neb. 332 (106 N. W. 331).

IV. RELEVANCY, MATERIALITY AND COMPETENCY IN GENERAL.

Admissibility under issues raised by pleadings, see *Pleading*, §§ 476-559.

Exclusion of cumulative evidence, see *Trial*, § 82.

A. Facts in Issue and Relevant to Issue.

Relevancy in general.

81. (1882.) In an action for fraud in inducing a creditor of a partnership to surrender a note, and in payment of such debt to accept several other notes payable to one member of the firm, which were secured by certain alleged mortgages, testimony of one partner as to the terms of the dissolution of the firm, and as to the solvency of the certain parties involved in the transactions, is not admissible. *Gehling v. Hinton*, 12 Neb. 554 (11 N. W. 878).

82. (1883.) Where evidence offered at a trial can have no legitimate bearing on any matter put in issue by the pleadings, it is immaterial, and its exclusion is proper. *State Historical Ass'n v. City of Lincoln*, 14 Neb. 336 (15 N. W. 717).

83. (1892.) In a cause tried to a jury the admission of opinion evidence which has no legitimate bearing on any matter in issue, and which is prejudicial to the party complaining, is good ground for reversal of the judgment. *Darner v. Daggett*, 35 Neb. 695 (53 N. W. 608).

84. (1900.) The test of the admissibility of evidence is upon the questions asked rather than the answers returned. *Missouri P. R. Co. v. Fox*, 60 Neb. 531 (83 N. W. 744).

85. (1902. Whether a particular fact sought to be proved is too remote is a question that cannot be determined according to any fixed and unvarying rule. The circumstances of the particular case and the relation of the fact in question to other evidence must be taken into account. *Gandy v. Estate of Bissell*, 3 Unof. 47 (90 N. W. 883).

86. (1903.) Where the evidence shows conclusively that all the negotiations for the purchase of the capital stock of an insurance company contemplated all the stock, it is not error to exclude, on cross-examination, the statement of a witness, who was the vendee, as to what he would have given per share for less than all the stock. *Barber v. Martin*, 67 Neb. 445 (93 N. W. 722).

87. (1903.) Evidence is not to be rejected necessarily because it does not bear directly upon the issue; if it tends reasonably to establish the fact in controversy by strengthening the probabilities upon one side, and is otherwise competent, it should be received. *Chamberlain v. Chamberlain Banking House*, 4 Unof. 278 (93 N. W. 1021).

88. (1905.) Where a case is tried upon an agreed stipulation of facts and oral and written evidence, it is proper for the jury to consider all the evidence, even though part of it may be inconsistent with the statement of facts. *Hunt v. Van Burg*, 75 Neb. 304 (106 N. W. 329).

Circumstantial evidence of facts in issue.

Proof of unlawful sale of liquor by circumstantial evidence, see *Intoxicating Liquors*, §§ 420-424.

89. (1884.) Where a defendant is

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charged with the execution of a fraudulent deed, it is proper to allow him to testify to "facts and circumstances" relative to the conveyance. *Union Nat. Bank v. Harrison*, 16 Neb. 635 (21 N. W. 446).

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90. (1907.) Where there is a direct conflict in the evidence of the witnesses relating to a material issue in the case, any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of the fact in issue is relevant evidence and proper for the consideration of the jury. *Shepherd v. Lincoln Traction Co.*, 79 Neb. 834 (113 N. W. 627).

Value or market price of property.

91. (1901.) In proving the value of property it is improper to admit testimony of an alleged offer of a particular price for the property as tending to show its value; this is a kind of proof that could be so easily manufactured that its admission would be too dangerous to be tolerated. *Stewart v. James*, 1 Unof. 507 (95 N. W. 778).

92. (1902.) In proving the value of land at a particular time it is not competent to show what a witness says he was authorized to bid for the land at that time; and the fact that he claims to have been authorized to bid for a party financially responsible would not change the rule. *First Nat. Bank of Harvard v. Hockett*, 2 Unof. 512 (89 N. W. 412).

93. (1904.) The value of real estate cannot be shown by proof of independent sales. *Union P. R. Co. v. Stanwood*, 71 Neb. 158 (98 N. W. 656).

Character or reputation.

Admissibility of character evidence in false imprisonment, see *False Imprisonment*, § 24.

94 (1882.) Evidence of good character in civil action is inadmissible. *Dunbier v. Day*, 12 Neb. 596 (12 N. W. 109).

Motive and intent.

95. (1875.) Where the defense to an action on a promissory note was that the note had been given to cover an overdraft by a depositor in a bank, testimony of one of the makers, as to his understanding of the purpose and object of giving the note, is inadmissible. *Lacey v. Central Nat. Bank*, 4 Neb. 179.

96. (1899.) Evidence is admissible which tends to show that a person had a motive for doing an act. *German-American Bank of Milwaukee v. Stickle*, 59 Neb. 321 (80 N. W. 910).

97. (1902.) A pleading drawn and filed by the attorney general on behalf of the state having been introduced in evidence as an admission, it is competent for him to testify to the theory of law upon which he drew and filed the same, for the purpose of explaining it and depriving it of its apparent force. *State v. Paxton*, 65 Neb. 110 (90 N. W. 983).

98. (1903.) Where a person's acts are ambiguous, and the effect thereof depends upon the intention with which they were done, he may testify as to his reason for doing them. *McCormick Harvesting Machine Co. v. Hiatt*, 4 Unof. 587 (95 N. W. 627).

Knowledge.

99. (1904.) A paper not signed by or binding upon a party but examined and rejected by him may be used as evidence of notice of a claim made apparent thereby, when such fact is in dispute. *Epley v. Lovell*, 5 Unof. 251 (97 N. W. 1027).

Matters explanatory of facts in evidence or of inferences therefrom.

100. (1894.) While evidence must be confined to the issues, it is not essential that it should always bear directly upon the precise point in issue, but is admissible if it affords a reasonable inference upon that point. *Lincoln Pressed Brick Co. v. Buckner*, 39 Neb. 83 (57 N. W. 749).

101. (1896.) Evidence of collateral facts corroborative of the statements of parties with respect to the principal contention is confined to such transactions as shed some real light upon the question at issue. As a rule, the circumstances surrounding the parties, their relations toward each other and the subject of the controversy at the time of the transaction involved, are proper subjects of proof. *Blomgren v. Anderson*, 48 Neb. 240 (67 N. W. 186).

102. (1902.) Evidence is not to be rejected, necessarily, because it does not bear directly upon the issue. If it forms a link in the chain of evidence or tends reasonably to establish the fact in controversy by strengthening the probabilities on one side or weakening those upon the other, it should be received. *Gandy v. Estate of Bissell*, 3 Unof. 47 (90 N. W. 883).

103. (1905.) Evidence of collateral facts corroborative of the statement of one party with respect to the main issue is admissible if confined to such matters as throw light upon the question. The jury are entitled

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to know all the circumstances surrounding the parties with reference to the property at the time of the transaction in order that they may judge which of them is telling the truth. *Farmers State Bank of Central City v. Yenney*, 73 Neb. 338 (102 N. W. 617).

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Facts relevant to issues erroneously stricken from pleadings.

104. (1879.) Evidence offered in support of an alleged defense, which had been erroneously held bad on demurrer to the answer, was properly rejected on the ground of irrelevancy. The error in such case lies not in the rejection of such evidence, but back of this, and in the ruling on the demurrer. *Nebraska City v. Gas Co.*, 9 Neb. 339 (2 N. W. 870).

105. (1898.) It is not error to exclude evidence irrelevant to the issues as made up, although the court may have erroneously stricken from the pleadings averments to which such evidence would be relevant. The error in such case would be in ruling upon the pleadings and not in ruling upon the evidence. *Lonergan v. Lonergan*, 55 Neb. 641 (76 N. W. 16).

B. Res Gestae.

Declarations of fraudulent grantor as to validity of conveyance, see *post*, §§ 239-243.

Statement of livery stable keeper's agent as to condition of horse after use as *res gestæ*, see *Livery Stable Keepers*, § 6.

Relation to issues in general.

106. (1893.) A declaration, to be a part of the *res gestæ*, need not necessarily be coincident in point of time with the main fact proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause. *Missouri P. R. Co. v. Baier*, 37 Neb. 235 (55 N. W. 913); (1898) *City of Friend v. Burleigh*, 53 Neb. 674 (74 N. W. 62); (1905) *City of Lexington v. Fleharty*, 74 Neb. 626 (104 N. W. 1056).

107. (1898.) A declaration, to be competent as *res gestæ*, must be made at such time and under such circumstances as to raise the presumption that it is the unpremeditated and spontaneous explanation of the matter about which it is made. *Union P. R. Co. v. Elliott*, 54 Neb. 299 (74 N. W. 627); (1903) *Pledger v. Chicago, B. & Q. R. Co.*, 69 Neb. 456 (95 N. W. 1057).

108. (1901.) Where a defendant is prosecuted for obtaining property by falsely representing that the maker of notes given as collateral was a man of wealth, notes given by the defendant are admissible in evidence as a part of the *res gestæ*. *West v. State*, 63 Neb. 257 (88 N. W. 503).

109. (1904.) Declarations, to be admissible as a part of the *res gestæ*, must accompany and be so connected as to be a part of the fact or transaction in controversy, and must tend to illustrate or explain it, such fact or transaction itself also being admissible in evidence. *Horst v. Lewis*, 71 Neb. 370 (103 N. W. 460).

Facts forming part of transaction.

110. (1899.) The testimony of a witness describing the positions of decedent and the engine shortly after the accident which resulted in the death of the plaintiff's intestate was admissible as *res gestæ*. *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1 (78 N. W. 359)

Acts and statements accompanying transaction.

111. (1875.) Demand for security for an overdraft by a depositor in a bank, made long after a note had been given and where there was an overdraft still due, does not constitute a part of the *res gestæ*. *Lacey v. Central Nat. Bank*, 4 Neb. 179.

112. (1884.) In an action by B against H. for the value of a horse which B. had left at the livery stable of H. with permission to occasionally let him to proper and careful drivers, and which had been let on the 4th day of July to an improper person, was overdriven and not properly cared for from the effect of which he died on the 8th of July following, a statement made to B by the agent of H. and foreman and general manager of said livery stable, as to the condition and appearance of the horse when returned to the stable July 4th, his symptoms since that time, and at the then present time, was properly admitted in evidence on the part of the plaintiff, having been made at the same time as the depending transaction, and constituting a part of the *res gestæ*. *Homan v. Boyce*, 15 Neb. 545 (19 N. W. 590).

113. (1890.) Declarations of an agent made after the completion of the transaction to which they relate are not admissible as a part of the *res gestæ*. *Gale Sulky Harrow Co. v. Laughlin*, 31 Neb. 103 (47 N. W. 638).

114. (1891.) Where, in the course of the canvassing and electioneering to induce a

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sufficient number of freeholders of a certain town to become signers of a petition to the county board for an election for the issuance of bonds to be donated to a railroad company, certain representations, promises, and inducements were falsely and fraudulently made and held out by the railroad company to such freeholders, and which resulted in such freeholders becoming signers to said petition, *held*, that such representations, promises, and inducements, although made at a time and meeting previous to the time at which said freeholders became signers, were nevertheless a part of the *res gestæ*. *Wullenwaber v. Dunigan*, 33 Neb. 477 (50 N. W. 428).

115. (1894.) Remarks by a brakeman, made at the time of an accident concerning the length of time of a stop, are admissible as *res gestæ*. *Omaha & R. V. R. Co. v. Chollette*, 41 Neb. 578 (59 N. W. 921).

116. (1889.) Public corporations act through their officers and agents, and the declarations of such officers and agents, made during, and in relation to, the transaction of official business, are, in a proper case, admissible in evidence as a part of the *res gestæ*. *Paxton v. State*, 59 Neb. 460 (81 N. W. 383; 80 Am. St. Rep. 689).

117. (1904.) Where an infant child of a guest at a hotel is injured by an employee of the hotel who pointed a revolver at the child, in an endeavor to frighten him from a room other than that occupied by his parents, and the revolver is discharged, an admission by a servant of the hotel, made the day after the accident, that the manager of the hotel had told the servants to keep the boy out of the halls and elevator, is not admissible as part of the *res gestæ*. *Clancy v. Barker*, 71 Neb. 83 (98 N. W. 440; 69 L. R. A. 642*n*).

118. (1906.) Declarations of parties made at a meeting where resolutions of a compromise of a claim against an officer of a school district was adopted, tending to show that they were intimidated and for that reason left the meeting and refrained from voting on the resolution, are properly receivable in evidence as a part of the *res gestæ*. *Gering v. School District*, 76 Neb. 219 (107 N. W. 250).

119. (1906.) In an action for the negligent killing of an employee by a railroad company, alleged as the result of a defective condition in the engine, evidence of a declaration of the engineer in charge regarding such defective condition, made at the time, and under such circumstances as to raise the presumption that it was an unpremeditated and spontaneous explanation of the casualty, is admissible as a part of the *res gestæ*. *Union P. R. Co. v. Edmondson*, 77 Neb. 682 (110 N. W. 650).

Acts and statements of person injured.

120. (1893.) Declarations of a party to the suit, explanatory of his physical condition at the time the declarations are made, are admissible where the circumstances warrant the inference that they were made spontaneously and not with a view to their effect upon the controversy. Whether or not they fall within this rule must be left largely to the discretion of the trial court. *Hewitt v. Eisenbart*, 36 Neb. 794 (55 N. W. 252).

121. (1893.) Where a woman starts to alight from a railroad train at a station where she is required to change cars, the train having stopped, and she starts to get off, at the instance of the conductor, who then instructs her to wait until the train again stops, and upon the next stop, after the train has moved up a short distance, she starts to alight and is injured by being thrown under the car by a sudden lurch of the train, a declaration as to how the accident occurred made to persons who came to her assistance upon hearing her screams is so closely connected with the accident as to form a part of the *res gestæ*. *Missouri P. R. Co. v. Baier*, 37 Seb. 235 (55 N. W. 913).

122. (1898.) Where the negligence of a city causes the death of a person, and his personal representative sues such city to recover for the benefit of the widow and next of kin of the deceased damages to compensate them for the pecuniary loss they have sustained by reason of his death, the exclusion from evidence of the declaration of the deceased that his injury was the result of his own carelessness, *held* not prejudicial. *City of Friend v. Burleigh*, 53 Neb. 674 (74 N. W. 50).

123. (1898.) In an action for damages for personal injuries, evidence of plaintiff's complaints of such sufferings as would probably be caused by the injuries may be admitted. *Omaha Street R. Co. v. Emminger*, 57 Neb. 240 (77 N. W. 675).

124. (1903.) Upon the face of the record in this case, *held*, that it was not an abuse of discretion to exclude the declarations of the injured party as to the cause of

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his injury offered in evidence as part of the *res gestæ*. *Pledger v. Chicago, B. & Q. R. Co.*, 69 Neb. 456 (95 N. W. 1057).

125. (1905.) Statements of fact, fairly indicative of a relevant bodily condition of the declarant at the time of the declaration, are admissible as evidence of the existence of such condition, although made a considerable time after the injury was received. *Western Travelers' Accident Ass'n v. Munson*, 73 Neb. 858 (103 N. W. 688; 1 L. R. A. [n. s.] 1068).

126. (1905.) A statement by a person who fell on an alleged defective sidewalk, made immediately upon getting up, that he was hurt, is admissible as part of the *res gestæ*. *City of Lexington v. Fleharty*, 74 Neb. 626 (104 N. W. 1056).

C. Similar Facts and Transactions.

Experience of witness at place of accident to horse, see *Livery Stable Keepers*, § 3.

Showing intent or motive.

127. (1903.) In an action by a stockholder against the manager of an insurance company, charging the manager, as agent, with fraudulently concealing from plaintiff the actual consideration received for plaintiff's stock, sold by him as agent, evidence of representations made to other stockholders similarly situated is admissible when such representations are so related in character and point of time as to furnish a basis for a reasonable inference as to the main issue. *Barber v. Martin*, 67 Neb. 445 (93 N. W. 722).

Showing value.

128. (1896.) As a general rule, the prices which goods brought at a public auction are admissible as evidence of their market value. *Imhoff v. Richards*, 48 Neb. 590 (67 N. W. 483).

129. (1897.) In a suit by a plumber to recover the fair and reasonable value of certain plumbing material furnished to defendant, the price charged by other plumbers for such material is irrelevant, when standing alone. *Thompson v. Gaffey*, 52 Neb. 317 (72 N. W. 314).

130. (1904.) When a witness as to the value of real property has testified that he has based his opinion, in part, upon his information as to prices obtained upon sales of other specifically described property in the neighborhood of that in controversy, it is error to exclude evidence of what the prices obtained at such sales actually were. *Union P. R. Co. v. Stanwood*, 71 Neb. 150 (91 N. W. 191). [Overruled. 71 Neb. 158.]

D. Materiality and Competency.

Admissibility of immaterial evidence in general.

131. (1895.) The admission of a party sought to be charged that, at a certain time, he had a conversation in given terms by telephone, renders immaterial the objection that independently of such admission there was no direct evidence of the scope of such conversation. *Nebraska Nat. Bank v. Burke*, 44 Neb. 234 (62 N. W. 452).

132. (1898.) The admission of immaterial evidence, when prejudicial, is ground for reversal. *Omaha Nat. Bank v. Robinson*, 56 Neb. 590 (77 N. W. 73).

Competency in general.

133. (1898.) Competent evidence bearing on the issues cannot be excluded from the jury because it may incidentally arouse their sympathies or influence their prejudices. *Missouri P. R. Co. v. Palmer*, 55 Neb. 559 (76 N. W. 169).

134. (1898.) The incompetency of one as a witness, or the incompetency of his evidence, must be found in express law and not based on strict or technical construction. If there is reasonable doubt, the witness and the evidence are competent. *Sorensen v. Sorensen*, 56 Neb. 729 (77 N. W. 68).

135. (1903.) Where plaintiff testifies having had a telephone communication with defendant on a certain date, defendant, claiming he had had only one such communication, may testify as to such a communication had on a different date, although he could not identify the voice of the person with whom he communicated as that of plaintiff. *Lincoln Mill Co. v. Wissler*, 4 Unof. 675 (95 N. W. 857).

135*a*. (1907.) The courts of this state are not bound by the rules of evidence adopted in another jurisdiction, but must be governed in the admission of evidence by the law prescribed by our own legislature. *Malcom Savings Bank v. Cronin*, 80 Neb. 228 (114 N. W. 158).

Testimony as to intent or motive.

136. (1903.) While a person's intention is to be determined primarily from his acts, where such acts are ambiguous and good faith is in issue, he may testify what his intention was. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624 (94 N. W. 822).

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Testimony as to character or reputation.

137. (1887.) The general reputation of a party to an action cannot be established by the proof of specific acts. *Dorsey v. Clapp*, 22 Neb. 564 (35 N. W. 389).

138. (1888.) When a witness is called for the purpose of testifying to the general reputation of a party for chastity, his examination-in-chief should be confined to general reputation, and not as to what particular persons, or how many, the witness may have heard speak of the person whose reputation is sought to be attacked. *Brooks v. Dutcher*, 22 Neb. 644 (36 N. W. 128).

Evidence admissible by reason of admission of similar evidence by adverse party.

139. (1871.) Competent evidence may be received on behalf of one party, to rebut incompetent evidence introduced by the other party without objection. *McCartny v. State*, 1 Neb. 121.

140. (1871.) Incompetent evidence cannot be admitted to rebut incompetent evidence. *McCartny v. State*, 1 Neb. 121.

141. (1889.) The introduction of illegal evidence by one party upon a trial, and its admission by the courts, is not sufficient justification for the admission of evidence otherwise inadmissible when offered by the other party. *Dodge v. Kiene*, 28 Neb. 216 (44 N. W. 191).

142. (1893.) A party cannot object that a wife was permitted to testify as to what her husband told her of the contract in issue, where the objecting party, on cross-examination of the wife, called out the matters objected to. *Jones Nat. Bank v. Price*, 37 Neb. 291 (55 N. W. 1045).

143. (1904.) Where one party to an action has introduced letters constituting a part of a correspondence between the other party to the action and a third party, such other party is entitled to show the entire correspondence upon the same subject. *Gosnell v. Webster*, 70 Neb. 705 (97 N. W. 1060).

144. (1904.) Section 339 of the code only requires that the entire conversation on "the same subject" may be inquired into, or one necessary to make the other fully understood. If the conversation relates to different subjects, introducing one of them in proof does not entitle the other party to inquire as to the entire conversation on other subjects, except so far as is necessary to make the part already in fully understood. *Pettis v. Green River Asphalt Co.*, 71 Neb. 513 (99 N. W. 235).

V. BEST AND SECONDARY EVIDENCE.

Necessity and admissibility in general.

145. (1894.) The best evidence of the facts to be proved of which the case is susceptible is required, and especially where the question at issue indicates that there is better evidence than is sought to be elicited by a question put to a witness. *American Bldg. & Loan Ass'n v. Mordock*, 39 Neb. 413 (58 N. W. 107).

146. (1894.) That evidence only is secondary which of itself indicates the existence of more original sources of information. *Gutta Percha & Rubber Mfg. Co. v. Village of Ogallala*, 40 Neb. 775 (59 N. W. 513; 42 Am. St. Rep. 696).

147. (1896.) The law requires the production of the best evidence obtainable, and if the primary evidence is lost, then secondary evidence satisfies the rule. *Regier v. Shreck*, 47 Neb. 667 (66 N. W. 618).

148. (1898.) An answer should be excluded when it is clear from what preceded that it would be secondary evidence, and not a matter of personal knowledge, though the question apparently calls for matter within the knowledge of the witness. *Pease Piano Co. v. Cameron*, 56 Neb. 561 (76 N. W. 1053).

149. (1900.) In all judicial proceedings, disputed questions of fact must be established by the best evidence attainable, and evidence cannot be received which, on its face, indicates that it is secondary and that the original source of information is in existence and accessible. *Bee Publishing Co. v. World Publishing Co.*, 59 Neb. 713 (82 N. W. 28).

150. (1900.) The best evidence of which a case is in its nature susceptible is always admissible to prove the fact in issue. *Wittenberg v. Mollyneaux*, 60 Neb. 583 (83 N. W. 842).

Discretion of court.

151. (1892.) Permitting the introduction in evidence of records of deeds duly recorded, instead of requiring the originals, in ejectment trials for the purpose of proving title, rests largely in the discretion of the trial court. *Rupert v. Penner*, 35 Neb. 587 (53 N. W. 598; 17 L. R. A. 824*n*).

What constitutes best evidence in general.

152. (1883.) The oral declarations of the commissioners of the state, who located,

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surveyed, and platted the city of Lincoln, are not competent evidence to prove the purpose for which the reservation of a block was made. This could be proved only by the plat and report of the commissioners, together with the act of the legislature confirming them. *State Historical Ass'n v. City of Lincoln*, 14 Neb. 336 (15 N. W. 717).

153. (1883.) A statement of a sheriff that an attachment has not been levied on certain goods is not the best evidence of that fact. *Harrison v. Baker*, 15 Neb. 43 (14 N. W. 541).

154. (1894.) A memorandum book kept by the manager of a brick yard and containing the signature of an employee to receipts for brick received and hauled by him is not admissible to show that such employee was laboring at the time, the statements of those who saw him being the best evidence. *Omaha & R. V. R. Co. v. Brady*, 39 Neb. 27 (57 N. W. 767).

155. (1900.) Blue prints of architectural plans offered are not subject to the objection that they are not the best evidence. *School District v. Fiske*, 61 Neb. 3 (84 N. W. 401).

156. (1901.) An agreement of accord and satisfaction, which has been performed, between a county board representing the county and those having claims against the county, may be proven by parol evidence in the absence of any written record or minutes of the county board of such agreement. *Green v. Lancaster County*, 61 Neb. 473 (85 N. W. 439).

157. (1903.) Where the record of a deed is primary evidence, by virtue of section 13, chapter 73, Compiled Statutes, the rule that there are no degrees of secondary evidence does not apply. *Staunchfield v. Jeutter*, 4 Unof. 847 (96 S. W. 642).

Fact of existence of writing.

158. (1888.) The rule as to proof of written instruments and records does not preclude that of oral testimony of the existence of such instruments and records, preliminary to their introduction or proof of loss. *Village of Ponca v. Crawford*, 23 Neb. 662 (37 N. W. 609; 8 Am. St. Rep. 144).

Laws of other states.

159. (1905.) The unwritten law of another state may be proved by parol evidence *Rieck v. Griffen*, 74 Neb. 102 (103 N. W 1061).

160. (1907.) The statute and constitution of another state or territory cannot be proved by parol, under the provisions of section 396 of the code. *Cook v. Chicago, R. I. & P. R. Co.*, 78 Neb. 64 (110 N. W. 718).

Municipal ordinances.

161. (1898.) Where a party desires to prove the existence of an ordinance of a city of the metropolitan class he may pursue the method pointed out by section 124 of the code, or he may resort to the common law method of proof. *Johnson v. Finley*, 54 Neb. 733 (74 N. W. 1080).

Ownership of property.

162. (1899.) It is competent to prove the ownership of a store building by parol evidence when it does not appear that such building is real estate. *Knights v. State*, 58 Neb. 225 (78 N. W. 508; 76 Am. St. Rep 78).

Existence and contents of records.

163. (1891.) Where papers in a case have been lost, as the license to sell real estate, proof that such license or other papers actually existed at the time of the sale may be shown by parol or other secondary evidence. *Keller v. Amos*, 31 Neb. 438 (48 N. W. 59).

164. (1896.) Where the files of a case have been lost,—such as papers in an attachment proceeding,—that such papers existed, and their contents, may be proved by parol, the proper foundation having been laid for the introduction of secondary evidence *Regier v. Shreck*, 47 Neb. 667 (66 N. W 618).

165. (1896.) A certified transcript of the record of a deed may, under section 13, chapter 73, Compiled Statutes, be read in evidence when the original is lost or not within the control of the party offering the proof *Thams v. Sharp*, 49 Neb. 237 (68 N. W. 474)

Contents of by-laws of corporation.

166. (1894.) In an action against a building and loan association to recover payments on shares of stock, parol evidence of the contents of the by-laws of the association is not admissible. *American Bldg. & Loan Ass'n v. Mordock*, 39 Neb. 413 (58 N. W. 107).

Contents of notices.

167. (1890.) Testimony as to the contents of a publication of a notice is inadmissible since it is not the best evidence. *Salisbury v. Iddings*, 29 Neb. 736 (46 N. W. 267)

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Deeds and conveyances.

See, also, *Deeds*, IV.

168. (1888.) The question of permitting the introduction of records to prove the title of the plaintiff in an action for injury to crops and to the land itself, instead of requiring the production of the original evidence of title, rests to a great extent in the discretion of the trial court, and unless there is a clear abuse of that discretion error will not lie. *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138 (40 N. W. 948; 13 Am. St. Rep. 482).

169. (1889.) Under the provisions of section 13 of chapter 73, Compiled Statutes 1887, the record of a deed duly recorded, or a transcript thereof duly certified, may be read in evidence with like force and effect as the original deed whenever, by the party's oath or otherwise, the original is known to be lost, or not belonging to the party seeking to use it, nor within his control; and therefore, in an action in ejectment, where the defendant seeks to prove title in a stranger as a defense, and it sufficiently appears that the original deed does not belong to him, a copy of the record will be competent evidence in the first instance, without proof of the loss of the original, or that it is not under the control of the party seeking to use it. *Buck v. Gage*, 27 Neb. 306 (43 N. W. 110).

170. (1903.) The record of a deed may be shown without inquiry as to the original whenever the evidence as a whole fairly indicates that the original is not in the possession or under the control of the party offering such proof. *Staunchfield v. Jeutter*, 4 Unof. 847 (96 N. W. 642).

Contents of private memoranda and writings.

171. (1896.) In an action on a subscription contract, parol evidence may be admitted to prove the contents of the subscription book after proof of its loss, though similar books not offered in evidence are in existence. *Rawlings v. Young Men's Christian Ass'n*, 48 Neb. 216 (66 N. W. 1124).

172. (1896.) An objection to a question calling for the contents of books, *held* properly sustained. *Columbia Nat. Bank v. Rice & Co.*, 48 Neb. 428 (67 N. W. 165).

173. (1898.) In absence of fraud, mistake, or ambiguity the writing signed by the parties constitutes the best and only competent evidence of the contract originally made. *State Bank of Ceresco v. Belk*, 56 Neb. 710 (77 N. W. 58).

174. (1901.) A writing is the best evidence of what it contains. *Peterson v. State*, 63 Neb. 251 (88 N. W. 549).

175. (1904.) Where the question in issue was whether or not drafts had been paid for when issued, it is incompetent for an accountant, who had examined the books of the bank, to testify as to what the books showed in that regard. The books themselves are the best evidence. *Mendel v. Boyd*, 71 Neb. 657 (99 N. W. 493).

176. (1904.) An acknowledgment, by a husband and wife, of an instrument conveying a homestead, or placing an incumbrance thereon, should appear from the instrument itself in the form of a certificate of the officer before whom the acknowledgment was taken, and, in the absence of such certificate, it is not competent to show by parol that the instrument was in fact acknowledged. *Bolt v. Anderson*, 71 Neb. 826 (99 N. W. 678).

Preliminaries to admission of secondary evidence.

——— Proof as to existence or availability of primary evidence.

177. (1877.) To establish the existence of a grade for a street in a city the records and files pertaining thereto should be produced; and unless these be shown to be either lost or destroyed, secondary evidence will not be received. *Nebraska City v. Lampkins*, 6 Neb. 27.

178. (1878.) Where defendant offered parol testimony as to the contents of certain letters, proof that the agent of plaintiff produced the letters in another case, leaving them in the court where that trial took place, and never saw them afterward, and testimony of the judge of that court that the letters were produced in that trial, and that they were not returned to the witness, and that he had examined the files in the case and could not find the letters, was sufficient proof to let in the secondary evidence. *Russell v. Wohlers*, 7 Neb. 466.

179. (1880.) A letter-press copy of a letter cannot be read in evidence without first proof of the loss or non-possession of the original. *Delaney v. Errickson*, 10 Neb. 492 (6 N. W. 600; 35 Am. St. Rep. 487); (1883) *Ward v. Beals*, 14 Neb. 114 (15 N. W. 353); (1898) *Westinghouse Co. v. Tilden*, 56 Neb. 129 (76 N. W. 416).

180. (1883.) Where a paper is shown to have been destroyed, it is not necessary to prove that it has been searched for as a

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foundation for the introduction of parol testimony of its contents. *Hawley v. Robeson*, 14 Neb. 435 (16 N. W. 438).

181. (1884.) On the question whether there is sufficient proof of the loss of a letter to render admissible secondary evidence of its contents, a wide discretion is left to the trial court. *Hapgood Plow Co. v. Martin*, 16 Neb. 27 (19 N. W. 512).

182. (1886.) Where it is sought to prove by a member of a law firm after its dissolution that he has made search for certain instruments sent to the firm and that he cannot find them, in order to admit secondary evidence of their contents it must be made to appear that he retained the possession of the same, and that search was made in such places as the instruments, if in existence, in all probability would be found. *Post v. School District No. 10*, 19 Neb. 135 (26 N. W. 911).

183. (1886.) Before secondary evidence is admissible to prove the existence of contents of a paper claimed to have been attached to and a part of the files of a case in court, it must appear that diligent search has been made in the proper office for such paper, and that it is lost or destroyed and cannot be found. *Murphy v. Lyons*, 19 Neb. 689 (28 N. W. 328).

184. (1888.) In an action in ejectment it was stipulated between the parties that certified copies of the record of deeds should be used in evidence without proof of the loss of the originals, and that such copies contained all that the originals contained. Plaintiff offered in evidence a certified copy of a deed executed by the Lincoln Land Association, a corporation, which was objected to for the reason that the copy did not show that the original deed was under the seal of the corporation, that is, that no impression of the seal was thereon. The objection was overruled, and the copy admitted. *Held*, Correct, it being recited in the deed that the seal of the corporation was thereto affixed. *Colvin v. Republican Valley Land Ass'n*, 23 Neb. 75 (36 N. W. 361; 8 Am. St. Rep. 114).

185. (1888.) Proof of the contents of certain letters is not admissible without showing a loss or destruction of such letters. *McClure v. Campbell*, 25 Neb. 57 (40 N. W. 595).

186. (1890.) Before a copy of a letter is introduced in evidence, over objection, it should be shown that the original cannot be produced. *Watson v. Roode*, 30 Neb. 264 (46 N. W. 491).

187. (1890.) Before the contents of a written instrument can be established by oral testimony, the loss of the instrument must be accounted for. *Meyers v. Bealer*, 30 Neb. 280 (46 N. W. 479); (1896) *Dempster Mill Mfg. Co. v. First Nat. Bank of Holdrege*, 49 Neb. 321 (68 N. W. 477).

188. (1890.) Where the order of allowance to a bill of exceptions made by the trial judge has become detached and lost after the bill was filed in the trial court, but before its filing in the supreme court, a certificate of the clerk of the district court that the bill, together with the order, was filed in his office, that by some means unknown they became separated, and that he has made diligent and ineffectual search for the order, is sufficient to admit secondary evidence of the contents of the order. *Warren v. Brown*, 31 Neb. 8 (47 N. W. 633).

189. (1892.) One who has assisted in searching in the office of the county clerk, under the direction of the latter, for a deed left therein for record is a competent witness to prove the loss of such deed in order to lay a foundation for secondary evidence thereof. It is not necessary in such case to call the clerk in order to establish the loss of the deed *prima facie*. *Buchanan v. Wise*, 34 Neb. 695 (52 N. W. 163).

190. (1894.) One who has made an examination of the office or books where a record should be found, and shows sufficient knowledge of the subject, is competent to testify to the non-existence of the record. *Gutta Percha & Rubber Mfg. Co. v. Village of Ogallala*, 40 Neb. 775 (59 N. W. 513; 42 Am. St. Rep. 696).

191. (1894.) Proof that the charter of an association has been destroyed by fire is sufficient to authorize testimony of the secretary of such association as to its contents. *Phenix Ins. Co. v. Rad Bila Hora Lodge*, 41 Neb. 21 (59 N. W. 752).

192. (1895.) Courts have not attempted to define the precise degree of diligence essential in attempting to procure the primary evidence of a material fact in order to establish the foundation for secondary evidence. But it is sufficient, as a rule, if the party offering such proof has exhausted all the sources and means of discovery which the nature of the case would suggest, and which are accessible to him. *Balduin v. Burt*, 43 Neb. 245 (61 N. W. 601).

193. (1895.) Evidence examined, and *held* that a sufficient foundation had been

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established for the admission of secondary evidence of the mortgage alleged in petition. *Baldwin v. Burt*, 43 Neb. 245 (61 N. W. 601).

194. (1895.) The existence of a record must be proved by its production or by an authenticated copy. The non-existence of a record may be proved by the oath of any one who has made a search therefor. *Smith v. First Nat. Bank of Chadron*, 45 Neb. 444 (63 N. W. 796).

195. (1896.) In an action to set aside a sale of a stock of goods as fraudulent, the admission of parol testimony as to the bill of sale is erroneous, where the absence of the bill itself is not accounted for. *Dempster Mill Mfg. Co. v. First Nat. Bank of Holdrege*, 49 Neb. 321 (68 N. W. 477).

196. (1901.) Before secondary evidence can be introduced as to the contents of a private instrument, there must be some evidence that the paper once existed and that a *bona fide* and diligent search has been unsuccessfully made for it in the place where it is most likely to be found. *Samuelson v. Gale Mfg. Co.*, 1 Unof. 815 (95 N. W. 809).

197. (1901.) Before the contents of a lost letter can be introduced in evidence there must be testimony of its loss and also testimony tending to prove the handwriting, or that it came from the alleged writer or his authorized agent, or was received in due course of mail in answer to letters previously mailed to the address of the alleged writer. *Whitwell v. Johnson*, 2 Unof. 66 (96 N. W. 272).

198. (1901.) Evidence examined, and *held* not to be sufficient identification to permit the contents of the letter to be received in evidence. *Whitwell v. Johnson*, 2 Unof. 66 (96 N. W. 272).

199. (1903.) When the loss or destruction of a written instrument is shown, secondary evidence of its contents is admissible. *Larson v. Cox*, 68 Neb. 44 (93 N. W. 1011).

200. (1903.) Ordinarily, to justify the reception of a copy of a private writing in evidence, it must appear that it is a true copy of some writing, admissible in evidence, which has been lost or destroyed, or which is in the possession of the adverse party, who refuses to produce it on due notice. *Peycke v. Shinn*, 68 Neb. 343 (94 N. W. 135).

——— Demand or notice to produce primary evidence.

201. (1877.) Where a defense to an action on a promissory note is a breach of a warranty in the sale of a threshing machine, and such written warranty was left with the plaintiff, the defendants cannot introduce parol evidence to show what the contract was, without first taking the necessary steps to require plaintiff to produce the written contract. *Birdsall v. Carter*, 5 Neb. 517.

202. (1890.) While the better practice is to serve notice on adverse party to produce private writings in his possession before evidence can be given of their contents, notice may be dispensed with on proof that such party has stated that the writings are lost. *Barmby v. Plummer*, 29 Neb. 64 (45 N. W. 277).

VI. DEMONSTRATIVE EVIDENCE.

Examination of person of injured party out of court, see *Damages*, §§ 142-146.

View by jury, see *Trial*, §§ 55-60, 683, 684.

In general.

203. (1904.) It is not error to permit the plaintiff, although crippled, to walk to the witness stand in the presence of the jury. *City of Minden v. Vedene*, 72 Neb. 657 (101 N. W. 330).

Exhibition of person to jury.

204. (1898.) In an action for personal injuries the right of plaintiff to exhibit an injured limb should not be denied on the ground that she is young, handsome, and attractive, and consequently that the sympathies of a jury composed of men would be unduly excited in her behalf. *Omaha Street R. Co. v. Emminger*, 57 Neb. 240 (77 N. W. 675).

205. (1902.) In an action for personal injuries it is not error to permit the plaintiff to exhibit the injured member to the jury after the introduction of evidence to the effect that it was permanently injured as and in the manner alleged in the petition, and that its condition at the time exhibited was wholly due to such injury. *City of Crete v. Hendricks*, 2 Unof. 847 (90 N. W. 215).

206. (1904.) In an action for personal injury it is not error to permit plaintiff to exhibit his injured limb to the jury. *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 70 Neb. 766 (98 N. W. 44).

207. (1904.) Although a plaintiff in an action to recover damages for personal injuries may be permitted to show his wounds and contusions to the jury, it may be reversible error to permit a dramatic exhibi-

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tion by him in the presence of the jury as a demonstration of the extent of his physical disabilities. *Felsch v. Babb*, 72 Neb. 736 (101 N. W. 1011).

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Experiments.

208. (1903.) Proof of an experiment, without establishing the fact that the person who made the experiment is competent to do so, and that the apparatus used was of the kind and in a condition suitable for the experiment, and that it was honestly and fairly made, is without probative force. *Omaha Street R. Co. v. Larson*, 70 Neb. 591 (97 N. W. 824).

Writings submitted for comparison.

209. (1881.) Defendant having denied the genuineness of the promissory note on which the action was brought, called his son as a witness, who testified in chief that certain words in the note which his father actually gave were written by himself. On cross-examination he was required to write the same words in the presence of the jury, for their inspection and comparison with the note in controversy. *Held*, Competent evidence and cross-examination. *Huff v. Nims*, 11 Neb. 363 (9 N. W. 548).

210. (1890.) Under section 344 of the code, school orders drawn by a party as treasurer are admissible to afford comparison of handwriting with the signature of a note which he denies having executed. *Grand Island Banking Co. v. Shoemaker*, 31 Neb. 124 (47 N. W. 696).

211. (1896.) Under section 344 of the code, the genuineness of handwriting may be determined by comparing the disputed writing with that proved to be genuine. Such genuine writings upon proof should be admitted in evidence for the purpose of permitting the jury as well as experts to make the necessary comparison. *First Nat. Bank of Madison v. Carson*, 48 Neb. 763 (67 N. W. 779).

212. (1901.) If writings offered as evidence of handwriting are admitted by a party to be his, but he claims that their form is the result of duress or fraud, the proper course is to show such fact for the purpose of affecting their weight. *Schmuck v. Hill*, 2 Unof. 79 (96 N. W. 158).

VII. ADMISSIONS.

A. Nature and Incidents in General.

Pleadings.

213. (1886.) When a cause is being tried upon an issue formed by an amended petition, answer, and reply, the original petition, if inconsistent with the amended petition, is competent evidence for the purpose of proving admissions inconsistent with the claim and testimony of plaintiff upon trial. *Bunz v. Cornelius*, 19 Neb. 197 (26 N. W. 621).

214. (1896.) No proper foundation having been laid for its introduction, a bill of particulars filed in a justice court is properly excluded, in an action by an agent for compensation for selling a threshing machine, which instrument showed plaintiff claimed less than in the present trial. *Aultman v. Martin*, 49 Neb. 103 (68 N. W. 340).

215. (1899.) Admissions made by a litigant in his pleading in a suit are competent evidence against those who subsequently come into the suit as his successors in interest to the matter in litigation. *Miller v. Nicodemus*, 58 Neb. 352 (78 N. W. 618).

216. (1899.) When a litigant files an amended pleading, the averments of which are inconsistent with the averments of his original pleading, the original is evidence in the case as an admission of the litigant contrary to his claim in the amended pleading but is not conclusive. *Miller v. Nicodemus*, 58 Neb. 352 (78 N. W. 618).

217. (1899.) Pleadings may be received in evidence in suits, other than those in which they were filed, as admissions or declarations against interest. *Paxton v. State*, 59 Neb. 460 (81 N. W. 383; 80 Am. St. Rep. 689).

218. (1899.) Pleadings, when not signed or verified by the party himself, are received in evidence only upon actual or presumptive proof that the admissions which they contain were either made by his direction or were afterwards sanctioned by him. *Paxton v. State*, 59 Neb. 460 (81 N. W. 383; 80 Am. St. Rep. 689).

219. (1900.) Pleadings may be introduced as evidence in actions other than those wherein they were filed, as admissions against interest. *Paxton v. State*, 60 Neb. 763 (84 N. W. 254).

220. (1903.) It is not reversible error to refuse to allow a defendant to introduce in evidence plaintiff's original petition, where there is no substantial difference in the statement of the facts contained therein, and in the one on which the suit is tried. *School District of Omaha v. McDonald*, 68 Neb. 610 (94 N. W. 829).

221. (1904.) A plea of guilty entered

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by the defendant in a criminal action may be used against him as an admission that he committed the acts charged against him, in any subsequent action to which he is a party and which involves the same subject matter. *Wisnieski v. Vanek*, 5 Unof. 512 (99 N. W. 258).

222. (1905.) An admission made in a pleading by either plaintiff or defendant may be proved by the pleading itself, although the pleading is subsequently discarded and an amended pleading filed. *New Omaha Thomson-Houston Electric Light Co. v. Rombold*, 73 Neb. 259 (102 N. W. 475; 106 N. W. 213).

Testimony at former trial.

See, also, *Witnesses*, §§ 396-399.

223. (1894.) The testimony of a witness in an action to which he was not a party may be proved in a subsequent action to which he is a party as an admission, but the fact of his having been a witness in such other action does not operate to estop him by the record thereof. *German Nat. Bank of Hastings v. Leonard*, 40 Neb. 676 (59 N. W. 107).

Offer of compromise and settlement.

See, also, *Compromise and Settlement*, §§ 39-47.

224. (1888.) In an action for the alleged conversion of mortgaged property, where the point in issue is as to the identity of the property taken by defendant with that covered by plaintiff's chattel mortgage, the fact that defendant took under consideration plaintiff's offer of compromise, without denying the identity of the property, is not an admission of such identity, and hence the offer and letters in response thereto are not admissible in evidence to prove such admission. *Kierstead v. Brown*, 23 Neb. 595 (37 N. W. 471).

225. (1888.) Letters written by defendant in response to plaintiff's proposal for a compromise of a disputed claim are not admissible as an admission. *Kierstead v. Brown*, 23 Neb. 595 (37 N. W. 471).

B. By parties or Others Interested in Event.

See, also, *Witnesses*, IV, C.

Admissibility in general.

226. (1879.) Oral declarations of a cashier of a bank, made subsequent to a conveyance of certain lands to him, are incompetent as evidence in an action against him to establish a trust to the lands. *Merchants Bank v. McConiga*, 8 Neb. 245.

227. (1886.) The statements or admissions of a party to a suit can be proved against him only when such statements or admissions are so connected with the main transactions involved in the litigation as to be material to the issue or issues in the case. *Hooper v. Browning*, 19 Neb. 420 (27 N. W. 419).

228. (1886.) The admissions of a party to an action can be proved against him when they are so connected with the main transactions involved in the litigation as to be material to the issue. *Cummings v. Winters*, 19 Neb. 719 (28 N. W. 302).

229. (1894.) Book entries, made by a party in the regular course of his business, are admissible in evidence on behalf of the adverse party when in the nature of admissions. *German Nat. Bank of Hastings v. Leonard*, 40 Neb. 676 (59 N. W. 107).

230. (1898.) Ordinarily, declarations against interest made by a party to a suit, or by one through whom he has derived title to the thing in controversy, are admissible as evidence against him; but one who has purchased property cannot be affected by statements made in relation thereto by his vendor after the latter had parted with his title and possession. *Zobel v. Bauersachs*, 55 Neb. 20 (75 N. W. 43).

231. (1898.) Admissions of a party against interest are receivable in evidence against him. *Maul v. Drexel*, 55 Neb. 446 (76 N. W. 163).

232. (1901.) Statements of parties directly relating to the issues are admissible on behalf of the opposing party as independent testimony. *Carlson & Hanson v. Holm*, 2 Unof. 38 (95 N. W. 1125).

233. (1902.) In a suit against a bank, book entries made by its officers or bookkeeper in the regular course of business are competent evidence as admissions against interest. *Globe Savings Bank v. Bank of Commerce*, 64 Neb. 413 (89 N. W. 1030).

C. By Grantors, Former Owners or Privies. Disparagement of title in general.

234. (1888.) In no case can admissions made by a vendor after he has parted with his title, and not connected with the transaction, be admissible against his vendee. *Rogers v. Thurston*, 24 Neb. 326 (38 N. W. 834).

235. (1889.) The declaration of one from whom a party obtains title to property, made after the transfer of title, and

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in derogation thereof, is inadmissible for the purpose of defeating such title. But where the vendor, being examined as a witness to prove a sale, was asked, on his cross-examination, whether he had not, at a time subsequent to the alleged sale, offered to sell the same property, as the owner thereof, to another, which he denied, it was *held* legitimate, for the purpose of impeachment only, to call other witnesses to prove the fact. *Williams v. Eikenberry*, 25 Neb. 721 (41 N. W. 770; 13 Am. St. Rep. 517).

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236. (1890.) Statements of a mortgagor of personalty, made as to the latter after it had passed out of his possession, are not admissible against mortgagee. *Farmers Loan & Trust Co. v. Montgomery*, 30 Neb. 33 (46 N. W. 214).

237. (1895.) The declarations of a former owner of land are not admissible as against those claiming under him when made after he has conveyed the land. *Consolidated Tank Line Co. v. Pien*, 44 Neb. 887 (62 N. W. 1112).

238. (1898.) After conveyance of property, declarations of seller in disparagement of the buyer's title are not admissible in evidence, but an exception to the rule arises where the conveyance is assailed as fraudulent. *Kyd v. Cook*, 56 Neb. 71 (76 N. W. 524; 71 Am. St. Rep. 661).

Nature and validity of conveyance.

239. (1888.) Declarations of the seller tending to show that the sale was not *bona fide*, made after the sale was made and the purchaser took possession, are not admissible. *Campbell v. Holland*, 22 Neb. 587 (35 N. W. 871).

240. Declarations of a mortgagor of chattels as to his intent in making the mortgage, if made while the mortgagor remains in possession of the property, are admissible as part of the *res gestæ*. (1889) *White v. Woodruff*, 25 Neb. 797 (41 N. W. 785); (1892) *Cunningham v. Fuller*, 35 Neb. 58 (52 N. W. 836); (1894) *McDonald v. Bowman*, 40 Neb. 269 (58 N. W. 704).

241. (1890.) While the general rule is that the declarations of a party made after he has parted with his interest in the subject matter of the litigation cannot be received to disparage the right or title of one who acquired the same in good faith before such declarations were made, yet this rule does not apply to transfers of property made for the purpose of defrauding creditors. In such case, the fraudulent character of the transfer being proved, the declarations and acts of the vendor, made shortly after the alleged transfer, and before the rights of innocent parties intervened, may be shown as circumstances in corroboration, where transfer is fraudulent. *Smith v. Boyer*, 29 Neb. 76 (45 N. W. 265; 26 Am. St. Rep. 373). [Rehearing. 35 Neb. 46.]

242. (1894.) Declarations of a mortgagor of chattels, made after the execution of the mortgage, are admissible in an action between the mortgagee and creditors of the mortgagor for the purpose of establishing a fraudulent intent on the part of the mortgagor. *McDonald v. Bowman*, 40 Neb. 269 (58 N. W. 704).

243. (1898.) Declarations of the seller which tend to disparage the buyer's title, if the seller is in possession, are admissible as *res gestæ*. If not in possession, the declarations are admissible as tending to establish the intent with which he made the conveyance, but not for the purpose of disparaging the vendee's title. *Kyd v. Cook*, 56 Neb. 71 (76 N. W. 524; 71 Am. St. Rep. 661).

Location of boundaries.

244. (1895.) In an action of ejectment admissions of defendant's grantor, that he knew a certain fence was not on the line, is not admissible against defendant. *Consolidated Tank Line Co. v. Pien*, 44 Neb. 887 (62 N. W. 1112).

D. By Agent or Other Representative.

Admissions constituting part of *res gestæ*, see *ante*, §§ 111-119.

Agents or employees.

See, also, *Principal and Agent*, §§ 12-20.

245. (1890.) Where an agent had in his possession a chattel mortgage on certain cattle, and was, as the agent of the mortgagee, making investigations with a view of foreclosing the mortgage upon certain cattle then being shipped by the mortgagor to other parties, and expressed the opinion that the cattle to be shipped were the same cattle described in the mortgage; and in a subsequent action brought by a third party against the mortgagee for the possession of other cattle claimed by the mortgagee to be the cattle described in said mortgage, *held*, that such expression of opinion by the agent was not admissible in evidence against his principal. *Wood River Bank v. Kelley*, 29 Neb. 590 (46 N. W. 86).

246. (1892.) Statements of an agent with

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authority to collect rents and care for the property of his principal will not be received in disparagement of the title of the latter so as to work an estoppel in favor of one who purchased from a stranger claiming adversely to such principal. *Bowman v. Griffith*, 35 Neb. 331 (53 N. W. 140).

247. (1893.) In a case where a bank sues the makers of a note indorsed to it by the secretary of the payee, a corporation, the declarations of officers of such corporation, made after the transfer to the bank, are inadmissible, for the purpose of showing want of authority in the secretary to make the transfer. *Commercial Nat. Bank of St. Paul v. Brill*, 37 Neb. 626 (56 N. W. 382).

248. (1896.) The testimony on another trial of an officer of a corporation with relation to previous corporate acts cannot be proved as an admission binding upon the corporation. *Columbia Nat. Bank v. Rice*, 43 Neb. 428 (67 N. W. 165).

249. (1898.) Statements of an agent acting within his authority when made concerning the business in hand at the time of the transaction, are admissible in evidence against his principal; but such statements, when made subsequent to the transaction, not connected therewith, and not specially authorized by his principal, cannot be received in evidence against the latter. *Union Life Ins. Co. v. Haman*, 54 Neb. 599 (74 N. W. 1090).

——— To prove agency.

250. (1895.) Agency cannot be proved by the acts or declarations of the alleged agent not brought home to the principal. *Richardson & Boynton Co. v. School District No. 11*, 45 Neb. 777 (64 N. W. 218); (1896) *Anheuser-Busch Brewing Ass'n v. Murray*, 47 Neb. 627 (66 N. W. 635).

Husband or wife.

251. (1891.) Where the proof fails to show that the wife of the person in possession of a farm had authority to control the business in the absence of her husband, the admissions of such wife in regard to the business of the farm cannot be received, and an instruction submitting them to the jury is erroneous. *Norfolk Nat. Bank v. Wood*, 33 Neb. 113 (49 N. W. 958).

Conspirators and persons acting together.

252. (1887.) Where the cause of action, or ground of defense, is based upon a conspiracy by two or more persons to perpetuate a fraud, the acts and declarations of one of such company of conspirators in regard to the common design as affecting his fellows —a foundation having been laid by proof sufficient in the opinion of the court to establish *prima facie* the fact of conspiracy between the parties, or proper to be laid before the jury, as tending to establish such fact— in pursuance of the original concerted plan, and with reference to the common object, may be given in evidence. *Brown v. Herr*, 21 Neb. 113 (31 N. W. 246).

253. (1894.) Where testimony tends to prove conspiracy to defraud creditors, declarations of one of the parties to it, in disparagement of his title, are admissible in action of replevin by him against sheriff. *Altschuler v. Coburn*, 38 Neb. 881 (57 N. W. 836).

254. (1894.) Acts and declarations of conspirators which are parts of the *res gestæ*, and, therefore, admissible against their co-conspirators, include those only which are done and made during the pendency of the conspiracy and in furtherance of its objects. *Stratton v. Oldfield*, 41 Neb. 702 (60 N. W. 82).

255. (1902.) Statements of one of the parties to a joint enterprise, made while borrowing money to be used, and which was used in such enterprise, are admissible against the other parties thereto so far as they form a part of the transaction. *Baker v. Union Stock Yards Nat. Bank*, 63 Neb. 801 (89 N. W. 269; 93 Am. St. Rep. 484).

E. Proof and Effect.

Laying foundation for impeachment of testimony of party.

256. (1891.) The admissions or statements of a party to a suit against his interest upon a material matter, may be proved without laying the foundation required in case of impeaching a disinterested witness. *Bartlett v. Cheesebrough*, 32 Neb. 339 (49 N. W. 360); (1899) *Churchill v. White*, 58 Neb. 22 (78 N. W. 369; 76 Am. St. Rep. 64).

Construction.

257. (1898.) An admission by one of the parties, of the existence of a judgment which it was incumbent on his adversary to prove, *held* to imply that such judgment was valid. *McCurdy v. Ryan*, 56 Neb. 511 (76 N. W. 1079).

258. (1901.) An admission, when tax receipts are offered in evidence, "that the taxes described in the receipts were duly levied and assessed" is an admission that the assessments were made at the dates mentioned in the receipts. *National Life Ins. Co. v. Butler*, 61 Neb. 449 (85 N. W. 437; 87 Am. St. Rep. 462).

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Conclusiveness and effect.

259. (1899.) The weight to be given a pleading in another action, as an admission of the facts stated therein, is for the jury. *Paxton v. State*, 59 Neb. 460 (81 N. W. 383; 80 Am. St. Rep. 689).

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VIII. Declarations.

Declarations of brakeman as to injury of passenger, see *Carriers*, § 258.

Declarations to prove agency, see *Principal and Agent*, §§ 12-20.

Discretion of court.

260. (1903.) The admission or exclusion of declarations rests largely in the discretion of the trial court; such discretion is not an absolute discretion to be exercised arbitrarily, but a legal discretion, the abuse of which constitutes reversible error. *Pledger v. Chicago, B. & Q. R. Co.*, 69 Neb. 456 (95 N. W. 1057).

Part of conversation.

261. (1893.) Where a person is called in by the parties to the contract as a witness to the bargain, and the conversation had in his presence is partly in English and partly in German, he not understanding the latter language, he may testify as to the portion which he understood, the rule that a person must give the whole of a conversation, and not a part, not applying. *Roberson v. Reiter*, 38 Neb. 198 (56 N. W. 877).

Self-serving declarations.

262. (1890.) The petition in the case on trial is not admissible in evidence, and one cannot take advantage of an oath thereon without himself being subject to a cross-examination. *Johnson v. First Nat. Bank*, 28 Neb. 792 (45 N. W. 161).

263. (1897.) An answer verified on belief is not substantive evidence of the allegations of facts therein set forth, and is not admissible as such in favor of the pleading party. If so received in evidence, and it is the only evidence on which a judgment in the cause is based, the judgment will be reversed as not sustained by the evidence. *Bourke v. Falck*, 52 Neb. 768 (53 N. W. 223).

264. (1898.) A party's own pleading in a cause is not substantive evidence in his own favor of the facts therein alleged. *Stewart v. Demming*, 54 Neb. 7 (74 N. W. 265).

265. (1899.) A pleading is not competent evidence, in favor of the party whose pleading it is, of the facts averred therein. *Green v. Morse*, 57 Neb. 391 (77 N. W. 925; 73 Am. St. Rep. 761).

266. (1905.) The admission of the testimony of the wife as to communications made to her by her husband in his last sickness, *held* not prejudicial error under the circumstances disclosed by the record in this case. *Western Travelers' Accident Ass'n v. Munson*, 73 Neb. 858 (103 N. W. 688; 1 L. R. A. [n. s.] 1068).

Declarations of person in possession of property.

267. (1892.) The declarations of a person in the possession of property, as to his title, are admissible evidence against him and all persons claiming under him. *Cunningham v. Fuller*, 35 Neb. 58 (52 N. W. 836).

268. (1898.) Where the *bona fides* of a transfer is assailed by creditors of transferor, his subsequent statements in relation to the transaction may be admitted on the issue of intent and to show the reason of his retention of possession of the property after the conveyance. *Armagost v. Rising*, 54 Neb. 763 (75 N. W. 534).

Declarations against interest.

See, also, *Witnesses*, IV, D.

269. (1902.) Statements made by a party to a suit, to a third person, may be received in evidence against him, and are not open to the objection that they are hearsay evidence. *Allen v. Hall*, 64 Neb. 256 (89 N. W. 803).

270. (1907.) A statement made by a party or his privy, suggesting any inference as to any fact in issue, or relevant fact unfavorable to the conclusion contended for by such party, is relevant, and should be permitted to go to the jury. *Ogden v. Sovereign Camp, Woodmen of the World*, 78 Neb. 806 (113 N. W. 524).

271. (1907.) The admissions and declarations of a party to an action against his own interest, upon a material matter, are admissible against him as original evidence, and, where he is examined as a witness in his own behalf, it is unnecessary to lay a foundation for the admission of such evidence by cross-examination. *Young v. Kinney*, 79 Neb. 421 (112 N. W. 558).

Declarations by decedents against interest.

Declarations of decedent in action against his estate, see *Executors and Administrators*, §§ 293-295.

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272. (1898.) It is not error to exclude a declaration of a deceased person to the effect that the injury was the result of his own carelessness in an action for damages for his death. *City of Friend v. Burleigh*, 53 Neb. 674 (74 N. W. 50).

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273. (1901) Statements of a person since deceased, that his property was incumbered, that he could not pay his debts, are admissible to prove his insolvency at the time, as being declarations against interest. *Quinby v. Ayers*, 1 Unof. 70 (95 N. W. 464).

Counter-declarations.

273*a*. (1907.) Declarations against interest cannot be annulled or explained away by counter-declarations. *Harrison v. Harrison*, 80 Neb. 103 (113 N. W. 1042).

IX. HEARSAY.

See, also, specific topics.

Admissibility in general.

274. (1875.) Conversations between one party and a third person, in the absence of the adverse party and without his knowledge, are not admissible. *Lacey v. Central Nat. Bank*, 4 Neb. 179.

275. (1881.) Hearsay evidence, corroborating witness on a material point, is inadmissible. *Clopper v. Poland*, 12 Neb. 69 (10 N. W. 538).

276. (1901.) Hearsay evidence is inadmissible. *Keeley Institute v. Wade*, 61 Neb. 313 (85 N. W. 288).

What constitutes hearsay.

277. (1877.) Loose expressions made by officers of the city, indicating that they supposed such a grade to have been established, are but hearsay, by which the corporation is not bound. *Nebraska City v. Lampkins*, 6 Neb. 27.

278. (1877.) A conversion had between the vendee and a trustee merely to transfer the title concerning the consideration, in the absence of the vendor, is not admissible in evidence against such vendor. *Reed v. Beardsley*, 6 Neb. 493.

279. (1886.) Where, in an action for damages resulting from personal injuries, a physician, being a son of plaintiff, was permitted to testify, over the objection of defendant, to the opinions expressed by consulting physicians who were called to examine plaintiff as to the results of the injury, it was *held* to be error, the testimony being incompetent and hearsay. *Village of Ponca v. Crawford*, 18 Neb. 551 (26 N. W. 365).

280. (1889.) Where a witness was called upon to testify as to words spoken in a language which he did not understand, and which were interpreted to him into his own language by an interpreter known to him, and in whom he confided (in the presence of the speaker), such testimony is unobjectionable as hearsay evidence. *Wise v. Newatney*, 26 Neb. 88 (42 N. W. 339).

281. (1892.) A communication through the telephone from Schuyler to Omaha repeated by one operator at Fremont, an intermediate station, *held* admissible in evidence in an action for breach of contract in case stated in opinion. *Oskamp v. Gadsden*, 35 Neb. 7 (52 N. W. 718; 37 Am. St. Rep. 428; 17 L. R. A. 440).

282. (1894.) As against strangers thereto, a receipt is incompetent evidence of the payment thereby acknowledged; for, as against such strangers, such receipt is but the hearsay declaration of the party who signed it, made without opportunity for his cross-examination, and independently of the sanction of his oath. *Ellison v. Albright*, 41 Neb. 93 (59 N. W. 703; 29 L. R. A. 737).

283. (1902) The testimony of a witness as to a conversation had with, or declarations made by him to, others as to the sanity or insanity of a person is inadmissible on the question of insanity, on the ground that it is hearsay. *Clarke v. Irwin*, 63 Neb. 539 (88 N. W. 783).

X. DOCUMENTARY EVIDENCE.

Admissibility of deposition, see *Depositions*, §§ 39-61.

Use of documents to refresh memory of witness, see *Witnesses*, §§ 193-205.

A. Public or Official Acts, Proceedings and Records.

Admissibility of record of proceeding to show probable cause, see *Malicious Prosecution*, §§ 70-76.

Ordinance as proof of annexation of territory to city, see *Municipal Corporations*, § 54.

Of ordinance regulating speed of street cars, see *Street Railroads*, § 42.

Judicial acts and records.

284. (1871.) A verdict of a jury is not admissible, to show that the matter has been determined, even if it be between the same parties for the same cause of action, because it is not conclusive of the matter. *Mc-*

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Ready v. Rogers, 1 Neb. 124 (93 Am. Dec. 333).

285. (1876.) When a decree has been rendered in an action for specific performance, containing a provision that further suits must be brought for the recovery of any damages occasioned to the property, such decree is admissible in evidence, in a subsequent action for trespass, for the purpose of showing title to the premises, and that the damages had not been adjudicated. *Wilcox v. Saunders*, 4 Neb. 569.

286. (1879.) An approved journal entry is indisputable evidence of a recorded judgment. *Findley v. Bowers*, 9 Neb. 72 (2 N. W. 349).

287. (1880.) The pleadings and judgment in the action wherein an injunction against the sale of real estate under execution issued are competent evidence to show the grounds on which the sale was enjoined. *Ryan v. State Bank*, 10 Neb. 524 (7 N. W. 276).

288. (1889.) The failure of the clerk to mark the date of filing on the verdict of a jury will not prevent it from being introduced in evidence in a proper case. *Baldridge v. Foust*, 28 Neb. 259 (44 N. W. 110).

289. (1890.) A person not a stranger to a judicial proceeding is bound thereby, and the record of such proceeding is admissible in evidence against him. *Dorsey v. McGee*, 30 Neb. 657 (46 N. W. 1018).

290. (1894.) A judicial record of this state may be proved by the producing of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he have one. *Burge v. Gandy*, 41 Neb. 149 (59 N. W. 359).

291. (1896.) The practice of introducing in evidence in a case on trial the papers and files belonging to another case, or the original records of an office, is not to be commended. If such files or records are needed as evidence certified copies should be procured for that purpose. *Regier v. Shreck*, 47 Neb. 667 (66 N. W. 618).

292. (1901.) Plaintiff commenced an action in the county court, which was afterward dismissed without prejudice; it afterward brought its action in the district court; on the trial, defendant, over plaintiff's objection, was permitted to introduce the petition, filed in the county court, in evidence. *Held*, Under the facts in the case, it should have been excluded. *Hamilton Brown Shoe Co. v. Milliken*, 62 Neb. 116 (86 N. W. 913).

293. (1901.) The authentication of a record of the queen's bench division of the high court of justice of England examined, and *held* to conform to the requirements of section 416 of the code. *Linton v. Baker*, 1 Unof. 896 (96 N. W. 251).

294. (1901.) A judicial record of another state, authenticated as provided in section 414 of the code, is admissible in evidence without further proof that the court from which it comes is one of record. *Brown v. Collins*, 2 Unof. 149 (96 N. W. 173).

295. (1903.) Where parties interested have been duly served with notice by a court having jurisdiction in a sister state to appear and show cause at a time stated why the final report of an executor should not be allowed and settled, such court having jurisdiction of person and subject matter, a properly authenticated transcript of the proceedings had will not be held inadmissible in the courts of this state, because it shows that a hearing was had and a judgment rendered at a subsequent term of such court. *Tunnicliff v. Fox*, 68 Neb. 811 (94 N. W. 1032).

Records of official acts and proceedings.

296. (1871.) The transcript is evidence of the highest character as to all the proceedings before the mayor, in hearing and determining the question of title upon which he rendered judgment. *Newcomb v. Boulware*, 1 Neb. 428.

297. (1890.) Where the engineers of the city have cross-sectioned certain grading to be done for the city, made estimates thereof and filed the same in the engineer's department, such estimates are admissible as *prima facie* evidence of the correctness of such estimates. *Clarke v. Williams*, 29 Neb. 691 (46 N. W. 82).

298. (1902.) A record kept under the ordinances of a city for the evident purpose of assisting the board of health in the conduct of the affairs of that office, is not such a public record as is entitled to admission in evidence to show the truth of the matters therein recited, and especially should it be rejected as evidence when offered to establish a fact which would not be admissible against a party because of its privileged character. *Sovereign Camp of Woodmen of the World v. Grandon*, 64 Neb. 39 (89 N. W. 448).

B. Exemplifications, Transcripts, and Certified Copies.

Judicial records and proceedings.

299. (1886.) A certified copy of the stenographic reporter's record of proceedings in

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the district court is admissible in all cases where the original would be; and where the parties stipulate that the evidence of a witness on a former trial may be used instead of taking his deposition the stipulation should be enforced. *Spielman v. Flynn*, 19 Neb. 342 (27 N. W. 224). [Overruled in part. 19 Neb. 511; 42 Neb. 356.]

300. (1893.) A copy of letters of administration, when duly certified to be true and correct copies of such letters as appear from the original on file in the county court, wherein such letters of administration were granted, is admissible in evidence with the same effect as the original. *Missouri P. R. Co. v. Baier*, 37 Neb. 235 (55 N. W. 913).

301. (1895.) Where a case is appealed to the district court and the issue in another action is whether the case appealed was tried in the appellate court, a finding made or verdict returned, and a judgment pronounced thereon, such issue can be proved by a certified copy of the record of proceedings had in the case in the appellate court. *Morrison v. Boggs*, 44 Neb. 248 (62 N. W. 473).

302. (1896.) The transcript of a foreign judgment is not admissible unless authenticated according to section 414 of the code. *Names v. Names*, 48 Neb. 701 (67 N. W. 751); (1898) *Comstock v. Kerwin*, 57 Neb. 1 (77 N. W. 387).

303. (1901.) The record of the proceedings of the district court, as kept in the journal entries, is the legal and authentic evidence of judgments and orders of the court. *Morrill v. McNeill*, 1 Unof. 651 (91 N. W. 601).

304. (1902.) The transcript of the proceedings and judgment of the United States district court, duly certified, is competent in evidence, although it fails to show that the presiding judge signed the journal record of the proceedings. *Stacks v. Crawford*, 63 Neb. 662 (88 N. W. 852).

305. (1903.) The law makes no provision for the certification by the shorthand reporter of the proceedings of the district court, hence a transcript of his notes, although accompanied by a formal certificate, is not admissible as independent evidence. *Jordan v. Howe*, 4 Unof. 667 (95 N. W. 853).

306. (1905.) It is indispensable to the authentication of a judicial record of a sister state that it have attached thereto a certificate of the presiding judge that the attestation is "in due form" or "in due form of law." *Chapman v. Chapman*, 74 Neb. 388 (104 N. W. 880).

306*a*. (1906.) A transcript of a justice of the peace, to be receivable in evidence, need not be authenticated in accordance with the provisions of section 414 of the code, which relates to judgments of courts of record. It is receivable in evidence if it conforms to the requirements of section 415, which relates specifically to judgments of justices of the peace of another state. *Gordon Bros. v. Wageman*, 77 Neb. 185 (108 N. W. 1067).

Official records and proceedings.

307 (1897.) A copy of a sheriff's return which has not been attested according to the requirements of section 414 of the code, is incompetent for the purpose of proving a judicial sale in another state. *Westerman v. Sheppard*, 52 Neb. 124 (71 N. W. 950).

308. (1899.) A certified copy of a letter written by a public officer stating in a general way what the records of his office disclose is not competent evidence of the facts stated. *Moore v. Parker*, 59 Neb. 29 (80 N. W. 43).

Records of foreign courts.

309. (1898.) A transcript of the record of a foreign court is not admissible in evidence, unless authenticated according to the provisions of section 414 of the code of civil procedure. *Comstock v. Kerwin*, 57 Neb. 1 (77 N. W. 387).

Records of conveyances.

310. (1889.) The filing of a chattel mortgage in the office of the recording officer of the county, under the provisions of section 14, chapter 32, Compiled Statutes, makes such mortgage a part of the records of the county, and under section 408 of the civil code a copy thereof duly certified to by the proper officer is competent evidence of equal credibility to the original. *Hall v. Aitkin*, 25 Neb. 360 (41 N. W. 192).

311. (1899.) The certificate of acknowledgment, as shown by the record of a deed, was dated on the 16th day of August, 1872, while the deed itself bore date of the 16th day of October of the same year. It was *held* that the date of the certificate of acknowledgment would prevail over that of the deed, and that the district court did not err in admitting a copy of the record in evidence, when objected to on account of the discrepancy in dates. *Buck v. Gage*, 27 Neb. 306 (43 N. W. 110).

C. Private Writings and Publications.

Refreshing memory of witness from memoranda, see *Witnesses*, §§ 193-205

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Books of account.

312. (1881.) The note register or collection register or book of bills receivable, kept by a bank or banker, is not a "book of account," in the sense in which that term is used, either in the statute or at common law, as it does not contain the "charges by one party against the other made in the ordinary course of business," and in no case are account-books evidence of any transactions, even between the parties, other than goods, wares, or merchandise, sold or delivered, and work, labor, or services performed. *Martin v. Scott*, 12 Neb. 42 (10 N. W. 532).

313. (1886.) Account books are admissible as evidence in an action only where they contain charges by one party against the other. *Masters v. Marsh*, 19 Neb. 458 (27 N. W. 438).

314. (1887.) Books of account are receivable in evidence only when they contain charges by one party against the other, and then only under the circumstances and verified in manner provided by statute. *Van Every v. Fitzgerald*, 21 Neb. 36 (31 N. W. 264; 60 Am. Rep. 835); (1887) *Pollard v. Turner*, 22 Neb. 366 (35 N. W. 192); (1889) *Gilbert v. Saddlery Co.*, 26 Neb. 194 (41 N. W. 993; 42 N. W. 11).

315. (1891.) Collection or loan registers are not admissible as books of account. *Labaree v. Klosterman*, 33 Neb. 150 (49 N. W. 1102).

316. (1891.) A witness who at the time of purchasing a bill of goods entered each item in a book, together with the cost thereof, may use such book as a memorandum, and when it is shown by his testimony that he knows the entries therein to be correct and that they were made at the time of the transaction in question, such book may properly be introduced in evidence, not for the purpose of proving the purchase of the goods, but in corroboration of the witness and as a detailed statement of the items involved. *St. Paul Fire Ins. Co. v. Gotthelf*, 35 Neb. 351 (53 N. W. 137).

317 (1898.) In an action for an accounting by a member of a partnership who has had access to the books of account at all times, such books are competent evidence on behalf of either party. *McDonald v. Buckstaff*, 56 Neb. 88 (76 N. W. 476).

318. (1904.) Books of account, in order to be admissible in evidence, are not required to be in any particular language, or to conform to any particular system of bookkeeping, so long as they conform to the provisions of the statute regulating the reception of such books in evidence. *Cather v. Damerell*, 5 Unof. 490 (99 N. W. 35).

Conveyances and contracts.

319. (1876.) A paper offered in evidence to establish a tripartite contract, being signed by one party only, is inadmissible. *Wilcox v. Saunders*, 4 Neb. 569.

320. (1885.) In an action for the price of bricks furnished for a building, a contract with the building contractor is admissible in evidence to show that such contractor was to pay for the material, and that certain payments had been made by such contractor. *Kiewit v. Harris & Fisher*, 17 Neb. 249 (22 N. W. 417).

321. (1886.) A deed of real estate, executed in another state before an officer having no seal, to be admissible in evidence must be certified in the manner provided in the statute. *O'Brien v. Gaslin*, 20 Neb. 347 (30 N. W. 274).

322. (1886.) Where the defense to an action on a note is founded upon a certain printed warranty alleged to have been delivered to defendant by plaintiff's assignor at the time of the execution of the notes sued on, and the delivery of the warranty is denied, the alleged warranty is admissible in evidence. *First Nat. Bank v. Erickson*, 20 Neb. 580 (31 N. W. 387).

323. (1890.) Where the holder of a chattel mortgage, in the form of a bill of sale, with a defeasance clause, through ignorance and good faith, without intent to defraud, tore the same into two parts, thus separating the granting from the defeasance clause, and upon the trial presented the two parts as an entire instrument, it was receivable in evidence. *Russell v. Longmoor*, 29 Neb. 209 (45 N. W. 624).

324. (1894.) The record of a deed is not admissible in evidence unless the certificate of acknowledgment is substantially in accordance with the statute. *Maxwell v. Higgins*, 38 Neb. 671 (57 N. W. 388).

325. (1896.) A deed executed and acknowledged in Kansas, conveying land in Nebraska, is admissible in evidence in ejectment though not witnessed. *Schields v. Horbach*, 49 Neb. 262 (68 N. W. 524).

326. (1896.) A negotiable promissory note imports, or is *prima facie* evidence of a consideration, and when such a note and

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the accompanying chattel mortgage securing its payment are properly identified they may be received in evidence, and this is true in an action in which their validity is attacked on the ground of fraud, as against the rights of the creditor of the maker. *Plummer v. Green*, 49 Neb. 316 (68 N. W. 500).

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Private memoranda and statements.

327. (1887) A time book of defendant, used to keep the time of workmen employed by him in completing a job of railroad grading which he claimed plaintiff, his subcontractor, had abandoned, offered for the purpose of proving the cost of completing the job, is inadmissible where it does not purport to contain entries of charges against plaintiff or of dealings with him. *Van Every v. Fitzgerald*, 21 Neb. 36 (31 N. W. 264; 60 Am. Rep. 835).

328 (1893.) *Ex parte* affidavit referred to in the opinion *held* inadmissible under the rules of evidence, and that it was properly excluded from the jury. *Barton v. McKay*, 36 Neb. 632 (54 N. W. 968).

329. (1893.) In an action against a contractor on his promise to pay for materials furnished to a subcontractor, a bill for such material made out to the subcontractor is admissible to show that it had been O. K.'d by the subcontractor as required by the agreement. *Barras v. Pomeroy Coal Co.*, 38 Neb. 311 (56 N. W. 890).

330. (1896.) A memorandum made contemporaneously with the facts of which it purports to be a record, when properly identified, is admissible as independent evidence. *Imhoff v. Richards*, 48 Neb. 590 (67 N. W. 483).

331. (1898.) Hotel registers, without proof that the names thereon are true entries of the guests, that they were paying guests, or the duration of their visits, are inadmissible to prove the extent of business of such hotel. *Wittenberg v. Mollyneaux*, 55 Neb. 429 (75 N. W. 835).

332. (1903.) Where a memorandum is kept in connection with a cash register, upon which, in the usual course of business, are entered all of the sales in a mercantile establishment, both cash and credit, at the time when such sales are made, it may be used by a witness to refresh his memory as to the amount of goods sold; and when he can testify, as a matter of fact, that such memorandum is correct, it may afterwards be put in evidence, not to prove anything of itself, but as a detailed statement of the items testified to by the witness. *Gross v. Scheel*, 67 Neb. 223 (93 N. W. 418).

Letters.

333. (1889.) Where papers or letters which are pertinent to the issue are offered in evidence on the trial of a case, they should be admitted, nor will the court form a collateral issue to determine how they were obtained. *Sanford v. Sornberger*, 26 Neb. 295 (41 N. W. 1102).

334. (1899.) To render admissible a self-explanatory letter, that to which it is an answer need not be offered in evidence. *New Hampshire Trust Co. v. Korsmeyer Plumbing & Heating Co.*, 57 Neb. 784 (78 N W. 303).

Photographs.

335. (1893.) Where on a trial an inspection of the premises in question is proper, but impracticable or impossible, a photographic view thereof is admissible. *Omaha S. R. Co. v. Beeson*, 36 Neb. 361 (54 N. W. 557).

336. (1902.) Under the proper precautions and with necessary explanations, what are known as "X-ray pictures" are admissible in evidence for the purpose of showing the condition of the internal tissues of the body. *City of Geneva v. Burnett*, 65 Neb. 464 (91 N. W. 275; 101 Am. St. Rep. 628; 58 L. R. A. 287).

337. (1902.) The discretion of the trial judge, in the reception of an X-ray photograph in evidence, is not absolute. Its exclusion on the ground that sufficient foundation has not been laid, where there can be no question as to the accuracy of the photograph, is error. *Carlson v. Benton*, 66 Neb. 486 (92 N. W. 600).

338. (1902.) To constitute a foundation for the introduction of an X-ray photograph in evidence, it is not essential that it appear that it was taken by a competent person, nor that the condition of the apparatus with which it was taken, and the circumstances under which it was taken, were such as to insure an accurate picture, where it has been shown by the evidence of competent witnesses that it truly represents the object it is claimed to represent. *Carlson v. Benton*, 66 Neb. 486 (92 N. W. 600).

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Mortality tables and tables of expectancy of life.

In action for loss of support against saloon-keeper, see *Intoxicating Liquors*, §§ 416-417.

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See, also, *Damages*, §§ 135-138a.

339. The Carlisle tables of mortality are admissible to show expectancy of life. (1879) *Roose v. Perkins*, 9 Neb 304; (1882) *King v. Bell*, 13 Neb. 409 (14 N. W. 41); (1890) *City of Lincoln v. Smith*, 28 Neb. 762 (45 N. W. 41); (1894) *City of Friend v. Ingersoll*, 39 Neb. 717 (58 N. W. 281); (1898) *City of Friend v. Burleigh*, 53 Neb. 674 (74 N. W. 62).

340. (1890.) A table showing the expectancy of life in healthy persons of different ages, printed in a law book of general acceptance and authority in the courts of this state, as the Carlisle tables of expectancy, is admissible in evidence in cases where such evidence is applicable. *Sellars v. Foster*, 27 Neb. 118 (42 N. W. 907); (1902) *Chicago, R. I. & P. R. Co. v. Hambel*, 2 Unof. 607 (89 N. W. 643).

341. (1890.) The Carlisle tables of expectancy of life were properly admitted in evidence, in an action to recover for injuries sustained by falling on a defective sidewalk, it appearing that the injuries are permanent. *City of Lincoln v. Smith*, 28 Neb. 762 (45 N. W. 41).

342. (1894.) Carlisle tables are competent though not conclusive evidence as to the expectancy of life. They are to be received and treated as any other evidence. *City of Friend v. Ingersoll*, 39 Neb. 717 (58 N. W. 281).

343. (1898.) Carlisle tables *held* admissible in evidence in an action for death by wrongful act. *City of Friend v. Burleigh*, 53 Neb. 674 (74 N. W. 50).

344. (1898.) Where a personal injury is permanent in its character, though plaintiff be a minor, evidence as to his expectancy of life, from experience tables, must be based on his actual age and not on the age of majority. *Swift v. Holoubek*, 55 Neb. 228 (75 N. W. 584).

345. (1904.) The Carlisle table of mortality or life expectancy is properly admissible in evidence for the consideration of the jury in determining the probable duration of the life of the deceased, the proper foundation as to age and general health being first proved. *Horst v. Lewis*, 71 Neb. 370 (103 N. W. 460).

346. (1907.) In an action for personal injuries, the Carlisle table of expectancy may be given in evidence after the introduction of credible evidence tending to show the permanent character of the injury. *Howard v. McCabe*, 79 Neb. 42 (112 N. W. 305)

Statutes and law books.

347. (1901.) The written laws of a sister state cannot be proved by Hubbell's Legal Directory. *Johnson v. Hesser*, 61 Neb. 631 (85 N. W. 894).

Scientific and technical works.

348. (1884.) Books of science or art are competent evidence when shown to be reputable or standard works. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578 (20 N. W. 860; 49 Am. Rep. 724)

349. (1897.) In a suit for damages against a surgeon for alleged negligence in operating upon and treating plaintiff's fractured kneecap, text-books on surgery, though standard authority, cannot be read to the jury as independent evidence. *Van Skike v. Potter*, 53 Neb. 28 (73 N. W. 295).

Market reports.

350. (1905.) Market reports in journals, such as the commercial world relies upon, are competent evidence of the state of the market. *Chicago, B. & Q. R. Co. v. Todd*, 74 Neb. 712 (105 N. W. 83).

D. Production, Authentication and Effect.

Inspection by adverse party.

351 (1903.) Under section 394, code of civil procedure, the granting of orders for inspection of books or papers is left to the discretion of the trial court, and it is also left to the discretion of the court whether or not to exclude such books or papers at the trial if inspection is not permitted. *Chamberlain v. Chamberlain Banking House*, 4 Unof. 278 (93 N. W. 1021).

Preliminary evidence for authentication.

352. (1902.) Where there is evidence tending to show the authenticity of a document sufficient, if believed, to establish it, the jury should pass upon it and its admission is no error. *Skow v. Locke*, 3 Unof. 176 (91 N. W. 204).

——— Official records.

353. (1891.) The journal of a school district clerk, though not received from a predecessor, is sufficiently authenticated if identified by a former clerk, and may be accepted as evidence of regular notice of a

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district meeting. *Maher v. State, ex rel. Allen & Jenkins*, 32 Neb. 354 (49 N. W. 436).

354. (1895.) A record of the adoption of a resolution by a city council is sufficiently authenticated as having been adopted at a regular meeting, so as to be admissible in evidence, where it recites "The council met in regular session." *City of Wahoo v. Tharp*, 45 Neb. 563 (63 N. W. 840).

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——— **Corporate records.**

355. (1896.) A page of a book was identified as a part of the records of the minutes of the meetings of the "Grandview Company." *Held*, Not an identification or foundation for its introduction as showing proceedings had by the board of trustees of the "City of Grandview." *Green v. Barker*, 47 Neb. 934 (66 N. W. 1032).

——— **Execution of instruments in general.**

356. (1892.) The absence of the attesting witnesses to an instrument may be established like any other fact. It is sufficient to prove facts from which a presumption will arise that they are absent from the county. *Buchanan v. Wise*, 34 Neb. 695 (52 N. W. 163).

357. (1892.) When attesting witnesses are absent from the county in which the action is pending, the execution of the instruments in question may be proved by any other competent evidence. *Buchanan v. Wise*, 34 Neb. 695 (52 N. W. 163).

358. (1894.) In case a subscribing witness is absent from the county in which the suit is pending, or if he denies or does not recall the execution of the instrument to which his name is subscribed as such witness, its execution may be established by other competent evidence. *Jewell v. Chamberlain*, 41 Neb. 254 (59 N. W. 784).

359. (1897.) When there is no other disputed question the signatures of defendants are sufficiently proved to allow of the receipt in evidence of a note alleged to have been signed by them, when a witness, duly qualified to testify on that question, gives it as his opinion that the alleged signatures are genuine. *Mosher v. Farmers & Merchants Nat. Bank*, 51 Neb. 55 (70 N. W. 540).

360. (1898.) In order to render written instruments admissible in evidence, their execution or genuineness, unless admitted, must be established by proof, except in cases within statutory exceptions. *Sloan v. Fist*, 53 Neb. 691 (74 N. W. 45).

360*a*. (1907.) Where an instrument is attested, the subscribing witness should be produced at the trial to prove the execution, unless his absence or disability is accounted for, or the execution of the instrument admitted by the adverse party. *Nason v. Nason*, 79 Neb. 582 (113 N. W. 139).

361. (1901.) An acknowledged instrument, of a kind permitted to be acknowledged and recorded, is admissible in proof without evidence of the authenticity of the signatures. *Brown v. Collins*, 2 Unof. 149 (96 N. W. 173).

——— **Deeds, mortgages and leases.**

362. (1887.) Where a lease purporting to have been executed by and between strangers and a party to the suit is offered in evidence, and its execution is not admitted by the opposite party, such execution must be proved. Where such lease purports to be signed by a subscribing witness, proof of such signature being the genuine handwriting of the witness is sufficient. *Oberfelder v. Kavanaugh*, 21 Neb. 483 (32 N. W. 295).

363. (1892.) Testimony of an old resident of the county that he had never heard of the witnesses to a certain deed in controversy, coupled with the fact that their attestation was made in another state, is sufficient to raise a presumption that such witnesses are absent from the county and to authorize proof of the execution of the deed by other evidence. *Buchanan v. Wise*, 34 Neb. 695 (52 N. W. 163).

364. (1896.) A deed to Nebraska land executed in Iowa, and there acknowledged before a notary public who attached his official seal, is presumed to have been executed and acknowledged in conformity with the laws of Iowa, and may be recorded or read in evidence in Nebraska without further proof of execution, though it was not witnessed. *Dorsey v. Conrad*, 49 Neb. 443 (68 N. W. 645).

365. (1903.) A mortgage bearing a certificate of the proper officer showing that it was duly acknowledged before him by the mortgagor may be read in evidence without further proof. *McKenzie v. Beaumont*, 70 Neb. 179 (97 N. W. 225).

——— **Wills and testaments.**

366. (1882.) A will is not admissible as evidence of title to real estate, unless it

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has been admitted to probate. *Pettit v. Black*, 13 Neb. 142 (12 N. W. 841).

——— Telegrams and letters.

367. (1895.) A letter identified as being in the handwriting of a party to the action may be admitted in evidence though the signature thereto is denied by the person charged with writing it. *Burgess v. Burgess*, 44 Neb. 16 (62 N. W. 242).

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368. (1898.) The genuineness of a letter ter is sufficiently established to permit its introduction in evidence when it is shown that it was received in due and regular course of mail in response to a letter addressed to the supposed writer. *People's Nat. Bank v. Geisthardt*, 55 Neb. 232 (75 N. W. 582).

369. (1899.) It is error to admit a letter in evidence until the proper foundation therefor has been laid. *Norberg v Plummer*, 58 Neb. 410 (78 N. W. 708).

370. (1902.) The contents of letters and telegrams, which pass between parties in the course of a business transaction, not otherwise identified than by a witness who has a direct legal interest in the result of the suit, are not competent evidence as against the personal representative of a deceased person. *Harte v. Reichenberg*, 3 Unof. 820 (92 N. W. 987).

371. (1903.) Where it is sought to establish a contract by letters, there must be evidence tending to prove that they are in the handwriting of the defendant, or that they came from him or his authorized agent, or were received in due course of mail, in answer to letters duly mailed to the address of the party sought to be bound. *Peycke v. Shinn*, 68 Neb. 343 (94 N. W. 135).

372. (1903.) A copy of a telegram received at the office of its destination is not admissible in evidence without proof of its authenticity. *Yeiser v. Cathers*, 5 Unof. 204 (97 N. W. 840).

373. (1906.) It is a sufficient foundation for the introduction of letters showing authority of an agent in evidence to show that they were received in due course of mail in answer to letters written by the agent to the principal and duly mailed to the address of the party sought to be bound *Peycke v. Shinn*, 76 Neb. 364 (107 N. W. 386).

——— Books of account.

374. (1881.) Where a wife testifies to the identity of her husband's book account, that the charges therein were in his hand writing, and made by him at or near the date of the services charged, it is error to exclude the book from the evidence. *Martin v. Scott*, 12 Neb. 42 (10 N. W. 532).

375. (1888.) Where entries in books of account are made by and in handwriting of a clerk, such clerk, if living and within reach of a subpœna, must be produced and entries verified by him, or such entries will not be admissible in evidence. *Holland v. Commercial Bank*, 22 Neb. 571 (36 N. W 113).

376. (1889.) Under section 346 of the code, books of account which in other respects are unobjectionable, may be introduced in evidence without calling the party or clerk who made the entries to prove the same, where a sufficient reason is given for not calling such witness. *Volker v. First Nat. Bank*, 26 Neb. 602 (42 N. W. 732).

377. (1889.) When books are identified as the books of original entries of the party, and the items and entries therein of the adverse party's account are given in evidence without objection, it is too late to object that the person who made the entries was not called to prove the same. *Volker v. First Nat. Bank*, 26 Neb. 602 (42 N. W. 732).

378. (1898.) Under section 346, code of civil procedure, books of account are not admissible, unless it affirmatively appears that the essential requirements of said section are complied with. *Atkins v. Seeley*, 54 Neb. 688 (74 N. W. 1100).

379. (1899.) It is error to admit in evidence a book account until the proper foundation therefor has been laid. *Norberg v. Plummer*, 58 Neb. 410 (78 N. W. 708).

380. (1902.) One party may introduce the books of his adversary without the preliminary proof necessary in other cases *Globe Savings Bank v. Bank of Commerce*, 64 Neb. 413 (89 N. W. 1030).

381. (1905.) An admission by a deceased person that an account kept in a certain book is correct is not sufficient to warrant the admission in evidence of a copy of his account in another book. *Fitch v. Martin*, 74 Neb. 538 (104 N W. 1072).

——— Memoranda and statements.

382. (1891.) A memorandum made at or near the time the transaction took place is admissible without the corroborating testimony of the person who made the

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same, if beyond the reach of the process of the court, his whereabouts being unknown, upon proof of his handwriting. *Labaree v. Kostermann*, 33 Neb. 150 (49 N. W. 1102).

383. (1903.) Where a party, while on the witness-stand, properly identifies a series of scale or weight checks as having been executed and delivered by himself, or some one authorized by him to do so, they may be introduced in evidence by the opposite party to rebut his testimony without further identification. *Matoushek v. Dutcher*, 67 Neb. 627 (93 N. W. 1049).

——— Law books and statutes.

384. (1902.) A book purporting to contain the written laws of a foreign jurisdiction, proves itself and is admissible as evidence without other authentication. *Hewitt v. Bank of Indian Territory*, 64 Neb. 468 (92 N. W. 741).

385. (1902.) The authenticity of a volume which it is claimed contains the statutes of a foreign state or territory, cannot be established by the mere declaration of counsel as to what the volume is. *Hewitt v. Bank of Indian Territory*, 64 Neb. 468 (92 N. W. 741). [Overruling same case. 64 Neb. 463.]

386. (1905.) The public seal of another state affixed to a copy of a written law of that state is admissible as evidence of such law. *Rieck v. Griffen*, 74 Neb. 102 (103 N. W. 1061).

Necessity of revenue stamp.

387. (1901.) The admission of an unstamped instrument in a trial without the intervention of a jury, there being sufficient evidence to sustain the judgment aside from such instrument, is not prejudicial in any event and calls for no ruling as to the effect of the United States revenue law of 1898. *Armstrong v. Mayer*, 1 Unof. 119 (95 N. W. 483).

388. (1902.) The federal congress is not authorized to prescribe rules governing the admissibility of evidence in the courts of this state, and hence absence of a revenue stamp from a deposition will not render it inadmissible. *Sulpho-Saline Bath Co. v. Allen*, 66 Neb. 295 (92 N. W. 354).

Conclusiveness and effect.

389. (1903.) If a message to be sent by telegraph is not reduced to writing by the sender, he makes the company his agent for that purpose, but he is not thereby estopped to deny that a paper offered in evidence was in fact reduced to writing by the telegraph company, or delivered as his message. *Peycke v. Shinn*, 68 Neb. 343 (94 N. W. 135).

390. (1904.) While the Carlisle and other mortuary tables of accepted accuracy and in general use are always properly admissible in evidence for the purpose of aiding a court or jury in determining the probable expectancy of life, when such fact is in issue, yet, when admitted, these mortuary tables are not binding upon the estimate of the triers of such fact. They may, without such tables, make their own estimate from the age, health, habits, physical condition and appearance of the person whose expectancy is at issue. *City of South Omaha v. Sutliffe*, 72 Neb. 746 (101 N. W. 997).

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

Parol evidence of acknowledgment, see *Acknowledgments*, § 42.

To prove assignment, see *Assignment*, § 41.

Parol evidence on motion to discharge attachment, see *Attachment*, §§ 316-319.

Parol evidence to locate boundaries, see *Boundaries*, §§ 34-36.

Parol evidence in action for breach of covenant, see *Covenants*, §§ 70, 71.

Parol evidence to prove existence of lost instrument, see *Lost Instruments*, §§ 10, 11.

Parol evidence to show trust, see *Trusts*, §§ 37-40.

A. Contradicting, Varying or Adding to Terms of Written Instruments.

Judicial records.

391. (1882.) Judge's minutes are *prima facie* evidence of proceedings, but may be shown to differ from judgment actually rendered, and court cannot be compelled to correct its journal from such minutes. *Sullivan Savings Institution v. Clark*, 12 Neb. 578 (12 N. W. 103).

392. (1895.) Where an officer fails to attach his jurat to an affidavit for service by publication, parol evidence, in a proper case, may be admitted to prove that affiant did in fact swear to the affidavit. *Bantley v. Finney*, 43 Neb. 794 (62 N. W. 213).

Election returns.

393. (1891.) Parol evidence is admissible to show that the count of a vote at a

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school meeting, as reported by a teller, is incorrect, the district records to the contrary notwithstanding. *State, ex rel. Bates, v. Hutchins*, 33 Neb. 335 (50 N. W. 165).

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Contracts in general.

394. (1876.) Parol proof cannot be received in evidence to contradict, vary, or modify the legal import of written agreements. Where there is no latent ambiguity to be explained the agreement alone must speak for itself. *Mills v. Miller*, 4 Neb. 441.

395. (1889.) Where a written agreement was signed and placed in the possession of a custodian to be held until certain conditions were to be complied with, the failure of the conditions can be proved by parol testimony, and such evidence would not be open to the objection that it contradicted or varied the terms of the written agreement. *Gregory v. Littlejohn*, 25 Neb. 368 (41 N. W. 253).

396. (1889.) Where a contract has been reduced to writing without any uncertainty as to its terms and meaning, the presumption of law is that the entire contract is contained in the writing, and parol testimony of declarations made by the parties at the time it was made is not admissible in evidence. *Dodge v. Kiene*, 28 Neb. 216 (44 N. W. 191).

397. (1896.) It is not competent to change or vary the terms of a written contract by parol evidence. *Stoner v. Keith County*, 48 Neb. 279 (67 N. W. 311).

398. (1898.) Where negotiating parties reduce their agreement to writing, and sign and deliver the same, the writing, in absence of fraud, mistake, or ambiguity, constitutes the best and only competent evidence of the contract originally made. *Sylvester v. Carpenter Paper Co.*, 55 Neb. 621 (75 N. W. 1092).

399. (1898.) A written contract, the meaning of which is certain and patent from its terms, may not be varied by direct explanation or interpretation in oral testimony. *Latenser v. Misner*, 56 Neb. 340 (76 N. W. 897); (1898) *Thomas v. Nebraska Moline Plow Co.*, 56 Neb. 383 (76 N. W. 876); (1904) *Agnew v. Montgomery*, 72 Neb. 9 (99 N. W. 820).

400. (1901.) Parol evidence is inadmissible to contradict or alter a written contract or to inject into it provisions it does not contain, and which cannot be implied from its terms. *Norfolk Beet Sugar Co. v. Berger*, 1 Unof. 151 (95 N. W. 336).

Evidence of prior or contemporaneous oral agreement in general.

401. (1878.) When the parties have reduced their contract to writing, the law presumes that all previous and contemporaneous negotiations and conversations leading to the contract are merged in it, and cannot be varied by parol testimony. *Hamilton v. Thrall*, 7 Neb. 210.

402. (1882.) A written contract of warranty of a machine cannot be varied by proof of oral agreements made before the writing was executed. *Sycamore Marsh Harvester Co. v. Sturm*, 13 Neb. 210 (13 N. W. 202).

403. (1887.) When a contract has been reduced to writing, verbal evidence of what passed between the parties either before the written instrument was made or during the time of its preparation, so as to add to or subtract from or in any manner to vary or qualify the written contract, is not admissible. *Delaney v. Linder*, 22 Neb. 274 (34 N. W. 630).

404. (1888.) Taxes become a lien upon real estate on and after the first day of April in each year, and a party who executes a conveyance with a covenant against incumbrances, in effect assumes the payment of taxes on the land sold for that year, and parol evidence of a contract made with the vendee before the making of the deed to pay such taxes, is not admissible to vary the terms of the covenant. *McClure v. Campbell*, 25 Neb. 57 (40 N. W. 595).

405. (1891.) A written contract cannot be waived, qualified, or contradicted by parol evidence of a prior or contemporaneous agreement between the parties. *Koserman v. Fries*, 33 Neb. 427 (50 N. W. 269); (1899) *Te Poel v. Shutt*, 57 Neb. 592 (78 N. W. 288); (1901) *Faulkner v. Gilbert*, 61 Neb. 602 (85 N. W. 843); (1901) *Norfolk Beet Sugar Co. v. Berger*, 1 Unof. 151 (95 N. W. 336); (1903) *Peterson v. Ferbrache*, 4 Unof. 249 (93 N. W. 1011).

406. (1894.) In the absence of fraud or mistake all previous verbal understandings are merged in the written contract of insurance, which is conclusively presumed to contain the entire engagements of the parties with all the conditions of their fulfillment. *McLaughlin v. Equitable Life Assurance Society*, 38 Neb. 725 (57 N. W. 557).

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407. (1894.) Parol evidence is incompetent to prove a contemporaneous oral agreement by which it is sought to change or alter the terms of a written contract and the result of which would be to change the effect of the written contract in a material portion and to insert or read into it a condition or reservation not contained in it, or implied by its terms. *Mattison v. Chicago, R. I. & P. R. Co.*, 42 Neb. 545 (60 N. W. 925).

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408. (1896.) Parol evidence of prior or contemporaneous conditions modifying a written proposition afterwards submitted and acted upon cannot be received in evidence to vary the terms of the writing. *Commercial State Bank of Neligh v. Antelope County*, 48 Neb. 496 (67 N. W. 465).

409. (1906.) If a written memorandum confirmatory of a previous oral agreement does not purport to recite the whole of the latter, oral testimony is admissible to supply omitted covenants not inconsistent with the writing. *De Laval Separator Co. v. Jelinek*, 77 Neb. 192 (109 N. W. 169).

410. (1907.) Evidence of a verbal agreement by a landlord with his tenant to construct a drain for the protection of a part of the land leased made without consideration, and evidence of damage by reason of the failure to construct such drain, is incompetent in an action for an accounting, the agreement being omitted from a written lease between the parties. *Gandy v. Wiltse*, 79 Neb. 280 (112 N. W. 569).

Conveyances.

411. (1890.) Where land is deeded to a railway company for purposes of a right of way, upon the representations of its agent that main line only should be built thereon, and sidetracks are laid, the purpose for which the deed was executed may be shown in an action to enjoin the maintenance of such side-tracks. *Donisthorpe v. Fremont, E. & M. V. R. Co.*, 30 Neb. 142 (46 N. W. 240; 27 Am. St. Rep. 387).

412. (1893.) Assignments of land contracts may be shown by parol to be securities in the nature of mortgages, even though formally and absolutely assigned in writing, upon payment of debt, or lien of assignee ceases. *Scharman v. Scharman*, 38 Neb. 39 (56 N. W. 704).

413. (1894.) A deed of real estate, absolute in form, may be shown by parol to have been intended by the parties to it as a security for a debt or loan, and as between such parties, at least, the instrument will be construed to be a mortgage merely. *Morrow v. Jones*, 41 Neb. 867 (60 N. W. 369).

414. (1896.) In an action by creditors, to set aside as fraudulent a chattel mortgage executed, by their debtor, to defendant, parol evidence is admissible to show that the transaction is different from that evidenced by a written memorandum. *Bacon v. Brockman Commission Co.*, 48 Neb. 365 (67 N. W. 304).

415. (1902) In an action by a grantee of a deed against his grantor to recover for a breach of covenant against incumbrances, parol evidence is inadmissible to show that taxes were, by contemporaneous oral agreement, excepted from the terms of the deed. *Stanisics v. McMurtry*, 64 Neb. 761 (90 N. W. 884).

416. (1904.) Where a party acquires the legal title by purchase of land at a sheriff's sale, in pursuance of a parol agreement with a judgment debtor that he is to hold the title thus obtained as a security for the loan of the money paid to relieve the land from the judgment lien, and that he will reconvey when the money is refunded, the case is not distinguishable from any other, where the deed, though absolute in terms, was designated simply as security for a loan; and parol evidence is admissible to show the transaction to be of that character. *Dickson v. Stewart*, 71 Neb. 424 (98 N. W. 1085; 115 Am. St. Rep. 596).

Bills and notes.

417. (1889.) Where a note has no date of payment, the legal intendment, that it is payable upon demand, cannot be changed by parol proof any more than could the express terms of a written instrument be changed. *Roberts v. Snow*, 27 Neb. 425 (43 N. W. 241).

418. (1894.) Evidence of a parol agreement entered into by the makers and payee of a promissory note contemporaneously with or previous to its execution, whereby it was attempted to be shown that such note was not to become due according to its plain terms, but that its collectibility depended upon the happening of an event in the future, was incompetent, and the jury was properly instructed to give it no consideration. *Van Etten v. Howell*, 40 Neb. 850 (59 N. W. 389).

419. (1895.) Parol evidence is not admissible to establish a contemporaneous

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oral agreement not to negotiate a negotiable instrument. *Waddle v. Owen*, 43 Neb. 489 (61 N. W. 731).

420. (1896.) Evidence contradictory of the terms of a promissory note cannot furnish a defense to such note when it is admitted by defendants that such note was duly executed by them. *Miller v. Gunderson*, 48 Neb. 715 (67 N. W. 769).

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421. (1898.) A promissory note or contract cannot be varied, qualified, or contradicted by evidence of a prior or contemporaneous agreement resting in parol. *Western Mfg. Co. v. Rogers*, 54 Neb. 456 (74 N. W. 849); (1901) *Garneau v. Cohn*, 61 Neb. 500 (85 N. W. 531); (1903) *Aultman, Miller & Co. v. Hawk*, 4 Unof. 582 (95 N. W. 695).

422. (1903.) Where the rights of innocent third parties are not involved it is permissible to show by parol evidence that the contract between the indorser and indorsee of a promissory note was different from that which results by legal implication from a blank indorsement. *Jaster v. Currie*, 69 Neb. 4 (94 N. W. 995).

Contracts of sale.

423. (1891.) Where parties enter into a written contract for the purchase of land, the price to be paid as soon as deed is executed and abstract furnished, parol evidence is inadmissible that the grantee paid grantor $30, which the former was to repay if he failed to comply with the contract, or if the latter failed he was to forfeit that amount, while it was to be deducted from the purchase price in case he took the property. *Kasermann v. Fries*, 33 Neb. 427 (50 N. W 269).

424. (1902.) Where a contract of sale has been consummated by writing, the presumption is that the writing contains the whole contract, and in absence of fraud, istake, or ambiguity of expression in the ntract itself, parol evidence is inadmissible to change or vary its terms *Nebraska Land & Feeding Co. v. Trauerman*, 70 Neb. 795 (98 N. W. 37).

425. (1903.) Where a contract to sell machinery and put it in place is in writing and free from ambiguity, evidence as to a prior or contemporaneous parol warranty is inadmissible. *Kummer v. Dubuque Turbine and Roller Mills Co.*, 4 Unof. 347 (93 N. W. 938).

426. (1905.) Where a contract of sale has been consummated by writing, the presumption is that the writing contains the whole contract, and, in the absence of fraud, mistake or ambiguity of expression in the contract itself, parol evidence is inadmissible to change or vary its terms. *Apking v. Hoefer*, 74 Neb. 325 (104 N W. 177).

Receipts.

427. (1893.) A written receipt may be explained or contradicted by parol testimony; but when it embodies a contract it cannot be contradicted, but is conclusive upon the parties in the absence of fraud or mistake. *Morse v. Rice*, 36 Neb. 212 (54 N. W. 308).

428. (1902.) Where neither fraud nor mistake is alleged, parol evidence to contradict or vary a written receipt must be clear and unequivocal. *Rouss v. Goldgraber*, 3 Unof. 424 (91 N. W. 712).

Indorsement.

429. (1893.) A blank indorsement of a negotiable instrument before due, where the transfer is to a *bona fide* holder in the due course of business, establishes a liability which cannot be varied by parol evidence. But between the original parties a blank indorsement may be modified by parol. The entire transaction may be shown by reason of which the indorsement was made, and parol evidence is admissible for the purpose of proving the same. *Holmes v. First Nat. Bank of Lincoln*, 38 Neb. 326 (56 N. W. 1011; 41 Am. St. Rep. 733).

430. (1896.) As between the original parties to the indorsement, the words "without recourse," following the name of the first, and preceding the name of the second, indorser of a bill or note, may be shown by parol evidence to apply to the former instead of the latter. *Corbett v. Fetzer*, 47 Neb. 269 (66 N. W. 417).

431. (1896.) As against a subsequent *bona fide* holder, the liability created by the indorsement in blank of a bill or note cannot be varied by parol evidence; but, as between the original parties to such an indorsement, the terms of the contract is a proper subject of inquiry, and may be established by parol evidence. *Corbett v. Fetzer*, 47 Neb. 269 (66 N. W. 417).

432. (1897.) A general indorsement of commercial paper may, except as against a *bona fide* holder, be explained and the precise terms of the agreement shown by parol evidence. *Whitney v. Spearman*, 50 Neb. 617 (70 N. W. 240).

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433. (1897.) As between the immediate parties the form of an indorsement is not conclusive, but the nature of the contract may be proved by parol evidence. *United States Nat. Bank v. Geer*, 53 Neb. 67 (73 N. W. 266; 41 L. R. A. 439). [Rehearing. 55 Neb. 462.]

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434. (1898.) A restrictive indorsement in unambigious language cannot be contradicted or explained by evidence resting in parol. *United States Nat. Bank v. Geer*, 55 Neb. 462 (75 N. W. 1088; 70 Am. St. Rep. 390; 41 L. R. A. 444).

435. (1898.) Where commercial paper is indorsed in blank, the terms of the contract may be shown by parol evidence to be different from those which the law implies in such case. *United States Nat. Bank v. Geer*, 55 Neb. 462 (75 N. W. 1088; 70 Am. St. Rep. 390; 41 L. R. A. 444).

436. (1898.) As between original parties to a note and those not innocent purchasers it may be shown by parol that one signing his name in blank on the back of the note was an accommodation indorser. *Drexel v. Pusey*, 57 Neb. 30 (77 N. W. 351).

437. (1898.) A certificate of deposit indorsed by the payee, "Pay to the order of R. C. O., Cash, for account" of the indorser, is a restrictive indorsement, vests no general property to the paper in the indorsee, but merely constitutes him an agent for the purpose of collecting; and parol evidence is not admissible to establish that the transfer of title was absolute. *United States Nat. Bank v. Geer*, 55 Neb. 462 (75 N. W. 1088; 70 Am. St. Rep. 390; 41 L. R. A. 444)

Guaranty.

438. (1895.) In an action against a guarantor to recover the purchase price of goods, the terms of the written guaranty cannot be varied by parol evidence that the credit had been limited to a certain fixed period. *Maxwell v. Burr*, 44 Neb. 31 (62 N. W. 236).

439. (1895.) In an action on a written guaranty to pay for certain goods sold to a third person, evidence of an oral agreement that the goods should be of a certain kind, is inadmissible as tending to vary the terms of the written contract. *Quinn v. Moss*, 45 Neb. 614 (63 N. W. 931).

Insurance contract.

440. (1895.) Actual representations as to the existence of safeguards against fire which were made to the agent of the insurer may be proved by parol evidence, notwithstanding the fact that such representations, incorrectly reduced to writing by such agent, were attested as true by the signature of the insured, even though by the terms of the policy issued it is provided that such representations shall be deemed a warranty, and as such a part of the policy itself. *German-American Ins. Co. v. Hart*, 43 Neb. 441 (61 N. W. 582).

441. (1897.) Parol testimony is competent to reform an insurance policy so as to make it recite the actual agreement between the parties. *Slobodisky v. Phenix Ins. Co.*, 52 Neb. 395 (72 N. W. 483).

Subscription contracts.

442. (1895.) In an action on a written contract agreeing to donate a certain sum if an opera house of a certain house should be built, parol evidence that the donee agreed orally that the building should be of certain material, tends to contradict, rather than explain, the written contract, and hence is not admissible. *Gerner v. Clark*, 43 Neb. 690 (62 N. W. 51).

443. (1896.) In an action upon a written subscription parol evidence is not admissible to add conditions to those expressed in the contract. *Nebraska Exposition Ass'n v. Townley*, 46 Neb. 893 (65 N. W. 1062).

444. (1902.) Where neither fraud nor misrepresentation is practised in securing a subscription contract, its terms cannot be changed or modified by parol evidence. *Mefford v. Sell*, 3 Unof. 566 (92 N. W. 148)

Nature of consideration.

445. (1892.) In an action on a promissory note, parol evidence is admissible that the amount of the note is part of a debt assumed by the holder as part consideration for the sale of a farm to him by the makers. *Fall v. Glover*, 34 Neb. 522 (52 N. W. 168).

446. (1901.) While parol testimony may not be received to vary or contradict the terms of a promissory note, yet the considerations for which it was given may be established by parol testimony. *Gifford v. Fox*, 2 Unof. 30 (95 N. W. 1066).

447. (1902.) Where a deed is assailed by third parties as fraudulent, and proof by them is introduced to impeach the recited consideration, the grantee may show by parol evidence the actual consideration, though different from the one recited in the

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deed. *Columbia Nat. Bank v. Baldwin*, 64 Neb. 732 (90 N. W. 890).

448. (1902.) A bill of sale of a reversionary interest in funds belonging to an estate, which recites a consideration of one dollar, does not prevent evidence by parol that the real consideration was that the assignee should hold the funds on the same terms, and for the same purposes as an executor had previously done. *Wolf v. Haslach*, 65 Neb. 303 (91 N. W. 283).

449. (1901.) Parol testimony is admissible in an action upon a promissory note to show that it was given to secure the performance of an agreement whereby the payee conveyed to the maker certain lands in consideration that the maker should support the payee during his lifetime, and that the maker had performed the conditions of the agreement. *Gifford v. Fox*, 2 Unof. 30 (95 N. W. 1066).

450. (1902.) Where a promissory note in the usual form calls for the payment of money, evidence that it was to be paid in work and labor cannot be received against the objection of the holder. *Vradenburg v. Johnson*, 3 Unof. 326 (91 N. W. 496).

451. (1904.) The defendant in an action for damages for breach of a covenant may prove the real consideration by parol regardless of the recital in the deed. *Holmes v. Seaman*, 72 Neb. 300 (100 N. W. 417).

Effect of writing as to third persons.

452. (1888.) Only as between the parties to the instrument, must an agreement stand as written; as to all others extrinsic evidence is admissible to show the real agreement. *Rosewater v. Hoffman*, 24 Neb. 222 (28 N. W. 857).

453. (1894.) Persons claiming mechanics' liens as against a vendor's lien are not restricted by the terms of the written contract of sale, but may, by parol evidence, establish the true terms of the contract so as to show a requirement that a building be constructed on the land. *Sheehy v. Fulton*, 38 Neb. 691 (57 N. W. 395; 41 Am. St. Rep. 767).

454. (1894.) In establishing the contract between the broker and his principal the parties are not bound by the terms of the written contract between the principal and purchaser, although it may evidence a portion of the broker's contract. In such a case parol evidence may be introduced, even if it operate to contradict or vary the terms of the written contract between the principals. *Barber v. Hildebrand*, 42 Neb. 400 (60 N. W. 594).

455. (1902.) Doctrine as to inadmissibility of oral evidence to vary a contract has no application as between a party to it and a stranger where there appears no estoppel against showing the truth. *Crockett v. Miller*, 2 Unof. 292 (96 N. W. 491).

456. (1903.) The rule that parol testimony canot be admitted to vary or contradict the terms of a written contract applies only to the parties and their privies. Accordingly, in an action by a principal against an agent for the recovery of the true consideration received by the agent for the sale of stock owned by the principal, under a contract in the agent's name, the principal is not estopped by the stated consideration in the contract between the agent and a third party. *Barber v. Martin*, 67 Neb. 445 (93 N. W. 722).

457. (1903.) Where the controversy is between a party to a written contract and one who is neither a party nor a privy to it, the rule excluding parol evidence tending to vary, modify or contradict the writing does not apply. *First Nat. Bank of Wayne v. Tolerton & Stetson Co.*, 5 Unof. 43 (97 N. W. 248).

B. Invalidating Written Instrument.

Want of consideration.

458. (1894.) Want of consideration for a bond to indemnify a sheriff on execution, signed by a party's attorney, or its invalidity, may be shown by parol. *Luce v. Foster*, 42 Neb. 818 (60 N. W. 1027).

Usury.

459. (1891.) Parol evidence is admissible to show usurious consideration of a note. *Koehler v. Dodge*, 31 Neb. 328 (47 N. W. 913; 28 Am. St. Rep. 518).

460 (1907.) The defense of fraud and want of consideration may be shown by parol, not to contradict or vary, but to destroy the legal and binding effect of a written contract. *Minneapolis Threshing Machine Co. v. Otis*, 78 Neb. 233 (110 N. W. 550).

Fraud.

461. (1894.) It is competent for a party, when sued upon a written contract, to show by parol that he was induced to execute the contract by the fraud or material false representation of the party seeking to enforce it. *Gerner v. Church*, 43 Neb. 690 (62 N. W. 51).

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462. (1894.) It is competent for a party, when sued upon a written contract, to show by parol that he was induced to execute the contract by the fraud or material false representation of the party seeking to enforce it. *Gerner v. Church*, 43 Neb. 690 (62 N. W. 51).

C. Separate or Subsequent Oral Agreement.

Prior or contemporaneous collateral agreement.

463. (1890.) The existence of a written contract or instrument, duly executed between the parties to an action and delivered, does not prevent the party apparently bound thereby from pleading and proving that conteporaneously with the execution and delivery of such contract or instrument the parties had entered into a distinct oral agreement which constitutes a condition on which the performancee of the written contract or agreement is to depend. *Norman v. Waite*, 30 Neb. 302 (46 N. W. 639).

464. (1893.) An employee brought suit against the purchaser of his employer's business to recover wages due from his employer at the time of the sale, alleging that in part consideration for the purchase price the defendant agreed to pay employer's debt to the plaintiff; that the agreement was omitted from an instrument in the form of a receipt set out in the petition, and containing other terms of the transfer; and that the omission was to prevent a third person from learning of the promise. *Held*, That such a promise may be proved by parol where the promisee was induced to execute the writing on the faith of the oral promise. *Barnett v. Pratt*, 37 Neb. 343 (55 N. W. 1050).

465. (1902.) Parol evidence tending to establish a separate oral agreement between the parties to a written contract, as to matters upon which such contract is silent, and not against its terms is admissible. *Huffman v. Ellis*, 64 Neb. 623 (90 N. W. 552).

466. (1902.) A written building contract provided that the work was to be done according to certain plans and specifications to the satisfaction of one of the parties "in design, workmanship, and finish." The plans and specifications contained no details as to certain materials required, and nothing was specified as to where they were to be obtained. *Held*, That parol evidence was admissible to show that at the time the contract was made such party insisted that said materials must be obtained in the east, because he considered the eastern designs, workmanship and finish superior, and to show that a subsequent purchase of such materials in the east was in pursuance of the understanding when the contract was made and to comply with the requirements he was empowered to make by its express terms. *Creedon v. Patrick*, 3 Unof. 459 (91 N. W. 872).

467. (1904.) If a written agreement is incomplete upon its face, parol evidence not in conflict therewith is admissible to supply its deficiencies. *Bell v. Wiltson*, 5 Unof. 486 (98 N. W. 1049).

468. (1904.) If out of the purchase price of a chose in action the assignor has agreed to discharge an obligation against the same, his agreement so to do may be shown by parol, although a contract of assignment making no mention of such agreement or of the purchase price may be in writing. *Bell v. Wiltson*, 5 Unof. 486 (98 N. W. 1049).

469. (1905.) The admission of oral evidence to explain the possession of and to prove that the delivery of a written contract was conditional, and that such delivery was not to become effective until the happening of some other event, is not a violation of the rule which would prohibit the introduction of oral evidence to contradict or vary the terms of the contract. *Dodd v. Kemnitz*, 74 Neb. 634 (104 N. W. 1069).

Subsequent agreements.

470. (1886.) It is competent to prove by parol a change or modifications in the terms of a written contract made by the parties to such contract at a time subsequent to the execution thereof; and the consideration for the contract may be a sufficient consideration for such change or modification. *Morrissey v. Schindler*, 18 Neb. 672 (26 N. W. 476).

471. (1887.) After a contract has been reduced to writing, it is competent for the parties, at any time before breach of it, by a new contract, not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it; which is to be proved partly by the written agreement and partly by the subsequent verbal terms, engrafted upon what will be thus left of the written agreement. *Delaney v. Linder*, 22 Neb. 274 (34 N. W. 630).

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472. (1891.) S. and B. entered into a written contract for the exchange of certain real estate, and in addition B. agreed to pay S. $25,000 in cash. After the execution of the contract S. stated to B. that he had negotiated a loan of $25,000 from C. upon the property agreed to be exchanged with B. and suggested that B. carry out the arrangement for the purpose of the cash payment, to which B. agreed. Since C. required interest from that date, and the papers for the exchange not being ready, it was mutually agreed that S. make the mortgage and receive the $25,000 from C. and that B. assume the mortgage in lieu of a cash payment. *Held*, That such transaction was no variance of the contract, and proof of it did not tend to establish the contract by parol but only to prove the performance of the agreement to pay $25,000 in cash. *Ballou v. Sherwood*, 32 Neb. 666 (49 N. W. 790, 50 N. W. 1131).

473. (1894.) Parol evidence is competent to show that services rendered after expiration of a term of hiring were not rendered under the terms of the original contract of employment. *Hale v. Sheehan*, 41 Neb. 102 (59 N. W. 554).

474. (1894.) A written contract for the construction of a line of railroad only does not preclude the introduction of parol evidence of a subsequent contract for supply of cattle yards, telegraph line, and other extras necessary to equipment and operation of the road, and not within the terms of the written contract. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374 (59 N. W. 838).

475. (1903.) Parol evidence of a subsequent agreement whereby the seller made further and different warranties, in order to induce the buyer to execute notes for the purchase price, notwithstanding he claimed the original warranty was not complied with, is admissible. *McCormick Harvesting Machine Co. v. Hiatt*, 4 Unof. 587 (95 N. W. 627).

D. Construction or Application of Language of Written Instrument.

Admissibility in general.

476. (1873.) Parol evidence is admissible to supply an ommission in a written contract, which, in case of a disagreement between the parties, would otherwise be ambiguous and wholly inexplicable. *Goodrich v. McClary*, 3 Neb. 123.

477. (1877.) Where there is no ambiguity in the description of property in a deed, parol testimony is not admissible to show what was in fact conveyed. *Frey v. Drake*, 6 Neb. 1 (29 Am. Rep. 353).

478. (1888.) Parol evidence is admissible to explain that the word "Excepted" written on a draft was intended as an acceptance. *Cortelyou v. Maben*, 22 Neb. 697 (36 N. W. 159; 3 Am. St. Rep. 284).

479. (1899.) Where the description of property in a chattel mortgage is clear, and free from all ambiguity, parol proof is inadmissible to show the extent and meaning of the language employed. *Drexel v. Murphy*, 59 Neb. 210 (80 N. W. 813).

480. (1901.) Extrinsic evidence may not be received to contradict the legislative journals, but such evidence is competent to supply missing portions of the journals which had become detached through accident or design. *State, ex rel Douglas County, v. Frank*, 61 Neb. 679 (85 N. W. 956).

481. (1903.) Oral testimony may be introduced for the purpose of explaining an ambiguity in a written instrument. *Fidelity Mutual Fire Ins. Co. v. Murphy*, 4 Unof. 578 (95 N. W. 702).

482. (1907.) In the absence of ambiguity, and of fraud, accident or mistake, parol evidence is not admissible to assist in the interpretation of a written contract. *Wheeler v. Moore*, 78 Neb. 484 (111 N. W. 120).

Identification of subject matter.

483. (1894.) Where the description in a deed contains a call to and along a line, the true location of which is uncertain, parol evidence is admissible to show that at the time of the conveyance a particular line was in the community generally recognized by the name used in the deed. *Hanlon v. Union P. R. Co.*, 40 Neb. 52 (58 N. W. 590).

484. (1894.) Where a written contract of dissolution of partnership requires a partner to pay certain liabilities not itemized, parol evidence may be admitted to show the items intended. *Peaks v. Lord*, 42 Neb. 15 (60 N. W. 349).

485. (1891.) Where property is correctly but indefinitely described in a contract, parol evidence is admissible to identify that intended. *Ballou v. Sherwood*, 32 Neb. 666 (49 N. W. 790, 50 N. W. 1131).

486. (1891.) B. contracted in writing to convey real property by the description of "B.'s lot 14, B. 5, and lot 11, B. 2, Boggs and Hill's addition, Omaha." Upon proof of two additions known as Boggs and Hill's, one of

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which was known as Boggs and Hill's second addition, that B. owned lot 14 in block 5 and lot 11 in block 2 in Boggs and Hill's second addition, but did not own or claim to own any lots in the other addition, *held* that the contract was not void under the statute of frauds; and *held, also*, that parol evidence was properly received to prove the ownership by B. of lots answering the general description contained in the contract. *Ballou v. Sherwood*, 32 Neb. 666 (49 N. W. 790, 50 N. W. 1131).

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487. (1903.) The description in a deed may be aided by extrinsic evidence. *Keplinger v. Woolsey*, 4 Unof. 282 (93 N. W. 1008).

XII. OPINION EVIDENCE.

See, also, specific topics.

Of non-experts as to disputed boundary, see *Boundaries*, §§ 37-39.

Of physician as to effect of continued intoxication, see *Intoxicating Liquors*, § 419.

To prove loss of business from libel, see *Libel and Slander*, § 104.

As to probable cause for prosecution, see *Malicious Prosecution*, § 68.

As to negligence of hirer of livery team, see *Livery Stable Keepers*, § 5.

As to speed of street cars, see *Street Railroads*, §§ 43-45.

As to value of property destroyed by fire from railroad, see *Railroads*, § 398.

See, also, *Witnesses*, §§ 11-52.

A. Conclusions and Opinions of Witnesses in General.

Conclusions and matters of opinion or facts.

488. (1875.) A witness testifying must state facts. His understanding of the purpose and object of a transaction is not evidence. *Lacey v. Central Nat. Bank*, 4 Neb. 179.

489. (1877.) A witness must testify to facts. His understanding or impression of the purpose and object of a transaction is not evidence. *Clarke v. Omaha & S. W. R. Co.*, 5 Neb. 314.

490. (1877.) It is not competent for a witness to give an opinion as to what was appurtenant to property conveyed, and a question which in effect called for such an opinion was rightly excluded. *Frey v. Drahos*, 6 Neb. 1 (29 Am. Rep. 353).

491. (1882.) A question whether a party "had any right of entry to the premises" calls for a conclusion, and is inadmissible. *Searles v. Oden*, 13 Neb. 344 (14 N. W. 420).

492. (1884.) Testimony of defendant as to whether he was indebted to plaintiff on a certain day, being a conclusion, is properly excluded. *Frederick v. Ballard*, 16 Neb. 559 (20 N. W. 870).

493. (1889.) In an action for the purchase price of goods ordered by an alleged partner of defendant the latter cannot testify to the conclusion whether there "was any authority in (the alleged partner) to order the goods." *Maurer v. Miday*, 25 Neb. 575 (41 N. W. 395).

494. (1895.) On the trial of a libel suit the plaintiff called as a witness another clergyman, of whom he inquired what effect it would have upon a clergyman to charge him with repeatedly and persistently uttering statements that are contrary to the truth, and with defaming the good name of members of the church. The witness answered that the charge would be detrimental to the clergyman's reputation and usefulness, and would destroy his reputation for honesty and qualifications for his office. *Held*, That the evidence of the witness was a mere opinion and its admission was error. *Piper v. Woolman*, 43 Neb. 280 (61 N. W. 588).

495. (1898.) A non-expert witness may testify to a conclusion when, from the nature of the subject under investigation, it is not possible to lay before the jury all the facts from which such conclusion is drawn. *Missouri P. R. Co. v. Palmer*, 55 Neb. 559 (76 N. W. 169).

496. (1898.) In an action for damages for assault and battery a question put to plaintiff asking whether or not any person could have been standing in the hallway when the alleged assault took place is not objectionable as calling for a mere conclusion of the witness. *Barr v. Post*, 56 Neb. 698 (77 N. W. 123).

497. (1900.) Witnesses should state facts, and not mere conclusions. *Orcutt v. Polsley*, 59 Neb. 575 (81 N. W. 616).

498. (1901.) Whether the whole of a conversation which a witness has detailed in full is embodied correctly in a written document in evidence is a question for the court and jury, and the opinion of the witness on such question is not admissible. *Union State Bank v. Hutton*, 1 Unof. 795 (95 N. W. 1061).

498*a*. (1902.) An answer of a witness in a deposition is not to be stricken out be-

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cause in answer to a proper question he gives the effect of a conversation instead of the very terms thereof. If the other party desires to know what transpired in more detail, he should cross-examine. *Bowman v. Wright*, 65 Neb. 661 (91 N. W. 580).

499. (1902.) Where it is practicable to place before the jury all the facts supporting the opinion of a non-expert, the witness should be restricted in his testimony to such facts, and the jurors left to form their opinion from the facts alone, without the aid of the opinion of the witness. *Read v. Valley Land & Cattle Co.*, 66 Neb. 423 (92 N. W. 622).

500. (1907.) In an action of forcible entry and detention, a question asked of a witness as to who was in possession of the property was not objectionable as calling for the conclusion of the witness on legal possession, in the absence of anything in the form of the question or previous questions put to witnesses indicating that the word was used in its technical sense as synonymous with seizin. *Iler v. Miller*, 78 Neb. 675 (111 N. W. 589).

Discretion of court.

501. (1901.) The competency of opinion evidence is largely in the discretion of the trial judge, and unless it is clearly inadmissible the ruling will not be disturbed. *Jerabek v. Kennedy*, 61 Neb. 349 (85 N. W. 279).

Inferences from collective facts.

502. (1901.) It is error to admit general conclusions of one who has examined the record as to what is shown, as to insolvency of an estate, by the probate records, and to refuse the admission of the record itself. *Quinby v. Ayers*, 1 Unof. 70 (95 N. W. 464).

503. (1901.) Testimony of a witness to a conclusion of fact not sustained by the particular facts upon which his conclusion is based need not be submitted to the jury. *Winterringer v. Warder, Bushnell & Glessner Co.*, 1 Unof. 413 (95 N. W. 619).

504. (1903.) Where the expert witness saw the occurrence with reference to which he testifies, and differences of opinion as to the conclusion to be drawn may reasonably arise, he should be required to state facts, rather than give his conclusion upon the ultimate issue. *Chicago, R. I. & P. R. Co. v. Holmes*, 68 Neb. 826 (94 N. W. 1007).

505. (1904.) Expert testimony must be based upon supposed facts of the existence of which there is evidence before the court. *Goken v. Dallugge*, 72 Neb. 16 (99 N. W. 818).

Matters directly in issue.

506. (1903.) It is error to permit an expert witness to give his opinion on the ultimate fact to be determined by the jury. *Chicago, R. I. & P. R. Co. v. Holmes*, 68 Neb. 826 (94 N. W. 1007).

507. (1903.) Where the facts upon which the opinion of an expert witness is based are stated, and the conclusion is one which must necessarily be drawn from such facts, error in permitting an opinion upon the ultimate fact to be determined by the jury to be given in evidence is without prejudice. *Chicago, R. I. & P. R. Co. v. Holmes*, 68 Neb. 826 (94 N. W. 1007).

508. (1906.) The opinion of an expert witness on the question of insanity, which assumes the point in dispute, is valueless. *Ames v. Ames*, 75 Neb. 473 (106 N. W. 584).

Special knowledge as to subject-matter.

509. (1890.) Action for damages from overflow caused by railway bridge; testimony of non-experts in bridge building properly admitted so far as it consisted of facts within their knowledge. *Omaha & R. V. R. Co. v. Brown*, 29 Neb. 492 (46 N. W. 39).

Personal conduct.

510. (1903.) A question put to a non-expert witness—"Q. What would you say was the treatment accorded by Mrs. Bullard to Mrs. Laughlin—the treatment usually accorded to hired help, or was it that which is usually extended to members of the family?"—*held* properly excluded as calling for a conclusion. *Bullard v. Laughlin*, 4 Unof. 697 (96 N. W. 159).

Cause and effect.

511. (1889.) Testimony of the party claiming to have been defrauded, that he relied upon the alleged false representations and that the same induced him to make the contract, is not the statement of a conclusion, and hence is admissible. *Cressler v. Rees*, 27 Neb. 515 (43 N. W. 363; 20 Am. St. Rep. 691).

512. (1895.) A coroner who is a physician and surgeon may state his opinion as to the manner of a death where no one was present when it occurred. *Gran v. Houston*, 45 Neb. 813 (64 N. W. 245).

513. (1904.) When medical testimony is

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relied upon to prove the cause or effect of a physical injury, it seldom goes further than an opinion based on the experience of the witness and the general learning of the profession. Positive statements of fact are seldom indulged in by physicians when testifying as experts, and yet this character of testimony is universally admitted by the courts of this country. *City of South Omaha v. Sutliffe*, 72 Neb. 746 (101 N. W. 997).

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Bodily appearance or condition.

514. (1883) One who is neither a physician nor surgeon is not competent to testify as to the condition of plaintiff's arm, as to dislocation at the wrist. *O'Hara v. Wells*, 14 Neb. 403 (15 N. W. 722).

515. (1883.) Although a non-expert witness is incompetent to give his opinion as to the existence of a dislocation of a limb, he may describe its appearance, as he saw it, to the jury. *O'Hara v. Wells*, 14 Neb. 403 (15 N. W. 722).

Mental condition or capacity.

516. (1896.) As the result of personal observation after stating the facts observed, a non-professional witness may give his opinion as to sanity. *Hay v. Miller*, 48 Neb. 156 (66 N. W. 1115).

517. (1898.) Non-expert witnesses can be permitted to express opinions as to the sanity or insanity of a person only when they have shown other sufficient qualifications, and have stated the facts and circumstances upon which their opinion of mental condition is based. *Lamb v. Lynch*, 56 Neb. 135 (76 N. W. 428).

518. (1902.) One shown to have an extended and intimate acquaintance with another is competent to state whether or not, in her opinion, such person is sane or insane. *Clarke v. Irwin*, 63 Neb. 539 (88 N. W. 783).

519. (1906.) Non-expert witnesses called upon the question of the mental capacity of a testator must state the facts upon which their opinion of incapacity is based. *Isaac v. Halderman*, 76 Neb. 823 (107 N. W. 1016).

520. (1907) One who shows an intimate acquaintance with a person whose mental capacity is in question, and who is familiar with his general conduct, who had occasion to and did observe the party and his condition at the time when his state of mind is in dispute, may testify affirmatively that in his opinion such person was of sound mind and possessed of his normal faculties, while the opinion that such person was of unsound mind must be based on facts consisting of particular acts or conduct indicating unsoundness. *In re Estate of Wilson*, 78 Neb. 758 (111 N. W. 788).

Handwriting.

Comparison of handwritings, see *post*, §§ 620-622.

521. (1894.) A witness may testify to the signature of one whom he has never seen write, if he has sent to, and received in reply letters, the replies coming apparently from such person. *Violet v. Rose*, 39 Neb. 660 (58 N. W. 216).

Rate of speed.

522. (1889.) It is not necessary to the admissibility of the testimony of a witness as to the rate of speed a train of cars was running at the time of an accident, that such witness should be an expert in the matter of the speed of trains. Any person of sound mind and judgment, who has observed trains running or other objects in motion, and who has an opinion thereon based upon seeing the train at the time in question, is a competent witness upon the subject, the jury being the judges of the weight of his testimony. *Chicago, B. & Q. R. Co. v. Clark*, 26 Neb. 645 (42 N. W. 703).

523. (1902.) A witness accustomed to observing the running of trains, and who observed one at the time of an accident and noticed its speed, may give his opinion, together with all the facts on which it is based, as to the rate of speed at which the train was running. *Union P. R. Co. v. Ruzicka*, 65 Neb. 621 (91 N. W. 545; 101 Am. St. Rep. 614).

524. (1902.) A witness need not be an expert in order to be permitted to give his opinion of the rapidity of motion of familiar objects like railway trains and street cars, but he must be shown to have had, and to have availed himself of, an opportunity for observation in the case in hand. *Mathieson v. Omaha Street R. Co.*, 3 Unof. 743 (92 N. W. 639).

525. (1902.) A non-expert who can testify to the rate of speed of a street railway car, only as the result of a mathematical calculation made after the event, is not a competent witness on the subject. *Mathieson v. Omaha Street R. Co.*, 3 Unof. 747 (97 N. W. 243).

526. (1903.) A witness who sees a moving car, and possesses a knowledge of time and distance, is competent to express an

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opinion as to the rate of speed at which the car was moving. *Omaha Street R. Co. v. Larson*, 70 Neb. 591 (97 N. W. 824); (1907) *Coffey v. Omaha & C. B. Street R. Co.*, 79 Neb. 286 (112 N. W. 589).

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Quantity.

527. (1889.) In an action to recover damages for false weighing of plaintiff's cattle, the opinion of witnesses of long experience in raising, feeding, handling, and weighing cattle is admissible for the purpose of establishing the falsity of such weight. *Filley v. Billings*, 26 Neb. 537 (42 N. W. 713).

528. (1890.) In an action for the removal of earth at twenty cents per cubic yard, one S. testifies that he had cross-sectioned the work before the grading was done, and in substance that the measurements were accurate. A Mr. H. then testified that he and S. had made estimates from the data furnished by S. and from such data a certain number of cubic yards of earth had been removed. *Held*, That the evidence of H. was properly received. *Clarke v. Williams*, 29 Neb. 691 (46 N. W. 82).

Boundaries.

529. In determining boundary lines between lands, non-experts, who have knowledge of the location of the lines as established by the government, may testify. (1889) *Obernalte v. Edgar*, 28 Neb. 70 (44 N. W. 82); (1902) *Baty v. Elrod*, 66 Neb. 735 (92 N. W. 1032).

530. (1906.) When a government monument between adjoining lands has been obliterated, its location may be proved by testimony of witnesses acquainted therewith. *Reed v. Burrell*, 77 Neb. 76 (108 N. W. 155).

Value.

531. (1887.) Testimony of a competent expert as to value of property, based upon what he would give for it, properly admitted, though unexplained might tend to diminish the weight of his testimony. *Connelly v. Edgerton*, 22 Neb. 82 (34 N. W. 76).

532. (1894.) In an action to recover for a loss under a policy, it is competent for the insured, who was acquainted with the value of the property destroyed at the time of the fire, to testify as to such value. *Western Home Ins. Co. v. Richardson*, 40 Neb. 1 (58 N. W. 597).

533. (1895.) Where the value of a stock of dry goods is in issue it is not competent to inquire of a witness not shown to have seen, or to know anything in regard to, the stock, what proportion of the original cost would represent the value of a stock of dry goods after it had been in a store three months. *Smith v. First Nat. Bank of Chadron*, 45 Neb. 444 (63 N. W. 796).

534. (1896.) In an action against a railroad company for setting out fire upon its right of way which spread to the lands of the plaintiff and destroyed trees thereon the plaintiff testified as to the value of the trees. On cross-examination he said that in estimating their value he considered what they were worth to him as ornamental trees and as adding to the value of the land. *Held*, That a motion to strike out his testimony as to value was properly overruled. *Kansas City & O. R. Co. v. Rogers*, 48 Neb. 653 (67 N. W. 602).

535. (1898.) One may testify to the value of his own services although his information in regard to the matter is chiefly derived from others adequately informed on the subject. *Missouri P. R. Co. v. Palmer*, 55 Neb. 559 (76 N. W. 169).

536. (1901.) Objection to certain testimony of witnesses, who were permitted to testify as to the value of services claimed to have been rendered by plaintiffs, *held* not well taken. *Green v. Lancaster County*, 61 Neb. 473 (85 N. W. 439).

537. (1906.) It is not error to permit a witness to testify whether or not growing timber is valuable as ornamental or shade trees or as a protection to the owner's premises. *Union P. R. Co. v. Murphy*, 76 Neb. 545 (107 N. W. 757).

Damages.

538. (1883.) On the trial of a question of damages for an injury to growing crops, neither science nor unusual skill being involved, the witnesses should be confined in their testimony to a statement of the facts showing the injury, and should not be permitted to express opinions as to the amount of the damages or loss occasioned thereby. *Burlington & M. R. R. Co. v. Schluntz*, 14 Neb. 421 (16 N. W. 439).

539. (1883.) On the trial of a right of way case a witness may state that the taking of a right of way across plaintiff's farm in a diagonal direction from the N. E. corner to the S. W. corner is a damage to the remaining and severed pieces of land, and may state in what such damage consists. *Re-*

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publican V. R. Co. v. Linn, 15 Neb. 234 (18 N. W. 35).

540. (1888.) Where a land owner sustains injury to his crops, land, etc., caused by the negligence of a railroad company, a witness who possesses the requisite knowledge may testify to the value of the crops, property, etc., and to facts and circumstances calculated to inform the jury on those questions, but will not be permitted to state the amount of damages sustained by a party for loss of crops or other injuries —that being a matter for the jury to determine. *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138 (40 N. W. 948; 13 Am. St. Rep. 482).

541. (1889.) A witness called to testify to the damages to certain private property from the location and construction of a public improvement near it, may state what the property was worth immediately before the location and construction of the improvement, and immediately afterwards; in other words, what the property was worth without the improvement, and what it is worth with it, not considering general benefits, but cannot be permitted to state the amount of damages thereby sustained by the land owner, as that is a deduction to be made by the jury from the evidence. *City of Omaha v. Kramer*, 25 Neb. 489 (41 N. W. 295; 13 Am. St. Rep. 504).

542. (1894.) A party cannot testify as to his opinion of the amount of his damages, but the facts upon which the court or jury can make such estimates are to be given. *Jameson v. Kent*, 42 Neb. 412 (60 N. W. 879).

543. (1898.) One may testify to the value of his own services although his information in regard to the matter is chiefly derived from others adequately informed on the subject. *Missouri P. R. Co. v. Palmer*, 55 Neb. 559 (76 N. W. 169).

544. (1902.) It is an invasion of the province of the jury in the trial of a cause to permit an expert to give his opinion as to the amount of damages which should be awarded. *Read v. Valley Land & Cattle Co.*, 66 Neb. 423 (92 N. W. 622).

545. (1906.) In order to establish the amount of damages to merchandise by reason of flooding basement, it is not permissible for a witness to testify to his conclusion as to the amount of damages; he should state the facts within his knowledge, and from those and other facts in evidence it is for the jury to determine the amount of damages sustained. *City of McCook v. McAdams*, 76 Neb. 1 (106 N. W. 988).

546. (1906.) In an action for damages to growing trees, evidence showing the effect the destruction of the trees had on the value of the land is admissible when the nature of the trees destroyed is such that they have no value, except with reference to and as a part of the real estate. *Alberts v. Husenetter*, 77 Neb. 699 (110 N. W. 657).

546*a*. (1908.) Where one claims his property has been damaged by certain acts of the defendant, it is not proper to ask the witness in what manner he has been damaged, but he should state the facts, and the jury will then in the exercise of its functions find whether the litigant has been damaged. *Kendrick v. Furman*, 80 Neb. 797 (115 N. W. 541).

——— Depreciation in value.

547. (1895.) Where the value of a stock of dry goods is in issue it is not competent to inquire of a witness not shown to have seen, or to know anything in regard to the stock, what proportion of the original cost would represent the value of a stock of dry goods after it had been in a store three months. *Smith v. First Nat. Bank of Chadron*, 45 Neb. 444 (63 N. W. 796.

——— Value before and after injury complained of.

548. (1881.) Witnesses should not be permitted to express their opinions before the jury of the value of the land, subject to the right of way. This should be left to the jury to ascertain from facts affecting the value, and proper to be considered, uninfluenced by the opinion of others. *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb. 585 (10 N. W. 491). [Modified. *Republican V. R. Co. v. Arnold*, 13 Neb. 485).

549. (1882.) Where persons are shown to be familiar with the value of a particular piece of land, across which a railroad has been built, they may be permitted to testify as to the value of such tract immediately before the location of the road, and to the value thereof immediately afterwards. *Republican V. R. Co. v. Arnold*, 13 Neb. 485 (14 N. W. 478); (1888) *Blakeley v. Chicago, K. & N. R. Co.*, 25 Neb. 207 (40 N. W 956); (1889) *Burlington & M. R. R. Co. v. White*, 28 Neb. 166 (44 N. W. 95).

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B. Subjects of Expert Testimony.

See, also, *Witnesses*, II.

Matters of opinion or facts.

550. (1893.) It is not prejudicial error to permit an expert to state what steps he would take in a given case if the question does not refer to any matter in dispute but is merely introductory in its character. *Hewitt v. Eisenbart*, 36 Neb. 794 (55 N. W. 252).

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551. (1902.) The testimony of a medical expert is not objectionable as being conjectural and speculative, because it gives the opinion of such expert as to the probability of a physician's accomplishing a certain result in a given time if he had been in attendance upon a woman in confinement. *Western Union Telegraph Co. v. Church*, 3 Unof. 22 (90 N. W. 878).

Matters of common knowledge.

552. (1894.) Expert testimony is not competent, and cannot be received upon a subject of inquiry of such a character as to be within the knowledge of men of common education and experience and to require no special skill, knowledge, or experience in considering or forming an opinion upon. *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb. 356 (58 N. W. 968); (1898) *Missouri P. R. Co. v. Fox*, 56 Neb. 746 (77 N. W. 57).

553. (1894.) A witness cannot express an opinion as to whether under certain conditions of wind and tracks, sparks could be carried from the engine to a car thirteen cars back from it, so as to set the car on fire, since such inquiry is not a subject for expert testimony. *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb. 356 (58 N. W. 968).

Matters involving special knowledge or skill.

554. (1900.) When the question involved does not fall within the range of common experience or common knowledge, the opinions of witnesses skilled in the particular science, art or trade to which the question relates are admissible in evidence. *Missouri P. R. Co. v. Fox*, 60 Neb. 531 (83 N. W. 744).

555. (1900.) Expert testimony may be received regarding a subject peculiarly within the knowledge and experience of those testifying, and which is not of such a character as to be within the knowledge of men of common education and experience in considering and forming an opinion upon it. *Missiouri P. R. Co. v. Fox*, 60 Neb. 531 (83 N. W. 744).

556. (1903.) In an action for malpractice in amputating part of plaintiff's hand and removing the metacarpal bone, it is proper to ask a professional witness for plaintiff, as a preliminary question, whether there is any method of cure without removing the bone. *Johnson v. Winston*, 68 Neb. 425 (94 N. W. 607).

557. (1903.) In an action against a physician and surgeon for alleged negligent treatment of a compound fracture of the bone, it is permissible to show by another surgeon what would be the proper treatment for a simple fracture, and that the treatment for a compound fracture would not be materially different. *Liesenring v. La Croix*, 68 Neb. 803 (94 N. W. 1009).

558. (1904.) Expert evidence is permitted where the facts under investigation are such that the witness is supposed, from his experience, skill and study, to have peculiar knowledge upon the subject of inquiry, which jurors generally do not possess. *Horst v. Lewis*, 71 Neb. 370 (103 N. W. 460).

Matters directly in issue.

559. (1902.) It is improper to permit an expert to give his opinion on the ultimate fact to be determined by the jury. *Read v. Valley Land & Cattle Co.*, 66 Neb. 423 (92 N. W. 622).

560. (1905.) An expert witness will not be permitted to usurp the functions of the jury, by finding a certain result from certain facts. *City of Central City v. Marquis*, 75 Neb. 233 (106 N. W. 221).

Laws of other states.

561. (1894.) The law of a sister state, when involved in the determination of an action here, is a fact to be established by evidence, and, so far, at least, as it is not statutory, is the proper subject of expert testimony. *Barber v. Hildebrand*, 42 Neb. 400 (60 N. W. 594).

562. (1901.) The written laws of a sister state cannot be proved by the testimony of an expert witness. *Johnson v. Hesser*, 61 Neb. 631 (85 N. W. 894).

Date of writing.

563. (1886.) Whether or not an indorsement on a note was made recently, is not a subject for expert testimony, and depositions of such not admissible. *Cheney v. Dunley*, 20 Neb. 265 (29 N. W. 925; 57 Am St. Rep. 828).

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Result of examination of accounts.

564. (1904) Where a book contains voluminous accounts or transactions, the examination of which could not conveniently take place in court, an accountant, who had made an examination of the book, may testify as to the result of his computation therefrom, but not as to mere inferences. *Mendel v. Boyd*, 71 Neb. 657 (99 N. W. 493).

565. (1906.) An expert accountant may testify to the results of an examination and computation of complicated accounts, the books, checks or memoranda making up the account being first introduced in evidence. *Kannow & Sons v. Farmers Co-operative Shipping Ass'n*, 76 Neb. 330 (107 N. W. 563).

Custom or usage.

566. (1898.) In an action on a contract for the purchase of "all patterns that are staple and down to date," where no criterion was fixed by which to determine what patterns came within that description, it was error for the trial court to exclude evidence of competent witnesses regarding the standard usually adopted by the trade in selecting and purchasing such patterns. *Hayden v. Frederickson*, 55 Neb. 156 (75 N. W. 530).

Amount of profits.

567. (1902.) Prospective gains arising from the probable increase of a flock of sheep and the probable wool-clip are not so uncertain and contingent as to prevent proof by experts of the amount and value of such increase and wool-clip. *Schrandt v. Young*, 2 Unof. 546 (89 N. W. 607).

Damages.

568. (1902.) It is an invasion of the province of the jury in the trial of a cause to permit an expert to give his opinion as to the amount of damages which should be awarded. *Read v. Valley Land & Cattle Co.*, 66 Neb. 423 (92 N. W. 622).

C. Competency of Experts.

In general.

569. (1882.) A witness not shown to have any knowledge in the matter of the construction or operation of railroads, is not competent to give an opinion as to the needs of a railroad company in respect to its depot or other grounds. *Deitrichs v. Lincoln & N. W. R. Co.*, 13 Neb. 361 (13 N. W. 624).

570. (1884.) Witnesses who show scientific or practical skill and knowledge and experience as to matters of which they testify, are competent as experts. The weight to be given to their testimony is for the jury to determine. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578 (20 N. W. 860; 49 Am. Rep. 724).

Discretion of court.

571. (1900.) The general rule as to the competency of a witness to testify as an expert rests in the sound discretion of the court, whose rulings will not be reversed unless clearly wrong. *Missouri P. R. Co. v. Fox*, 60 Neb. 531 (83 N. W. 744); (1901) *Schmuck v. Hill*, 2 Unof. 79 (96 N. W. 158).

572. (1901) 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*, 62 Neb. 1 (86 N. W. 936).

Accounts and book entries.

573. (1899.) A person who has held office for some considerable time, is presumably competent to give an opinion as to the meaning of entries in the books of the office evidencing business transactions therein. *Paxton v. State*, 59 Neb. 460 (81 N. W. 383; 80 Am. St. Rep. 689).

Machinery and mechanical devices and construction.

574. (1894.) An engineer, who examined the work two months after it was abandoned by the contractors and found the original stakes showing the depth of the ditch and was able to verify his estimate from such stakes, *held* competent to testify to the cost of completing such work in accordance with the contract. *McDonald & Penfield v. Dodge County*, 41 Neb. 905 (60 N. W. 366).

575. (1900.) Yardmaster of a railroad *held* competent to testify as an expert in regard to construction of car. *Missouri P. R. Co. v. Fox*, 60 Neb. 531 (83 N. W. 744).

576. (1900.) Persons having several years' experience in railroading, and having knowledge as to the manner of constructing road-beds and maintaining the same, *held* to be competent to testify, and to express an opinion, as to whether the road-bed at a certain place was properly or improperly constructed *Missouri P. R. Co. v. Fox*, 60 Neb. 531 (83 N. W. 744).

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Obstetrics.

577. (1907.) A professional nurse, having fifteen years' experience in obstetrical cases, and who assisted at the birth of a child, is competent to testify as to her opinion whether or not the child was fully developed at the time of its birth. *Souchek v. Karr*, 78 Neb. 488 (111 N. W. 150).

Value.

578. (1882.) One who testified that he knew only a "portion of a lot of horses" is incompetent to give an opinion as to the value of the entire lot. *Dunbar v. Briggs*, 13 Neb. 332 (14 N. W. 414).

579. (1882.) Where persons are shown to be familiar with the value of a particular tract of land, they are competent to testify as to the value thereof immediately before the location of a railroad thereon, and immediately after such location. *Republican V. R. Co. v. Arnold*, 13 Neb. 485 (14 N. W. 478); *Burlington & M. R. R. Co. v. White*, 28 Neb. 166 (44 N. W. 95).

580. (1883.) The owner of land taken for right of way by a railroad company, having resided upon and improved it for several years, who swears that he knows what it is worth, is a competent witness on the question of its value. *Burlington & M. R. R. Co. v. Schluntz*, 14 Neb. 421 (16 N. W. 439); (1884) *Sioux City & P. R. Co. v. Weimer*, 16 Neb. 272 (20 N. W. 349).

581. (1883.) Persons who have for several years resided in the immediate neighborhood of the land, are competent to testify as to the value of the land taken under the right of eminent domain. *Burlington & M. R. R. Co. v. Schluntz*, 14 Neb. 421 (16 N. W. 439); (1884) *Sioux City & P. R. Co. v. Weimer*, 16 Neb. 272 (20 N. W. 349).

582. (1887.) Testimony of expert as to value of property not inadmissible because he has not seen it since about a month prior to time when value was to be established; it being shown by other testimony that the property was in substantially the same condition at both periods of time. *Connelly v. Edgerton*, 22 Neb. 82 (34 N. W. 76).

583. (1888.) In an action to recover damages for real estate condemned fro right of way for a railway company, a witness who testified that he resided near the land condemned, and was acquainted with the value of the real estate in that vicinity at the time of the condemnation, is *prima facie* a competent witness to prove the amount of damages sustained by the landowner. *Northeastern Nebraska R. Co. v. Frazier*, 25 Neb. 53 (40 N. W. 609).

584. (1891.) A witness who, in answer to questions by counsel for the plaintiff, testified that he had resided in the town of Harvard for about six years; was engaged in land and loan and general real estate business, and had been so employed for about six years; that he had a very fair idea of the value of real estate in Harvard, and was acquainted with the property of the plaintiff in dispute ever since he had resided in the town; that he knew about the time that the grade of the street was established, is competent to testify as to what was the fair market value of the Hammond property immediately prior to the establishment of the grade. *Hammond v. City of Harvard*, 31 Neb. 635 (48 N. W 462).

585. (1892.) A person having a general knowledge of the value of household goods may testify as to such value although he may not have dealt in goods of that kind. *Omaha Auction & Storage Co. v. Rogers*, 35 Neb. 61 (52 N. W. 826).

586. (1896.) One who has resided upon and owned real estate for twenty years, and is acquainted from hearsay with the recent sales of land in the vicinity and the prices paid therefor, is a competent witness to the value of his own property. *Chicago, B. & Q. R. Co. v. Shafer*, 49 Neb. 25 (68 N. W. 342).

587. (1897.) In a suit by a landowner against a county to recover damages which he alleged he had sustained by reason of the appropriation of a part of his land towards the construction of a public highway, a supervisor of such county, who participated in the location of such highway, and in passing upon the claim filed by the landowner against the county for damages, is a competent witness in behalf of the county. *Lane v. Harlan County*, 51 Neb. 641 (71 N. W. 302).

588. (1898.) Where the owner resided on land taken for right of way and is familiar with the value of the land, he is a competent witness on the question of such value. *Chicago, R. I. & P. R. Co. v. Buel*, 56 Neb. 205 (76 N. W. 571).

589. (1899.) To lay a foundation for testimony as to the value of goods in common use it is sufficient to show that witness, by purchasing and by pricing similar goods, is in a general way familiar with their value, the weight of his opinion being for the jury.

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Langdon v. Wintersteen, 58 Neb. 278 (78 N. W. 501).

590. (1901.) One who has kept a team for another is competent to testify as to the value of such keep. *McCormick Harvesting Machine Co. v. Davis*, 61 Neb. 406 (85 N. W. 390).

591. (1901.) When one of the questions in a lawsuit is the value of the use and occupation of real property in a city, one of the parties, who immediately before the litigation arose had for a considerable time occupied the premises for business purposes and was seeking for damages for alleged unlawful dispossession of them, is a competent witness, after swearing that he knows such value, to testify what he considers it to be, his degree of competency and the effect of his interest upon his credibility being left to the jury to determine. *Ish v. Marsh*, 1 Unof. 864 (96 N. W. 58).

592. (1902.) Resident owners of farm property in the particular locality, who are acquainted with the land in question, are qualified to testify as to its value, although no recent sales have been made in the locality upon which to base the estimate of value. *Greeley County v. Gebhardt*, 2 Unof. 661 (89 N. W. 753).

593. (1904.) The fact that a witness as to values, shown to be competent in that respect, testifies on cross-examination that in making his estimate he took into consideration, besides matters that were proper to be so considered, other matters that were not proper for that purpose, does not entitle a party to have the entire testimony of the witness upon that subject withdrawn from the jury and stricken from the record. *Union P. R. Co. v. Stanwood*, 71 Neb. 150 (91 N. W. 191).

594. (1904.) Persons who have resided for several years and own property in the immediate neighborhood of property alleged to have been damaged by grading a street in front of such property, and who seem, upon examination, to be well informed of its situation, condition and value, are competent witnesses on the question of its value. *City of South Omaha v. Ruthjen*, 71 Neb. 545 (99 N. W. 240).

595. (1905.) A husband and wife are competent to express an opinion as witnesses concerning the value of their own household furniture. *Lincoln Supply Co. v. Graves*, 73 Neb. 214 (102 N. W. 457).

596. (1907.) One who has been engaged in ordinary mercantile business for a considerable time may testify as to the value of his services and attention to such business. *Howard v. McCabe*, 79 Neb. 42 (112 N. W. 305).

Quality.

597. (1893.) In an action to recover upon an account for flour sold, where the defendant pleads a breach of warranty, a person engaged in selling flour in the different markets of the state, and knows what flour is worth at defendant's place of business, may testify as to the quality of the flour sold. *Reed v. Davis Milling Co.*, 37 Neb. 391 (55 N. W. 1068).

Handwriting.

597*a*. (1901.) Where a witness swears that he has made a special study of and has been an instructor in penmanship for twenty-five years and has given special attention to the comparison of signatures, such evidence is sufficient to qualify him to testify as an expert on handwriting. *Heffernan v. O'Neill*, 1 Unof. 363 (96 N. W. 244).

Preliminary evidence as to competency.

598. (1881.) A witness before he is competent to testify as to the value of property must show by his testimony that he has knowledge of the value of such property. *Engster v. State*, 11 Neb. 539 (10 N. W. 453).

599. (1882.) Where a witness is called to testify as to whether proper care was given to stock during the winter, it was competent to show by the number of cattle kept by him as a foundation for his opinion. *Catlin v. Wright*, 13 Neb. 558 (14 N. W. 530).

600. (1883.) Without a showing, there is no presumption that a witness is competent to give a reliable estimate of the market value of land; and where one's competency is challenged, before he should be permitted to express an opinion it should be made to appear that he has in some way become qualified to do so. *Missouri P. R. Co. v. Coon*, 15 Neb. 232 (18 N. W. 62).

601. (1886.) Where a witness is examined in the trial of a cause as an expert, and testifies as to his opinions upon scientific questions involved in his profession, it is competent upon cross-examination to inquire as to the extent of his knowledge and his familiarity with the accredited standard authors of his profession. *Hutchinson v. State*, 19 Neb. 262 (27 N. W. 113).

602. (1896.) Answers to questions on

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cross-examination as to the capacity of the witness to testify as an expert *held* properly excluded. *Denise v. City of Omaha*, 49 Neb. 750 (69 N. W. 119).

603. (1897.) It is not error to exclude expert evidence for the introduction of which no proper foundation has been laid. *Union P. R. Co. v. Evans*, 52 Neb. 50 (71 N. W. 1062).

D. Examination of Experts.

Laying foundation.

604. (1903.) In an action for malpractice in amputating part of plaintiff's hand and removing the metacarpal bone, a surgeon of thirty-five years' experience, who has inspected the amputated bone, may be asked to examine plaintiff's hand, and state what ligaments would need to be severed in the operation, without a preliminary showing that the question can be answered from such inspection. *Johnson v. Winston*, 68 Neb. 425 (94 N. W. 607).

Hypothetical question.

605. (1883.) If hypothetical questions are resorted to in the examination of expert witnesses, they must be so framed as to fairly reflect facts, either admitted or proved by other witnesses. *O'Hara v. Wells*, 14 Neb. 403 (15 N. W. 722); (1886) *Morrill v. Tegarden*, 19 Neb. 534 (26 N. W. 202).

606. (1886.) Hypothetical questions to experts must be framed so as to fairly reflect facts either admitted or proved by other witnesses and must not assume as proven that which has not been, nor should they be based upon conclusions of fact which can only be found by a jury. *Ballard v. State*, 19 Neb. 609 (28 N. W. 271).

607. (1893.) A judgment will not be set aside because an expert witness was permitted to answer a hypothetical question assuming a fact unsupported by the evidence, where such fact was the only hypothesis of the question, not combined with others based upon evidence, and the answer could not mislead the jury. *Hewitt v. Eisenbart*, 36 Neb. 794 (55 N. W. 252).

608. (1894.) Some latitude must necessarily be given in an examination of medical experts and in the propounding of hypothetical questions, the better to enable the jury to pass upon the question submitted to them. It is the privilege of counsel in such cases to assume, within the limits of the evidence, any state of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed. *Omaha & R. V. R. Co. v. Brady*, 39 Neb. 27 (57 N. W. 767).

609. (1896.) In the trial of an action for personal injuries a hypothetical question containing inquiries relating to facts expressly assumed was *held* not prejudicial to defendant. *Chicago, R. I. & P. R. Co. v. Archer*, 46 Neb. 907 (65 N. W. 1043).

610. (1896.) An objection to a hypothetical question put to an expert witness, that it is "incompetent, immaterial, and irrelevant," is too general to raise the point that the question involves erroneous statement of evidence. *Chicago, R. I. & P. R. Co. v. Archer*, 46 Neb. 907 (65 N. W. 1043).

611. (1896.) A hypothetical question, after stating a number of hypotheses, concluded, "[suppose] he has been unable to work by reason of such injury for a period of seven months, * * * to what would you attribute his inability to work, and for what period would he be partially or wholly incapacitated for labor, and until what time would it require for a total disappearance of the pains and other results of such injuries and leave no trace thereof?" *Held*, That the first two inquiries relating to facts expressly assumed were not prejudicial, and that the last was an inquiry as to the probable future duration of the injury, and a proper question to ask an expert. *Chicago, R. I. & P. R. Co. v. Archer*, 46 Neb. 907 (65 N. W. 1043).

612. (1898.) *Held*, That the court committed no prejudicial error in refusing to permit plaintiff in error's witness, on his redirect examination, to answer a certain hypothetical question. *Barr v. Post*, 56 Neb. 698 (77 N. W. 123).

613. (1898.) A hypothetical question should not be permitted when it only in part calls for the exercise of special skill or knowledge, and for the rest asks the witness to base his opinion on matters within the ordinary experience of men. *Missouri P. R. Co. v. Fox*, 56 Neb. 746 (77 N. W. 130).

614. (1901.) A hypothetical question is not necessarily to be rejected because it does not include all the facts in evidence. If elements, not important upon the theory of the party putting it, are omitted, the other party, deeming such elements material to the conclusion and desiring the opinion of the witness in view of them, may embody them in a further question

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upon cross-examination. *Herpolsheimer v. Funke*, 1 Unof. 471 (95 N. W. 688).

615. (1901.) All the undisputed pertinent facts of a case should be substantially included in hypothetical questions propounded to expert witnesses. *Schulz v. Modisett*, 2 Unof. 138 (96 N. W. 338).

Facts forming basis of opinion.

616. (1894.) The opinion of a medical expert may be based (1) on his acquaintance with the party whose condition is under investigation; (2) upon a medical examination of him which he has made; or (3) upon a hypothetical case stated to the expert in court. *Omaha & R. V. R. Co. v. Brady*, 39 Neb. 27 (57 N. W. 767).

617. (1888.) A witness on his examination-in-chief, or re-examination by the party calling him, when on account of his possessing special knowledge, skill, or experience, is permitted to give his opinion or judgment on a question of quality or values, if he is permitted to give the source of his special knowledge, experience or skill, it will be confined to general statements. And when he is permitted to narrate the facts and circumstances of a special transaction, outside of the case on trial, for the purpose of enabling the jury to compare the facts and results of such transaction with those of the case on trial, and in that manner impress them with the soundness of his opinion or judgment, *held*, error. *Bollman v. Lucas*, 22 Neb. 796 (36 N. W. 465).

Contradiction.

618. (1904.) When a witness as to the value of real property has testified that he based his opinion, in part, upon his information as to prices obtained upon sales of other specifically described property in the neighborhood of that in controversy, it is error to exclude evidence of what the prices obtained at each sale actually were. *Union P. R. Co. v. Stanwood*, 71 Neb. 150 (91 N. W. 191). [Overruled. 71 Neb. 158.]

619. (1904.) When a witness as to the value of real estate has testified that he has based his opinion upon the prices obtained upon sales of other specifically described real estate in the neighborhood of that in controversy, an offer of evidence of the prices actually obtained at such sales must include an offer to prove that such prices were in fact different from what the witness, in basing his estimate of value thereon, understood them to be. *Union P. R. Co. v. Stanwood*, 71 Neb. 158 (98 N. W. 656).

E. Comparison of Handwriting.

In general.

620. (1876.) A witness who is not an expert, and who has no knowledge either of the handwriting, or the signature, is not competent to give an opinion from a comparison of handwriting. *First Nat. Bank of Omaha v. Lierman*, 5 Neb. 247.

621. (1876.) A witness who is acquainted with the handwriting of a person whose signature is in dispute, although not an expert in judging of handwriting, is competent to give his opinion as to its genuineness. *First Nat. Bank of Omaha v. Lierman*, 5 Neb. 247.

622. (1890.) Under section 344 of the code, evidence respecting handwriting may be given by comparisons made, by experts or by the jury, with writings of the same person which are proved to be genuine. *Grand Island Banking Co. v. Shoemaker*, 31 Neb. 124 (47 N. W. 696).

F. Proof and Effect.

Conclusiveness and effect.

623. (1899.) It is error to instruct the jury that "expert evidence is of the very lowest order and is the least satisfactory." *Hayden v. Frederickson*, 59 Neb. 141 (80 N. W. 494).

624. (1899.) Triers of fact are not generally bound by opinion evidence of value, even when it is not met by opposing proof. *Lincoln Land Co. v. Phelps County*, 59 Neb. 249 (80 N. W. 818).

625. (1907.) In ejectment as to a military reservation an instruction that persons not surveyors who testify as to existence of government corners are entitled to consideration is not erroneous. *Oldfather v. Ericsson*, 79 Neb. 1 (112 N. W. 536).

XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDING.

Admissibility in evidence.

626. (1886.) The report of the shorthand reporter of a district court of the testimony of a witness examined in such court is not admissible as evidence in a future action between the same parties, as documentary or independent evidence. *Lipscomb v. Lyon*, 19 Neb. 511 (27 N. W. 731).

627. (1889.) The record in a former trial, in the same case between the same parties, is admissible in evidence on the second trial. *Filley v. Billings*, 26 Neb. 537 (42 N. W. 713).

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Stipulation for use.

628. (1894.) An affidavit in support of a motion for a continuance may be read to the jury as the testimony of an absent witness, where the adverse party so stipulated in order to procure the overruling of the motion, notwithstanding the facts were stated in the affidavit in the form of a conclusion. *Blaine v. Poyer*, 42 Neb. 709 (60 N. W. 865).

629. (1896.) Depositions taken in a case pending before a justice and by stipulation used in said case and another pending before said justice, may be used on the trial of both cases in the appellate court, the stipulation in the meantime not having been set aside. *Keens v. Robertson*, 46 Neb. 837 (65 N. W. 897).

Death of witness.

630. (1889.) Where, after the preliminary hearing before a justice of the peace, but before the trial, the plaintiff, in a bastardy proceeding, dies and the action is revived in the name of the county, the testimony of such plaintiff given before the justice is admissible on the trial. *Dodge County v. Kemnitz*, 28 Neb. 224 (44 N. W. 184).

Absence of witness.

631. (1892.) Where a witness has testified on a former trial of the case and his testimony reduced to writing in open court by the stenographic reporter, and the witness is absent from the state, such testimony, if otherwise competent, is admissible in evidence; and an objection "that no sufficient cause has been shown for the reading of that testimony" is not an objection to the mode of certifying the same, and was properly overruled. *City of Omaha v. Jensen*, 35 Neb. 68 (52 N. W. 833; 37 Am. St. Rep. 432).

632, 633. (1894.) Where a witness is shown to be absent from the state, his testimony given at a former trial of the cause is admissible in evidence, if otherwise unobjectionable. *Omaha Street R. Co. v. Elkins*, 39 Neb. 480 (58 N. W. 164); (1897) *City of Ord v. Nash*, 50 Neb. 335 (69 N. W. 964).

Preliminary evidence.

634. (1894.) Before the testimony of a witness at a former trial can be admitted in evidence it must be shown that he is absent from the state, or without the jurisdiction of the court, or beyond the reach of process. *Young v. Sage*, 42 Neb. 37 (60 N. W. 313).

635. (1896.) Where, in a trial before the judge of a district court without the intervention of a jury, a witness was allowed to state his recollection of the evidence of a witness given at a former trial foundation having first been laid for the of the case who had since died, no sufficient introduction of the evidence in such manner, and the witness making statements in giving his evidence which would have completed the foundation for its introduction, it renders the evidence competent for consideration in the determination of the issues in the action and cures the error, if any, committed by its admission. *Twohig v. Leamer*, 48 Neb. 247 (67 N. W. 152).

636. (1899.) The showing of the absence of a witness from the jurisdiction of the trial court *held* insufficient to warrant the admission of his testimony given at the former trial of the cause. *Wittenberg v. Mollynéaux*, 59 Neb. 203 (80 N. W. 824).

Mode of proof.

637. (1894.) The testimony of a witness in another case may be proved by any witness who heard the testimony, and who, with or without the aid of a memorandum, may speak from his own memory as to such testimony. The reporter's notes are not the only or best evidence as to such testimony. *German Nat. Bank of Hastings v. Leonard*, 40 Neb. 676 (59 N. W. 107).

638. (1896.) The evidence of a witness, given or used on the trial of a cause and who has since died, is competent on a subsequent trial of the same action, and where not in the form of deposition or preserved in any manner prescribed or contemplated by law, may be stated by any person who heard it given and who recollects and can state it substantially. *Twohig v. Leamer*, 48 Neb. 247 (67 N. W. 152).

Impeachment.

639. (1905.) On a subsequent trial the evidence of a deceased witness taken at a second trial cannot be impeached by showing that some of his statements on the witness stand at the first trial are inconsistent therewith, where upon the second trial his attention was not directed to such statements, and he was given no opportunity to explain the alleged discrepancies. *Omaha street R. Co. v. Boesen*, 74 Neb. 764 (105 N. W. 303).

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XIV. WEIGHT AND SUFFICIENCY.

Weight and sufficiency of evidence as to particular matters, and in particular actions, see specific topics.

Weight and effect of opinion evidence, see *ante*, §§ 623-625.

Weight and conclusiveness in general.

640. (1877.) Where evidence is before the court which is unimpeached, the court cannot disregard it. If improper it should have been excluded; if properly admitted it must be considered and given due weight. *Roberts v. City of Lincoln*, 6 Neb. 352.

641. (1882.) Where the proof is of a doubtful or equivocal character, it must be construed least favorably to the party offering it. *Bennett v. Rogers*, 12 Neb. 382 (11 N. W. 314).

642. (1896.) A jury is not bound to accept as true all testimony of a witness not directly contradicted or impeached. *Murphey v. Virgin*, 47 Neb. 692 (66 N. W. 652).

643. (1901.) Where it has been held on an error proceeding in the supreme court that a petition states a good cause of action, evidence sustaining the allegations of such petition is sufficient to support a verdict and judgment in favor of the plaintiffs in the action. *Garneau v. Kendall*, 61 Neb. 396 (85 N. W. 291).

644. (1900.) The mere fact that the testimony of the plaintiff is contradicted in every essential particular by that of the defendant does not necessarily determine that the former has failed to make out his case by a preponderance of the evidence. *Grand Island Mercantile Co. v. McMeans*, 60 Neb. 373 (83 N. W. 172).

645. (1903.) Evidence sufficient to take a question to the jury will ordinarily support a verdict upon it. *New Orleans Coffee Co. v. Cady*, 69 Neb. 412 (95 N. W. 1017).

Circumstantial evidence.

646. (1894.) A fact may be considered as established which may be reasonably inferred from all the facts and circumstances proved in a case; and in civil actions it is sufficient if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove, and it is the duty of the jury to decide according to the reasonable probability of the truth. *Union Stock Yards Co. v. Conoyer*, 41 Neb. 617 (59 N. W. 950).

647. (1894.) In a civil action, when a fact may be fairly and reasonably inferred from other and all the facts and circumstances proved, it may be taken as established. *Chicago, B. & Q. R. Co. v. Hildebrand*, 42 Neb. 33 (60 N. W. 335).

Evidence at former trial.

648. (1902.) Not error to refuse to tell the jury that statements read from record of former trial were to be given same weight as if made by witness actually present. *Crane & Co v. Columbus State Bank*, 3 Unof. 339 (91 N. W. 532).

Admissions in pleadings.

649. (1886.) Where a pleading, verified by oath of the party filing it, is shown in evidence and is contradictory to the amended petition on which the issues are formed, and the cause depends upon the unsupported testimony of the party, such petition is entitled to weight in the evidence. *Buntz v. Cornelius*, 19 Neb. 107 (26 N. W. 621).

Parol or record evidence.

650. (1886.) Where the plaintiff establishes a *prima facie* case by parol evidence, and the defendant establishes, by record evidence, such facts as to constitute a defense, a verdict for plaintiff is not sustained. *Dickenson v. State*, 20 Neb. 72 (29 N. W. 184).

Failure of proof.

651. (1882.) The evidence in a lawsuit, like a line of battle, or a chain of military defenses, is "no stronger than its weakest point"; and so, where there is a point entirely undefended, it may be said that there is an entire failure of evidence. *Bennett v. Rogers*, 12 Neb. 382 (11 N. W. 314).

Uncontroverted evidence.

652. (1886.) Where, upon a question of the value of the property, a witness, in answer to an hypothetical question, gives evidence of the value of property of the kind and quality of that in question, a verdict adopting such valuation will not be molested, as not supported by sufficient evidence, if no other testimony of value is given. *Western Horse Ins. Co. v. Putnam*, 20 Neb. 331 (30 N. W. 246)

Conclusiveness of evidence on party introducing it.

653. (1880.). Where affidavits filed in another case are erroneously admitted in evidence, the party introducing them is bound by the material facts which they establish. *Campbell v. Crone*, 10 Neb. 571 (7 N. W. 334).

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Number or credibility of witnesses.

654. (1890.) The preponderance of evidence is not determined alone by the number of witnesses testifying to a particular fact. In determining upon which side the evidence preponderates, the credibility of the witnesses, their situation, interest, means of knowledge, and manner of testifying, should be considered. *Fitzgerald v. Richardson*, 30 Neb. 365 (46 N. W. 615).

655. (1902.) The preponderance of evidence is not determined alone by the greater number of witnesses who testify in favor of a party. *New Hampshire Savings Bank v. Dillrance*, 63 Neb. 412 (88 N. W. 653).

Degree of proof.

656. (1879.) In a civil action a preponderance of evidence is all that is required to sustain the claim of a party to the action. *Search v. Miller*, 9 Neb. 26 (1 N. W. 975); (1898) *First Nat. Bank of Omaha v. Goodman*, 55 Neb. 409 (75 N. W. 846); (1901) *Western Mattress Co. v. Potter*, 1 Unof. 627 (95 N. W. 841); (1904) *Link v. Campbell*, 72 Neb. 307 (100 N. W. 409).

657. In civil cases the party holding the affirmative of an issue is only required to establish it by a preponderance of the evidence. (1879) *Patrick v. Leach*, 8 Neb. 538; (1882) *Kopplekom v. Huffman*, 12 Neb. 95 (10 N. W. 577); (1883) *Altschuler v. Algaza*, 16 Neb. 631 (21 N. W. 401); (1885) *Dunbar v. Briggs*, 18 Neb. 94 (24 N. W. 449); (1890) *Stevens v. Carson*, 30 Neb. 544 (46 N. W. 655).

658. (1894.) It is not error to instruct that the party on whom the burden rests is required to establish his cause of action or defense by a fair preponderance of the evidence. *Altschuler v. Coburn*, 38 Neb. 881 (57 N. W. 836).

659. (1901.) The rule that a plaintiff in a civil action is only required to prove his case by a preponderance of the evidence is not altered by the fact that the acts charged upon the defendant are highly discreditable or even criminal. *Schmuck v. Hill*, 2 Unof. 79 (96 N. W. 158).

660. (1902.) Ordinarily a preponderance of evidence will suffice in a civil action. But a greater degree is required to overcome the express terms of a conveyance. *Doane v. Dunham*, 64 Neb. 135 (89 N. W. 640).

661. (1903.) The expression "unequivocal evidence," in the syllabus and opinion in *McCoy v. Conrad*, 64 Neb. 150, was intended as the equivalent of "evidence of an unequivocal act or conduct." A simple preponderance of the evidence is all that is required to maintain an issue of fact in a civil action. *Estate of Davidson v. Davidson*, 70 Neb. 584 (97 N. W. 797).

662. (1904.) The use in an instruction of the phrase "a fair preponderance of the evidence" criticised, but *held* not to be prejudicially erroneous. *Link v. Campbell*, 72 Neb. 310 (104 N. W. 939).

663. (1906.) A preponderance of the evidence is all that is required to establish a disputed fact in a civil action, and an instruction which informs the jury that, if upon any reasonable hypothesis a fact can be accounted for upon any other theory than a dishonest one, they should so find, is erroneous. *Nebraska Mercantile Mutual Ins. Co. v. Myers*, 76 Neb. 460 (107 N. W. 747).

EXCAVATIONS.

Necessity for, as element of damage on taking property for public purpose, see *Eminent Domain*, §§ 70-72.

Liability of city for injuries from excavation in street, see *Municipal Corporations*, §§ 770-776.

Liability for injuries to person by reason of, see *Negligence*, §§ 33-35.

EXCEPTIONS.

Necessity of, as prerequisites to appeal, see *Appeal and Error*, IV, C.

To reception of evidence, see *Trial*, §§ 127-176.

To argument and conduct of counsel, see *Trial*, §§ 213-221.

To instructions, see *Trial*, §§ 618-650.

To conduct of jury, see *Trial*, §§ 719-722.

To verdict or findings, see *Trial*, §§ 770-773; 798-799.

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