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CASTLE ROCK IRRIGATION CANAL & WATER POWER COMPANY, APPELLANT, V. PHILIP JURISCH, APPELLEE.

FILED FEBRUARY 4, 1903. No. 10,118.

1. **Injunction: IRRIGATION COMPANY: CROSSING CANAL WITH LATERAL.** Injunction is the proper remedy for preventing one, without authority so to do, from crossing the canal of an irrigation company with a lateral for the purpose of carrying water to his land from another canal.
2. **Irrigation: APPLICANT FOR APPROPRIATION: CONDEMNATION: RIGHT OF WAY: STATE BOARD OF IRRIGATION: PERMIT.** An applicant for the appropriation of the waters of the state for irrigation purposes, can not prosecute the work and condemn a right of way for that purpose until he has a permit from the state board of irrigation to divert the water of the state to specific lands described in his application.

APPEAL from the district court for Scott's Bluff county. Action for a perpetual injunction to prevent the unauthorized crossing of an irrigation canal. Heard below before GRIMES, J. Judgment for defendant. *Reversed.*

Andrew G. Wolfenbarger, T. W. Morrow, Thomas F. A. Williams, for appellant.

Heist, Mann, Wesley T. Wilcox and *J. S. Halligan, contra.*

SEDGWICK, J.

This plaintiff and appellant owns and is operating a canal for irrigation purposes. In May, 1889, it began the construction of the canal, and took the necessary steps for the appropriation of the water of the North Platte river, pursuant to the statute then in force, and in July, 1895, the county clerk of Scott's Bluff county having transmitted a copy of plaintiff's notice of appropriation to the state board of irrigation, the plaintiff filed its claim with the state board, and afterwards, in January, 1897, the plaintiff's right to irrigate all lands included

Syllabus by court; catch-words by editor.

in its claim so filed, among which were the lands of the defendant Jurisch, was declared in the opinion of the state engineer and secretary of the board, which opinion was in September, 1897, affirmed by the state board of irrigation. In April, 1895, the defendant and others organized the Steamboat Ditch Company, and the defendant was the owner of some of the capital stock of that company. This latter company constructed a canal parallel with plaintiff's canal, the point of diversion of the water of the North Platte river being above that of the plaintiff company. The new canal being on the south side of the plaintiff's canal, and the defendant's land lying on the north side, the defendant began proceedings in the county court of Scott's Bluff county to condemn a right of way across the plaintiff's canal for a lateral with which to supply the defendant's land with water from the canal of the Steamboat Ditch Company.

The plaintiff began this action in the district court for Scott's Bluff county to enjoin the defendant from crossing the plaintiff's canal, and from further prosecuting his condemnation proceedings for that purpose. Upon the trial, the district court found that the defendant's proceedings in condemnation were irregular, and enjoined the defendant from further prosecuting those proceedings, or attempting to cross the plaintiff's canal thereunder, but refused to enjoin any further attempts to cross plaintiff's canal with the canal of defendant, and the plaintiff has appealed to this court.

1. The first contention is that this action can not be maintained because the plaintiff has an adequate remedy at law. The trial court found "that a lateral ditch, flumed or siphoned, can be built or constructed across the plaintiff's right of way at the locality intended by the defendant, and all damages sustained thereby can be compensated," and it is insisted that it follows that the plaintiff's remedy at law is complete. In *Beatty v. Beethe*,* 23 Nebr., 210, 211, it was held that: "If it is sought to ex-

* Opinion by REESE, C. J.

ercise the right of eminent domain, the statutory provisions must be followed, or the proceedings will be void and injunction will lie." If the defendant could proceed without first obtaining a lawful right so to do, we would have the two parties occupying the same location with their canals, and with no definite limits fixed to their respective rights. This would be a continuing injury to both parties, and neither party should be compelled to submit to such a condition.

2. The plaintiff contends that there is no right under the statute to construct irrigation works, and to take the property of others without their consent for right of way, until the state board of irrigation has granted a permit to divert the waters of the state, and that such permission can be granted only upon an application for that purpose, in which application the lands to be watered by the proposed improvement, and the amount of water appropriated therefor, must be specified. We think this contention is well founded. The trial court made specific and comprehensive findings of fact, which are not seriously questioned by either party. From these findings, it appears that the plaintiff company was duly organized under the irrigation laws then in force, and, after the enactment of the act of 1895 (Session Laws, 1895, ch. 69), complied with the provisions thereof, and its right to appropriate the waters of the North Platte river for the irrigation of the defendant's land was adjudicated in pursuance of sections 16 to 21 of the act, and no appeal was taken from that adjudication.

It also appears that defendant has never been granted a permit by the state board to appropriate any of the waters of the state for the irrigation of the land in question.

"The water of every natural stream not heretofore appropriated, within the state of Nebraska, is hereby declared to be the property of the public, and is dedicated to the use of the people of the state, subject to appropriation as heretofore provided." Section 42 of the act of 1895.

Section 16 of that act provided that the state board at its first meeting should "make proper arrangements for beginning the determination of the priorities of right to use the public waters of the state."

By section 19 it was provided that: "When the adjudication of a stream shall have been completed it will be the duty of the state board to make and cause to be entered of record in its office and [an*] order determining and establishing the several priorities of right to use the water of said stream, and the amount of the appropriation of the several persons claiming water from such stream and the character and kind of use for which such appropriation shall be found to have been made."

Section 20 makes it the duty of the board to determine each appropriation in its priority and amount by the time at which it shall have been made, and the amount of water which the works are constructed to carry, and the section provides that such an appropriator shall at no time be entitled to the use of more than he can beneficially use for the purposes for which the appropriation may have been made, and that no allotment for irrigation shall exceed one cubic foot per second for each seventy acres of land for which such appropriation shall be made.

Section 21 makes it the duty of the state board, "within thirty days after the determination of the priorities of appropriation to the use of water of any stream," to issue a certificate, to be transmitted to the county clerk of the county in which said appropriation shall have been made, "setting forth the name and post-office address of the appropriator, the priority number each of appropriation, the amount of water appropriated and the amount of prior appropriation and if such appropriation be made for irrigation, a description of the land to which the water is to be applied and the amount thereof."

Section 22 provides for an appeal from the determination of the state board to the district court.

* The enrolled bill reads "and,"—a patent error. The correction was made by the writer of the opinion.—W. F. B.

Thus the control of the waters of the state is provided for, and a state board established with exclusive original jurisdiction to apportion the waters of the state to the citizens thereof for beneficial purposes. When water is desired for irrigation it is necessary to show to this board what lands are to be irrigated, and authority is given to allot to such lands for irrigation one cubic foot per second for each seventy acres.

By section 28 it is provided that the state board "may upon examination of such application, indorse it approved for a less amount of water than the amount of water stated in the application, or for a less amount of land or for a less period of time for perfecting the proposed appropriation than that named in the application. * * * If there is no unappropriated water in the source of supply, or if a prior appropriation has been made to water the same land to be watered by the applicant, the state board, through its secretary, shall refuse such appropriation and the party making such application shall not prosecute such work so long as such refusal shall continue in force."

Section 18 provides that all appropriations for water must be for some beneficial or useful purpose, and when the appropriator or his successor in interest ceases to use it for such purpose the right ceases.

It is contended in this case that the charges of plaintiff for water used upon defendant's land were exorbitant, and that defendant should not be compelled to take water from plaintiff at exorbitant charges; that the Steamboat Ditch Company is a mutual corporation for the purpose of obtaining water by the stockholders thereof for their own lands, and that they should be allowed the privilege of procuring water at as reasonable rates as they may be able by making the ditches for themselves. But it is not necessary, nor is it proper, to consider these questions in this proceeding. If the action of the state board in refusing to grant the defendant or the company in which he is a stockholder a permit to appropriate the waters of the

state was wrongful, the remedy was by appeal under the statute, and if the state board refused to act upon his application, when properly presented, its action thereon could undoubtedly be compelled in a proper proceeding for that purpose. Neither the defendant nor any one acting for him has complied with the laws of the state entitling him to an appropriation of the waters of the state. The state board has not allowed such appropriation. This refusal is not appealed from and is of full force, and the defendant "shall not prosecute such work so long as such refusal shall continue in force."

The plaintiff company is by the statute made, in some sense, the agent of the state in the distribution of its waters, and it is in the control of the state, so far as may be necessary to insure a lawful and just distribution of the water. It should not be allowed to make unreasonable charges for its services, nor unreasonably refuse to furnish water to the lands for which it has appropriated it; but these matters were not before the court in this proceeding.

The right of a private owner of land to condemn the property for a lateral to convey water to his land from the main canal of the company is much discussed in the briefs, but clearly, from the view we have taken of the principal point presented, this question is not involved in a determination of this case, since neither the defendant nor the company has been allowed an appropriation of the water of the state to irrigate the defendant's land.

The defendant, not having complied with the law, was not entitled to proceed with the contemplated work, and the injunction should have been allowed. The decree of the district court is reversed, with instructions to enter a decree enjoining the defendant as prayed.

REVERSED.

NOTE.—*Irrigation—History—Legislation—Judicial Construction—St. Raynor Law—Act of 1895—Wyoming Statute.*—Irrigation was known to the Egyptians as early as the fourteenth century, B. C. It was, probably, borrowed from Egypt by the Phœnicians, Carthaginians, Assyrians, Babylonians, Greeks and Romans; it was encouraged in Spain

by the Moors; and introduced into England by an Italian, one Pallavicino. The management of irrigation meadows and watered gardens is mentioned by Cato, who wrote in the third century B. C. Irrigation has been practiced in China and India from prehistoric days. The Incas of Peru had a perfect system of irrigation long before the conquest of Pizarro.

Nebraska.—The first irrigation act—known as the St. Raynor law—was passed in 1877; it made irrigation canals internal improvements; and gave corporations organized to build the power to condemn land for right of way. Session Laws, 1877, p. 168. Section 1, article 1, of the act of 1889—Water Rights—Right of Way—provided for the right of appropriation of running water in a stream, canyon or ravine by a natural person, domestic company or corporation; a provision reserved the rights of riparian owners in all streams not more than fifty feet wide. Session Laws, 1889, pp. 503, 504. The act of 1895 resembles very closely the law of Wyoming. Session Laws, 1895, ch. 69; Revised Statutes of Wyoming, 1899, division 1, title 9, ch. 14, and other provisions. See in index under Board of Control, Ditches, Ditch Companies, Water.

Wyoming.—The supreme court of Wyoming has held that a water right acquired for the irrigation of lands and the conduit passes by the conveyance of the realty without being specifically mentioned (*Frank v. Hicks*, 4 Wyo., 502); that a landowner in possession of land under a desert-land entry, at the inception of the water right of a ditch owner, does not lose his claim for damage for the land taken for right of way for the ditch on account of a subsequent relinquishment of said entry and a contemporaneous entry of the same land as a homestead (*Clear Creek Land & Ditch Co. v. Kilkenny*, 5 Wyo., 38); that one who enlarges his ditch constructed across lands of another, is liable for the damage to the lands occurring by reason of the enlargement, notwithstanding right of way had been acquired for the ditch as at first constructed (*Clear Creek Land & Ditch Co. v. Kilkenny*, 5 Wyo., 38); that the waters of a spring which naturally flow into a certain river are to be treated as a part of the waters of the river, in determining the right to use (*Moyer v. Preston*, 6 Wyo., 308); that the common-law doctrine relating to the rights of riparian proprietors in the waters of a natural stream, never did obtain in the state of Wyoming (*Moyer v. Preston*, 6 Wyo., 308); that the provision which limits the time of appeal from the decision of the board, is jurisdictional and the limit can not be enlarged by the court or agreement of parties (*Daley v. Anderson*, 7 Wyo., 1); that a ditch owner who does not provide proper safeguards to prevent the stock of the owner of the land crossed by the ditch falling into a washout caused by the ditch, is liable (*Big Goose & Beaver Ditch Co. v. Morrow*, 8 Wyo., 537); that the doctrine of prior appropriation prevails in the state of Wyoming and is in contravention of the common-law rule of riparian rights (*Farm Investment Co. v. Carpenter*, 9 Wyo., 110); and the last case cited holds the legislation on the subject constitutional.

Nebraska—History.—The United States government first attempted

irrigation at the fort near Sidney, Nebraska, but no date is at hand. The first record of any irrigation company is of the Bay State Live Stock Company, which was organized and in operation in 1876, before the passage of the St. Raynor law. This company was located in Kimball county. Irrigation was an incident and not the object of the corporation. They afterwards complied with the statute; their notice is dated May 20, 1889. The utilized stream was Lodge Pole creek.

Kansas v. Colorado.—Reference is had to the note on page 156 of the 65th volume of the reports. In the case there mentioned as pending before the United States supreme court, the United States have intervened, claiming that a decision favorable to either Kansas or Colorado would interfere with the Reclamation Act of congress (1902). United States Compiled Statutes, Supplement, 1903, p. 218. This question of riparian and interstate rights is important to other states than Colorado and Kansas, for example.

1. Lake Tahoe, a body of water twenty miles long and more than 6,000 feet above sea level, is divided by the state line of California and Nevada. In this lake, Truckee river takes its rise; it flows for some distance in California, enters Nevada, where it flows for near 100 miles and empties into Pyramid lake. If the right of the sovereign state of California to the source and headwaters of Truckee river is supreme, she can make a desert of the best irrigated district in Nevada.

2. Bear river rises in Utah, flows into Wyoming, crosses again into Utah, returns to Wyoming, flows into Idaho, from thence again into Utah, and empties into Great Salt Lake. All the states—like Cæsar's Gauls—differ among themselves in respect to their laws. Who shall solve this riddle of riparian rights?

3. Little Snake river crosses the boundary between Colorado and Wyoming eight times. But adjudicated rights in one state are ignored in the other.

4. The North Platte river rises in Colorado, crosses a corner of Wyoming, where it receives one-fourth of the drainage of that state, enters Nebraska on its western border, traverses the entire length of this state and empties into the Missouri, a river navigable to the sea. The situation is similar to the Arkansas river through Colorado, Kansas, Oklahoma and the state of Arkansas.

The rights of navigation on the mouth of a stream, may be enforced over the water-supply of its remotest tributaries. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S., 690.

Would it not have been better if state lines had been run on physical rather than mathematical divisions? A difference of less than twenty miles, would have obviated the difficulties in regard to Bear river, already mentioned.

Probably the best living authority on irrigation is Elwood Mead of Berkeley, California.—W. F. B.

STATE OF NEBRASKA, EX REL. VILLAGE OF GENOA, V. CHARLES WESTON, AUDITOR.

FILED FEBRUARY 4, 1903. No. 13,101.

Commissioners' opinion, Department No. 1.

Publication of Notice of Election for the Issuance of Water Bonds Under a Village Ordinance: TIME. Under a village ordinance calling an election at a given date as to the issuance of bonds for the extension of water-works, and providing for publication of notice in a certain paper for five weeks before such election, a publication in each issue of the paper thereafter till the election, being five weekly publications, is sufficient notice, although the first one was only thirty-two days before the election.

ORIGINAL proceeding in mandamus to require the auditor to register certain village bonds, in the sum of $3,500, for the extension of water-works. *Writ allowed.*

Paul F. Clark, Charles S. Allen and *Martin I. Brower,* for relator.

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

BY THE COMMISSIONERS.

This is an application for a mandamus to require the auditor to register bonds, in the amount of $3,500, for the extension of village water-works of the village of Genoa, in Nance county.

The auditor objects to the registering of the village bonds which have been presented to him for that purpose on the ground that the history of the bonds, as filed in his office, does not disclose a notice of election duly published in accordance with the terms of the ordinance calling the election. The ordinance was adopted on the 27th day of June, 1902. It provided (section 3): "The village

Syllabus by court; catch-words by editor.

clerk shall cause to be published in the *Genoa Leader* for five consecutive weeks prior to the said election a notice of the special election to be held as provided in section one of this ordinance, together with the proposition and form of the ballots to be used at said election." Section 1 of the ordinance fixed August 5 as the date of the election.

The first issue of the *Genoa Leader* after June 27 occured regularly on July 4, the paper having been published on June 27. The first publication of the ordinance in question, therefore, fell upon July 4, and could not be sooner. This fact was known to the village board.

It is objected that five full weeks did not intervene between July 4 and August 5. The election was held on the date provided by the ordinance, and after five publications in the newspaper mentioned, but leaving from July 4, the day of the first publication, to the election, only thirty-two days. The auditor declined to register the bonds because of this alleged defect.

It must be conceded that under the decisions of this court upon various statutes, couched in similar terms, the words "for five weeks" must be construed as meaning during five weeks, which would be thirty-five days. *State v. Cherry County,* 58 Nebr., 734, citing *State v. Cornell,* 54 Nebr., 647, and *Lawson v. Gibson,* 18 Nebr., 137.

The relator alleges that at most this is a mere irregularity; that the statute provides for no form of notice and no particular publication; and that it has been held that an election may be called by an ordinance or a resolution, or motion of the board. *State v. Babcock,* 20 Nebr., 522. In this case it was by ordinance. The statute provides for a publication of such proceedings, and on behalf of the relator the claim is made that no other notice of the election is, by statute, required; that the provision in the ordinance for special publication of notice was simply by way of abundant precaution, and that a failure to comply with it strictly is not jurisdictional, and that it does not avoid the election or the bonds.

It is further contended that as the notice is a mere proceeding, inserted by the village authorities at their own desire, and not required by the statute, their intention must be interpreted by the surrounding facts, and especially in view of the fact that they knew the publication day of the newspaper, and that it could not be regularily published sooner than July 4. This fact evidently goes far to establish that the council, in passing this ordinance, merely intended to provide for five publications before the election. These five publications were all made. The only complaint now is that the first one did not occur quite thirty-five days before election. On these two grounds,—that the statute requires no special notice, and if none at all had been published other than the ordinance itself the bonds would be good, and therefore the failure to strictly comply with the ordinance would not avoid them, and the other ground, that, inasmuch as knowledge of the situation by the council when they passed the ordinance is conceded, it must be held to provide for only such notice as could be given within the time, and that therefore the five publications made are a compliance with it,—it would seem that the election and the bonds should be upheld. If it be held that the ordinance was not complied with, it would seem to be a mere irregularity, which could not vitiate the bonds. *State v. Babcock,* 20 Nebr., 522.

It seems to us that the absolutely essential things in municipal elections, as to the issuance of bonds, are those which the statute requires; that, these latter being present, the failure in some other particular will not be fatal unless it affects a substantial right of some party interested.

In this view of the case, we are compelled to hold with the contention of the relator, and it is recommended that the mandamus be issued.

W. G. HASTINGS,
CHARLES S. LOBINGIER,
J. S. KIRKPATRICK,
Commissioners.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that a peremptory writ of mandamus issue.

WRIT ALLOWED.

WILLIAM S. POPPLETON, APPELLEE, V. FRANK E. MOORES ET AL., APPELLANTS.

FILED FEBRUARY 4, 1903. No. 10,450.

Commissioner's opinion, Department No. 1.

1. **Unauthorized Action Under Color of Office: RIGHT OF TAXPAYER TO INJUNCTION IN ABSENCE OF DIRECT LEGAL REMEDY.** Wholly unauthorized action under color of office by municipal authorities, which injuriously affects the interest of a taxpayer and water-user of the city, and for which he has no direct remedy at law, warrants an injunction to protect him.

2. **Ordinance: WATER-WORKS COMPANY: FRANCHISE.** The ordinance conferring upon the Omaha water-works company the franchise of the public streets for maintenance of its plant, provided that after twenty years the city might purchase the entire plant, on an appraisement by engineers, without regard to any value in the franchise. *Held*, that an amending ordinance whose sole effect was to put off the time when the city might exercise such right to September 1, 1908, was an extension of the franchise, and forbidden by section 19 of the city charter.

3. **Time of Accruing Right Not Decided.** The time when, under the terms of the existing ordinance, the city's right to purchase accrues, not decided, as it must, in any event, be long before September, 1908.

4. **Injunction Heretofore Allowed.** The injunction heretofore allowed in this case, *held* to have reference only to direct attempts to postpone the accruing of the city's right to purchase.

REHEARING of case reported in 62 Nebr., 851.

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

W. J. Connell, for appellants.

Weaver & Giller, contra.

Syllabus by court; catch-words by editor.

James M. Woolworth, William D. McHugh and *Richard S. Hall, amici curiæ*

HASTINGS, C.

A rehearing was requested in this case on two grounds. In the first place it was urged that the former opinion herein (62 Nebr., 851), is mistaken in holding that there was need for the intervention of equity to prevent the passage of the ordinance in question; that, as suggested in that opinion, if void it would do no harm, and if valid its passage could not be enjoined. It was claimed that the only ground for injunction was that the proposed action of the council was *"ultra vires,"* and if so, the proposed action would be harmless, and there should be no injunction. It is true that the special and irreparable injury to the complainant is, as was stated in the former opinion, somewhat hard to find, but that question was somewhat carefully considered at that time, and it is believed that the conclusion reached was in accordance with the general doctrines, as to which the authorities do not entirely agree, but which are stated very forcibly in Dillon, Municipal Corporations [4th ed.], sec. 922: "The proper parties may resort to equity, and equity will, in the absence of restrictive legislation, entertain jurisdiction of their suit against municipal corporations and their officers when these are acting *ultra vires,* or assuming or exercising a power over the property of the citizen, or over corporate property or funds, which the law does not confer upon them, and where such acts affect injuriously the property owner or the taxable inhabitant. * * * Much more clearly may this be done when the right of the public officer of the state to interfere is not admitted, or does not exist; and in such case it would seem that a bill might properly be brought in the name of one or more of the taxable inhabitants for themselves and all others similarly situated, and that the court should then regard it in the nature of a public proceeding to test the

validity of the corporate acts sought to be impeached, and deal with and control it accordingly."

The rehearing was granted, however, in view of the earnest claim made on behalf of the city council by the city attorney, and on behalf of the water-works company by its counsel, as *amici curiæ*, that the proposed action of the council was not an extension of a franchise, and therefore did not come under the inhibition of the last clause of section 19* of the city charter. At the former hearing this point, although raised in the brief, was not pressed, and it seemed to be taken for granted that the object and purpose of the proposed ordinance was, as is charged in plaintiff's bill, "an extension of the franchise heretofore granted for the construction and maintenance of a water-works plant in the city of Omaha." It is now urged that there is no assurance that the city will in any way exercise its option to purchase the water-works plant at or after the expiration of the twenty years provided in the ordinance creating it, and that therefore, at most, the proposed ordinance, whose passage was enjoined, only might have such effect, but would not necessarily, of itself, be an extension. It would seem more in accordance with the truth, and the reasonable view of the acts and intentions of those who constructed the water-works, and passed the ordinance providing for them, that they understood it as an absolute franchise for twenty years, and after that a franchise at will, subject to the city's option to purchase whenever it should choose to exercise it. It seems clear that the effect of this ordinance in question would be to provide an extension of this absolute franchise until September, 1908. If the effect of the ordinance is to produce an extension of an absolute franchise, then its passage is forbidden, without a submission to a vote of the people, and the proposed action of the council is *ultra vires*. As before suggested, the plaintiff alleges that such was the intention and effect. It must be acknowledged that if it has not that effect, it has none at all.

* Compiled Statutes, ch. 12*a*, Cobbey's Annotated Statutes, sec. 7468.

Counsel for the city and for the water-works company assert with much energy that the twenty years does not constitute a limit of any franchise, but that it is simply a condition similar in effect and nature to the numerous other conditions which are embodied in the ordinance granting the water-works' franchise—such as, for instance, those relating to the pumping of the water from a point in the river above danger of contamination by the city sewerage, or those providing for the maintenance of a certain head and force of water. Counsel say that these are conditions of the franchise which might effect its termination—conditions whose violation might lead to the forfeiture of it altogether. They say that the provision permitting the city to purchase after twenty years is simply another condition on which the water-works company exercises its franchise after twenty years have lapsed, that the conditions of this franchise are under the control of the council, and that therefore the proposed ordinance is not in violation of section 19 of the charter. It is to be noted, however, that these several conditions refer to and control something quite different from the duration of the franchise; they are not intended to have any relation to its termination, but to its carrying on. While the franchise might be terminated by violation of other conditions, it was never designed that it should be. The plain intention of section 19 of the city charter seems to be that those conditions attached to a franchise which control its extension and termination, shall not be changed in such a manner as to extend this franchise except by popular vote. The proposed action in the enjoined ordinance, to put off the city's right to purchase the water-works plant, and so to withdraw the franchise from its holders, until 1908, was intended to extend an absolute franchise to that extent. It was therefore prohibited by the charter provisions referred to; the proposed action of the council was *ultra vires;* the trial court was warranted in finding that it would injuriously affect the plaintiff as a taxpayer and a water-user. He had no adequate

remedy at law, and he was entitled to have the validity of this proposed corporate act ascertained, and if such action was entirely beyond the power of the council, have it reaffirmed.

Complaint is made because the former opinion asserts an absolute right of purchase in the city on and after June 11, 1900. As between the city and the water-works company, this date is not now in dispute and could not be litigated. To the result of this action, it does not matter whether such right accrued in 1900 or will do so in 1903. It is not in issue here and is not determined, and the former opinion is so far modified.

It is suggested that the injunction, as allowed, ties the hands of the city in all respects in dealing with its water company. The claim is made that as there is no change in the franchise or its conditions that may not affect its duration, this injunction against any change in that respect, forbids any change whatever. It hardly seems that such a contention is seriously made. Because a change alleged by plaintiff and found by the trial court to be intended to operate as an extension of the franchise is enjoined by the court, although it might possibly not have such effect, it does not follow that another change, not intended nor expected to affect the duration of the franchise, would be prohibited because it might possibly have such an effect. Changes in the terms of the franchise not directly affecting its duration are as much in the power of the city council as they ever were.

It is recommended that the former conclusion of this court be adhered to, and the decree of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the former judgment of this court be adhered to.

FORMER JUDGMENT ADHERED TO.

NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT COMPANY V. EMMA M. JOHNSON, ADMINISTRATRIX OF THE ESTATE OF CHARLES L. JOHNSON, DECEASED.

FILED FEBRUARY 4, 1903. No. 12,557.

Commissioner's opinion, Department No. 1.

1. **Evidence:** FINDING: ACCIDENTAL DEATH. Evidence *held* not to support a finding that plaintiff's intestate came to his death from accidentally stepping upon scrap iron electrically charged from the wires of the electric-light company.

2. ———: VOLUNTARY CONTACT WITH GUY-WIRE. Evidence *held* to show that if fatal contact was with defendant's guy-wire, such contact was voluntary, and after warning on deceased's part.

3. **Guy-Wire:** ELECTRIC CURRENT: REASONABLE PRECAUTION. Defendant company *held* to be under a 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.

4. **Attorney as Witness:** CONTINGENT FEE: CROSS-EXAMINATION. Where an attorney proffers himself as a witness and voluntarily gives testimony in a case in which he admits having a contingent fee, he should be required to answer on cross-examination as to the amount of such fee.

5. **Intoxication:** CONTRIBUTORY NEGLIGENCE: EVIDENCE: INSTRUCTION. Where there is very slight evidence of intoxication, it is not error to refuse an instruction telling the jury that contributory negligence caused by intoxication would be a defense; the court having fully instructed them as to what would constitute contributory negligence.

ERROR from the district court for Douglas county. Action in the nature of trespass on the case. Tried below before BAXTER, J. *Reversed.*

Isaac R. Andrews and *Albert W. Jefferis,* for plaintiff in error.

Charles A. Goss and *Thomas F. Lee, contra.*

Syllabus by court; catch-words by editor.

HASTINGS, C.

July 15, 1900, Charles Johnson was killed by an electric shock obtained from a guy-wire attached to a pole maintained by the defendant company upon lot 2 in block 87 in the city of Omaha. This lot was uninclosed and unoccupied. There was no public alley through the block, but there was a pathway used by the public towards the west side, running from Dodge street north to Capitol avenue. It also appears that the vacant lot on which the pole was standing was sometimes used by teamsters in turning their wagons around, and a foot-path ran along its west side next to Burket's undertaking establishment, and foot-passengers crossed the lot in various directions toward Capitol avenue. The company's pole seems to have been about 100 feet south of Capitol avenue, and twenty feet north from the south end of the lot. This south end of the lot was bounded by a board fence. Between this fence and the pole was a pile of galvanized roofing, consisting, as one witness said, of half a load. Another said it was a light load for an express wagon. It is described as consisting of pieces eighteen inches square and smaller. The guy-wire had formerly been attached to a stump or stake about fifty feet southwesterly from the pole, but had been for some weeks detached, and the lower end coiled up and deposited in a box just south of the fence on top of which the wire rested. It seems to have rubbed against a wire carrying a heavy electric current until it had worn the insulation from the latter and had itself become charged with a powerful current. Plaintiff claims that the company was bound to know and guard against such danger. The guy-wire, on the day of the accident, rested on this scrap iron about fifteen feet south of the pole. It then passed along over such scrap iron, and up over the fence, and then down into a coil in the wooden box directly south of the fence. It is alleged that the plaintiff's intestate had no knowledge of electricity, and was unaware of any danger from contact with the wire

or with the scrap iron, and that while walking in the vicinity of the guy-wire, without negligence on his part, he stepped on some of the scrap iron and received a shock because of which he fell upon the pile of scrap iron and upon the wire, with fatal result. He was thirty-five years old, strong, vigorous, industrious and economical, and earning $60 per month. The action was brought by his widow on her own behalf and her young son's. The company denied that she was the widow or administratrix of Charles Johnson; admitted its ownership of the electric plant; denied the rest of plaintiff's allegations; and alleged that plaintiff's intestate was guilty of contributory negligence, without which his injury would not have been received. The reply denied such contributory negligence. The jury found for the plaintiff in the sum of $1,300. Motion for new trial was overruled, and from that judgment the company brings error.

Fifty-three assignments of error are laid in the petition. The brief filed on behalf of the company, however, complains only of error in refusing a peremptory instruction for the defendant at the trial; error in refusing to require plaintiff's attorney, who testified at the trial, to state on cross-examination the amount of his contingent fee; and error in refusing instruction 11 tendered on defendant's behalf, to the effect that if the jury should find that plaintiff's intestate was under the influence of liquor, which caused him to neglect ordinary precautions, and by that reason he came in contact with the wire and was killed, they should find for the defendant, even if they also found that the defendant had been negligent in regard to the guy-wire. The reasons why the defendant claims it was error to refuse its request for a peremptory instruction are summarized in counsel's brief as follows:

"1. The defendant, therefore, claims that because of the failure of the plaintiff to establish the allegation in his petition that he received his shock of electricity while walking in a pathway, by reason of his feet coming in contact with scrap iron, and for the further reason that

he was a mere licensee, to whom the defendant owed no duty, the court should have sustained the motion of the defendant to instruct the jury to return a verdict for the defendant.

"2. That the testimony fails to show that the alleged negligence of the defendant was the cause of the deceased's death.

"3. That the uncontradicted evidence of five witnesses, and the circumstances surrounding the whole transaction, show so clearly that the deceased came to his death owing to his own gross negligence and carelessness that no two reasonable minds could possibly differ in regard thereto, and the court should have given instruction No. 1 asked by defendant. For the above reason this judgment should be reversed."

The matters necessary to be determined in passing upon this case seem to be: First. Is the evidence sufficient to maintain plaintiff's claim that her intestate received an electric shock by his feet coming in contact with scrap iron as alleged? Second. If the evidence is sufficient to sustain that conclusion, was the condition of the wire and the scrap iron the result of negligence of any duty owed by the defendant to the deceased? Third. Does the evidence establish conclusively the contributory negligence of the deceased? Fourth. Was it error on the part of the trial court to reject the cross-examination of plaintiff's attorney as to the amount of his contingent fee, he having testified in the case? Fifth. Was it error on the part of the trial court to refuse the eleventh instruction, as to contributory negligence from intoxication?

An examination of the testimony submitted on the plaintiff's behalf compels the conclusion that the shock received by the deceased was not caused by an accidental stepping upon any of these pieces of galvanized iron which lay between the pole and the fence. The deceased had been engaged in moving his furniture that day. With the teamster who hauled it, Gust Nelson, he passed Nyberg's saloon, on Dodge street, south and a little west from this

guy-wire, and in the same block. While there it appears that information was brought in that an employee in Norris's restaurant, next door east of the saloon, had received a shock from this guy-wire. The deceased and his companion started north along the pathway across the block, just west of the saloon which has been mentioned, and the restaurant keeper, Norris, testified that he told them not to go back there; that there was a live wire, and that they would be killed. Nelson neither admits nor denies this statement. They seem to have gone north as far as the rear end of Burket's undertaking establishment, which was at that time the first building west from the lot on which this pole and guy-wire were situated. The fence along the south end of the latter lot commenced some twelve or fifteen feet to the east of the southeast corner of Burket's building. To the east side of Burket's building was, as stated, a pathway running north to Capitol avenue. Between the corner of the Burket building and the fence was a pool of water. It had been raining very hard that day, as all of the witnesses agree, and the day before. The pool of water was an inch or so in depth and two or three yards in diameter, and was close to the west end of this fence. The guy-wire rested on the fence about four feet from its west end. Nelson seems to have stopped at some point outside of the vacant lot where the pool stood, and west from the wire, and Johnson approached it from the west. Nelson is either unable or unwilling to say precisely how Johnson came in contact with it, but knows that a few minutes later Johnson was lying on the ground, with his feet still in this pool of water, his head towards the east, face downwards, with this guy-wire, and one hand at least, and perhaps both of them, under him. A lad in the neighboring building to the east says that his attention was attracted by a loud report like that of a gun; that he looked out and saw Johnson fall forward, and immediately ran to call somebody, and found Mr. Bell and a policeman. The policeman does not testify, but the witness Bell declares

that while Johnson was lying on the ground with the wire under him and his feet in this pool of water, so strong a current of electricity was passing through his body that when he took hold of Johnson's wet clothing he received a shock, and it gave out sparks; and when the policeman took hold of Johnson's pants it brought a strong discharge. Johnson was finally pried off the wire with a dry board, and carried away. There is no testimony that the scrap iron extended into the pool of water. It seems clearly established that Johnson fell forward with his feet extending into that pool. It seems clearly impossible that any shock could have been sustained by stepping upon one of these fragments of scrap iron lying upon ground saturated with water. Of course, the shock could have been sustained by stepping upon scrap iron, which was itself in contact with the wire, only as the result of insulation both of the wire and the iron. If either the wire or the iron was "grounded"—that is, was in contact with moist earth—it would be a better conductor than would the human feet and body, and no current through the latter capable of producing an injury would be so caused. There is an entire failure to establish either the contact with the scrap iron or the latter's insulation, and no evidence from which the jury could find it, except the fact of the shock being received. Practically that much was admitted by plaintiff's counsel. In order that the fact of the shock being received may furnish an inference that it came from the scrap iron, the supposition that it was otherwise obtained must be excluded. That is far from being done. Three witnesses swear in positive terms they saw the deceased walk up to and seize in his hands the guy-wire close to the point where it passed over the fence after resting upon the pile of scrap iron. It seems impossible, under such circumstances, to sustain the jury in finding that the deceased received his injury from accidentally stepping upon a charged piece of the scrap iron. Of course, deceased's taking up the wire in his hands, if it was resting on the

pile of scrap iron and he drew it away from such contact while his own feet were in the pool of water, would make his own body complete a ground circuit, and fully account for the shock that he received. It seems true that, as he lay, his body was partly upon the pile of scrap iron, but there is nothing to support the inference that the shock which threw him down there came from contact with it, and it does appear that as soon as his body was gotten off of the wire the current stopped, and there was no difficulty in removing him. It is clear that he fell forward with his feet still in the water, where a shock from stepping on scrap iron would be impossible.

The extensive argument of counsel that there was no duty owed by this electric-light company to the public to render its appliances and guy-wires on this vacant lot safe can hardly be sustained. The public was in the habit of passing back and forth across it in various directions, but principally along the path upon the east side of Burket's building, which came within fifteen or twenty feet of the pole and of the lower end of the guy-wire. It appears that the wire had been loosened and across the power wire for several weeks. There is evidence tending to show that an electrician in the employ of the company had discovered that the guy-wire was charged with a current nearly four weeks before this accident occurred.

While it is true that a bare licensee usually takes the risk of the premises as he finds them, yet he has rights. It is clear that the general public was licensed by its condition, and the practice which grew out of that condition, to pass over this lot. To throw, without warning, a deadly electric current down this guy-wire, would seem to be strictly analogous to running a licensee down without warning, which, it has been often held, may not be done.

The defendant's claim, that contributory negligence of the deceased conclusively appears, could hardly be maintained if the evidence was sufficient to warrant the jury in finding that he came to his death by stepping upon one of these pieces of roofing iron. If we were able to say that

the evidence warranted the jury's finding as to that, we would be compelled to say that it could not be held, as a matter of law, that stepping on such piece of iron was contributory negligence on the part of one ignorant of the dangers from electricity. The evidence going to establish contributory negligence is just as conclusive in favor of the proposition that he came to his death by voluntarily taking hold of the wire, as to which he admittedly had warning. It is, therefore, only by holding that the specific negligence alleged was not the cause of his death, and that the evidence does not support such a finding, that the contributory negligence can be held to be conclusively shown.

As we have held that the evidence is not sufficient to warrant any inference that he died from stepping upon an electrically charged piece of scrap iron, it seems to follow that it must be held that he voluntarily approached and seized the wire. It seems clear that the trial court should have instructed for a verdict in favor of the defendant upon this evidence, and that for this reason the judgment must be reversed.

It is not necessary, in this view of the case, to discuss the alleged error in refusing to allow the plaintiff's attorney, when produced as a witness, to be questioned as to the amount of his contingent fee. It would seem clear that, where an attorney proffers himself as a witness and admits that he has a contingent fee in the case, the jury are entitled to know and consider the amount of that fee as one of the circumstances affecting his credibility.

With regard to the instruction 11 tendered, the trial court seems to have instructed fully as to what would be the effect of contributory negligence if that question was to be submitted to the jury. Whether such contributory negligence was caused by intoxication or otherwise would seem not to be material. The proof of intoxication was very slight. One witness said that he seemed to have been drinking, and there is testimony of his having taken one glass of beer with the witness Nelson. It is

not thought that there was any error in refusing to give special prominence to this question of intoxication as tending to make probable the truth of the positive statements of the witnesses who were swearing to the deceased's voluntarily picking up the wire, when it clearly appears that he had full knowledge that one person had just received a severe shock, and that he was warned against it.

It is recommended that the judgment of the district court be reversed, and the case remanded.

LOBINGIER and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the case remanded.

REVERSED AND REMANDED.

CITY OF LINCOLN V. FIRST NATIONAL BANK OF LINCOLN.

FILED FEBRUARY 4, 1903. No. 12,603.

Commissioner's opinion, Department No. 1.

1. **Statute of Limitations: Lot Owner's Liability:** JUDGMENT FOR INJURIES: DEFECTIVE SIDEWALK. The statute of limitations does not begin to run against an action on a lot owner's liability over to a city for a judgment for injuries growing out of a defective sidewalk, until the city's liability is fixed by law or by admission and payment on its part.

2. **Judgment Against City:** LOT OWNER: NOTICE: FACT: CAUSE: EXTENT OF INJURY. Judgment against the city in an action of which the lot owner has notice, is conclusive upon the latter as to the fact, cause and extent of the injury.

3. ———: ———: RESPONSIBILITY. Such judgment is not conclusive as to the responsibility of the lot owner for such cause.

4. **Constructive Possession of Landowner:** LIABILITY OF CITY FOR PERSONAL INJURY: JUDGMENT PAID. A purchaser of a lot at sheriff's sale, who does not appear to have obtained any possession or control of the premises except such as arises constructively from the delivery and recording of a sheriff's deed,

Syllabus by court; catch-words by editor.

is not responsible to the city, which has paid a judgment for injuries received by one falling into a negligently constructed coal-hole in front of such lot three weeks after the issuance of the sheriff's deed, and while the former owner is still in possession.

ERROR from the district court for Lancaster county. Action in the nature of trespass on the case, by a municipal corporation against a landowner, to recover for damages recovered for personal injuries sustained by a pedestrian from an open coal-hole in a sidewalk.* See 59 Nebr., 634. Tried below before FROST, J. Judgment for defendant. *Affirmed.*

Edmund C. Strode and *D. J. Flaherty* for plaintiff in error.

J. W. Deweese, Frank Elmer Bishop and *William E. Blake,*† *contra.*

HASTINGS, C.

In this case plaintiff filed in the district court for Lancaster county, January 24, 1901, a petition setting out its incorporation and that of the defendant bank; that the latter, November 1, 1894, and long prior thereto and thereafter, owned lot 13 in block 34 in plaintiff city, and maintained for its own use and benefit a vault under the sidewalk, which was a public sidewalk of the city on one of its principal thoroughfares, with a large opening or coal-hole through the sidewalk, constructed by defendant's grantors, and maintained by it for its own benefit; that the lid covering this hole was defective, unfastened and insecure, and subject to displacement by any person stepping upon the edge of it, and was not of sufficient size and weight to securely cover the hole; that these facts were well known to the defendant; that about November 1, 1894, Mrs. Pirner stepped upon the coal-hole cover, and

* The pivotal question in the present case was: Is a party who comes into possession of lands as grantee, with a nuisance already existing thereon, liable for a continuation of the nuisance before notice and request to abate the same?—W. F. B.

† Of the Iowa bar.

by reason of its defective construction, fell through and sustained serious injuries thereby, and because of such injuries instituted an action against the plaintiff, in which she recovered the sum of $4,000 damages and $227.26 costs; that the city prosecuted error to this court, where the judgment was affirmed on February 9, 1900,* and additional costs in the sum of $40.80 court costs, and $20 for printing, were incurred; that on September 10, 1900, the city paid the judgment, interest and costs in full, amounting to $5,256.12, and incurred expenses, including costs of the supreme court, and procuring bill of exceptions prepared in the defense of said action, in the sum of $349.86; that the injuries to Mrs. Pirner were caused by the defendant's unlawfully maintaining its excavation under and its coal-hole through the sidewalk in an unsafe, dangerous and defective condition, to the plaintiff's damage in the sum of $5,605.98. The defendant answered, admitting the corporate character of the parties and the recovery of judgment by Mrs. Pirner against the plaintiff and the error proceedings to this court, and denied the other allegations. A general denial was filed to this answer, and on the issues so made, trial was had to the court, a jury being waived, and the district court found for the defendant and dismissed the action. Motion for new trial was overruled. From this judgment the plaintiff brings error.

The plaintiff claims that under the facts in this case the defendant is liable over to the city (1) at common law; (2) under the city charter, which at the time of the accident provided as follows: "It is hereby made the duty of all real estate owners and occupants to keep the sidewalk alongside or in front of the same in good repair and free from snow and ice and other obstructions, and they shall be liable for all damages or injuries occasioned by reason of the defective condition of any such sidewalk" [Compiled Statutes, 1893, ch. 13*a*, sec. 67, subdiv. 6]; and (3) under the ordinance of the city providing for excava-

City of Lincoln v. Pirner, 59 Nebr., 634.

tions beneath sidewalks, as follows: "No person shall be allowed to keep or use for vaults, areas, or other purposes, the space beneath the sidewalks included within the sidewalk lines of any street within the city, unless a permit therefor shall have been obtained from the city council; such permit to continue and be issued only upon such condition that the party receiving the same shall, as compensation for the privilege granted by such permit, maintain and keep in repair a sidewalk over such space intended to be used for vaults, areas, or other purposes, and pay all damages that may be sustained by any person by reason of said sidewalk being in a defective or dangerous condition."

The bank asserts that there is no common-law liability on its part for lack of any knowledge or notice on its part of the defective condition of this coal-hole; that no liability attaches to it as mere owner, for a mere passive neglect; that defendant's possession of the property was only constructive, by reason of a sheriff's deed bearing date about three weeks before Mrs. Pirner's accident, and no actual knowledge on the part of the bank, or demand upon it for repairs, appears in the evidence; that there was no statutory liability, because in the year 1899, a year and more before the institution of this action, the statute above quoted was repealed; that any attempt to create such a liability by ordinance was unconstitutional and void; and that the right of action is barred by the statute of limitations, because the injury was sustained by Mrs. Pirner in 1894—more than six years before the commencement of the action.

The bank appears clearly to have had notice of the pendency of Mrs. Pirner's action against the city and to have refused to take any part in it. Under the admissions of the answer, therefore, the bank is concluded as to the existence of the trouble of which she complained—a defective lid on this coal-hole—as to her injury from that cause, and as to the amount of damages sustained by her. The bank, of course, is not concluded by that adjudi-

cation as to the question of its own responsibility for the condition of the coal-hole. 2 Dillon, Municipal Corporations, sec. 1035.

The sole questions in this case, then, are as to the responsibility of defendant merely because it was the owner of this coal-hole, and as to the statute of limitations. If either is found in favor of the defendant, the judgment must be affirmed. So far as the latter question is concerned, no authority whatever is cited by defendant, and only some cases on sureties' rights to contribution and officers' claims for indemnity, by plaintiff. It seems clear, however, that if there exists any right on the part of the city to recover over against the bank because of the injury to Mrs. Pirner, it could only be when the city's liability towards Mrs. Pirner became fixed. The wrong, so far as the city is concerned, only became actionable when damage to the city accrued, and that was only when a final judgment in Mrs. Pirner's favor was rendered. Any attempt to recover of the bank on plaintiff's part before that time would have been futile, and the statute would not commence to run, as against a right of action, until such right of action was in existence. Evidently the city could not assert its liability to Mrs. Pirner in a case against the bank so long as it was denying such liability in Mrs. Pirner's own action in the same court, or in this one on review. It will not be necessary to discuss further the question of the statute of limitations. The city's claim here is for indemnity against liability on Mrs. Pirner's judgment, not for the injury to Mrs. Pirner.

It remains to see whether there is any right to charge defendant with responsibility for the condition of the coal-hole lid, either at common law, by statute or by ordinance of the city.

The common-law liability of the defendant is the claim most strongly urged by plaintiff. It rests, as above stated, solely on the ownership of the property on the defendant's part by virtue of a sheriff's deed bearing date about three weeks before Mrs. Pirner's fall. One Carr,

as owner, had built the walk and coal-hole some years before and was still in possession. In what capacity he was still holding, does not appear. There is nothing to show possession by defendant except the sheriff's deed and its recording on October 11, 1894. In that deed, Carr is named as one of the defendants whose rights were conveyed by it. The injury occurred November 1, 1894. The sole cause alleged is the loose lid of the coal-hole, so that it slipped aside and let the woman's foot through, and caused a fall, with bruising of the foot and leg and some injury of the back. The excavation and hole in the walk had been there since 1883, in substantially the same condition. The walk and coal-hole had been made under the inspection of the city's street commissioner. Not so much as knowledge of the coal-hole's existence on the part of this defendant, whose sheriff's deed is dated twenty-three days, and recorded twenty days, before this accident, appears. It is clear that if the defendant is liable at common law, it must be for maintaining a nuisance in a public street. It may be taken as settled that an unauthorized coal-hole in a sidewalk would be a nuisance *per se*. *Irvine v. Wood,* 51 N. Y., 224, 10 Am. Rep., 603; *Robinson v. Mills,* 65 Pac. Rep. [Mont.], 114. Both of the above cases hold, with seeming good reason, that an unsafe and improperly secured authorized excavation is as much a nuisance as is an unauthorized one. No authority for maintaining a coal-hole is pleaded here, and the finding in Mrs. Pirner's case would be conclusive as to its bad condition if there was. But can defendant, under the evidence here, be claimed to have been conclusively shown to be guilty of maintaining it, so that the trial court's finding otherwise must be reversed? The bank had only a sheriff's deed, and the defendant in the foreclosure action was still in possession.

"A party who comes into possession of lands as grantee or lessee, with a nuisance already existing on them, is not, in general, liable for the continuance of the nuisance until his attention has been called to it, and he

has been requested to abate it." Cooley, Torts [1st ed.], p. 611, [2d ed.], p. 728. This rule is put upon the ground, in the first place, that the purchaser has a right to assume, as to other persons, that a right to maintain it has been acquired. It is also put on the ground that the purchaser ought not to be held liable for consequences of which he was ignorant, and which he did not intend. *Johnson v. Lewis,* 13 Conn., 303, 307, 33 Am. Dec., 405.

It is conceded by plaintiff that such is the general rule, but it is urged that it has no application to a public nuisance that results in an obstruction to the streets. The rule requiring at least notice to the purchaser of the existence of a nuisance, before his liability commences, is stated in Pollock on Torts,* without the indication of any exception, and based on *Penruddock's Case,* 5† Coke [Eng.], 100½. In Cooley, Torts, at the place cited, it is said to have no application to cases where a personal duty or obligation is cast upon the owner by law, or where the nuisance is immediately dangerous to life or health. It would seem reasonable to hold that it would not apply where the owner's suffering the nuisance to continue would amount to a failure to perform some duty owed to the public, or apply to the actual infliction of a wrong. The three cases cited and relied upon by plaintiff are of this kind.

Leahan v. Cochran,‡ 60 N. E. Rep. [Mass.], 382, 53 L. R. A., 891, 86 Am. St. Rep., 506, is distinctly of this kind. Defendant purchased and thereafter occupied a house whose gutter discharged water on the sidewalk. The water froze, and plaintiff was injured by the ice. The defendant was held liable because of a duty to keep obstructions off the walk, and no prescriptive right to maintain a dangerous situation there was acquirable by use or purchase.

Matthews v. Missouri P. R. Co., 26 Mo. App., 75, 81, is another case of obstruction in a highway, and liability is

* 6th ed., p. 416.
† Coke's reports are cited by parts, not by volumes.
‡ 178 Mass., 566.

said to result for the same reason to one who was openly maintaining the obstruction which caused the injury. Defendant is held, not as owner of the premises, but as "the continuer of the nuisance."

The case of *Morgan v. Illinois & St. Louis Bridge Co.*, 17 Fed. Cas., 749, No. 9,802, is cited by plaintiff. The liability in the Missouri case is held to result because the receiver and the road which he represented, had maintained for three years, as lessees of another corporation, a fourteen-foot cut in a crowded thoroughfare, without railing or protection. It was held that the fact of the premises being in such condition when leased was no protection. A duty to protect passers against their excavation, arose when they commenced to use it.

These cases are very far from showing a duty on defendant's part to protect passers or the city from injury because of this coal-hole.

It seems clear that to bring the defendant within the exception to the rule requiring that purchasers have notice of the existence of a nuisance to render them liable, such possession and control of these premises as to cast upon it the duty of actively providing for the public safety must be shown. Such a duty is found and indicated in *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep., 603, where it is held to devolve upon both landlord and tenants to see that an excavation under the street was made safe for passers. The numerous decisions as to the respective liabilities of lessor and lessee in such cases show that the owner's liability, where it exists, is not as owner, but as creator or continuer of a nuisance. They may be found collected and discussed in *Plumer v. Harper*, 3 N. H., 88, 14 Am. Dec., 333, or more recently and fully in *Wasson v. Pettit*, 117 N. Y., 118,* 5 L. R. A., 794, and in the extended notes to those cases. Such presumption of use and control as the three-weeks possession of a sheriff's deed might

*The title of this case in 117 N. Y., is *Martin, Executor, v. Pettit.* Elias Wasson, the original plaintiff, died pending the appeal; and, upon suggestion of his death, his executor was substituted.—W. F. B.

raise, is rebutted by the fact that the foreclosure defendant was still in possession.

The liability as owner, which is sought to be established by means of the statute before quoted, can not attach. As before stated, a right of action accrued in favor of the city only when its liability to Mrs. Pirner became fixed. This was after the repeal of the statute in question, which took place in 1899. The affirmance of Mrs. Pirner's judgment was in 1900. The general saving clause in chapter 88, section 2, Compiled Statutes (Annotated Statutes, sec. 6966), relates only to causes of action accruing before such repeal.

The liability under the city ordinance is against the person who is "allowed to keep or use" a vault or excavation beneath the street. As the evidence in this case entirely fails to show that defendant kept or used this excavation or coal-hole, there can be no liability under this ordinance. Indeed, the fact that the excavation and coal-hole were outside of the defendant's lot, and entirely on the city's land, and could not be maintained save with the consent of the city, is of itself a sufficient answer to any claim against defendant merely as owner of lot 13. Doubtless possession, control and use of these premises would make defendant responsible for the safety of any excavation under the city's streets, at least to the extent of taking all reasonable precaution to make it safe. *Wasson v. Pettit*, 117 N. Y., 118, 5 L. R. A., 794. No such control appears here.

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

KIRKPATRICK and LOBINGIER, CC., concur.

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

AFFIRMED.

MARIA J. OBERLENDER, APPELLEE, V. JOSEPH O. BUTCHER ET AL., APPELLANTS.

FILED FEBRUARY 4, 1903. No. 12,439.

Commissioner's opinion, Department No. 1.

1. **Trust: PURCHASE MONEY: CLAIMANT: PARTIAL CONTRIBUTOR: ALIQUOT PART OF PREMISES: RESULTING TRUST.** The rule that no trust arises in land purchased for another's benefit, unless the purchase money is furnished at the time, nor, if the claimant is a partial contributor, unless there is an agreement that he shall have an aliquot part of the premises, is restricted to resulting trusts, and has no application to express trusts or those arising by agreement.

2. **Statute of Frauds: CESTUI QUE TRUST: POSSESSION: TRUST AGREEMENT.** The statute of frauds is satisfied where the *cestui que trust* takes possession of land purchased in pursuance of a trust agreement, notwithstanding it is oral.

3. **Possession: CESTUI QUE TRUST: NOTICE.** Such possession on the part of the *cestui que trust* is notice to all the world of his rights in the land.

APPEAL from the district court for Cedar county. Suit in equity to enforce a parol trust in certain real estate. Heard below before GRAVES, J. Trust declared. *Affirmed.*

NOTA BENE.

Maria J. Oberlender, as plaintiff, instituted this action October 6, 1900, and in her petition alleged that Joseph O. Butcher, her son, in the month of October, 1898, acting for and on behalf of herself, purchased certain lots in the village of Coleridge, Nebraska, for which he agreed on behalf of plaintiff to pay the sum of $148.50; that said Butcher, acting for the plaintiff, erected a house on said lots of the value of $300; that, while the said house was in the course of construction, plaintiff paid said Butcher the sum of $400, for the purpose of paying for said land

Syllabus by court; catch-words by editor.

and house; that, when said house was completed, Butcher notified plaintiff, who was then in Missouri, that the house was ready for her; that, on or about November 1, 1898, she moved into and occupied the house, and continued to occupy the same till, to wit, August 25, 1900; that, upon her arrival at Coleridge, she inquired for her deed to the lots and was informed by Butcher that it would be produced; that after repeated demands Butcher informed her that the title to the lots was in his name, when she demanded that he convey the property to her; that on the 8th day of January, 1900, Butcher, without the consent of plaintiff, conveyed the property to the defendant Douglas A. Meigs, with full knowledge, on the part of the grantee, that the plaintiff was the owner of said lots; that, on the 29th day of January, instant, said Douglas A. Meigs and Lottie R. Meigs, his wife, executed a mortgage on said premises to the defendant William G. Waite for the sum of $300, with the full knowledge, on the part of the grantee, of the rights of the plaintiff in the premises; that, on the 25th day of August, 1900, said Douglas A. Meigs wrongfully and unlawfully entered into possession of said premises, put the plaintiff out of such possession, and refuses to surrender possession thereof. Then followed an allegation of equitable ownership and legal title in trust, closing with a prayer that a trust be declared and the mortgage canceled.

A demurrer was filed by Lottie R. Meigs, which the lower court did not pass upon.

By an answer filed January 9, 1901, defendant Butcher admitted the execution and delivery of both the deed and the mortgage, but denied the other allegations in plaintiff's petition; and alleged that on the 22d day of August, 1898, the plaintiff was in a destitute condition; that her health was broken and she had no means by which to support herself and family; that she requested the answering defendant to help her; that he, then and there, agreed to help if she would leave her husband and live with said defendant; that he would provide a home for

her; and that to assure plaintiff of the performance of his part of the agreement, he deposited in the Nodaway Bank the sum of $500, subject to her order, which she, then and there, accepted, with the express agreement that as soon as answering defendant should decide on a location she would send this money with which to build a house, and, when completed, would leave her husband and live with said defendant Butcher; that pursuant to such agreement Butcher came to Coleridge, Nebraska, purchased and paid from his own money for the property in controversy and took the deed therefor in his own name, erected a house thereon, which, together with the lots, cost over $700; that pursuant to said agreement plaintiff sent Butcher $350, and on the completion of said house came to Coleridge accompanied by her husband, contrary to said agreement; that he protested against the husband occupying said house and continued to protest until about the month of April, 1899, when, on account of the abusive conduct of the husband of plaintiff, Butcher was obliged to leave said house; that all the time he lived in said house he furnished provisions for plaintiff and himself as he had agreed; that he was in actual possession of the premises in controversy from the 12th day of September, 1898, to the 8th day of January, 1900, and at no time during said time was his title or right to the possession of said premises questioned, but that plaintiff held out to the public, and especially to the said Meigs, that Butcher was the absolute owner of the premises.

To this answer plaintiff filed a motion on January 26, 1901, wherein the court was asked to strike certain parts of said answer which referred to plaintiff leaving her husband, because said agreement was contrary to public policy. Said motion was sustained and leave given to file a second amended answer.

May 14, 1901, Butcher filed his second amended answer, which omitted the allegations stricken by order of court from the first amended answer. Douglas A. Meigs alleged good faith on his part.—W. F. B.

Elberti Ready and *Cassius H. Whitney,* for appellants:

Where possession is relied on as notice to purchasers of land as to equitable claims not of record, it must be so open and notorious as to indicate to neighbors who has the management. *Hubbard v. Kiddo,* 87 Ill., 578, 580.

James C. Robinson and *R. J. Millard, contra.*

LOBINGIER, C.

This is a suit in equity to enforce an alleged parol trust in certain real estate claimed by plaintiff to have been purchased by her son as a home for her. At the time the alleged arrangement was first entered into, the son, Joseph O. Butcher, one of the appellants, had just attained his majority and had received from his father's estate, through his guardian, the sum of $2,175 in cash. The appellee, his mother, who after his father's death had married a second time, was then living at Maryville, Missouri. It appears that Joseph had decided to give his mother a portion of the money which he had just received, and the two went together to the bank, where $500 of it was deposited to the appellee's credit, Joseph remarking to his mother, according to the testimony, "That's yours for a home." The son's relations with the stepfather, it seems, were not harmonious, and the former claims that the gift was made on condition that his mother should leave her husband. She denies any conditions, however, and other witnesses who were present say that no such terms were mentioned. Shortly after this the son left Missouri and came to Coleridge, in this state. It seems to be conceded that before leaving it was arranged between himself and his mother that he was to select a place for a home for her, to be purchased with the $500. She testifies that soon after his arrival at Coleridge he wrote her stating that he had found a place that he thought would suit, and asking her to send $330 or $400. There was some other correspondence between the parties, but none

of the letters were produced in evidence, having been lost, and it does not appear what their contents were. The tract selected by the son consisted of about three and one-half acres. He testifies that a deed to him for this property was delivered between September 10 and 20, 1898, and that he paid for it out of his own money, but it is nowhere shown that this deed was recorded. He also testifies that he paid for the materials for building a house on this tract, and for the digging of a well, and that he built a barn on the premises. The cashier of the Maryville bank testifies that the appellee obtained from him a draft for $350 on September 16, and appellee says she sent this amount to her son. The latter admits that he received some money from his mother, but says it was about the middle of October, after the lot and building materials had been paid for. When the house was ready for occupancy appellee and her husband came to Coleridge, and she testifies that she asked her son for the deed to the property on the evening of her arrival, and that he told her that her deed was in the bank. She also says that she advanced him further sums to pay bills for materials, amounting in all to $58.20, and that she settled another claim of this kind by surrendering a note which she held against the claimant. The son admits that the mother asked him for a deed, and says that he refused to give one, and told her that the place belonged to him. The parties, including the stepfather, occupied the premises jointly from the fall of 1898 until the following June, when Joseph left, unable, as he claimed, to live longer with his stepfather. On January 8, 1900, Joseph executed a deed to the premises to appellant Meigs for an expressed consideration of $500, and the latter subsequently mortgaged the property to appellant Waite. The petition prayed for a cancelation of both deed and mortgage, and that the plaintiff might be decreed to be the "real and equitable owner of the premises." After a hearing of the cause, a decree was rendered in accordance with the prayer of the petition and from this, defendants bring the cause here by appeal.

Appellants' main contention is that no trust arose because appellee did not send the money before or at the time the property was purchased by her son, and because the amount paid by her was not equal to the entire purchase price, and there was no agreement that she should have a specific share. The rules upon which this contention is based are applicable to resulting trusts or those which arise by implication of law from the presumed intention of the parties. Counsel on both sides refer to the facts of this case as disclosing a resulting trust. But as we interpret them they show an express and not a resulting trust, nor, indeed, an implied trust at all. There was an express agreement between the parties that the son should select a suitable place for his mother's home, and that the $500 which he had given her should pay the purchase price. It was an instance where a donor entered into an arrangement with his donee by which he became the trustee of the identical fund which he had just parted with as a gift, and the donee became the *cestui que trust.* It is obvious that such a trust is created by act of the parties, and is, therefore, express. The rules invoked by appellants have no application to express trusts, and the authorities on which they rely relate exclusively to resulting trusts. Perry, Trusts [3d ed.], sec. 132; *Pickler v. Pickler,* 180 Ill., 168; *Botsford v. Burr,* 2 Johns. Ch. [N. Y.], 404, 415; *Reed v. Reed,* 135 Ill., 482; *Lescalcet v. Rickner,* 16 Ohio C. C. Rep., 461; *Graham v. Selbie,* 8 S. Dak., 604; *Fessenden v. Taft,* 65 N. H., 39; *Logan v. Johnson,* 72 Miss., 185; 2 Pomeroy, Equity Jurisprudence, 1040.

Another objection to the decree is that the transaction is within the statute of frauds. As this is an express trust the statute is applicable here, and as the letters which passed between the parties were not produced there was no written evidence of the transaction. But the *cestui que trust* remitted her money on the strength of it, and afterward came from another state and took possession of the premises, and this, in the absence of writing, is a sufficient performance and execution of the trust to

take it out of the statute. 2 Reed, Statute of Frauds, secs. 889, 890.

Appellee and her husband were in the possession of the premises when appellant Meigs received his deed from the son, and also when appellant Waite made the loan and took his mortgage. The record shows that Meigs was her nearest neighbor, and that Waite's agent who conducted the transaction for him was informed of appellee's possession. Under the decisions of this court, therefore, these appellants were chargeable with notice, not only of the fact that appellee was in possession, but also of her "right, title, and interest." *Uhl v. May*, 5 Nebr., 157; *Scharman v. Scharman*, 38 Nebr., 39; *Kahre v. Rundle*, 38 Nebr., 315; *Pleasants v. Blodgett*, 39 Nebr., 741, 42 Am. St. Rep., 624.

Whether in a proper proceeding Joseph Butcher might not be entitled to recover any sum which he has invested in the property in excess of that received from his mother we do not here determine, because he prays for no such relief in his answer and there is no satisfactory evidence as to just what the property cost.

Complaint is made concerning certain interlocutory rulings in reference to the pleadings, but these can not be considered in the absence of a petition in error. The questions of fact as to alleged admissions by appellee we consider settled by the adverse findings of the court. We therefore recommend that the decree be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

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

AFFIRMED.

CHARLES MCGLAVE V. MARY FITZGERALD, ADMINISTRATRIX OF THE ESTATE OF JOHN FITZGERALD, DECEASED, ET AL.

FILED FEBRUARY 4, 1903. No. 12,447.

Commissioner's opinion, Department No. 1.

1. **Sufficiency of Petition by Creditors Against Administratrix and County Judge, Calling for an Accounting and Alleging Collusion, Fraudulent Payment and Retention of Illegal Fees.** In an action by a creditor (suing in behalf of all) of an insolvent estate against the administratrix thereof and the county judge for an accounting, a petition which alleges collusion between the defendants, and a fraudulent payment and retention of illegal fees to the prejudice of the creditors, is sufficient as against a demurrer.

2. **Jurisdiction of District Court: MOTION TO RETAX COSTS: ACTION ON BOND: STATUTORY PENALTY.** The district court is not deprived of jurisdiction in such a case 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.

3. **Technical Refusal by Administratrix to Sue.** Allegations of collusion and fraud on the part of such defendants, are sufficient to entitle a creditor to bring such an action without showing a technical refusal by the administratrix to sue.

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

John S. Bishop, for plaintiff in error.

James Manahan and *Thomas J. Doyle,* for defendant in error Mary Fitzgerald.

Allen W. Field, for defendant in error Samuel T. Cochran.

LOBINGIER, C.

In the court below plaintiff in error filed a petition containing the following averments:

Syllabus by court; catch-words by editor.

"1. The plaintiff, who brings this action for himself and on behalf of all other creditors of the estate of John Fitzgerald, deceased, who may join herein, complains of the defendants and alleges that John Fitzgerald, late of said county of Lancaster, died intestate on the —— day of December, A. D. 1894, and that the defendant, Mary Fitzgerald, was on the 19th day of February, 1895, duly appointed administratrix of the estate of the said John Fitzgerald, deceased, by the county court of said Lancaster county, and letters of administration were duly issued to her as such by said court; that she accepted such office and qualified therefor, and that ever since March 14, A. D. 1895, she has been and still is the duly appointed, qualified and acting administratrix of said estate.

"2. And the plaintiff further alleges that at and prior to his death the said John Fitzgerald was indebted to the plaintiff; that after the death of said John Fitzgerald and within the time fixed by law and allowed by the court for that purpose, the plaintiff duly filed his claim against the estate of said John Fitzgerald for the amount of said indebtedness, which claim was by said county court of Lancaster county duly allowed on the 2d day of February, 1895, in the sum of $1,746.86 and the interest thereon from the 1st day of January, 1895, at the rate of seven per cent. per annum, whereof the sum of $1,543 is and remains wholly due and unpaid, and that the order allowing the same is and remains in full force and effect, unmodified, unreversed and unappealed from.

"3. That the claims allowed against said estate and the valid and legal claims awaiting adjudication are far in excess of the assets and property of said estate; that said property and assets are insufficient in value to meet the valid and legal claims of creditors; and that said estate is insolvent, and unable to pay its debts in full.

"4. That the defendant, Samuel T. Cochran, from the 2d day of January, 1896, up to the 4th day of January, 1900, was and continued to be the duly elected, qualified and acting judge of said county of Lancaster.

"5. That during the terms of office of said defendant Cochran as county judge the defendant Mary Fitzgerald, as such administratrix, wrongfully, unlawfully and in fraud of the creditors of said estate, paid to the said Cochran, as his pretended costs in the administration proceedings in said estate in said court [here follow items amounting to $612.40], which payments were to each of said defendants well known to be far in excess of any legal or proper costs or charges against said estate in the administration thereof in said court and were to the manifest injury and wrong of the creditors of said estate and in fraud of their rights.

"6. That in truth and in fact the fees and costs justly and lawfully taxable against said estate during the terms of office of said defendant Cochran and to him payable out of the funds of said estate during said time did not and do not exceed the sum of one hundred fifty dollars ($150).

"7. That during his said terms of office the said Cochran wrongfully, unlawfully and extortionately charged and taxed against said estate upon his fee book in said court the following items, to wit: [Here follows itemized statement of fees paid] each of which items, charges and fees is without legal warrant, excessive and extortionate, and that the several sums paid to the said Cochran by the said administratrix as aforesaid were applied to the payment of said unlawful, excessive and extortionate fees and charges while said estate was and was known to be insolvent, and unable to pay its debts in full, to the prejudice of the creditors of said estate, among whom such sums ought to have been divided, and in fraud of their rights.

"8. That said several sums so paid upon said unlawful, excessive and extortionate charges were in equity the money of creditors of said estate, and were diverted and paid to said Cochran by said Mary Fitzgerald as administratrix of said estate wrongfully, without authority of law, and in fraud of creditors, and that said administratrix has wrongfully, and to the prejudice of and in fraud

of the creditors of said estate, acquiesced in said unlawful, fraudulent and excessive charges and has taken and is taking no steps whatever to recover said sums for said estate and for the benefit of creditors thereof.

"9. And the plaintiff further alleges that no part of such moneys paid to and received by said Cochran by said administratrix as aforesaid were by said Cochran paid over to or turned into the treasury of said county of Lancaster, but were and are by him kept and retained."

The prayer was for an accounting, for the restoration and distribution of the amount improperly paid as fees, and for general relief.

To this petition each defendant interposed a demurrer for want of jurisdiction and for insufficiency, and, these being sustained, plaintiff elected to stand on his petition and has brought the case here on error, presenting the sole question as to the correctness of the ruling by which the demurrers were sustained.

Defendants in error contend that plaintiff had an adequate remedy by a motion to retax costs in the county court, and that this excludes the jurisdiction of equity. The rule announced in the cases relied on is summarized in *Haskell v. Valley County,* 41 Nebr., 234, 238, as follows: "In order for this court to review a judgment for costs the party against whom the judgment is rendered must file a motion in the district court to retax the costs and then come here from the ruling of the court upon such motion." In other words, where a party is merely seeking a different ruling as to the taxation of costs in an appellate court, he must lay a foundation by a motion of this kind. But we do not find it anywhere held that such a motion is a condition precedent to an action to recover back money illegally exacted as costs. Neither does it seem to us to take the place of such an action nor to have been so intended. Such a motion is no doubt sufficient where the costs have been taxed but not actually paid, or where the taxing officer stands ready to refund them providing the taxation be changed. But we are

unable to see how it could reach a case like this, where, as is alleged, the costs have not only been paid, but the official who taxed and collected them refuses to refund. Plaintiff might have moved for a retaxation in the county court and upon this basis obtained one in the district court, and still have been, as regards the recovery of the money, in no better plight than when he started. A remedy which will deprive equity of jurisdiction must be as "practical and efficient" as that which equity affords. *Taylor v. Ainsworth,* 49 Nebr., 696; *Sherwin v. Gaghagen,* 39 Nebr., 238. This can not be said of a remedy which forces a suitor to seek ultimate relief in another action, as is the case where an official refuses, after a motion to retax, to refund fees illegally collected. The petition alleges that defendant Cochran has fraudulently misappropriated this money, and that his taxation of costs was to him "well known to be far in excess of any legal or proper costs or charges." A motion to retax costs before such an official could hardly be more than a vain and fruitless proceeding.

It is also contended that under the averments of the petition the administratrix is liable on her bond, and that as there is no allegation that either she or her sureties are insolvent, an action on the bond would afford an adequate remedy. We may presume that this bond complied with sections 164 and 179 of chapter 23 of the Compiled Statutes (Annotated Statutes, secs. 5029, 5044), and that it bound the administratrix "to administer according to law * * * all * * * goods, chattels, rights, credits, and estate," which have come into her possession. Assuming that the acts complained of would constitute a breach of this condition (they certainly would not fall within any of the other conditions prescribed in the statute), it still remains true that an action on this bond is a statutory remedy cumulative to and not exclusive of others. *Coney v. Williams,* 9 Mass., 114.

As was said in *McNab v. Heald,* 41 Ill., 326, 330: "The rule is well recognized, that, where equity has jurisdic-

tion, and an act of the legislature confers like jurisdiction on a court of law, it then becomes concurrent in the two courts. Jurisdiction having once vested in a court of equity, it remains there until the legislature shall abolish or limit its exercise; as, without some positive act, the reasonable inference is, that it is the legislative pleasure that the jurisdiction shall remain upon its old foundations. Story's Equity, sec. 64, *i.* Even where courts of law have been vested by legislative enactment with equitable jurisdiction, unless there are prohibitory or restrictive words employed, the uniform interpretation is, that they confer concurrent and not exclusive remedial authority."

We have been cited to no case, and we have found none, where equity was held to be ousted of jurisdiction over an administrator merely because an action on his bond would lie. For similar reasons a resort to equity is not excluded by the remedy provided by section 34 of chapter 28 of the Compiled Statutes (Annotated Statutes, sec. 9060) in the form of a qui-tam action. This is likewise cumulative (12 Am. & Eng. Ency. Law [2d ed.], 587), and would, moreover, require a separate action by each of the creditors in whose behalf this proceeding is brought, and that against the county judge alone. It was to prevent the necessity of this, and to determine the rights of all creditors in one proceeding, that chancery originally took jurisdiction of administration suits. As was said in *Thompson v. Brown,* 4 Johns. Ch. [N. Y.], *619, *631: "A creditor has a right to come here for a discovery of assets. This is a settled and necessary right. * * * He shall be decreed satisfaction here for his debt, and this upon the ground of preventing multiplicity of suits."

The present state of law as regards the jurisdiction of equity in cases of this kind has been summarized as follows: "In the United States there are two lines of decisions in regard to the jurisdiction of equity over accounts of executors and administrators. In some states it is held that the ancient jurisdiction of courts of equity is

not divested by the statutes which confer similar jurisdiction on the courts of probate, but that such statutes merely give the courts of probate concurrent jurisdiction with courts of equity, leaving it to the moving party to proceed in either court at his option. In other states it is held that the jurisdiction given by statute to the courts of probate is exclusive, and that equity can take cognizance of the matter only when some special ground of equitable interference exists." 11 Am. & Eng. Ency. Law [2d ed.], 1191, where the authorities on each phase of the proposition are set out.

The cases relied on by defendants in error are from states which belong to the second class above mentioned. But even there the right of equity to interfere is recognized "when some special ground exists." The petition alleges that the defendant county judge fraudulently taxed and collected the fees in question, and that in this the administratrix acquiesced—in effect, a collusion between these parties. Now, fraud has always been a "special ground" of interference, regardless of other remedies. "It is objected that complainant had ample remedy at law; and this is probably true. There has nevertheless always been a concurrent remedy in equity cases of fraud." *Wyckoff v. Victor Sewing Machine Co.,* 43 Mich., 309, 312. See, also, *Wright v. Hake,* 38 Mich., 525, 532; *Tompkins v. Hollister,* 60 Mich., 470, 479; *McKinney v. Curtiss,* 60 Mich., 611, 620. Again, "chancery always has jurisdiction to enforce a trust." *Coates v. Woodworth,* 13 Ill., 654, 659. Indeed, a trust can not be enforced elsewhere than in a court of equity. *Bartlett v. Dimond,* 14 M. & W. [Eng.], 49. Ames, Cases on Trusts [2d ed.], 37, and cases cited in notes.

The defendant administratrix is a trustee (*Mahar v. O'Hara,* 4 Gilm. [Ill.], 424, 428), and the moneys belonging to the estate constitute a trust fund. *Ewing v. Maury,* 3 Lea [Tenn.], 381. "In equity, the assets which thus pass into the hands of an executor are treated as a trust fund, and held by him for the benefit of all persons interested

therein, according to their relative priorities, privileges and equities. 1 Story, Equity Jurisprudence, sec. 579. And whenever it is made to appear that there has been a misapplication of any portion of such trust fund, and it can be clearly traced into the hands of any person affected with notice of such misapplication, the trust will be held at once to attach in favor of the person who has been wronged. Idem., sec. 581." *Blake v. Chambers,* 4 Nebr., 90, 94. Moreover, it must be remembered that our inquiry is not limited to the question whether this petition sets forth ground for relief in equity. The court in which this proceeding was brought is not exclusively a court of equity; neither is it a court of law. It is a court of general jurisdiction, endowed by the state constitution with both common-law and equity powers. It had jurisdiction, therefore, to hear this cause whether legal or equitable, and to award relief accordingly. "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 Nebr., 484, 24 L. R. A., 444, 42 Am. St. Rep., 683.

It is urged that the administratrix is the proper party to bring this action and that the petition alleges no refusal on her part. It does allege, however, that the administratrix has paid this money "wrongfully, unlawfully and in fraud of creditors"; that she has acquiesced in the excessive charges, "and has taken and is taking no steps whatever to recover said sums." As against a demurrer, we think this amounts to a charge of collusion and shows that the position of the administratrix is antagonistic to the interests of the creditors. "It is equally well settled that where such parties [administrators] are either in collusion with one holding property alleged to have been fraudulently transferred, or where, as in this case, it is actually claimed by them, or the trustee unreasonably refuses to sue, the creditors or other persons interested may

themselves bring an action for, or reclaim the property fraudulently transferred, making the transferees and the trustees parties." *Harvey v. McDonnell,* 113 N. Y., 526, 531.

It is also claimed that the petition fails to show that the defendant Cochran did not comply with the provisions of section 42 of chapter 28 of the Compiled Statutes (Annotated Statutes, sec. 9069), requiring him to pay the excess of fees into the county treasury, and that it must now be presumed that the county, and not the defendant, holds the money here sought to be recovered. But on referring to paragraph 9 of the petition it will be seen that plaintiff has distinctly alleged that no part of this money has ever been paid to the county, but is kept and retained by Cochran. In the face of this we can not presume that Cochran paid over other money in place of that which he holds, nor do we see how it would avail him if such a presumption could be entertained.

Whether all the averments of this petition can be maintained upon a hearing, is quite another question and one which does not now concern us; but assuming, as we must here, that they are true, we reach the conclusion that the petition is sufficient as against these demurrers, and we accordingly recommend that the judgment be reversed.

HASTINGS and KIRKPATRICK, CC., concur.

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

REVERSED AND REMANDED.

LORENZO V. MORSE ET AL., APPELLEES, V. CITY OF OMAHA ET AL., APPELLANTS.

FILED FEBRUARY 4, 1903. No. 12,153.

Commissioner's opinion, Department No. 1.

1. **Special Assessment**: PETITION: FOOT-FRONTAGE: VALID LEVY: REPAVING: INJUNCTION. Under the provisions of section 110, chapter 12*a*, Compiled Statutes, 1897, a petition signed by the owners of a majority of the foot-frontage is requisite to a valid levy of a special assessment against property specially benefited to pay for repaving, and the collection or enforcement of such special assessment will be enjoined where it does not appear that a petition so signed was first obtained.

2. **Insufficiency of Petition**. Petition for repaving in case at bar examined, and *held* not signed by owners of a majority of the foot-frontage.

3. **Assessment**: STATUTORY PROVISIONS. Statutory provisions authorizing assessments of special taxes against property benefited by public improvements, are to be strictly construed, and it must affirmatively appear that the taxing authorities have taken all steps which the law makes jurisdictional; the failure of the record to show such proceedings, will not be aided by presumptions.

4. **Laches**: ESTOPPEL. One who has not been guilty of laches, will not be estopped to object to the payment of a special assessment which is void for want of jurisdiction in the taxing authorities to make the assessment.

5. **Repavement of Street**: PETITION: STATUTORY PROVISION: INCUMBRANCE: CONVEYANCE. A petition asking for the repavement of a street does not come within the provisions of section 4, chapter 36, Compiled Statutes, 1901, as being an incumbrance or conveyance of land, and where the owner in fee signs such petition the land will be bound thereby without the signature of his wife. *McLain v. Maricle*, 60 Nebr., 353, followed.

6. **Corporation as Petitioner**: UNAUTHORIZED SIGNATURE. The president or secretary of a corporation, either singly or jointly, can not bind the corporate property by signing the corporate name to a petition asking for a street improvement without being specially authorized.

7. **Repaving Street**: ABUTTING OWNERS: ORDINANCE: THIRTY DAYS: ASSESSMENT. A statute authorizing the city council to repave

Syllabus by court; catch-words by editor.

streets under certain conditions, provided that the abutting property owners should have thirty days from the date of approval and publication of an ordinance declaring such improvement necessary within which to designate the paving material. No other reference was made in the statute to such ordinance declaring the improvement necessary. The property owners were given thirty days from the publication of a certain ordinance within which to designate the paving material. *Held*, That the failure of the council to pass and publish an ordinance declaring the improvement necessary would not invalidate the assessment.

8. **Unconstitutional Law:** DETERMINATION UNNECESSARY. The appellate court will not pronounce a statute unconstitutional and void where a determination of the case does not require that the constitutionality of the statute be determined.

9. **Notice.** Notice of the sitting of the board of equalization examined, and *held* to comply with the requirements of the statute.

10. **Special Assessment.** The only foundation for special assessments rests in the special benefits conferred upon the property assessed, and, therefore, the frontage rule per foot can not be adopted unless the benefits are equal and uniform.

11. **Assessment:** SPECIAL BENEFITS: FOOT-FRONTAGE: REVIEW: INJUNCTION. Under the provisions of section 161, chapter 12*a*, Compiled Statutes, 1897, the council, before assessing property for special benefits, according to the rule per foot-frontage, must find that the benefits accruing thereto are equal and uniform. However, where the council fails so to find, a taxpayer with notice, dissatisfied with the rule per foot-frontage adopted, should cause such action to be reviewed, and on failure so to do he will not, in a proceeding to enjoin the collection of such tax, be heard to say that the tax is void.

12. **Special Assessment:** MATTERS TO BE CONSIDERED IN THE PREMISES. Where it affirmatively appears of record that the council in levying the special assessment took into consideration the question of the extent of the benefits, and, preliminary to the levy, formally and specifically found that each parcel of land is specially benefited to an amount equal to the tax assessed against it, it is immaterial that each parcel has been assessed an equal amount per front foot, as a finding that the benefits are equal and uniform need not be in the exact language of the statute.

APPEAL from the district court for Douglas county. Injunction. Facts appear in opinion. Heard below before FAWCETT, J. Judgment for plaintiffs. *Affirmed.*

James H. Adams and *Charles E. Morgan,* for appellants.

Franklin J. Griffen and *Silas Cobb, contra.*

KIRKPATRICK, C.

This is a proceeding in equity brought by Lorenzo V. Morse and other taxpayers against the city of Omaha and Albert G. Edwards, as city treasurer, to enjoin the defendants from collecting or attempting to collect certain special taxes and assessments, and for a decree holding such taxes void and a cloud on the petitioners' title, and praying for a perpetual injunction, and for a decree removing the cloud from the title to their real estate because of the void taxes and assessments complained of. Trial was had which resulted in findings by the trial court of all the issues in favor of the petitioners, and a decree enjoining the city and its officers from collecting or attempting to collect such taxes, and removing the cloud created by such special taxes and assessments from the title to petitioners' lands. From this decree the cause is brought to this court upon appeal by the city of Omaha and its treasurer.

Very many questions are presented by the record and ably argued by opposing counsel. Section 110, chapter 12*a*, Compiled Statutes, 1897,* the charter for cities of the metropolitan class, among other things, contains the following provision: "No repaving shall be ordered except upon the petition of the owners of a majority of the taxable front feet in any improvement district." It is disclosed by the record that street improvement district No. 617 was created by ordinance in the city of Omaha, and a petition was duly presented to the city council praying for the repaving of the streets in said district, which petition purported to contain the signatures of the owners of more than a majority of the taxable front feet within the paving district. The first contention of the petitioners

* As amended, Cobbey's Annotated Statutes, sec. 7562.

in the trial court, was that the petition which was presented to and acted upon by the city council did not in fact contain the names of the owners of a majority* of the front feet; and the trial court so found. In answer to this contention and the finding of the trial court, it is urged by appellants in this case, first, that the petition upon which the city council acted being regular upon its face, purporting to contain the requisite signers, and the repaving having been done, the sufficiency of the petition can not now be attacked collaterally in an action like this; and second, that the petition did, in fact, contain the names of the owners of a majority* of the foot-frontage within the district.

The correct determination of the first question must depend upon whether a petition in fact containing the signatures of the owners of a majority of the taxable front feet is a jurisdictional prerequisite to valid action by the council in making the assessment. It may, in the first place, be remarked that the rule firmly established in this state by a long line of decisions is that statutory provisions authorizing the levy and collection of special assessments shall be strictly construed, and that the record of such proceedings must on its face affirmatively show a compliance with all the conditions made necessary by the statute to a valid exercise of the taxing power. In discussing this principle, IRVINE, C., in *Hutchinson v. City of Omaha,* 52 Nebr., 345, 349, expressing an individual opinion, said: "Such grants of power hold out temptations and opportunities for the confiscation of property to such an extent that the protection of property rights demands that they should receive the very strictest construction, and that the courts should be insistent that the proceedings should be of the utmost regularity." Again, in *Batty v. City of Hastings,* 63 Nebr., 26, it was said (p. 32): "It is the settled construction of the statutes of this state

*This use of the word majority is a solecism, but it occurs in the statute.—W. F. B.

relating to municipal corporations that the several steps required to be taken in assessing the cost of public improvements against property benefited must be construed strictly." *Medland v. Linton,* 60 Nebr., 249; *Grant v. Bartholomew,* 58 Nebr., 839; *Smith v. City of Omaha,* 49 Nebr., 883; *Harmon v. City of Omaha,* 53 Nebr., 164.

Keeping in mind the principle referred to, we will proceed to an examination of the question presented. From a reading of the language quoted, it is clear the act contains a positive prohibition against the city council taking any steps to repave a street in the absence of a petition signed by the owners of a majority of the taxable front feet in any improvement district. We are at a loss to see how the prohibition could have been couched in language stronger or more imperative. Every step taken by the council towards repaving, if taken in the absence of the petition designated by this act, is unlawful, and we are unable to see how the action of the council taking property in this manner could be said to be the taking of private property for a public purpose by due process of law.

Judge Cooley, in his work on Taxation [2d ed.], page 656, in construing provisions identical with that involved herein, says: "Their legislative action, if properly taken, is conclusive of the propriety of the proposed improvement, and of the benefits that will result, if it covers that subject, but it will not conclude as to the preliminary conditions to any action at all; such, for example, as * * that the particular improvement shall be petitioned for or assented to by a majority or some other defined proportion of the parties concerned. This last provision is justly regarded as of very great importance, and a failure to observe it will be fatal at any stage in the proceedings. And any decision or certificate of the proper authorities, that the requisite application or consent had been made, would not be conclusive, but might be disproved."

In 2 Dillon, Municipal Corporations, section 800, in discussing this question, it is said: "Where the power to pave or to improve depends upon the assent or petition

of a given number or proportion of the proprietors to be affected, this fact is jurisdictional, and the finding of the city authorities or council that the requisite number had assented or petitioned is not, in the absence of legislative provision to that effect, conclusive; the want of such assent makes the whole proceeding void, and the non-assent may be shown as a defense to an action to collect the assessment, or may, it has been held, be made the basis for a bill in equity to restrain a sale of the owner's property to pay it."

In the statute under consideration there is an entire absence of any provision tending to make the action of the city council in passing upon the petition final and conclusive.

Mulligan v. Smith, 59 Cal., 206, is a leading case upon this question. There it is said (p. 229): "When, therefore, the legislature prescribed that a petition from the owners of a majority in frontage of the property to be charged with the cost of the improvement was necessary to set the machinery of the statute in motion, no step could be taken under the provisions of the statute, until the requisite petition was presented. It was the first authorized movement to be made in the opening of the avenue. When taken, officers who were to constitute and organize a board of public works were authorized to organize. Until it was taken, they had no such authority. They could not legally act at all; or if they acted, their proceedings would be unauthorized and void. The presentation of the petition required by statute, was therefore essential. It was, as other courts, in construing similar statutes, have expressed it, a jurisdictional fact, that may not be presumed or inferred, upon which rested all the subsequent proceedings authorized by the statute."

In *Ogden City v. Armstrong,* 168 U. S., 224, 18 Sup. Ct. Rep., 98, 42 L. Ed., 444, the supreme court of the United States, quoting *Mulligan v. Smith* with approval, said (p. 235): "We agree with the court below in thinking that no jurisdiction vested in the city council to make an

assessment or to levy a tax for such an improvement, until and unless the assent of the requisite proportion of the owners of the property to be affected had been obtained, and that the action of the city council in finding the fact of such assent was not conclusive as against those who duly protested. The fact of consent, by the requisite number, in this case to be manifested by failure to object, is jurisdictional, and in the nature of a condition precedent to the exercise of the power."

The same doctrine is announced in *Sharp v. Speir,* 4 *Hill* [N. Y.], 76, where it is said (p. 88): "Defendant insists that the petition conferred jurisdiction on the trustees * * * provided they should judge that a majority of the persons intended to be benefited had signed; that, by granting the petition and proceeding with the work, the trustees adjudicated upon the question, and determined that a majority had petitioned; and that this judgment of the trustees is conclusive upon all persons so long as it remains unreversed. It is impossible to maintain that in this matter the trustees were sitting as a court of justice, with power to conclude any one by their determination. True, they were called upon to decide for themselves whether a case had arisen in which it was proper for them to act, but they acted at their peril. They could not make the occasion by resolving that it existed. They had power to proceed if a majority petitioned, but without such petition they had no authority whatever. They could not create the power by resolving that they had it,"—citing *Graves v. Otis,* 2 Hill [N. Y.], 466.

In *Auditor General v. Fisher,* 47 N. W. Rep. [Mich.], 574, it is said: "The determination of a township board that a majority of the property holders have signed a petition for a local improvement is not conclusive, and, in the absence of statutory provisions to the contrary, the question may be investigated in a collateral proceeding."

As sustaining the rule, the following cases may be cited: *Miller v. City of Amsterdam,* 149 N. Y., 288; *Vil-*

lage of Hammond v. Leavitt, 181 Ill., 416; *Kline v. City of Tacoma,* 11 Wash., 193, 39 Pac. Rep., 453; *Kahn v. Board of Supervisors,* 79 Cal., 388; *Corry v. Gaynor,* 22 Ohio St., 584; *Allen v. City of Portland,* 35 Ore., 420.

This court, in considering charter provisions like that involved herein, has many times said that the number of signers to the petition made necessary by statute was jurisdictional, although the question seems not in each case to have arisen in a collateral attack. *Harmon v. City of Omaha,* 53 Nebr., 164; *Horbach v. City of Omaha,* 54 Nebr., 83, 88; *Leavitt v. Bell,* 55 Nebr., 57; *Grant v. Bartholomew,* 58 Nebr., 839; *City of Beatrice v. Brethren Church of Beatrice,* 41 Nebr., 358, 362; *State v. Birkhauser,* 37 Nebr., 521.

From an examination of the authorities upon the question we are of the opinion that the great weight of authority as well as right reason support the conclusion which we have reached, that is, that the petition with the number of signers required by statute is jurisdictional to the right of the council under an ordinance to repave a street; and that, being jurisdictional, it follows that the action of the city council, when not supported by such a petition, may be collaterally attacked. We are aware that courts whose decisions are entitled to great respect hold to a doctrine opposed to the conclusion which we have reached. This is particularly true of the state of Indiana, which in several instances seems to have passed upon the question, reaching the conclusion that the action of the council based upon a petition which was sufficient upon its face, was not subject to collateral attack. *Board of Commissioners of Lawrence County v. Hall,* 70 Ind., 469; *Faris v. Reynolds,* 70 Ind., 359. But a careful examination of these decisions has led us to the conviction that they can not be considered as authority upon the question here presented, involving, as they do, largely political, rather than property rights.

In *Lincoln St. R. Co. v. City of Lincoln,* 61 Nebr., 109, 146, cited as authority in support of the contention of

appellants herein, a ruling upon the question under consideration was not necessary to a determination, and the discussion thereof must be held to be rather the individual expressions of the writer of that opinion, than the determination of this court. While we concede that there is some merit in the contention of the city of Omaha, appellant, that a taxpayer should not be permitted to stand by while valuable improvements are in progress redounding to the benefit of his property, and then, when called upon to pay his share of the expense, be heard to object that the council in its action had no jurisdiction, we can not say that even such conduct, if free from laches, estops him. Every man has a right to assume that the public officers will do their duty and observe the law. If he is to be charged with notice of what the law contains, he may well be permitted to assume that the city council will not proceed with an improvement without observing the law. The law does not make it incumbent upon him, in order to preserve his rights, to protest against an improvement, or to make inquiry whether the council has complied with statutory prescriptions, but it does, in our opinion, very clearly and in mandatory tones, enjoin upon the council to proceed only upon a petition signed by those owning a certain definite proportion of the foot-frontage. While it is true that he who objects to an assessment to pay for accomplished improvements presumably benefiting his property may not always be deserving of unalloyed sympathy, we think that, under a statute such as this, to hold him estopped, as a general rule, from basing an objection on the sufficiency of the petition at any stage of the proceedings, would result more often in hardship and injustice than would a rule, in our opinion wholly in harmony with the statute as well as the authorities, that the council, in making the improvement, acts at its peril. The law under which the council acts is plain. The work undertaken by it is of vast importance. Every circumstance is calculated to put the authorities upon their guard. Their conduct in the premises is fraught with the

possibility of great hardship. The system of special assessments for local improvements, at its best, is not perfect. Even where the owners of a majority of the foot-frontage have united in a valid petition, and the council has plenary power to proceed, the dissenting owners might still be able to make out a moral case of hardship. But any grievance they might have in such case must, in the nature of things, be an incident to the steady development of metropolitan life among a progressive people. Nevertheless, the owner, whose peculiar knowledge of his own affairs and the status of his property has led him to the conviction that the improvement would not be beneficial to him, if obliged to pay therefor, has the guaranty of the statute that the council can not take valid action binding upon him, until at least a majority of the foot-frontage is represented upon the petition, and upon this guaranty we think he should in a case such as this be permitted to rely. *Mulligan v. Smith,* 59 Cal., 206; Cooley, Taxation,* p. 573; *Harmon v. City of Omaha,* 53 Nebr., 164.

It is next contended on behalf of the city that, even if the action of the city council was subject to examination in a collateral proceeding, in the case at bar the evidence discloses that the petition was signed by the requisite number of the abutting property owners. It is alleged in the petition and found by the trial court that G. N. Clayton, who signed as owner of lot 28, Adolph Bowman, who signed as owner of lot 15, and A. W. Griffen, who signed as owner of lot 14, were each, at the time of the signing of the petition, married men, who were occupying the several lots named with their families as homesteads. The evidence to sustain the finding of the trial court, is meagre, but we will assume its sufficiency for the purposes of this decision. It is contended on behalf of the petitioners that the petition would be invalid as to these three described lots unless duly signed by the wives of the several owners named. Counsel cite section 4, chapter 36, Compiled Statutes, 1901 (Annotated Statutes, sec. 6203), as decisive of the question, to the effect that no conveyance

* 1st ed.

or incumbrance of a homestead is valid, unless in its execution and acknowledgement both husband and wife join. We are clearly of the opinion that the signing of a petition for a street improvement is not a conveyance or incumbrance within the meaning of the section quoted. When the special tax or assessment ripens into an incumbrance, which it probably does, it is because of the action of the city council and taxing officers acting in accordance with the laws authorizing the assessment. While, as we have heretofore found, a petition signed properly is a jurisdictional prerequisite, it is not in any sense an incumbrance or a conveyance in itself. The nature of the interest of the wife in the homestead, the fee to which is in the husband, is discussed fully by this court in *McLain v. Maricle,* 60 Nebr., 353, HOLCOMB, J., speaking for the court. We are satisfied with the views therein expressed, and are of the opinion that the judgment of the trial court in this respect is wrong, and can not be sustained.

It is next urged by appellees in support of the judgment that even if it should be found that it was not necessary to the validity of the signatures of the persons named, who were occupying lots with their families as homesteads, that the wives should sign the petition, and admitting that the petition was sufficient as to those names, yet from the evidence the court was justified in finding that the petition respecting the names of the other signers was insufficient. It is disclosed that the total foot-frontage on the street being repaved was 1,563.8 feet, one-half of which would be 781.9. It appears that the name of Mary Larson, owning lot 32, representing 32 feet, was signed by her husband, and not in her presence, and without her knowledge or consent. The testimony also shows that W. C. Janes, who signed for lot 20, representing 64 feet, was not the owner of record of that lot, but that the title to the same stood in the name of Annie Janes, his wife. The testimony shows that Frank D. Brown signed as owner of lot 27, representing 64 feet, while in fact that lot was owned jointly by himself and G. N. Clayton, and

his signature should have been counted only for 32 feet. Deducting the foot-frontage of the persons named from the petition, the frontage properly signed would be reduced by 128 feet, and after this deduction the petition is insufficient. Again, it is disclosed by the evidence that the name of the Omaha Security Company, a corporation, shown to be the owner of lot 16, signing for 64 feet, was signed to the petition by Thomas Brennan, president. From the articles of incorporation of the company it appears that its business was to be transacted by a board of directors, and that no action was taken by this board regarding the improvement in question, and the president was never authorized to sign the petition. In fact, the board had no knowledge that the petition was signed. The president testified that he signed the name of his corporation upon his own responsibility, without consultation with any of the directors. The rule seems to be settled that the president and secretary of a corporation, whether acting singly or jointly, are without power to bind the corporation by signing a petition for a street improvement, unless specially authorized so to do by the board of directors. *Mulligan v. Smith, supra; Liebman v. City of San Francisco,* 24 Fed. Rep., 705, 706; *Minor v. Board of Control of the City of Hamilton,* 10 Ohio C. C. Rep., 4. It is therefore very clear that the finding of the trial court that the petition in this respect was insufficient is fully sustained by the evidence.

The determination of this case might well be rested on what has been said, but counsel have devoted much of their briefs and oral argument to a discussion of some other questions of considerable importance, and they will be given brief consideration. It is contended by appellees that the assessment is invalid because of the failure of the council to pass an ordinance declaring the improvement contemplated necessary. This contention is based upon the following portion of section 110, chapter 12*a*, Compiled Statutes, 1897 (as amended, Annotated Statutes, sec. 7562): "And whenever any of the improvements herein

named * * shall be declared necessary by the mayor and city council, and an improvement district shall have been created, then it shall be the duty of the mayor and council to give the property owners within such district thirty days from the date of approval and publication of the ordinance declaring such improvement necessary, to designate by petition the material to be used in the paving of the streets," etc. It is apparent from a reading of this portion of the section, which appears to have been added as an amendment in 1897, that the legislature assumed that one of the required steps to be taken by the council preliminary to the making of the improvement was the passage of an ordinance declaring the improvement necessary. It seems to have been the theory of the law-framers that the abutting owners, required to pay for the improvement, should be given a choice in the matter of material. The provision quoted clearly provides for this option in the abutting owner. However, it was necessary to fix a limit of time within which the choice should be made. Accordingly, the provision says that this time shall extend for thirty days after the date of approval and publication of a certain ordinance, viz., "the ordinance declaring such improvement necessary." The situation seems to be as if the legislature, intending to provide that the abutting owners shall have the selection of the material, and intending to limit the period within which they shall be obliged to express their preference, had prescribed that limit by commencing with the date of a certain ordinance, presumably already provided for, and designating that ordinance as the one declaring the necessity of the improvement. In the provision for a petition of the abutting owners, the legislature has spoken clearly and in mandatory tones. So also with the provision regarding the status of the intersection fund. There is no difficulty under the authorities and this statute to hold these provisions jurisdictional. But when we come to a consideration of the point raised by appellees as to the ordinance declaring the improvement necessary, reference to which

is made for the first time in a portion of the statute clearly intended to govern in the matter of designating the material, while we have given the matter careful consideration, we can not see that the legislature has said that the passage, approval and publication of an ordinance declaring the work necessary is one of the prerequisite steps to a valid assessment. If it had done so, we would, doubtless, experience no difficulty under the authorities cited by appellees in holding that such declaration was also a necessity. Many authorities are cited to sustain the contention of appellees, but upon examination it is shown that they were under statutes which spoke directly and clearly upon the declaration of necessity. In the case at bar it appears that an ordinance, duly passed, approved and published, gave to the abutting owners thirty days from its date and publication within which to designate the material. Nothing besides the selection of the material remained for the owner to do. Under these circumstances, notwithstanding this ordinance can not in strictness be said to contain a formal declaration of the necessity of the improvement, it seems to us that this portion of the statute has been substantially complied with. Whether a provision similar to that contained in many statutes requiring the council first formally to declare the necessity of an improvement before proceeding therewith is wise and salutary need not be discussed, but section 110 does not say, nor are we warranted by the language therein to infer, that the law-framers intended that the formal declaration of necessity should precede the improvement, and that the failure so to declare shall vitiate subsequent proceedings; and the safer rule would seem to us to be that where so much of the statute as is mandatory and jurisdictional, regarding which the legislative intent is unambiguous, has been strictly complied with, and nothing remains but the designation, either by the abutters, or, upon their failure by the mayor and council, of the paving material, thirty days' notice, by ordinance formally passed, approved and published, to

owners to make the selection, should be held to be sufficient.

It is next contended that section 20 of the charter of 1897 (as amended, Annotated Statutes, sec. 7469) is unconstitutional and void. It is well settled that an appellate court will not pass upon the constitutionality of a statute where that question is not necessary to a determination of the case under consideration. We do not think that the question of the constitutionality of a portion of the statute under consideration is material to a disposition of the case at bar, and, therefore, following the rule just referred to, we will leave that matter undecided.

It is contended by appellees that the publication of the notice of the sitting of the board of equalization is insufficient, and was not for the necessary length of time. It is disclosed that the council convened on Tuesday, September 13, 1898, at 10 o'clock A. M., for the purpose of equalizing the assessment. It is also disclosed that notice of this meeting was published in the Omaha *Bee* and the Omaha *World-Herald*, on the 6th, 7th, 8th, 9th, 10th, 11th and 12th days of September, being each day for several days immediately prior to the meeting of the city council sitting as a board of equalization.

A further contention is that the notice was insufficient, in not giving the names of the abutting property owners. No good reason has been offered why this should be done, and we are of opinion that under the statute it was not necessary. The notice does set out the lots to be affected by the levy by their numbers, and as it seems to have been published the necessary length of time, we are of opinion that the contention of appellee with regard to this notice can not be sustained.

It is shown by the record in this case that the property within the improvement district was assessed at a uniform rate of a little over $2.50 per front-foot throughout the district. Appellees insist that there is nothing in the record to show that the council found as a matter of fact that the benefits accruing to the abutting property would

be equal and uniform throughout the district. Section 161 of chapter 12*a* (Annotated Satutes, sec. 7629) provides that all special assessments to cover the cost of any public improvements shall be assessed on the property abutting the improvement "to the extent of the benefits to such lots," by reason of the improvement, such benefits to be determined by the council, sitting as a board of equalization, after due notice, "and in cases where the council sitting as a board of equalization, shall find such benefits to be equal and uniform, such assessment may be according to the foot-frontage." From a reading of the entire section we are certain that the evident purpose of the legislature was to guarantee to the property owner that his property would never be assessed for special improvements in excess of the benefits specially accruing thereto by the improvement; and to subserve this evident legislative intent we think the whole section should be construed. It must be constantly borne in mind that the whole and only foundation for special assessments lies in the special benefits conferred upon the property assessed, and an assessment in excess of the benefit so conferred is a taking of property for a public use without compensation, and is illegal. *Cain v. City of Omaha,* 42 Nebr., 120; *Hanscom v. City of Omaha,* 11 Nebr., 37. All, therefore, that the legislature has made essential in the proceedings leading up to a special assessment must be strictly followed, no presumptions coming to the aid of him who seeks to enforce the lien of a special tax. *Merrill v. Shields,* 57 Nebr., 78. In this case, appellants must show that the taxes were legally levied; and in *Equitable Trust Co. v. O'Brien,* 55 Nebr., 735, 737, this is said to be "no new doctrine in this state." *Leavitt v. Bell,* 55 Nebr., 57. That property shall be assessed according to the benefits specially accruing is mandatory. It would be impossible to adopt any other construction without opening the door to the gravest dangers and holding out to extravagant municipal authorities the strongest temptations to the confiscation of pri-

vate property. But absolute accuracy, of course, can not be expected, and the determination of the extent of the benefits must therefore be left to some tribunal, and the statute plainly says that it shall be lodged in the council sitting as a board of equalization, after due notice to the owners. It is fairly implied in the language employed that this determination shall be preliminary to the assessment of the cost, that it shall be formal and specific, that is, that the record shall show that the council actually took the subject of the extent of the benefits under consideration and came to a conclusion thereon, and further, that the action of the council was based upon and was in harmony with such conclusion. To the same effect, and carrying out the same general idea, is the next sentence, namely, "and in cases where the council * * * shall find such benefits to be equal and uniform, such assessment may be according to the foot-frontage." This is tantamount to saying that the assessment shall not be according to the foot-frontage, unless the council shall have found the benefits to be "equal and uniform." Unless the benefits are equal, the foot-frontage rule is a taking of private property without due process of law, and is illegal. We think the council in this case adopted the foot-frontage rule. In the notice of the sitting of the board of equalization, after giving the sum necessary to be raised by the proposed assessment, it is said, "which sum it is proposed to assess upon the lots and real estate on both sides of said 26th avenue, within said district, according to the usual scaling back process, pro rata per foot-frontage at the rate of $2.5089579 per foot, as follows," etc. This notice was first published September 5, 1898. It is apparent that the council proposed an assessment according to the foot-frontage. Does the record show that before passing the ordinance levying this special tax the council did make the finding which by statute is a condition precedent to the adoption of the rule per foot-frontage? The levy ordinance was passed October 10, 1898, and approved October 14, 1898. Therein it is re-

cited that "whereas it having been and being hereby adjudged, determined and established that the several lots and pieces of real estate hereinafter referred to have each been specially benefited to the full amount herein levied and assessed against each of said lots and pieces of real estate respectively by reason of the repaving," etc. The amounts against each lot or parcel of land are then set out in the ordinance, being the same as those in the notice of September 5. There is no reason for holding that the finding contemplated by the statute as the basis for an assessment according to the foot-frontage shall be in the exact language of the statute. We are certain that the council, in the ordinance referred to, after due notice, specifically found as a fact that the property abutting on the district was specially benefited to the full amount assessed against each tract of land. It is certain that the question of the extent of the benefits was determined by the board after deliberation and a hearing. The ordinance contains a specific finding of such benefits. There is no uncertainty; nothing is left to conjecture. What the council as a board of equalization adjudged to be the amount of benefit to each parcel of land abutting may be readily and certainly determined from an examination of the ordinance. So far as any particular property in this district is concerned, we have here an ordinance, passed and approved after due notice and a hearing, declaring, first, that such property is found or adjudged to be benefited to a certain extent by reason of an improvement; and second, that it shall be assessed to that extent to pay for such improvement. But even if the city council had failed to make this finding in the specific manner it did, we are of opinion that such failure would not render the levy void and subject to collateral attack. We think that, at most, the failure would be erroneous, rendering the action taken liable to be reversed upon review. Section 161, chapter 12*a*, Compiled Statutes, 1897 (Annotated Statutes, sec. 7629), provides that "all such assessments and findings of benefits shall

not be subject to review in any legal or equitable action, except for fraud, gross injustice or mistake." This provision, in effect, amounts to a declaration that the action of the city council in finding that the property is benefited to the full extent of the amount levied, in order to justify an assessment per foot-frontage, can be reviewed for fraud, gross injustice or mistake. The taxpayer has notice of the sitting of the city council to be held for the purpose of equalizing and making the levy, and if he is dissatisfied with the action taken concerning the assessment by front foot, it is his duty to have such action reviewed by a proper proceeding, and if he fails to take such action, he can not be heard in a proceeding by injunction to allege that the tax is void for failure of the council to make the finding referred to. *Webster v. City of Lincoln*, 50 Nebr., 1. It seems that the statute in this regard has, in the case at bar, been fully complied with, and the finding of the trial court upon this point can not be sustained under the record.

Some of the contentions of the parties herein considered have not been necessary to a determination of this case, but have been discussed for the reasons already given. We have carefully examined the record, and are satisfied that the special assessment sought to be sustained by appellants is wholly void for the reason that the petition asking the improvement was not signed by the owners of a majority of the taxable foot-frontage in the district. The judgment of the trial court holding such assessment void, and enjoining its collection, is right, and it is recommended that the same be affirmed.

HASTINGS and LOBINGIER, CC., concur.

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

AFFIRMED.

CHARLES J. BARBER v. CHARLOTTE MARTIN.

FILED FEBRUARY 4, 1903. No. 12,208.

Commissioner's opinion, Department No. 1.

1. **Insurance Company**: STOCKHOLDER: MANAGER: STOCK: CONSIDERATION: SALE: REPRESENTATIONS: MAIN ISSUE. 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.

2. **Written Contract**: PAROL EVIDENCE. The rule that parol testimony can not 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 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.

3. **Purchase of Stock**: INSURANCE COMPANY: VENDEE AS WITNESS: CROSS-EXAMINATION: EXCLUSION ERRONEOUS. 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.

4. **Corporation**: OFFICERS: DIRECTORS: SHAREHOLDERS: SECRET PROFITS. The officers and directors of a corporation and the shareholders thereof sustain to each other the relation of trustees 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.

5. ———: GENERAL MANAGER: GENERAL AGENT FOR ALL STOCKHOLDERS. The general manager of a corporation in effectuating a sale of the entire capital stock of his company, acts as the agent of all the stockholders, and he can not receive and retain a secret compensation from the vendee for effectuating the contract of sale.

Syllabus by court; catch-words by editor.

6. **Manager of Insurance Company**: SALE OF CAPITAL STOCK: SHAREHOLDERS. 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 with a limited period at a stated sum, as tending to show the existence of a contract of agency at a later period.

7. **Manager Agent for Sale of Stock.** In an action by a shareholder, as principal, against the general manager and secretary of the corporation, as agent for the sale of the shareholder's stock, to recover the difference between the actual consideration received therefor and the amount accounted for, it appeared that the general manager led the shareholder to believe that he would not purchase her stock under any circumstances; that an option to purchase the shares for a sum much larger than the manager stated he would take for his own was given to the manager by a son of plaintiff, which was fully explained to have been given for the express purpose of enabling the manager to effect a sale to third parties. A few days later the manager sent a telegram to plaintiff, stating, "Have offer $900 cash." He had never received such offer, but as a result of negotiations then pending, he later received a much higher offer. *Held*, That the manager was the plaintiff's agent for the sale of the stock.

8. **Admission and Exclusion of Evidence.** Rulings of the trial court on the admission and exclusion of evidence examined, and *held* not erroneous.

10. **Giving and Refusal of Instructions.** Rulings of the trial court in the giving and refusal of instructions examined, and *held* not error.

ERROR from the district court for Douglas county. Action by stockholder against manager of insurance company for fraud. Tried below before SLABAUGH, J. *Affirmed.*

Westel W. Morsman and *Virgil O. Strickler*, for plaintiff in error.

Byron G. Burbank, *contra.*

KIRKPATRICK, C.

This action was brought by Charlotte Martin in the district court for Douglas county against Charles J. Barber. The petition charged that defendant, as agent for plaintiff, undertook to sell for her eighteen shares of capital stock owned by her in the Home Fire Insurance Company of Omaha; that Barber, as such agent, sold the stock for $2,070, and paid to plaintiff $900, a balance of $1,170 remaining due. The answer of defendant was a denial. There was a trial to a jury, a verdict for plaintiff, and judgment thereon. A motion for new trial was overruled, and the case is presented to this court by Barber, plaintiff in error.

From the record it appears that on December 1, 1899, and prior thereto, defendant was the general manager, secretary and treasurer of the Home Fire Insurance Company, having its place of business in the city of Omaha. On or about November 27, 1899, certain negotiations were pending between Barber and one M. L. C. Funkhauser for the purchase by the latter of the entire capital stock of the insurance company. On November 27, 1899, Funkhauser sent a letter to Barber from Chicago, stating, in substance, that he had sent to him a letter offering to purchase the entire capital stock of the Home Fire Insurance Company; that he was aware that Barber was the manager, secretary and treasurer of the company, having the management of the same, and owning a major part of the stock, and he would therefore be likely to be able to secure for sale and delivery the entire capital stock; and in consideration of these facts, Funkhauser offered to pay as a bonus and consideration for Barber's efforts in bringing about a sale the sum of $40,000. This proposition was made subject to the acceptance by Barber of another proposition of the same date, and subject to an agreement by Barber, in the event the sale was consummated, not to engage in the insurance business for three years thereafter. On the same day Funkhauser sent to

Barber a letter proposing to buy the entire capital stock of this insurance company for $75,000, subject to the terms and conditions of a certain memorandum of agreement then in the hands of Barber, which conditions are stated in the letter to be that Barber should, when the stock was ready for transfer, make a schedule of the business of the insurance company, which Funkhauser should be permitted to examine and verify. On December 1, 1899, a contract was entered into between the parties; Funkhauser agreeing "to pay in cash to the said Charles J. Barber the sum of $75,000 therefor (the capital stock or options therefor), and in addition thereto, the bonus mentioned and specified in the letter of M. L. C. Funkhauser to the said Charles J. Barber, dated at Chicago, Illinois, and bearing date of the 27th day of November, 1899." Barber, on the other hand, agreed to procure the resignation of the majority of the directors and all of the stockholders of the insurance company. The other matters touched upon in the agreement are not material to this controversy. On and prior to the date of this agreement Mrs. Martin, defendant in error (plaintiff below), was the owner of eighteen shares of the stock of the insurance company. On February 17, 1899, one N. R. Persinger, for Mrs. Martin, who lived at Central City, Nebraska, wrote to Barber with reference to Mrs. Martin's stock, asking if Barber knew "of any one wishing to buy stock, and, if so, at what price." The following day Barber replied to Persinger's letter, stating: "As to value of stock, I can give no figures, as none has changed hands recently. The times have not justified investments of that character. If you would advise me what Mrs. Martin holds her stock for, I will bear it in mind, and should an opportunity present, will try and effect the sale for her. Please have her give bottom figures, as there is but little market for any kind of stock at the present time." On February 22, 1899, Persinger wrote Barber as follows: "I saw Mrs. Martin to-day and she said, if she could get one thousand dollars, and the return of the notes,

for her eighteen shares of stock in the Home Fire Insurance Company, within the next thirty days, she would take it, net to her. She is in need of money, is her reason for this offer." Some time in October, 1899, A. D. Martin, a son of defendant in error, called upon Barber in Omaha. According to him, this visit was for the purpose of ascertaining why certain statements customarily issued to stockholders were not being sent to his mother. His testimony relates, for the most part, to conversations between him and Barber regarding the stock and its value; Barber having stated to him that he was willing to part with his own stock for fifty cents on the dollar; that he was negotiating with eastern parties for the sale of all the stock, and to place him in a position to further this deal, he wanted an option upon the shares held by Mrs. Martin, which, with other options from the other stockholders, was to be placed in an Omaha bank for the purpose of showing the unnamed purchasers that the entire capital stock would be forthcoming. Thereupon A. D. Martin gave Barber the following: "Omaha, October 3, 1899. I hereby give Charles J. Barber an option to purchase eighteen shares of Home Fire Insurance stock owned by me, for the sum of one thousand dollars for a period of sixty days. Mrs. C. M. Martin, per A. D. Martin." Martin at the trial said that he was not told by his mother to do this, and that she did not learn that he had done so until after this suit was commenced, and then through other parties. On November 26, 1899, Barber sent the following telegram to A. D. Martin, who was then in Chicago: "Have offer nine hundred dollars cash for your mother's Home Fire stock. If accepted, deliver immediately through Omaha bank assigned in blank, wire answer." Martin replied by mail as follows on December 4, 1899: "Your telegram offering $900 for mother's stock arrived during my absence from the city, but had left orders for all telegrams to be forwarded to mother at Central City, Nebraska. She writes me she accepted your offer, and immediately forwarded the stock

to blank bank in Omaha, and trust by this time same is in your possession. Would be glad to hear from you regarding this matter and wish to thank you for procuring a buyer."

There is much testimony in the record, admitted over objection, explanatory of the two propositions sent to Barber by M. L. C. Funkhauser from Chicago, dated November 27, 1899. From the testimony of M. L. C. Funkhauser and one Charles B. Obermeyer, an attorney acting for the Funkhausers, it appears that negotiations with Barber for the sale of the stock of the Home Fire Insurance Company were pending prior to November 25, 1899. There appears of record an unsigned memorandum of agreement between Funkhauser and Barber, providing for the sale of the entire capital stock for a consideration which appears to be cut out of the writing. Shortly after November 25, 1899, M. L. C. Funkhauser and Obermeyer met Barber at the office of Burbank, the attorney for the insurance company at Omaha, for the purpose of going over this memorandum of agreement, to see whether the parties were ready to execute it. Barber interrupted Obermeyer, who was reading the contract, and stated to him and Funkhauser, in the absence of Burbank, who had withdrawn from the room, that he objected to the naming of the consideration in the contract then under consideration, which, from the testimony of Funkhauser, appears to have been $115,000. Funkhauser testified that Barber then requested a proposition in two ways,—the one, of $75,000 for the stock of the company, and the other, of $40,000 as a bonus to Barber; the former to be shown to the stockholders, if necessary; and that they were to know nothing about the difference. In consideration of keeping the actual consideration secret, Barber then offered to agree to keep out of the insurance business for three years. Funkhauser was not ready to accede to this modification of the form of the contract then, but promised to go back to Chicago and think it over. Obermeyer's version of this conversation is substantially as that of Funkhauser.

It is conceded that in the giving of the following instruction the trial court did not err:

"You are instructed that the sole questions for you to determine in this case from the evidence are: (1.) Did the defendant Barber in selling said 18 shares of stock which originally belonged to the plaintiff act as her agent and representative? If he did not, you need not consider the case any further, but return a verdict for defendant. (2.) If you find that he did act as the agent of plaintiff in selling the 18 shares of stock, you will then determine from the evidence the amount for which said stock was sold by said agent and the amount remaining due the plaintiff and unpaid of said purchase price, and which was received by defendant as agent."

From the evidence adduced it is apparent that the jury believed that Barber was the agent of Mrs. Martin in the sale of the eighteen shares belonging to the latter, and that the consideration received by him was $115 per share, upon the theory that the real consideration paid by Funkhauser for the entire capital stock of the insurance company was $115,000.

Plaintiff in error complains of the admission of certain testimony over objection. Fred Krug, president of the insurance company, and a stockholder, was called by defendant in error. He said that Barber had called him to his (Barber's) office, stating that he intended to sell out the company, having secured a party from outside of Omaha willing to pay $62.50 cash, or $65 if part of the consideration were real estate. Krug thought this price low, under the circumstances, and asked who the party was, to which Barber replied that it was an eastern party. Krug stated that he would not sell at that price unless Barber also got that price, and that every stockholder should get the same price that Barber got, to which Barber replied that he would do the best he could. This conversation occurred the latter part of November, 1899.

On November 26, 1899, Barber sent the telegram to A. D. Martin, stating that he had cash offer of $900 for Mrs.

Martin's stock. In her petition, defendant in error had alleged that at that time Barber falsely and fraudulently concealed from plaintiff the fact that he had received an offer of $115 a share for her stock, and that on December 2 he did in fact sell her stock for $115 a share. Krug's testimony was doubtless intended to sustain this allegation. The evidence shows, and the jury must have believed, that on November 25, 1899, Barber had received a proposition from Funkhauser of $115,000 for the entire capital stock of the insurance company. This proposition was contained in the unsigned memorandum of agreement, which, according to the testimony heretofore adverted to, was subsequently altered to meet the request of Barber for a splitting of the consideration into two parts,—one for the stock and the other as a bonus. Krug's testimony tended to show that at that time Barber concealed from him, as president of the company and as a stockholder, the fact that he had such a proposition under consideration. We think this testimony was admissible. While it does not bear directly upon the main issue—whether Barber concealed from Mrs. Martin, assuming that he was her agent for the sale of her stock, the fact that he had received an offer of $115 per share for her stock—it certainly shows that he concealed this fact from Krug, a stockholder similarly situated with Mrs. Martin, and for whose stock it must also be assumed he had an offer of $115 under consideration at or about the time he stated he had an offer of $62.50. This testimony, while upon a collateral issue, can not for that reason be conclusively said to be irrelevant. It certainly formed the basis of a reasonable inference of the main issue of concealment of the offer of $115 for the shares of defendant in error at the time he stated he had an offer of $900 for her shares. *Lincoln Vitrified Paving & Pressed Brick Co. v. Buckner*, 39 Nebr., 83; *Remy v. Olds*,* 21 L. R. A. [Cal.], 645. As-

* This case has an interesting note on the act of God as affecting the obligation to perform a contract, that is to say, an intervening, insurmountable impediment, resulting from the operation of nature, which could not have been contemplated by the parties.—W. F. B.

suming for the present that he was her agent for the sale of the stock, and that he did have an offer of $115 at the time he stated by telegram that he had an offer of $900, the fact that he concealed from her the real consideration offered for her stock must be taken as established; and in such event, Krug's testimony, even if of doubtful character, would not warrant a reversal of the judgment. But we think it was clearly admissible, as relating to facts and acts related in point of time and character to the main issue of fraudulent concealment from defendant in error. What has been said upon this contention is equally applicable to the testimony of several other witnesses, also stockholders in the company, who at the trial gave testimony substantially like that by Krug.

Complaint is made of the admission of the testimony of M. F. Funkhauser, tending to show that in the negotiations preceding the written contract finally executed between the parties for the sale of the stock to Funkhauser, the price offered was $115 a share. Objection was made on the ground that negotiations preceding and leading up to a contract finally reduced to writing are merged therein, and that as long as the contract remains unimpeached on the ground of fraud or mistake, parol testimony of prior or contemporanous conditions can not be received to vary the terms of the writing. *Commercial State Bank of Neligh v. Antelope County,* 48 Nebr., 496.

Counsel for plaintiff in error offered to show that the contract was in writing, to lay the foundation for objection. The offer was refused and the testimony admitted. We understand that it is conceded that the rule referred to does not apply, except to the parties to the contract or their privies. *National Car & Locomotive Builder v. Cyclone Steam Snow Plow Co.,* 49 Minn., 125; *Clerihew v. West Side Bank,* 50 Minn., 538; *Reynolds v. Magness,* 2 Ired. Law [24 N. Car.], 26; *Lee v. Adsit,* 37 N. Y., 78; Wharton, Evidence [3d ed.], secs, 923, 1041, 1042, 1078. But counsel seek to obviate the applicability of this exception by saying that the contract between Barber and

Funkhauser was, according to defendant in error's own theory, so far as it embraced her shares, made by Barber as her agent, and that she was, therefore, upon the theory of her case, privy to the contract. We think that this contention is based in a misconception of the relation of the parties to this action. This is not an action by Mrs. Martin against the Funkhausers upon a contract made by her agent upon her behalf. In such event, doubtless, in the absence of a proper issue, parol testimony varying the contract would have been excluded. On the contrary, this is an action by the principal against her agent to recover the profit made by the agent in a transaction affecting the principal's property, and which, under the law, he had no right to keep. Being the agent of Mrs. Martin for the sale of her stock, the question was, what in fact was the consideration received by him for the stock? If that consideration was in fact $115 per share, and the contract by which the shares were sold had been, upon his suggestion, made to recite a false consideration, the law would be justly charged with holding out inducements to agents to be dishonest, if it should be held that such contract would estop the principal, as against the agent, on the question of consideration. This testimony was, therefore, admissible.

M. L. C. Funkhauser was permitted to narrate in detail the negotiations between him and Barber which culminated in the sale, and his testimony was to the effect that the consideration for the capital stock, as first proposed, was $115,000, and that upon the request of Barber, for reasons already referred to, the proposition was made in two parts—one for the stock and the other as a bonus. The objection to this testimony is the same as that urged to the testimony of M. F. Funkhauser, and has already been disposed of adversely to plaintiff in error.

The trial court refused to permit Funkhauser and Obermeyer, upon cross-examination by counsel for plaintiff in error, to say what they would have given for the shares without the resignation of Barber, or whether they would

have given $115 per share for less than all or less than a major part of the capital stock.

Before passing upon this contention, we will consider another question presented by counsel for plaintiff in error, and intimately connected therewith. It is said that the verdict giving to Mrs. Martin the difference between what she actually received for her stock and $115 enables her to participate in a consideration which came to Barber because of a surrender by him of rights and benefits belonging exclusively to him. His agreement was to refrain from engaging in the insurance business for three years, surrendering a salary as manager and secretary of the Home Fire Insurance Company, in an amount not shown by the record, but placed by counsel at a sum not less than $10,000 per annum. These benefits, it is claimed, entitle Barber to compensation in which Mrs. Martin can not of right participate. It is further suggested that his work in procuring the resignation of a majority of the directors, and in inducing the holders of outstanding stock to sell, which are among the premises constituting the stated consideration of the $40,000 bonus, gives him an indisputable right to appropriate the $40,000 bonus to himself. Whether, in the absence of all fraud or misrepresentation, Barber would be entitled to a personal compensation for his agreement to stay out of the insurance business for three years, need not be decided. Such an agreement was upheld in *Bristol v. Scranton,* 11 C. C. A., 144, 63 Fed. Rep., 218, 221, but upon a ground which distinguishes it from the case at bar: "In our opinion," it is there stated, "the transaction, as consummated, so far as the consolidation of these two companies is concerned, is not tainted by a scintilla of fraud on the part of the defendants. It was conducted openly and fairly; was brought in its earlier and later stages to the knowledge of a very large number, if not all, the stockholders interested, who were represented by the defendants; and the terms of the consolidation, as finally agreed upon, when submitted to the stockholders of the Scranton Com-

pany, including the complainants, was approved, not only with entire unanimity, but as well as a great 'triumph.'" It can not be said, under the evidence and the verdict in the case at bar, that Barber's conduct was free from fraud and concealment. Barber, as general manager and secretary, as well as director, bore a trust relation to Mrs. Martin, as well as to all other stockholders, which continued so long as he remained an officer of the company. It is primary knowledge that corporation business is transacted through managing officers. The relation between officer and stockholder is that of trustee and *cestui que trust.* The officer can not use the confidence reposed in him for personal profit. If his conduct is impeached and brought under review, it will be closely scrutinized. The burden was upon Barber to show that he had dealt fairly with the stockholders, and he was inhibited by every rule of equity and fairness from taking to himself the benefit of a transaction, if that benefit was inconsistent with the faithful discharge of his trust. As stated in *Bristol v. Scranton, supra* (p. 221): "It is a rule of the broadest application in equity that no one who has fiduciary duties to discharge shall be permitted to enter into contracts or engagements, in which he has a personal interest, which actually do conflict or may conflict with the interest which he represents, and which he is bound to protect. To uphold such proceedings,—to justify such conduct,—would be contrary to public policy. The law does not permit fiduciary agents to subject themselves to temptations to serve their own interest in preference to those of their principal. An agent's interest and an agent's duty must be coterminous and harmonious. These principles are perfectly well settled." Under the evidence the jury was justified in finding, and may be presumed to have found, that Barber was offered $115 per share for all the stock, and that upon his suggestion the contract was made to show a consideration of $75 per share. He had no right to assume that Mrs. Martin or any other stockholder would be willing to take less than the largest

offer obtainable; and by concealing the actual offer, he was enabled to reap a profit which rightfully belonged to Mrs. Martin. In *Cumberland Coal and Iron Co. v. Parish*, 42 Md., 598, it is said (p. 605) that in the case of directors of a corporation, "there is an inherent obligation, implied in the acceptance of such trust, not only that they will use their best efforts to promote the interest of the shareholders, but that they will in no manner use their positions to advance their own individual interest as distinguished from that of the corporation, or acquire interests that may conflict with the fair and proper discharge of their duty." The court says further that the burden of proof is upon a party holding a confidential or fiduciary relation to establish the perfect fairness, adequacy and equity of a transaction with the party with whom he holds such relation; and that, too, by proof entirely independent of the instrument under which he claims. *Bent v. Priest*, 86 Mo., 475. It follows that Barber could not legally make a profit out of the sale of Mrs. Martin's stock, in the absence of a clear showing that it was the latter's intention to sell to him, as the vendee of her stock, for a price agreed upon between them, after which the stock would be his. But Barber never pretended to buy the stock. In no event did he make an offer to purchase it. The telegram under which the stock was sent to the bank for delivery expressly stated that he had received an offer of $900. This could mean nothing to Mrs. Martin except that Barber was in a position to sell her stock for her at that price. It nowhere appears that he had received an offer of $900. On the contrary, it is amply proved by the record that he had received a much higher offer. He made no disclosure of this higher offer. His conduct was not free from fraud or concealment. He used the confidence reposed in him for his personal profit.

It was the theory of counsel for plaintiff in error that Funkhauser offered a bonus of $40,000 in good faith to secure the consummation of the transfer of all the stock, and the resignation of a majority of the directors. Hence,

on cross-examination of Funkhauser and Obermeyer, as already indicated, it was sought to be shown that they would not have paid $115 per share without the resignation of a majority of the directors, or for less than a major part of the stock. Was the exclusion of this testimony erroneous? The record, we think, shows conclusively that Funkhauser and his associates never proposed to buy less than all of the capital stock of the company. From the very commencement of the negotiations, the parties considered only the proposition of the transfer of all the stock. The question was, what did they pay for it? It follows, therefore, that it was immaterial what they would have paid a share for less than the entire capital stock, and the ruling of the trial court was not erroneous. In this connection, it should also be remembered that Barber was not entitled, as against Mrs. Martin, to enjoy a secret compensation from Funkhauser for effectuating the contract. It is elementary that the agent for one party can not appropriate to himself a fee paid by the other party to the contract for bringing about the contract; and we can not see how his liability in this could be affected, even if it were shown that the price paid a share by Funkhauser was governed by the consideration of Barber's services in bringing about a sale of all the stock. If it was his duty, as manager and director, to manage the affairs of the corporation for the benefit of Mrs. Martin and the other stockholders, it was equally his duty, in making a sale of the company, to remain aloof from any temptation to make such sale profitable to him personally at the expense of the shareholders.

So far we have considered this case upon the assumption that Barber, in the sale of the stock, acted as agent for Mrs. Martin, defendant in error. It is earnestly contended on behalf of plaintiff in error that the trial court's rulings upon the evidence tendered for the purpose of proving agency in Barber are erroneous, requiring a reversal of this judgment. We have read the record, and are convinced that under the evidence upon this issue,

which was clearly admissible, the jury was manifestly justified in believing that Barber was Mrs. Martin's agent for the sale of her stock; that both he and she so regarded him. He stated to her that he had an offer of $900. He admits that he never had such offer. In his testimony, which appears in the record by deposition, he says, in answer to a question why he stated that he had an offer of $900 if in fact he was buying the stock himself: "For the simple and sole reason that I didn't propose to be bound to take their stock if my negotiations with Funkhauser fell through, which I would have been bound to have done had I made a stated offer."

Q. Well, do you mean that Funkhauser had offered you $900 for the stock?

A. No, sir; I do not.

Q. Well, who was making you an offer?

A. No one.

Q. Why did you say, "Have offer $900"?

A. I have simply said why I have used that language; so I could not be held and be compelled to take the stock and pay $900 for it if my negotiations fell through. I did not want the stock at any price, and I should have repudiated taking the stock had my negotiations fallen through.

Thus Barber's own testimony accords with that given by A. D. Martin, to the effect that Barber cried the stock down, saying that he would take fifty cents on the dollar for his own. It also appears from his testimony that he was considering Funkhauser's proposition when he telegraphed to Mrs. Martin's son that he had an offer of $900. A. D. Martin testified that he gave Barber the option to sell at $1,000 for sixty days, already referred to, upon Barber's suggestion, in order that the latter might show it to eastern purchasers. There is some question made of A. D. Martin's power to deal for his mother. But this is not material in this connection. There is no suggestion from Barber that he doubted Martin's authority. It conclusively appears that he led A. D. Martin to believe that he

himself would not give $1,000 for the stock under any circumstances. It is equally clear that he concealed from A. D. Martin Funkhauser's identity, and the negotiations for the sale of the stock then under consideration between himself and Funkhauser. All of this was inconsistent with Barber's trust relation as manager and director of the company, and at the same time amply shows that he intended the Martins to believe that he would not and was not buying the stock himself, but was undertaking to sell it for them.

Error is urged in the admission in evidence of the three letters heretofore quoted, dated February 17, 18 and 22, 1899, respectively; the first and third from Persinger to Barber, and the second from Barber to Persinger, relative to Martin's stock. In the letter of the 17th, Persinger asks Barber if he knows of any one wishing to buy Mrs. Martin's stock, and if so, at what price. In his answer, Barber asked to be advised at what price Mrs. Martin held her stock, saying that he would bear it in mind, and should an opportunity present, he would try to effect a sale for her. Replying to this letter on the 22d, Persinger says that he had seen Mrs. Martin, who said if she could get $1,000 for her shares within the next thirty days she would take it, net to her; her need of money being the reason for this offer. Counsel contend that these three letters constitute a contract, which by its terms expires within thirty days from February 22, and therefore can not be relevant to the issue whether a contract existed ten months later. Counsel for defendant in error contends that the intent of the parties, gathered alone from these several writings, warrants the conclusion that the limitation of time in the letter of February 22 to Barber applies only to the latter's authority to sell Mrs. Martin's stock for $1,000, and that the offer of Barber to try to effect a sale, should an opportunity present itself, was a continuing offer, and was never revoked. The trial court evidently adopted the view of defendant in error, and we are unable to say that, by adopting this contention,

error was committed. We are of the opinion that the parties themselves understood—an understanding evidenced by the letters, as well as much other evidence in the record—that the offer of Barber to effect a sale of Mrs. Martin's stock, if he could do so, was a continuing offer, and that the limitation of thirty days was upon the authority to sell for $1,000, and that thereafter he was agent to negotiate a sale at a price acceptable to Mrs. Martin. Barber himself evidently put this construction upon the status of the parties when he telegraphed to Mrs. Martin's son that he had an offer for the stock. He made no inquiry whether she wanted to sell, but simply submitted to her an offer for her approval. In determining the question whether Barber was Mrs. Martin's agent, the jury had a right to know all the circumstances surrounding the transactions, and these letters were material for the purpose of establishing agency. It is apparent from the conversation between A. D. Martin and Barber that both understood that Barber was attempting to find a purchaser for Mrs. Martin's stock. As already stated, the telegram stating he had an offer of $900 is a circumstance tending to show that he understood that he was the agent for the sale of the stock at a price subject to her approval. We think the letters were competent evidence to establish agency.

A similar objection is made to the admission in evidence of the letter sent by A. D. Martin to Barber in reply to the telegram Barber sent to Martin announcing that he had an offer for the stock, and in which A. D. Martin says: "Wish to thank you for procuring a buyer." We think this letter was properly received in evidence, for the reason given above, justifying the admission of the other letters, and for the reason that it tended to show that Barber was not himself the purchaser of the stock.

The conclusion we have reached as to these letters disposes of the assignment based on the refusal of the trial court to give an instruction withdrawing from the jury's consideration these letters, as not tending to establish

agency, and that contention need be considered no further.

Complaint is made of an instruction given by the court, stating, in substance, that if the defendant was by the jury found to be plaintiff's agent, and if by concealments he induced her to accept but $900 for her shares, when in fact he obtained a larger sum, he would be liable for the difference. We can not see how this was prejudicial to the rights of plaintiff in error.

The requested instruction of plaintiff in error numbered 2 was to the effect that in case the jury found for plaintiff upon the issue of agency, her recovery must be limited to the difference between the amount she had actually received, namely, $50 a share, and $75, or $25 a share on her eighteen shares. This instruction was upon the theory that defendant in error was bound by the consideration of $75,000 stated in the contract between Barber and Funkhauser. We have already disposed of this contention adversely to plaintiff in error.

We have given careful consideration to the several questions raised by the record, presented—and ably presented—by counsel in briefs and argument; and we believe that the verdict is amply sustained by competent evidence, and that the judgment of the trial court thereon is free from error, and is right, and it is therefore recommended that the same be affirmed.

HASTINGS, C., concurs.

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

AFFIRMED.

THEODORE H. FARAK V. FIRST NATIONAL BANK OF SCHUYLER.

FILED FEBRUARY 4, 1903. No. 12,469.

Commissioner's opinion. Department No. 2.

1. **Dormant Judgment: REVIVOR: PLEA OF PAYMENT: REPLY: JURY** In a proceeding to revive a dormant judgment, where the defendant pleads facts which amount to a payment and satisfaction, and plaintiff joins issue by a reply, it is error for the court to deny a request for a trial by jury. *McCormick v. Carey*, 62 Nebr., 494.

2. **Attachment Will Not Lie.** An attachment will not lie in such a proceeding.

ERROR from the district court for Colfax county. Proceeding to revive dormant judgment. Plea of payment. Issue joined. Request for jury trial denied by court. Tried below before GRIMISON, J. Order of revivor. *Reversed.*

Mesne process of attachment issued on application of judgment creditor. Motion to dissolve attachment. Heard below before GRIMISON, J. Motion overruled. *Reversed.*

The questions involved in this case were: 1. The right to a trial by jury upon a question of fact involved in determining the right to the revival of a dormant judgment. 2. The right to a mesne process of attachment hinged upon the question: Is a proceeding to revive a judgment the commencement of a new, or the continuation of an old action?

Frank J. Everett and *George W. Wertz*, for plaintiff in error.

George H. Thomas, contra.

BARNES, C.

On the 28th day of December, 1899, the First National Bank of Schuyler filed its motion or petition in the nature

Syllabus by court; catch-words by editor.

of an affidavit in the district court for Colfax county to revive a certain judgment against Theodore Farak, setting forth therein, in substance, that on the 8th day of June, 1893, it duly recovered a judgment against the defendant in a justice court of said county for the sum of $69.85 and costs of suit, taxed at $1.20; that a duly certified transcript of the judgment was filed, docketed and indexed in the office of the clerk of the district court for Colfax county on the 10th day of May, 1899; that an execution was issued on said judgment on the 25th day of August, 1893, which, on the 12th day of September of that year, was returned wholly unsatisfied; that the said judgment was wholly unpaid and unsatisfied, except the sum of $10, which was paid thereon on the 14th day of April, 1896; that more than five years had elapsed since the judgment was rendered and since an execution was issued thereon; that the judgment had become dormant by reason of said lapse of time. The plaintiff, therefore, prayed the court that the judgment be revived against the defendant, Theodore Farak, for the amount due thereon. The plaintiff also filed an affidavit for an attachment in said proceeding, and the writ was issued and levied upon a lot in the city of Schuyler, in said county. A conditional order of revivor was issued and served upon the defendant, who appeared, filed his answer and objections to the application and also a motion to dissolve the attachment, which was overruled, and to which ruling the defendant excepted. His answer and objection to the revivor of the judgment was in substance as follows: The defendant objects to the revivor of the judgment rendered in the above-entitled action on the 8th day of June, 1893, for the following reasons: At and after the time of the rendition of the judgment herein, this defendant claimed that said judgment had been illegally and wrongfully obtained, and had been obtained without service of summons upon him, and without any appearance on his part therein, and that said judgment was void. The defendant further alleged that he informed the plaintiff of said facts after the rendition of the said

judgment, and represented to the plaintiff that said judgment was void, and that he would contest the legality thereof and would contest and resist any execution levied thereunder, and would not pay the same, but would begin legal proceedings to set aside said judgment; that in order to avoid litigation as to said judgment, and as a compromise of the matter and for a valid consideration, plaintiff agreed with the defendant that if the defendant would execute and deliver to it his three certain negotiable promissory notes for the sum of $10 each, the plaintiff would accept and receive them in full settlement of any and all claims under and by virtue of said judgment; that in pursuance of said agreement the defendant, on the 3d day of May, 1895, executed and delivered to plaintiff his three certain negotiable promissory notes for the sum of $10 each in full payment, accord, settlement and satisfaction of said judgment, and said plaintiff then and there agreed to accept and receive, and did accept and receive, said notes in full settlement, satisfaction and payment of said claim, and that said judgment is fully satisfied, paid and settled; that the defendant, on the 14th day of April, 1895, paid to the plaintiff the amount due upon one of the said notes, amounting to the sum of $10, and received said note from said plaintiff, and said plaintiff still retains the other two notes so executed and delivered to it as aforesaid, and has never at any time returned or offered to return said notes to this defendant; that plaintiff, by reason of the above-recited facts, is estopped to claim anything by reason of said judgment. The defendant denied that he ever paid $10 or any other sum on said judgment, and alleged that any credit given him on said judgment, or any payment indorsed thereon, was made and done without his knowledge or consent. He further alleged "that on the 25th day of November, 1899, and prior to the commencement of this proceeding, this defendant tendered, in lawful money of the United States, and offered to pay to the plaintiff, in liquidation and satisfaction of the two promissory notes described in the objections (being two notes

executed and delivered by defendant to plaintiff on or about May 3, 1895, and on said November 25, 1899, being still unpaid), the sum of $33, and then and there demanded of plaintiff that it receive the sum in payment of said notes; and plaintiff then and there refused to accept or receive said sum." The plaintiff thereupon joined issue by filing a reply in the nature of a general denial of the facts stated in the answer. The issues of fact, having been thus formed, and the action being ready for trial, the defendant filed his application and demand in writing for a jury trial of said issues of fact, which motion and demand was overruled and denied by the court, to which the defendant duly excepted. At the following term of court, the case came on for hearing and was tried by the court, who found on the issues joined against the defendant and rendered a judgment of revivor against him, sustained the attachment and ordered the property seized thereunder sold; to all of which the defendant duly excepted. A motion for a new trial was filed and overruled. Exceptions were taken, and the case was brought to this court by the defendant by a petition in error. The defendant in the court below will hereafter be called the plaintiff, and the plaintiff therein the defendant.

1. Plaintiff contends, among other things, that the court erred in overruling his motion, and refusing his written demand and request for a jury to try the issues of fact made by the pleadings. We take up this question first because a determination of it will dispose of the case, and render it unnecessary to consider the numerous other assignments of error contained in the plaintiff's petition.

A proceeding to revive a dormant judgment partakes of the nature of a civil action. It is not the commencement of a new action, but the continuation of an action previously commenced. *Bankers' Life Ins. Co. v. Robbins*, 59 Nebr., 170. Where a person is summoned to show cause why a dormant judgment should not be revived against him, he may interpose any suitable defense thereto, and he may show by affidavit or answer that it has in fact been

settled and paid. In case he makes such defense, it is error for the court to render a final order of revivor against him without hearing testimony as to such payment or satisfaction. "There being a presumption in favor of such payment and satisfaction, the burden of proof is on the judgment plaintiff to show that the judgment is unsatisfied." *Garrison v. Aultman & Co.*, 20 Nebr., 311; *Boyd v. Furnas*, 37 Nebr., 387, 390; *Broadwater v. Foxworthy*, 57 Nebr., 406; *Wittstruck v. Temple*, 58 Nebr., 17.

The plaintiff herein, by his answer and affidavit, stated facts which, if true, would constitute a complete defense to any order of revivor against him. In fact, if he had established these matters of defense to the satisfaction of the court, he would have been entitled to an order canceling and discharging the judgment of record. *Manker v. Sine*, 47 Nebr., 736.

The defendant having joined issue upon these facts by its reply, it was the duty of the court to proceed to the trial of the issue in the same manner as it would conduct the trial of an ordinary civil action, and the parties thereto would be entitled to the same rights which should be accorded to them on such a trial. Article 1, section 6, of the constitution of this state, provides: "The right of trial by jury shall remain inviolate." In the case of *McCormick v. Carey*, 62 Nebr., 494, where this question was directly involved, Commissioner ALBERT in the opinion says (p. 496): "Every mode of trial except that by jury is of rare admissibility; being not only confined to a few questions of a certain nature, but in general also, if not universally, to such questions when arising in a certain form of issue. And to all issues not thus specially provided for, the trial by jury applies, as the ordinary and only legitimate method."

The issues in this case were properly triable by a jury, and the court erred in overruling the plaintiff's demand therefor. *McCormick v. Carey, supra; Simpson v. Watson*, 15 Mo. App., 425; *Hartman v. Alden*, 34 N. J. Law [5 Vroom], 518.

It is contended, however, by the defendant, that plaintiff waived his right to a jury trial, and therefore is not entitled to urge that objection here. It is insisted that because the plaintiff went to trial at a term of court subsequent to the one at which his demand for a jury was made without renewing such demand, he waived his right to complain of that matter in this court. We can not agree with this contention. The plaintiff having, at a proper and suitable time, made his demand in writing for a jury, and the court having denied the same, to which ruling he duly excepted, he was not required to renew such demand. He could safely rely upon his record as made and take advantage of it at any subsequent stage of the case. We therefore hold that for refusing the plaintiff a jury trial in this case the court erred, and the judgment must be reversed.

2. Plaintiff insists that the court erred in overruling his motion to dissolve the attachment, and contends that an attachment in a proceeding to revive a dormant judgment will not lie. This question ought to be determined, so that in case of another trial the court may be advised as to what order should be made in relation to the attachment.

The right to an attachment is a statutory one. There are many cases in which the legislature might authorize an attachment, but has not done so. It is universally held that such statutes will be strictly construed, and in doubtful cases the right to the writ will not be extended. The language of the statute, "in a civil action for the recovery of money,"* will not include proceedings to revive a dormant judgment. This is a statutory proceeding, not for the purpose of recovering money, but for the purpose of restoring the judgment. If the right should exist in such actions, which seems reasonable, it is for the legislature to so provide. The court, therefore, erred in overruling the motion to dissolve the attachment.

For these errors we recommend that the judgment of the district court be reversed.

OLDHAM and POUND, CC., concur.

* Cobbey's Annotated Code of Civil Procedure, sec. 1171 (198) and note.

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

REVERSED AND REMANDED.

N. B.—Discrepancy as to dates on pages 464 and 465 accords with record below.

CITY OF LINCOLN V. LINCOLN STREET-RAILWAY COMPANY ET AL.

FILED FEBRUARY 4, 1903. No. 12,842.

Commissioner's opinion. Department No. 2.

1. **Stipulation:** AGREEMENT: RELEASE: MISTAKE: REMEDY: MOTION TO WITHDRAW: REFORMATION OF AGREEMENT. One party to a stipulation or an agreement can not be released from a part of it on the ground of a mistake and still leave the other party bound thereby; his remedy is not by motion to withdraw from a part of the stipulation, but by a proceeding to reform the agreement, or to set it aside altogether.

2. **Discretion of Court as to Withdrawal of Stipulation.** Where a party waits until near the close of a second trial before asking to withdraw from a stipulation of facts used by both parties on both trials, the court may, in its discretion, refuse such request.

3. **Street-Railway Company:** POWER TO BORROW MONEY. A street-railway company authorized to construct, equip and operate lines of electric street-railway may purchase lines already constructed and fit and suitable for the extension and completion of its system, as well as construct the same. And a recital contained in a mortgage executed by such company that it has power to borrow any sum or sums of money which may be necessary for the purchase, construction and equipment of its electric street-railway will not render the mortgage void upon its face.

4. **Charter.** The charters of all street railway companies in this state are created by general law. Cities have no power to grant such charters or impose any limitations thereon, and the act of 1889, authorizing street-railway companies to borrow money for certain purposes and secure the payment of the same by mortgaging their property and franchises, applies to all street-railway companies in this state, whether chartered before or after the passage of that act.

Syllabus by court; catch-words by editor.

5. **Mortgage**: EXCESSIVE AMOUNT: PROOF: PRESUMPTION. Where it is claimed that a mortgage executed by a street-railway company is for an amount in excess of that permitted by law and its charter, such alleged fact must be proved, so that an examination of the record will disclose it. Otherwise it will be presumed that the mortgage was not for an excessive amount.

6. **Fictitious Indebtedness.** Where a street-railway company mortgaged its property and franchises to secure the sum of $600,000 for the purpose of purchasing, constructing and equipping its lines of electric street-railway, and it is shown that it expended for that purpose about $900,000, it can not be said that the mortgage was given to create a fictitious indebtedness.

7. **Bonds**: MORTGAGE: TRUST DEED. A series of bonds secured by a mortgage or trust deed on the property of a street-railway company are negotiable, and as between bona-fide purchasers thereof for value, are equal in priority; the lien of each bond dating from the recording of the mortgage that secured it and not from the time it was issued.

8. **Special Assessments**: PAVING TAXES: FIRST LIEN. Such a mortgage is a first lien upon the property of the street-railway described therein as against all special assessments for paving taxes, except such as were assessed for paving already done, or as were in contemplation at the time it was recorded.

9. **Lien Upon Personal Property.** Section 77 of chapter 11 of the Session Laws of 1887, which creates a lien for paving taxes against the lines of street-railway companies, does not make such special taxes a lien on their personal property.

10. **Special Assessments**: INTEREST. Under the statute, the taxes levied as special assessments in cities of the first class draw interest at the rate of twelve per cent. per annum from the time of delinquency, and a decree enforcing a tax lien arising thereon will draw interest at the same rate. A computation of the amount due on special assessments upon that basis will be sustained. *Lincoln St. R. Co. v. City of Lincoln*, 61 Nebr., 109.

11. **Creditor**: DIVERSION OF PAYMENT. A creditor can not divert a payment by his debtor from the appropriation made by him, upon mere equitable considerations that do not amount to an agreement between the parties giving the creditor a right to appropriate the payment otherwise than directed by the debtor, though mere equitable considerations may control where the payment is made without designating its application.

12. **City Treasurer**: DIRECTION GIVEN. The direction given by defendant to the city treasurer, as shown by the evidence in this case, was specific enough to require him to credit the payment of

the $5,000 deposited with him on the taxes which were a first lien upon the defendant's line of street-railway.

13. **Decree of Foreclosure**: PURCHASER: CHALLENGING VALIDITY OF DECREE. One purchasing property and retaining title to it under a decree of foreclosure, will not be permitted to challenge the validity of such decree.

14. **Purchase of Property**: DIVESTING LIEN: THIRD LIEN: CANCELATION OF LIEN. The sale and purchase of property under a decree of foreclosure divests the property of the lien of the decree; but where the decree is also a third lien upon other property such proceedings do not operate to cancel the lien thereon for the amount of the deficiency arising upon such sale.

15. **Street Improvements**: SPECIAL ASSESSMENTS. "Where street improvements are made and the cost of paving that portion of the street occupied by street-railway companies is levied as special assessments against the property of several street-railways as separate properties, and the different street-railways are afterwards consolidated and merged into one property and operated as one street-railway system, the old companies losing their individuality and identity and the new company assuming the burdens and obligations of the constituent companies, *held*, that, as between the consolidated company and the municipal authorities levying such special assessments, the liens arising by reason of the several assessments against the different constituent companies and properties attach to the new property owned and operated by the substituted company as one property in its entirety." *Lincoln St. R. Co. v. City of Lincoln, supra.*

16. **Street-Railway Property**: SPECIAL ASSESSMENT: TAX LIEN: MERGER. "Where, however, a mortgage was placed upon a street-railway property, and afterwards another company, against which certain liens for taxes levied as special assessments existed, was consolidated with the mortgagor company, *held*, that the lien of the mortgage on the property covered thereby, without the consent of the mortgagee, could not be impaired by the agreements and acts of consolidation, and that the tax lien on property consolidated and merged into the new company, and with the property mortgaged, could not be made prior to the mortgage lien on all the property after consolidation; that the tax and mortgage liens attached to the specific properties embraced in the levy and the mortgage respectively," in accordance with their original priorities. *Lincoln St. R. Co. v. City of Lincoln, supra.*

17. **Finding of Trial Court**: SUPERIOR LIEN. Where the trial court finds, on sufficient evidence, that certain assessments for paving taxes were in contemplation at the time of the execution of a mortgage by the street-railway upon its property, it follows

as a matter of law that the lien of such taxes is superior to the lien of the mortgage.

18. **Assessments**: CAR LINES: PAVING OUTSIDE OF RAILS. Assessments for paving one foot outside of the rails of street-car lines will not be held void where such paving was done while the statutes were in force providing that street-railway companies should be required to pave between their tracks and one foot outside of the rails thereof.

19. **District Court**: DISCRETION: PERSONAL JUDGMENT. The district court, in its discretion, may refuse to render a personal judgment against defendants at the time of the rendition of its decree in a suit to foreclose tax liens, and may defer such action until after the execution thereof.

ERROR from the district court for Lancaster county. Second trial of case reported in 61 Nebr., 109. The ultimate facts are clearly stated in the opinion. Tried below before CORNISH, J. *Affirmed.*

Edmund C. Strode and *D. J. Flaherty,* for plaintiff in error.

Paul F. Clark, Charles S. Allen, J. W. Deweese and *Frank E. Bishop, contra.*

BARNES, C.

This is an action brought by the city of Lincoln to foreclose a lien for certain special assessments, or paving taxes, against the Lincoln Street-Railway Company, the New York Security & Trust Company, the New York Guaranty & Indemnity Company, Brad D. Slaughter, receiver, and the Lincoln Traction Company. At a former trial in the district court for Lancaster county a decree was rendered in favor of the city for about $108,000, and it was awarded a first lien for that sum on all of the property of the street-railway owned by the consolidated company, and afterwards purchased by the persons who formed the Lincoln Traction Company. From that decree the defendants prosecuted error to this court, and on the hearing the decree of the trial court was reversed and the cause was remanded

for a new trial. Counsel for the city thereupon obtained leave to file an amended and supplemental petition in the district court. To this petition the defendants filed an answer, and the city, by its reply, for the first time, raised the question of the validity of the mortgages involved in this controversy. Counsel for the city also attempted to withdraw from a part of the stipulation of facts on which the former trial was had, but the court refused to allow them to do so. These questions were litigated on the second trial, together with the same issues on which the former trial in the district court was conducted. The trial resulted in a series of findings, which we will not quote in full, but will refer to them as occasion requires, and a decree in favor of the plaintiff for a first lien, amounting to $48,180.25, in effect a second lien for $6,855.83, and a third lien for $37,352.63 on all of the property of the consolidated company, except the lines acquired and constructed after the consolidation took place, and a foreclosure of said liens as prayed. The court found and decreed that the plaintiff was not entitled to a lien on the personal property of the company. From this decree the city prosecutes error, and the defendants appeal to this court. Thus the case is before us a second time.

Most of the questions presented herein were decided in our former opinion, which is reported in 61 Nebraska, at page 109. It appears that, prior to the year 1891, several corporations, under different names, had acquired franchises for the purpose of constructing and operating lines of street-railway in the city of Lincoln; that all but one of them had constructed a portion of their lines, and were operating them with horse-cars; that early in that year one F. W. Little, acting for a company or syndicate known as F. W. Little & Co., purchased all of said franchises and lines of street-railway which had been constructed by the several companies, and merged them into one corporation, called the Lincoln Street-Railway Company, with the single exception of the lines owned by a corporation called the Rapid Transit Company; that said lines were recon-

structed, extended, connected, and equipped with electric motive power, as a system of electric street-railway for the whole city; that on the 20th day of July, 1891, the said consolidated company executed and delivered to the New York Security & Trust Company a mortgage for $600,000, which is one of the mortgages in question herein; that on the 16th day of November, 1891, the Rapid Transit Company's lines were taken over by the said consolidated company, and a final consolidation was effected, the company being thereafter known as the Lincoln Street-Railway Company; that meanwhile the said company became indebted to the city on account of certain special taxes for paving between the rails of its tracks in the several paving districts of the city, which taxes and the liens thereof, are the principal matters in controversy in this suit; that after the final consolidation was effected a mortgage was executed and delivered to the New York Security & Indemnity Company, which is the second mortgage in question herein; that shortly thereafter the New York Security & Trust Company commenced an action to foreclose its mortgage in the United States circuit court for the district of Nebraska; that a receiver was appointed, who took charge of the property; that the New York Security & Indemnity Company filed its cross-bill and the mortgages were foreclosed; that the property was sold under the decree, and was purchased by the persons who now own and operate the lines under the name of the Lincoln Traction Company; that in the decree of foreclosure the rights of the city were duly protected; and that about that time the city commenced this suit to foreclose its paving tax lien. It further appears that, after the consolidated company absorbed the Rapid Transit Company and its property, a large part of the Rapid Transit's lines were sold to a corporation called the Home Street-Railway Company; that a suit was afterwards commenced in the federal court for the district of Nebraska, by a party who had furnished the money to reconstruct and equip the Rapid Transit Company's lines, to foreclose a lien thereon, and

that the city, in order to save and preserve its lien, filed a cross-bill in said suit and obtained a decree giving it a first lien on the property for and on account of the separate paving taxes assessed against it; that the property was sold under the decree and was purchased by the city; that it did not sell for enough to satisfy the decree, and a large part thereof was and is still due to the plaintiff herein. This was the situation in which matters stood at the time of the second trial in the district court, which resulted in the decree now before us for review.

Counsel for the city contend that the court erred in refusing to allow plaintiff to withdraw from a portion of the written stipulation made by the parties herein, and upon which the former trial was had. We take up this question a little out of its regular order, because many of the other assignments presented herein will be settled by the determination of this one. The record shows that counsel for the city, before the case was called for trial, filed an application to be permitted to withdraw from paragraphs 15 and 16 of the stipulation. The court overruled and denied the application. The city excepted and now strenuously urges that such ruling was reversible error. An examination of the bill of exceptions, discloses that the stipulation contained thirty-eight paragraphs and covered 213 pages of the record; that by its use the city was saved the trouble and expense of proving its ordinances and resolutions, the engineer's estimates, the assessments in question, the time and manner of making them, and the amount due thereon. In fact, it appears that the city obtained such substantial benefits and concessions thereby that the trial court must have deemed it unjust and inequitable to allow it to withdraw from the two paragraphs in question and retain the benefits accruing to it by the other portions thereof. In *Gerdtzen v. Cockrell,* 52 N. W. Rep. [Minn.], 930, the court held that one party to a stipulation or an agreement could not be released therefrom on the ground of a mistake, and still leave the other party bound thereby; that his remedy was not by motion

to withdraw from it, but by a proceeding to reform the agreement. In the case of *Welsh v. Noyes,* 10 Colo., 133, 14 Pac. Rep., 317, it was held that "a stipulation in a case by both parties, made for convenience and expedition, but by which counsel inadvertently admit facts not in accord with the premises, and injurious to their client, may be relieved against; but to strike out a portion of a stipulation on the suggestion of one party is error if such part be material. The entire stipulation should be canceled." Counsel for the city made no formal application to be allowed to withdraw from and cancel the whole stipulation, and have it set aside; and no application was made to have it reformed. The rule that one party can not withdraw from a part of a stipulation of facts made for the purpose of expediting the hearing of a case, and leave his opponent bound thereby, is one founded in reason and justice and is so well settled that it is no longer an open question. Therefore the trial court did not err in denying the application. Counsel for the city claim, however, that they asked to be allowed to withdraw from the whole stipulation and to have the same wholly set aside, and that the court erred in not permitting them to do so. It appears on page 742 of the bill of exceptions that during the trial, and while the defendants were introducing evidence, they offered paragraphs 15, 16 and 17, and a portion of paragraph 8 of the stipulation of facts, being that part of it which had not been put in evidence by the city; that thereupon the following objection was made: "Counsel for the plaintiff object to paragraphs 15 and 16, for the reason that the same purport to stipulate facts which are not the facts, but which are untrue; and for the reason that counsel for the city did not know at the time the original stipulation was entered into that such facts were not true, but assumed they were, on the representation of counsel for the defendants, whereby plaintiff was misled; and counsel for plaintiff asks leave to withdraw from the stipulation, and particularly from paragraphs 15 and 16, because the alleged facts therein stated are not

true." The court overruled the objection, and denied the request. We think the request was insufficient in form. It was for leave on the part of the plaintiff to withdraw from the entire stipulation, but no request was made to wholly set it aside. If this request had been granted, it would still have left the defendants bound by the agreement. It would also seem that the application came too late to be entertained by the court. The plaintiff had made its case and rested; it had put in evidence all of the stipulation, except that portion of it which defendants were then attempting to introduce, and it would have been unjust at that stage of the proceedings to deny the defendants the benefit of these paragraphs. Yet counsel insist that the court, in the exercise of its discretion, ought to have sustained the objection and granted their request. We can not assent to this proposition. Paragraph 15 fixed the time when the bonds and mortgage in question were delivered to the New York Security & Trust Company, and stipulated that they were sold to bona-fide purchasers for value, without knowledge or notice of any of the matters mentioned in the stipulation, except such constructive notice, if any, as was imparted by the corporate records of the street-railway company, and of the city of Lincoln and the laws of this state. Paragraph 16 contained practically the same statements as to the bonds and mortgage executed and delivered to the New York Guaranty & Indemnity Company. These paragraphs had been disregarded by the plaintiff, and it had been permitted to introduce other evidence by which it sought to establish the fact that the lien of the mortgages attached at a time subsequent to that fixed by the agreement. It is certain that the trial court found that the evidence so introduced was insufficient to establish the fact sought to be proved, and such finding will not be set aside. If the court had sustained the objection and granted the request, the result would have been a mistrial; it would have rendered it necessary to retry the whole case, and to require this to be done would have been an abuse of discretion. Stipula-

tions and agreements like the one in question, should be encouraged and sustained by the court. *Palmer v. People*, 4 Nebr., 68, 76; *Rich v. State Nat. Bank of Lincoln*, 7 Nebr., 201, 205, 29 Am. Rep., 382; *State Bank of Nebraska v. Green*, 8 Nebr., 297, 307. In *Van Horn v. Burlington, C. R. & N. R. Co.*, 69 Ia., 239, we find the following: "Where a party enters into a written stipulation as to material facts in a case, he can not on the trial disregard the stipulation and introduce evidence to contradict it, on the ground that he was not informed as to the facts when he entered into the stipulation." In *Ryan v. Mayor*, 154 N. Y., 328, 332, 48 N. E. Rep., 512, the court held that, under a stipulation that upon a second trial of an action "the evidence taken upon the previous trial be read at the trial term as the evidence in this action," either party is entitled to the benefit of whatever the record of the previous trial presented as evidence, and letters put in evidence at the previous trial by the plaintiff, without objection, may be read by the defendant as a part of his case, without reference to their competency. The court in that case sustained the stipulation and agreement absolutely, although it was sought by one of the parties to be relieved therefrom. For these reasons, we hold that the court was not guilty of an abuse of discretion in overruling the plaintiff's objection and denying its request.

The city now claims that the mortgage to the New York Security & Trust Company is void for illegality. No such claim was made upon the first trial in the district court, or upon the former hearing before us; but after the case was remanded to the district court for a new trial, counsel for the city filed a supplemental petition, to which the defendants filed an answer, and in reply to this answer it was alleged that the mortgage was void. This question was thereupon litigated in the trial court, and resulted in a finding against the city. Defendants contend that this question could not be raised for the first time by the reply, and, technically speaking, this may be true; but as long as the question is before us, we may as well determine it upon

its merits. The first point made by the city is that it appears upon the face of the mortgage that it was given for an unauthorized and illegal purpose. This contention is based on the fact that the mortgage recites "that the company is authorized by law to borrow any sum or sums of money which may be necessary for the purchase, construction and equipment of its lines of electric street-railway," while the statute which authorizes a street-railway company to borrow money provides that it is authorized to make mortgages and "execute deeds of trust upon its railway and property, in whole or in part, including its real and personal property and franchises, to secure money borrowed for the construction and equipment of their roads."* It is strenuously contended that the word "purchase" not being a part of the statute, its appearance in the recitals of the mortgage renders it void on its face. No authorities are cited by the city which directly sustain this point, and even if the city is in a position to raise this question we think the construction of the statute contended for is entirely too narrow. A similar question was before the New York court of appeals in *Gamble v. Queens County Water Co.*, 123 N. Y., 91, 9 L. R. A., 527. In that case a shareholder in the waterworks company, at his own expense and for his own personal benefit, had built a system of pipes suitable for an extension of the company's plant. He sold this property to the company and received in payment therefor its stock and bonds. The point was made that the purchase was void, and the bonds issued in payment therefor were also void, because the company was not authorized to issue them for that purpose. The statute under which they were issued provided that the company might borrow money for the purpose of constructing its water-works, and issue bonds for the payment thereof. The court disposed of the question as follows (p. 109): "It is altogether too narrow a construction of the statute to hold that the corporation must itself construct the works, and

* Cobbey's Annotated Statutes, sec. 10088; Compiled Statutes, ch. 72, art. 7, sec. 11.

may not purchase works already constructed, and fit and suitable for its purposes." A like question was before the supreme court of the United States in the case of *Branch v. Jesup,* 106 U. S., 468, 27 L. Ed., 279. It was held that where a railroad company had power to construct a particular line of road, it might purchase from another company a railroad constructed upon that line. In the case at bar, the Lincoln Street-Railway Company had power to construct and operate lines of street-railway throughout the city of Lincoln. It had power to mortgage its property and franchises to construct and equip such lines. No good reason can be suggested why it could not, under such power, purchase a line of street-railway constructed in whole or in part if suitable for its purposes, complete, equip and construct extensions thereto, and connect it with its other lines, so as to form a complete system of street-railways for the whole city. We therefore hold that the finding of the trial court that the mortgage was not void upon its face was right, and should be affirmed.

The second consideration urged upon our attention as a reason for holding the mortgage void, is that the property and franchises were inalienable. This contention is based on the following premises: That the ordinance under which the electors of the city of Lincoln voted to authorize the street-railway companies to construct their lines upon the streets of the city, together with its adoption by the popular vote, in effect created the charters of the street-railway companies, and was the source of their franchises; that the ordinance contained no privilege of alienation; that these matters amounted to a contract between the city and the street-railway companies; that the franchises and privileges were personal to the companies to which they were granted, and, therefore, could not be alienated or transferred; and that the legislature, by a subsequent act, authorizing street-railway companies to alienate or mortgage their property and franchises, could not confer such a right upon the companies or those who purchased their franchises so acquired. This question was

settled by our former decision. In 61 Nebr., 109, Mr. Justice HOLCOMB, speaking for the court, said (p. 125): "Counsel for defendants insist that the ordinance establishes a contract with respect to its franchise, defines its terms and grants property rights, which are infringed upon by the statutes afterwards enacted requiring the company to pave the part of the streets occupied by its tracks. We observe no authority in the statute giving to the city the right to grant charters to street-railway companies, and as all such authority must be derived from the statute, we must conclude that, unless it is found there, it does not exist. By the constitutional provisions quoted, special charters are prohibited, and corporations receive their franchises only by general law, and subject to all legal rules and statutes as to the reserved right of the lawmaking power 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. *Abbott v. Omaha Smelting Co.*, 4 Nebr., 416; *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Nebr., 279. In the case of a street-railway corporation, the grant by the legislature under general law, is, by the constitution, ineffectual, without such company first obtain the consent of a majority of the electors to the construction and operation of a proposed street-railway over the streets where such railway is to be constructed. The statute provides how such consent may be secured. Compiled Statutes, 1887, p. 562, ch. 72, art. 7.* It is therein provided how the question shall be submitted. No authority is given the city except to submit the proposition. It is not authorized to grant a charter upon any terms whatever. There is, we think, a marked distinction between a provision enacted for the purpose of securing the consent of a majority of the electors of a city for a street-railway corporation chartered under the general laws to construct and operate a street-railway over the streets of such city, and authority to the city, as a municipal corporation, to grant to such

*As amended, see Cobbey's Annotated Statutes, secs. 10078 *et seq.*

corporation a charter to construct its railway over the streets under the terms and stipulations entered into by such city. While it is essential that the consent of a majority of the electors be secured before any charter or franchise rights can accrue to a street-railway company, the provisions of the constitution and the statutes requiring such consent can not be made the basis of a contract respecting corporate rights and privileges between the city and such company. The charter rights are derived from the general law. The consent of a majority of the electors can only be regarded as a condition precedent, on the happening of which is dependent the right to construct and maintain on the streets a railway, and does not enlarge or restrict the grant arising by virtue of the general laws, or in other respects affect the legislature in the exercise of its lawful authority. The property rights of the defendant company, its right of an easement in the streets for the purposes of its creation, and its corporate franchise derived under the law, are all recognized and respected. If contention of counsel be correct, and the ordinance and its acceptance constitute a contract between the city and defendant with respect to its franchise, then it is in the power of the authorities of the different towns and cities to enter into contract relations with respect to such franchise, which in effect creates special charters, nullifies the constitutional provisions referred to, and renders impotent the legislature as to all future legislation in regard to such matters. This clearly is not the law." The charter or franchise of the company having been created by the legislature under general laws, that body could at any time change, amend, enlarge or restrict any of the rights and privileges conferred thereunder. And the act of 1889 authorizing street-railway companies to borrow money for certain purposes and to mortgage their property and franchises to secure the payment of the same, is valid, and applies to the defendants and all other street-railway companies in this state.

The third contention is that the mortgage was given to

secure a fictitious increase of corporate indebtedness, within the prohibition of the constitution. Section 5, article 11 of the constitution provides: "No railroad corporation shall issue any stock or bonds, except for money, labor or property actually received and applied to the purposes for which such corporation was created; and all stock, dividends, and other fictitious increase of the capital stock or indebtedness of any such corporation shall be void. The capital stock of railroad corporations shall not be increased for any purpose, except after public notice for sixty days, in such manner as may be provided by law." This provision is an important one. It was intended to prevent overcapitalization of railroads, and prohibit the issuance of what is commonly known as "watered stock," upon which exorbitant charges for transportation of passengers and commodities might be based, thus creating an apparent necessity for such charges, in order to earn and pay dividends thereon. It is a wise and beneficent measure, and we should enforce it strictly whenever occasion requires or opportunity permits us to do so. It is doubtful if this provision applies to street-railway companies. It appears, however, that the money borrowed upon the mortgage in question was used to pay for some of the constituent properties purchased by the defendant, which became parts of the property of the consolidated company; that some of it was used for the construction and extension of the several lines of street-railway so purchased, and a large part of it was used to electrically equip the whole system; that the amount of money expended for these purposes was about $900,000, so that no fictitious indebtedness was created by the mortgage in question; and it appears that the company in effect received property, money or labor for the amount, and to the extent of a much greater sum than the total amount of bonds secured by the mortgage.

It is further contended that the mortgage is void because it was for an amount in excess of that authorized by law. The evidence does not sustain this claim, so far as we can ascertain from the bill of exceptions. Therefore this con-

tention must fail. The finding of the trial court upon that question is sustained by the evidence and should be affirmed. It follows that the mortgage was valid, and created a lien upon the property described therein. Having held that the mortgage is valid, it is unnecessary to discuss or determine the question of its negotiability. The question of the negotiability of the bonds secured thereby was disposed of in *Kendall v. Selby,* 66 Nebr., 60, and in *Garnett v. Myers,* 65 Nebr., 280, where it was held that such bonds were negotiable. It may be further stated that the finding of the court that the bonds were executed and signed in substantial compliance with the statutes is also sustained by the evidence, and is affirmed.

It is contended by the city that the lien of the mortgage did not attach to the property of the defendant until some time subsequent to the 20th day of July, 1891; that the court erred in its finding that it became a lien thereon at that date. By the terms of the stipulation the court was required to fix that date as the time when the mortgage of the New York Security & Trust Company became a lien on the property. Having upheld the stipulation, the finding of the trial court upon that question must be sustained. But waiving the stipulation, we are satisfied that the city failed in its attempt to show that it did not become a lien until a later date. The evidence discloses that the mortgage was delivered to the trust company on July 20, 1891, and that the bonds secured by it were sold to the purchasers thereof for value. The dates of said sales are not shown. It follows that we must hold that the mortgage became a lien from the time it was delivered and recorded, which was July 20, 1891. Jones, Mortgages [6th ed.], sec. 374; *Omaha Coal, Coke & Lime Co. v. Suess,* 54 Nebr., 379. In the case of *Pittsburgh, C., C. & St. L. R. Co. v. Lynde,* 55 Ohio St., 23, the supreme court of Ohio held that: "The bonds of an Ohio railroad corporation, payable in New York city to bearer, are negotiable without indorsement, although sealed with the corporate seal, notwithstanding that they were made in 1864, while section 1 of

the act of 1820 (1 Swan & Critchfield, 862), in relation to negotiable paper, was in force. Where such bonds are secured by a mortgage on the roadway and other property of the maker, executed to a trustee for that purpose and are issued at different times, the lien of all the bonds outstanding in the hands of bona-fide holders for value, are equal in priority; the lien of each bond dating from the record of the mortgage that secured it, and not from the time it was issued." We therefore hold that the finding of the trial court that the mortgage in question became a lien on the property of the street-railway company July 20, 1891, should be sustained.

The contention is made that the court erred in holding that the New York Security & Trust Company's mortgage takes precedence over the lien of the special assessments made subsequent to the execution and delivery thereof. This question is settled by our former decision. The language of Judge HOLCOMB on that branch of the case is as follows (p. 159): "The statute on the subject is as follows: 'No mortgage, conveyance, pledge, transfer or incumbrance of any such property of any such company or person, or of any of its rolling stock or personal property, created or suffered by any such company, or party, after the time when any street or part thereof, upon which any such street-railway shall have been laid, shall have been ordered paved, repaved, macadamized, or repaired, shall be made or suffered, except subject to the actual or prospective lien of such special taxes, whether actually levied or not if such levy be in contemplation.' Compiled Statutes 1899, ch. 13*a*, art. 1, sec. 79. The lien on the property assessed is only by virtue of the statute. The legislature has, for reasons no doubt appearing to it as sufficient and satisfactory, enacted that the tax lien should be prior if the improvement is in contemplation, whether the taxes are actually levied or not. By the language used it is contemplated that if the improvement has been projected and is under way, that is, if the street 'shall have been ordered paved,' no lien shall be created except subject to the pros-

pective lien. The language of the statute excludes the idea that under all circumstances the lien for special assessments shall be superior to all other liens. If force and effect be given to the language of the statute, and the words used be taken in their ordinary and natural meaning, the conclusion is irresistible that an incumbrance placed on the property before street improvements are projected is prior to a lien for special assessments levied thereafter for such improvement. It is not for us to engage in judicial legislation or trench on the clearly expressed meaning of the language used by the legislature in its enactment of law. The legislature having determined under what circumstances special assessments levied on property of street-railway companies for street improvements should be a first lien on the property assessed, it follows, under any recognized rule of construction, that valid liens on the property before any improvements are made or contemplated within the meaning of the section can not be subordinated to the statutory lien. We observe no escape from this conclusion. Counsel for the city insists that the general provisions, as to assessments levied generally being liens on the property assessed prior to all others, should likewise govern in the case at bar. We can not so construe the law without ignoring entirely the language quoted, and this we are not at liberty to do. Were it not for such language, and relying only on the general provisions with reference to special assessments, we could readily agree with counsel in this regard. The principle of subordination of liens for taxes to liens created by contract has been also recognized by the legislature in the act providing that a general lien for taxes shall exist in favor of the state on all the personal property of the tax debtor from and after the time the assessment books are placed in the hands of the county treasurer or tax collector for collection; and yet it is held that a mortgage in good faith executed on such property prior thereto is a superior lien to that of the lien for taxes. *Reynolds v. Fisher,* 43 Nebr., 172; *Farmers' Loan & Trust Co. v. Memminger,* 48 Nebr., 17;

Chamberlain Banking House v. Woolsey, 60 Nebr., 516." The foregoing is the law of this case, and this question is no longer an open one in this court.

Complaint is made because the court found that the paving taxes were not a lien on the personal property of the street-railway company. Section 77 of chapter 11 of the Session Laws of 1887 which creates the lien, reads as follows: "Special taxes for the purpose of paying the costs of any such paving, repaving, macadamizing or repairing of any such street-railway may be levied upon the track including the ties, iron, road-bed and right of way, side-tracks, and appurtenances, including buildings, and real estate belonging to any such company or person, and used for the purpose of such street-railway business, all as one property, or upon such part of such tracks, appurtenances, and property as may be within the district paved, repaved, macadamized, or repaired, or any part thereof, and shall be a lien upon the property upon which levied from the time of the levy until satisfied." And it is claimed that the word "appurtenances," used therein, should be construed to mean the personal property, including the rolling stock, of the defendant company. It must be conceded that the word, in its ordinary sense, does not mean personal property; the term "appurtenance" signifies something pertaining to another thing as principal, and which passes as incident to the principal thing, which is different, but of a congruous nature. Thus a deed conveying land and its appurtenances conveys only such things in the nature of fixtures as are appurtenant to the land itself. It does not convey the personal property or effects of the grantor, although they are situated upon the land at the time the conveyance takes effect. It is insisted that the word "appurtenances," as used in the statute in this case, means personal property, because in the same act, speaking of a mortgage given by a street-railway company, the language of the statute is that "no mortgage, conveyance, pledge, transfer, or incumbrance of any such property of any such company, or person, or of

any of its rolling stock or personal property, created or suffered by any such company or party, after the time when any street or part thereof, upon which any such street-railway shall have been laid, shall have been ordered paved, repaved, macadamized or repaired, shall be made or suffered, except subject to the actual or prospective lien of such special taxes, whether actually levied or not, if such levy be in contemplation."* We do not understand that this in any way extends the lien of the special taxes as defined and described in the statute; or that the legislature intended that it should have that effect. The same section provides that the treasurer shall have the power and authority to seize any personal property belonging to the street-railway company for the satisfaction of such taxes, when delinquent, and to advertise and sell the same, in the same manner as constables are authorized to sell property upon execution. The evident intention was to permit such seizure and sale, notwithstanding the personal property was mortgaged, unless the mortgage became a lien thereon before the assessments were actually made or were in contemplation by the city authorities. It has often been held that the words "with the appurtenances" can not enlarge the rights of the parties or enlarge the scope of the deed. *Huttemeier v. Albro*, 18 N. Y., 48; *Frey v. Drahos*, 6 Nebr., 1, 5, 29 Am. Rep., 353. Again, a lien upon personal property would be ineffectual. Such property is transitory in its nature, and is subject to change. In fact, the evidence contained in the bill of exceptions in this case discloses that of the many cars which were owned by the street-railway company at the time the special assessments were made have been abandoned, and but very few of them are in use in any form at this time. It is, therefore, obvious to us that the legislature never intended that the lien for special assessments for paving taxes should extend to and cover the personal property of the street-railway company. The trial court was therefore right in the construction it placed upon the statute in question.

* Session Laws, 1887, ch. 11, sec. 77.

The plaintiff in error contends that the court erred in his findings of the amount due the city. It appears that the trial court took as a basis for computation the amounts of the original assessments and computed the interest thereon at the rate of one per cent. per month from the date they became delinquent, plus a penalty of five per cent. on all of such delinquent instalments. It is contended by counsel for the city that the court should have determined the amount due by computing interest at six per cent. per annum from the date of levy until the taxes were delinquent, and thereafter a penalty of one per cent. the first month, two per cent. the second month, and so on, to wit, at the rate of twenty-four per cent. per annum up to the time of the trial; and as authority for such contention cites us to section 69, chapter 13*a*, of the Compiled Statutes of 1891. An examination convinces us that the statute is incomplete; in other words, something is left out of the closing part thereof. In its present condition it is impossible to determine its meaning with any degree of certainty. In section 62 of the same chapter we find the following: "Special taxes and assessments shall, except deferred yearly instalments for paving purposes, be deemed delinquent if not paid in fifty days after the passage and approval of the ordinances levying the same in each case, and a penalty of five per cent., together with interest at the rate of one per cent. a month, shall be paid on all delinquent special taxes or assessments from the time the same shall become delinquent." If the plaintiff's theory is accepted, it is impossible to harmonize these two sections, and we believe that portion of section 62, above quoted, should be adopted as the rule of computation in this case. In fact, that matter was before us upon the former hearing of this case, and in considering it we held: "Under the statutes, taxes levied as special assessments in cities of the first class draw interest at the rate of twelve per cent. per annum from the time of delinquency, and a decree enforcing a tax lien arising therefrom will draw interest at the same rate after rendition." *Lincoln*

St. R. Co. v. City of Lincoln, 61 Nebr., 109, 113. Mr. Justice HOLCOMB, in the body of the opinion, says (p. 150): "Complaint is made because interest was computed on the different levies for special assessments at the rate of twelve per cent. per annum and the judgment rendered decreed to draw interest at the same rate. We think this action was in strict accord with the provisions of the statutes and in conformity with the well settled rule of this and other jurisdictions with respect to the rate of interest allowed on delinquent taxes levied for either general revenue purposes or as special assessments. In cities of the class that plaintiff belongs to, the statutory provision is that all delinquent taxes, both general and special, shall draw interest at the rate of twelve per cent. per annum from the time they become delinquent." We think this is a correct solution of the question, and the same is hereby approved and followed. The trial court, in making the computation, having followed this rule, his finding of the amount due is approved and affirmed.

It is next contended by the city that the finding by the court which gives the defendant the Lincoln Street-Railway Company credit for $5,000 on account of a payment on the taxes which are a first lien on its lines, is erroneous, and is not sustained by the evidence. It appears that an attempt was made to compromise all of the matters in controversy in this suit; that it was agreed that the defendant the Lincoln Street-Railway Company should pay the city $65,000 in instalments, and the whole claim for special assessments upon the receipt of that amount should be canceled. On this agreement $5,000 was paid into the city treasury. The city was then enjoined by a taxpayer from carrying out the agreement. Under this condition of affairs, the defendant had the right either to withdraw this payment, or have it applied in satisfaction of the debt, as it might see fit to direct. It chose to have it applied in payment of a part of the special assessments, which this court had declared to be a lien on its property prior to the mortgage of the New York Security & Trust

Company, and directed the treasurer to so credit it. The direction, as shown by the evidence, was as follows (testimony of Mr. Humpe):

Q. Mr. Humpe, do you remember whether or not any tender or deposit of money has been made by any of the defendants on any of the taxes involved in this litigation?

A. Yes, sir.

Q. What amount?

A. $5,000 paid.

Q. Paid to whom?

A. Paid to Mr. Aitken, city treasurer.

Q. I will ask you if you remember about when the decision of the supreme court was rendered in this case; the record of it being January 4, 1901. Do you remember that decision was made?

A. Yes, sir. I remember the fact.

Q. Well, what, if anything, did you do or say with reference to this command—with reference to this $5,000 payment to the city treasurer of Lincoln?

A. After the decision of the supreme court had been rendered, I asked to have the $5,000 applied on these districts which were covered by the decision of the supreme court, as being against the property owned by the Lincoln Traction Company.

Q. Prior to the giving of the mortgage?

A. Yes, sir.

Q. That is, the lien for taxes that existed prior to the giving of the mortgage that was foreclosed, and the Lincoln Traction Company made its purchase under?

A. Yes, sir.

"The debtor may, at or before the time of payment, prescribe the application of such payment, and it is the duty of the creditor to so apply it." 18 Am. & Eng. Ency. Law [1st ed.], 234.

"If the creditor receives money with a direction from the debtor to appropriate it to a particular debt, it must go to that debt, no matter what the creditor may say at the time; and an appropriation once made by the debtor can

not be changed by the creditor without the debtor's consent." 18 Am. & Eng. Ency. Law [1st ed.], 235; *Mayor of Alexandria v. Patten,* 4 Cranch [U. S.], 317, 2 L. Ed., 633; *Tayloe v. Sandiford,* 7 Wheat. [U. S.], 13, 5 L. Ed., 384.

The supreme court of Ohio, in the case of *Stewart v. Hopkins,* 30 Ohio St., 502, passing upon this question, says: "The creditor can not divert a payment so made by his debtor, from the appropriation made by him, upon mere equitable considerations, that do not amount to an agreement between the parties giving the creditor a right to appropriate the payment otherwise than directed by the debtor, though mere equitable considerations may control where the payment is made without designating its application." This rule is recognized and followed in this state in the case of *Life Ins. Clearing Co. v. Altschuler,* 55 Nebr., 341. The direction to the city treasurer, as shown by the evidence above quoted, was specific enough to require the city to credit the payment on the assessments which had been declared by this court to be a first lien on the defendant's lines of street-railway. We are unable to say that the finding of the court that this money should be so applied was clearly wrong, and, therefore, it should be sustained.

The trial court found that the remainder due on the assessments against the Rapid Transit Company was $37,352.63, and gave the city a third lien on the property of the Lincoln Street-Railway Company, acquired by the traction company by the foreclosure proceedings in the federal court. Both parties complain of this part of the decree. The city excepts because it was not given a first lien on the property described in the first finding of facts, and in the first conclusion of law, and the traction company complains because the remainder due on account of said special taxes was not canceled by the decree. It appears that the city, by a cross-bill filed in an action pending in the federal court against the Home Street-Railway Company, which owned a portion of the original Rapid Transit lines of street-railway, obtained a decree giving it a first lien on

the Rapid Transit lines for the paving taxes assessed against that company, and a decree of foreclosure thereon; that said property was sold under the decree and was purchased by the city, and that it obtained title thereto by a master's deed, upon a confirmation of the sale; that the amount bid at the sale left a deficiency of the amount due as established by the decree herein. The city is certainly bound by the decree under which it obtained title to the property purchased. *Pope v. Benster,* 42 Nebr., 304, 47 Am. St. Rep., 703; *Denver City Irrigation & Water Power Co. v. Middaugh,* 12 Colo., 434, 13 Am. St. Rep., 234; *Canal & Banking Co. v. Lizardi,* 20 La. Ann., 285, 290. And for that reason it is contended by the defendant that, the city having obtained title to the former Rapid Transit lines, such proceedings operated to completely extinguish its claim and lien for the remainder of the Rapid Transit paving assessments. We can not assent to this proposition. The sale extinguished the lien on the property purchased by the city under the decree, but the city was still entitled to recover the amount of the deficiency. In the first instance it was entitled to a first lien upon the Rapid Transit property. The lien having been extinguished by the sale and purchase thereof, it was entitled to a third lien on the other lines of the consolidated company obtained by its purchase at the master's sale. It was not entitled to a personal judgment against the old Lincoln Street-Railway Company or the Traction Company, the present owner of the consolidated lines, therefor. In our former opinion in this case, Mr. Justice HOLCOMB, in determining this question, used the following language (p. 157): "Can the lien of the city for special assessments levied on the property of the Rapid Transit Company extend to all the property of the new company after consolidation prior to and in disregard of the lien theretofore created on the property of the original company by virtue of the said mortgage? By section 8, article 7, chapter 72, Compiled Statutes, 1899,* it is specially provided, with

* Cobbey's Annotated Statutes, sec. 10085.

respect to street-railway corporations being merged into a new corporation by consolidation, 'that all the rights of creditors and all liens upon the property of either of said corporations shall be and hereby are preserved unimpaired, and the respective corporations shall continue to exist so far as may be necessary to enforce the same.' At the time of the consolidation the trust company possessed a lien on the property of the defendant company to the extent of the sum due on the bonds sold and secured by the mortgage held by it as trustee. The city held a lien against the same property for special assessments levied, and also a similar lien on the property of the Rapid Transit Company consolidated with it. The liens were conflicting, and to retain each unimpaired necessitated a finding of the several sums due against the respective properties and the priority of each. We do not understand upon what principle of law the lien existing against the property of the Rapid Transit Company can be made a prior lien upon the property mortgaged to the defendant trust company. This, it seems to us, would be an impairment of the lien to that extent in violation of the statutory provisions quoted, as well as the fundamental principle against the impairment of the obligations of a contract without the consent of the parties thereto. We do not think it a sufficient answer to say that the value of the property acquired by consolidation from the Rapid Transit Company exceeded the tax lien with which it was burdened, and which therefore might be spread over the entire property without prejudice to the interest of the mortgagee. Of the value of each of the properties we are not fully informed by the record. We are, however, satisfied that the defendant trust company may rightfully insist that the property on which it holds a lien shall not be charged, beyond the terms of its contract, with a lien not existing when its rights thereto attached. As between conflicting equities and lien-holders the rule is settled and well-grounded in principles of equity that the liens follow the property into the consolidated company, and one can not

take precedence, by reason of such consolidation, over other liens already existing. The lien of the defendant trust company on all the property of the street-railway company before consolidation can not be subordinated to the lien of the levy for special assessments on other property afterwards acquired by consolidation." It follows that the lien for the Rapid Transit taxes attached to the other lines owned by the consolidated company when the consolidation with the Rapid Transit lines took place, which was at a time subsequent to the giving of the mortgages to the New York Security & Trust Company and the New York Security & Indemnity Company. The amount still due on the Rapid Transit paving taxes is, therefore, a third lien on the lines of the consolidated company. This was the holding of the trial court, and was strictly in accordance with our former views on this question, to which we still adhere.

It is contended by the defendant companies, on their appeal herein, that the court erred in giving the city a first lien for the paving taxes in paving districts 21 and 22. The trial court found that these assessments were in contemplation when the mortgage was given to the New York Security & Trust Company. The statute creating the lien, as above stated, expressly makes it superior to that of the mortgage, and the court did not err in so holding.

It is further claimed by defendants that a part of the tax is void because it includes the cost of paving one foot outside of the rails of the street-car lines. It is sufficient to say that an examination of the question discloses that at the time this paving was done the statute, in express terms, provided that the company should pave one foot outside of its rails. Session Laws, 1887, ch. 11, sec. 76. Therefore it can not be claimed that the assessment objected to was void.

It is contended on the part of the city that the court erred in not giving it a personal judgment for a certain part of the taxes. It is sufficient to say that no such judgment was asked for in the pleadings. Again, the trac-

tion company, by its purchase of the property under the decree foreclosing the mortgages, did not personally assume the debt. Therefore no personal judgment can be rendered against it. No judgment is asked for against the old Lincoln Street-Railway Company, and it does not appear that if one was rendered it could be enforced or collected. Again, it was within the discretion of the court to defer any action looking to the rendition of a personal judgment until after the execution of the decree by sale of the property, when the amount of the deficiency, if any, as shown by the return, can be determined, and upon a proper showing a judgment can be rendered against those personally liable therefor. The city, therefore, was not injured by the refusal of the court to render a personal judgment, and has no cause of complaint so far as that question is concerned.

After a laborious reading of the record and bill of exceptions, and a careful examination of all of the matters involved herein, we find that the trial was fairly conducted; that the findings and the decree of the trial court are sustained by the evidence and are in substantial accord with the law of the case as set forth in our former opinion. We therefore recommend that the decree of the district court be, in all things, affirmed.

OLDHAM and POUND, CC., concur.

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

AFFIRMED.

FARMERS' BANK V. SIBBY I. BOYD.

FILED FEBRUARY 4, 1903. No. 12,611.

Commissioner's opinion, Department No. 2.

1. **Married Woman**: COMMON-LAW LIABILITY: CONTRACT. Under our statute, a married woman is but partially emancipated from her common-law disability to contract.

2. ———: PROMISSORY NOTE: CONSIDERATION: INTENTION: PRESUMPTION. The signing of a promissory note by a married woman creates no presumption of consideration or of her intention to bind her separate estate.

3. ———: ———: INTENTION: SATISFACTION: SEPARATE ESTATE: BURDEN. 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.

ERROR from the district court for Otoe county. Action in the nature of *indebitatus assumpsit* on two promissory notes given by a *femme covert*. Tried below before JESSEN, J. Judgment for defendant. *Affirmed.*

Edwin F. Warren, for plaintiff in error.

D. T. Hayden and *W. W. Wilson, contra.*

OLDHAM, C.

This was a suit on two promissory notes signed by a married woman, without her husband joining with her. The notes did not recite that they were given on the faith and credit of the separate estate of the maker. The undisputed facts arising on the pleadings and evidence are that the notes were given for stock in a hedge-fence company; that the maker of the notes was the owner of separate property at the time the notes were executed; that she never actually received any consideration for the notes; that the plaintiff purchased these notes for a valuable consideration, before maturity, relying on the separate estate

Syllabus by court; catch-words by editor.

of the maker, and without notice of any defenses, but with knowledge of the fact that the maker of the notes was a married woman. There was conflicting evidence on the question of the intention of the maker of the notes to bind her separate property for the payment of the obligation. The issues were submitted to a jury, who found in favor of defendant; there was judgment on the verdict, and plaintiff brings error to this court.

The learned trial judge submitted the questions on instructions to a jury, which, in substance, told the jury that if they believed from the evidence that the notes were executed by the defendant with the intention of binding her separate estate, then their verdict should be for the plaintiff for the face of the notes and interest; that the burden of proof was upon the plaintiff to establish the fact that the notes were given with reference to and with the intention of binding the separate estate of the defendant; that the omission to recite an intention to bind the separate estate in the body of the notes raised no presumption as to what the actual presumption was; and also that if the they found from the evidence that the notes were not given by the defendant with reference to her separate business, trade or property, or were not given with the intent to bind her separate estate, then the notes would be void under our statute, and the verdict should be for the defendant. The plaintiff in error contends that as it purchased the notes relying on the separate estate of the maker, for a valuable consideration, and before maturity, and without notice of defenses, the separate estate of the maker was bound, no matter what her intention may have been at the time she executed the notes. It also contends that in any event the burden of proof should have been cast upon the defendant to show that the notes were not given with the intention of binding her separate estate. Having requested instructions from the trial court properly setting forth these theories, error is alleged in the action of the trial court in refusing plaintiff's requests for instructions, and also in giving of instructions in substance as above set forth.

Plaintiff in error has filed an earnest and forceful brief in support of its contentions in the case at bar, and has clearly pointed out the manifest injustice to bona-fide purchasers of commercial paper which may result from an adherence to the doctrine set forth in the instructions of the trial court, and has fortified its position by a citation of authorities from other states which tend to support its claim as to the liability of the separate estate of a married woman for the satisfaction of negotiable promissory notes executed by her. But the question of the possible abuse that may follow from the enactment of a statute fixing the liability of a married woman with reference to her separate estate is one to be determined by the law-making power of the state and not by the courts; and, whatever view may have been expressed of the liability of the separate estate of a married woman by the courts of last resort of sister states under their statutes, the question, as we view it, has been fully determined by this court. We have held that under our statute she has been but partially emancipated from her common-law disability to contract, and that her separate estate can only be bound when she contracts specifically with reference to it. We have also held that a promissory note made by a married woman, does not raise a presumption either of consideration or of her intention to bind her separate estate, and that the burden of proof is upon the holder of a negotiable promissory note executed by a married woman to show that she intended to bind her separate estate for the satisfaction of the obligation. *Barnum v. Young,* 10 Nebr., 309; *Grand Island Banking Co. v. Wright,* 53 Nebr., 574; *Stenger Benevolent Ass'n v. Stenger,* 54 Nebr., 427; *Smith v. Bond,* 56 Nebr., 529; *Kocher v. Cornell,* 59 Nebr., 315. It follows that the instructions given by the trial judge were fully warranted by a long line of decisions of this court, and that there was no error in refusing the instructions requested by plaintiff.

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

BARNES and POUND, CC., concur.

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

AFFIRMED.

JENS C. MENG, APPELLANT, V. CHARLES F. COFFEE ET AL., APPELLEES.

FILED FEBRUARY 4, 1903. No. 9,837.

Commissioner's opinion, Department No. 2.

1. **Common Law**: POWER OF COURTS TO DECLARE THE SAME INAPPLICABLE. 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.
2. **Riparian Owners**: RIGHTS MODIFIED BY STATUTE. 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.
3. **Rights Defined.** The common law does not give to a riparian owner an absolute and exclusive right to the flow of all the water of the stream in its natural state, but only a right to the benefit and advantage of the water flowing past his land so far as consistent with a like right in all other riparian owners.
4. **Riparian Owners**: REGULATION OF USE OF WATER: SMALL QUANTITIES: LARGE QUANTITIES: THE LAW DISTINGUISHES. In regulating the use of water by riparian owners, the law distinguishes between those modes of use which ordinarily involve the taking of small quantities and but little interference with the stream, and those which necessarily involve the taking or diversion of large quantities and a considerable interference with its ordinary course and flow.
5. **Purpose of the Law as to Use of Water by Riparian Owners.** The purpose of the law as to use of water by riparian owners, is to secure equality therein, as near as may be, to each, by requiring each to exercise his rights reasonably, and with due regard to the right of other riparian owners to apply the water to the same or other purposes.
6. **Irrigation**: USE WHICH RIPARIAN OWNER MAY MAKE OF WATER. A riparian owner may take water from a stream for purposes of irrigation. But his use of the water for such purposes must be reasonable with reference to the size, situation and character

Syllabus by court; catch-words by editor.

of the stream, the uses to which its waters may be put by other riparian owners, the season of the year and the nature of the region; and he must not, in so doing, unreasonably diminish or wholly consume such water, to the injury of other owners, nor so as to prevent reasonable use of it by them.

7. **Reasonable Use of Water a Question of Fact.** What is a reasonable use of water for irrigation is largely a question of fact, depending upon the circumstances of each case, and one which may be viewed with some liberality in semiarid regions, where use for such purposes necessarily involves much loss; but waste, needless diminution, or total consumption of a stream, to the injury of others, is clearly unreasonable.

8. **Squatter's Right: STATE LAW: DECISIONS OF COURTS: PRESCRIPTIVE RIGHT.** An appropriation of water by "squatter's right," not recognized by the laws of this state, the decisions of its courts, nor any general, well-recognized or widely respected custom therein, does not, by virtue of section 2339, Revised Statutes of the United States, give to the settler who has appropriated water in that way for a less period than ten years an exclusive right as against other settlers upon the same stream.

9. **Settler's Appropriation of Water: TACKING.** But a settler who so appropriates water, and afterwards duly enters and receives a patent to the land from the government, may, as against other patentees from the government upon the same stream, count the time during which he appropriated the water as a mere squatter in making out the statutory period of prescription.

10. **Appropriation of Considerable Quantities: SEASON, WET OR DRY: INFERIOR OWNERS.** Appropriation of considerable quantities of water in seasons when that may be done without sensible injury to lower owners, does not give a prescriptive right to divert the whole stream in dry seasons.

APPEAL from the district court for Sioux county. Petition for a perpetual injunction by an inferior riparian owner against his superior riparian owners. Heard below before WESTOVER, J. Decision below adverse to the plaintiff. Attempted appeal dismissed.* Judgment entered below on original finding. Second appeal. *Affirmed in part.*

Chambers Kellar and *Nathan K. Griggs,* for appellant.

Allen G. Fisher, contra.

* 52 Nebr., 44.

POUND, C.

This suit was brought in 1893 to enjoin the defendants, upper riparian owners upon Hat creek and its several tributaries, from diverting the waters of said streams for irrigation purposes to such extent as to deprive the plaintiff, a lower owner, of the use of the stream. Upon trial a decision was announced orally adverse to the plaintiff. On appeal to this court, it appeared that no final decree had been entered in accordance with such announcement, and the appeal failed. Thereafter a decree dismissing the cause and following the findings originally announced was duly entered, from which the present appeal is prosecuted. The defendants justify their diversions of the waters of said streams upon these grounds: (1) Prior appropriation; (2) that irrigation of meadow land to produce forage for their stock is a "domestic" use of the water, for which, if necessary, they may consume the whole; (3) that they have a right to divert the water, as against the plaintiff, by reason of section 2339, Revised Statutes of the United States; (4) that the character of the soil in the region in question and the nature of the beds of the streams are such that the waters diverted would be lost by evaporation and absorption in any event before reaching the plaintiff; and (5) that they have acquired rights to divert the water by prescription. The alleged appropriations were long prior to any legislation authorizing the same, and no questions under the present irrigation laws are before us in this case.

The first two positions are clearly untenable if this court is to adhere to its repeated pronouncements that the rules of the common law as to the rights and duties of riparian owners are in force in this state. *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*, 45 Nebr., 798; *Gill v. Lydick*, 40 Nebr., 508; *Eidemiller Ice Co. v. Guthrie*, 42 Nebr., 238, 28 L. R. A., 581; *Slattery v. Harley*, 58 Nebr., 575; *Crawford Co. v. Hathaway*, 60 Nebr., 754, 61 Nebr., 31. But in view of the general mis-

conception of the scope and purpose of those rules and their effect upon irrigation, and the earnest and able arguments which have been presented in the endeavor to bring the court to a contrary conclusion, it has seemed proper to treat the question as *res integra,* and for that purpose the arguments in the several other cases now pending which involve the soundness of the prior decisions referred to have been considered in connection with those in the case at bar.

A great deal of what has been urged upon us as demonstrating the inapplicability of the rules of the common law upon this head to conditions in Nebraska proceeds upon an erroneous impression of the nature and purpose of such rules. Thus, in a brief in which the subject is most elaborately and exhaustively discussed, counsel say: "No riparian proprietor in Nebraska today is entitled to the full flow of the stream through his premises just for the pleasure it may give him to see the stream filling its banks. * * * The use of the water belongs to the people." And throughout that brief, and in all the arguments we have examined, it is assumed that at common law taking of water from a stream is an injury to the riparian proprietor, and that the latter may insist that no water whatever shall go out. The common law does not hold to so unreasonable a rule. On the contrary, it considers running water *publici juris,* and while it will not permit any one man to monopolize all the water of a running stream when there are other riparian owners who need and may use it also, neither does it grant to any riparian owner an absolute right to insist that every drop of the water flow past his land exactly as it would in a state of nature. "No one," said Nelson, J., in *Howard v. Ingersoll,* 13 How. [U. S.], 380, 426, 14 L. Ed., 189, "can set up a claim to an exclusive right to the flow of all the water in its natural state; and that what he may not wish to use himself shall flow on till lost in the ocean. Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the uni-

versal sense of mankind, to debar a riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use works no substantial injury to others." In *Embrey v. Owen*,* 6 Ex. [Eng.], *353, a case involving the right to use water for irrigation, Parke, B., said (p. 368): "This right to the benefit and advantage of the water flowing past his land, is not an absolute and exclusive right to the flow of all the water in its natural state; * * * but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence." In the leading case of *Elliot v. Fitchburg R. Co.*,† 10 Cush. [Mass.], 191, 57 Am. Dec., 85, Shaw, C. J., said: "The right to the use of flowing water is *publici juris*, and common to all the riparian proprietors; * * * it is a right to the flow and enjoyment of the water, subject to a similar right in all the proprietors." The common law seeks to secure equality in use of the water among all those who are so situated that they may use it. It does not give any riparian owner property in the *corpus* of the water, either so as to be able to take all of it, or so as to insist that every drop of it flow in its natural channel. *Vernon Irrigation Co. v. City of Los Angeles*, 106 Cal., 237.

When, therefore, counsel tell us that their clients have a natural right to irrigate, and that reasonable use of the water is necessary in the exercise of that right, they urge nothing against the rules of the common law, since the latter merely insist that others along the streams in question have the same natural right, and permit every rea-

* There is a most valuable note at the end of this case on page 372. Lawyers preparing briefs on this subject are recommended to consult it. It relates particularly to the rights of riparian proprietors, and contains citations both from England and the States.—W. F. B.

† The author of the opinion in this case refers to *Embrey v. Owen*, *supra*, as having settled the law; and, in a separate paragraph, Shaw proceeds to use almost the exact language of Parke.—W. F. B.

sonable use by each consistent with like use by all. The apparent modifications of the common-law rules in the semiarid or arid states, in that courts of such states are more liberal in their construction of what is a reasonable use, are no departure from the principles on which the rules are founded. On the contrary, they carry them to their logical conclusion in view of the special conditions of such regions.

Understanding what is meant by the general common-law rule as to riparian rights, and bearing in mind that it does not give to a riparian owner an absolute and exclusive right to the flow of all the water of the stream in its natural state, but only a right to the benefit and advantage of the water flowing past his land so far as consistent with a like right in all other riparian owners, we come next to the question, is such rule in force in this state? Much of what has been urged to show that the rule is inapplicable to our conditions, and hence not in force under chapter 15*a*, Compiled Statutes (Annotated Statutes, sec. 6950), is deprived of its effect by proper statement and limitation of the rule itself and apprehension of the principle on which it proceeds. It is further to be noted that the rule has long been in operation without complaint or objection in the eastern portion of the state, and that the difficulties now asserted arise quite as much from the necessity of application of the principles of the common law to the different circumstances of the semiarid portions of the state so as to reach detailed rules applicable to those sections, as from any inherent deficiency in the principles themselves. It is obvious that whatever rule is adopted must be of general effect throughout the state, or, at the least, if there are to be two rules, the areas within which they are to prevail respectively must be capable of judicial recognition. The territory of each rule must be known to the courts as something of which they take judicial notice. But this is not an arid state. Only a portion of it may be so described with propriety, and there is no arbitrary line by which the arid portions are

bounded so as to be judicially recognizable. In the Pacific states, where one rule is applied with reference to the public domain and another in cases of private ownership, the limits are not subject to dispute. But, in this state, whether a particular locality is or is not arid is a question of fact in each case (*Slattery v. Harley*, 58 Nebr., 575, 577), and it would be an anomaly to have the rules of law by which a cause is to be governed depend upon such an issue, and be triable to a jury. Moreover, if a rule of the common law is to be rejected as inapplicable to our state, it must be because its inapplicability is general throughout the state. If it were conceded that the extreme western portion of the state presents conditions to which the common-law rule is not applicable, how are we in a state like Nebraska, in which the diversity of extreme conditions is great, and yet the transitions are gradual and imperceptible, to draw any line at which we may say one condition ceases and another begins? Where purely arbitrary, the drawing of such a line would be legislation; and nothing short of anarchy could result from leaving it undrawn with two conflicting rules in force. What is needed in such cases is a sound and practical mode of applying the principles of the common law to the peculiar conditions of arid or semiarid localities, not a sweeping act of judicial legislation requiring not a little supplementary legislation of the same oblique character. In a case like the one at bar, where but a few of the questions inevitably to arise could be involved, complete formulation of a system of rules would be improper and impossible. But to abrogate the existing law as to riparian rights and put anything less than an equally complete system in its place, would result in a condition of chaos far worse than the partial or local difficulties sought to be obviated. "Where the precedents are unanimous in support of a proposition, there is no safety but in a strict adherence to such precedents. If the court will not follow established rules, rights are sacrificed, and lawyers and litigants are left in doubt and uncertainty, while there is

no certainty in regard to what, upon a given state of facts, the decisions of the court will be. If the common-law rule is inadequate, the proper course is by legislation." MAXWELL, C. J., in *Wilson v. Bumstead*, 12 Nebr., 1, 4.

Not only should the inapplicability of a common-law rule be general, extending to the whole, or the greater part, of the state, or at the least to an area capable of definite judicial ascertainment, to justify the courts in disregarding such rule, but we think, in view of the ease with which legislative alteration and amendment may be had, the power to declare established doctrines of the common law inapplicable should be used somewhat sparingly. In the whole course of decision in Nebraska, from the territorial courts to the present, this power has been exercised but three times: (1) with reference to trespass upon wild lands by cattle (*Delaney v. Errickson*, 10 Nebr., 492, 35 Am. Rep., 487), restricted, however, to wild lands by later adjudications (*Lorance v. Hillyer*, 57 Nebr., 266); (2) with reference to the effect of covenants to pay rent in a lease after destruction of leased buildings, dissented from, however, by three* of the six judges (*Wattles v. South Omaha Ice & Coal Co.*, 50 Nebr., 251, 36 L. R. A., 424, 61 Am. St. Rep., 554); and (3) with reference to estates by entirety (*Kerner v. McDonald*, 60 Nebr., 663, 83 Am. St. Rep., 550). Of these three cases it may be remarked that the first was in line with legislation which clearly ran counter to the common-law rule, and that the other two dealt with strict feudal rules of property, based on conceptions long since become obsolete. The recent holdings as to the statute of uses (*Farmers & Merchants' Ins. Co. v. Jensen*, 58 Nebr., 522), and the statute of Elizabeth concerning charitable uses (*St. James Orphan Asylum v. Shelby*,† 60 Nebr., 796); are of different nature. In the statute of uses the court did not have to do with a rule of the common law, but with an English statute, which was not adjustable to our own legislation as to convey-

* POST, C. J., IRVINE and RYAN, CC. IRVINE delivered the dissenting opinion.

† This case appears in 84 N. W. Rep., 273, as *In re Creighton's Estate.*

ances. In the statute of Elizabeth relating to charitable uses the court was again dealing with an English statute, and as that statute gave extrajudicial powers to the courts, which they could not exercise under our constitution, the question was one of legislative superseding of the rule, not of inapplicability. Thus the distinction between the case at bar and those in which common-law rules or English statutes have been set aside is readily apparent. Here we are confronted with no legislation to the contrary, nor are we dealing with an antiquated rule of feudal origin, but with an enlightened system of rules, founded on obvious principles of justice, and concededly applicable to the general conditions of the country and to the greater part of this state. Moreover, in each of the three cases in which common-law rules have been held inapplicable there was a complete rule at hand to take the place of the one rejected, and no complicated and extensive judicial legislation was required. In the case of trespasses by cattle, the herd law was on the statute books; the rule as to the effect of covenants in a lease to pay rent was an isolated rule, without collateral consequences, and the obvious and well-settled principle of apportionment, governing all agreements, was available in its stead; and the doctrine of tenancy by the entirety stood alone, unconnected with any general body of rules, and all cases that might have been governed by it were readily referable to the rules governing tenancy in common. In like manner, with the statute of uses removed, we had a complete statutory system of conveyancing, and in the absence of the statute of charitable uses, there were still the general equitable powers of the court of chancery existing anterior to that statute. But while in those cases a single rule, part of no general system of modern application, was rejected, here the rules assailed are results of a general doctrine and part of a complete system, and to overthrow them would leave the whole body of the law of waters unsettled and confused. The subject calls for legislative, not for judicial, action. Black's Pomeroy, Water Rights, secs. 162, 163.

Nor do we believe that the common-law rule of equality among riparian owners, administered liberally with respect to the circumstances of particular localities, is necessarily prohibitive of irrigation anywhere. If we bear in mind wherein the essential doctrine of the common law on this subject consists, we doubt whether a more equitable starting point for a system of irrigation law may be found; and we are not alone in this view. Black's Pomeroy, Water Rights, sec. 163. But if the existence of a rule better applicable to parts of the state were of itself sufficient ground for judicial overturning of the law, the question would arise, what principle are we to adopt? The one for which counsel contend, and the only one that could be contended for seriously, is the doctrine of appropriation, and, believing that to adopt this doctrine by judicial legislation in place of the rules of the common law would lead to difficulties in other parts of this state no less great than those charged to the rules at present sanctioned, we purpose to review briefly its history and some of its incidents. The history of this doctrine is well known and has often been set forth. Black's Pomeroy, Water Rights, secs. 11-24; 17 Am. & Eng. Ency. Law [2d ed.], 494; *Atchison v. Peterson,* 20 Wall. [U. S.], 507, 22 L. Ed., 414. It arose in California at a time when government and law were not yet established, when there was no agricultural population and were no riparian owners, and when streams could be put to no use except for mining. From the necessities of the case, there being no law applicable, the miners held meetings in each district or locality and adopted regulations by which they agreed to be governed. As at that time streams could be put to no use except for mining, and as the use of large quantities of water was essential to mining operations, it became settled as one of the mining customs or regulations that the right to a definite quantity of water and to divert it from streams or lakes, could be acquired by prior appropriation. This custom acquired strength; rights were gained under it and investments made and it was soon approved by the courts

and by local legislation; and, though not originally available against the general government or its patentees, was made so available by act of congress in 1866.* But it was only the same rule as that by which possession of mining claims was recognized. It was a custom intended to prevent disorder and forcible dispossession of those who had located mines. As stated by Field, J., in *Atchison v. Peterson, supra* (p. 510): "By the custom which has obtained among miners in the Pacific states and territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters." In other words, the doctrine in question was not formulated as an enlightened attempt to adjust the conflicting relations of a large community of individuals. It was a crude attempt to preserve order and the general peace, and to settle customary rights among a body of men subject to no law, under which so many and so valuable rights arose that when the law stepped in it was obliged to recognize them. In this way the rule of appropriation became established in the Pacific states, in opposition to the common law, with reference to streams or bodies of water which wholly ran through or were situated upon the public lands of the United States. Black's Pomeroy, Water Rights, sec. 15. These rules, however, were confined to the public lands, and are so confined at the present time in California, Oregon and Washington. In other states and territories the new doctrine was given general application; sometimes by judicial decision, as in Nevada, but chiefly by constitutional or legislative enactment. Thus, in those states of which the whole or a portion is arid, we now find some in which the common-law rules are in force—California, Oregon, Washington, Montana, North Dakota and, substantially, Texas—though in many of these, for reasons stated, the other rule obtains

*2 U. S. Compiled Statutes (1901), p. 1437.

upon the public lands of the United States; others in which the doctrine of prior appropriation is in general force—Nevada, Arizona, Colorado, Idaho, Utah, Wyoming. Of these, however, Colorado, Idaho and Wyoming have constitutional provisions declaring such to be the paramount law, and in the other jurisdictions named it is generally established by statute. Not only does the history of the rule obviously remove our state from its operation, but a mere comparison of the jurisdictions where the contending principles are in force is very suggestive. In all states which, like our own, are but partially arid, the common law is in force. The states holding to the contrary rule are wholly within the arid regions. Moreover, whereas in those states and some of the partially arid, the arid regions were first settled, and rights, customs and legislation grew up and were shaped with reference to such conditions, with us the amply watered regions of the eastern portion of the state were first settled, and our laws, legislation and lines of judicial decisions were fixed before agriculture in the arid or semiarid portions of the state was at all established. Not only does this suggest that the appropriation doctrine unregulated by minute legislation is unsuited and inapplicable to the state as a whole, but a consideration of some of its incidents will make such conclusion manifest. Under such doctrine the first appropriator may appropriate the entire flow of a stream, if used in proper irrigation. *Hammond v. Rose,* 11 Colo., 524, 19 Pac. Rep., 466, 7 Am. St. Rep., 258; *Drake v. Earhart,* 2 Idaho, 716. Also a nonriparian may appropriate and get an exclusive right to the whole water of a stream for nonriparian lands. *Hammond v. Rose, supra.* It must be clear that such rules are not applicable to this state at large. Land along streams has been bought and sold and titles have been acquired for many years throughout the older portions of the state in reliance upon the rights and advantages incident to ownership of riparian property. The application of the rules of the common law in this state having been undoubted so long, the results of sud-

denly overturning them and permitting the first comers to get all the water from the several streams in the older parts of the state by mere appropriation and turn whole streams upon nonriparian tracts, would be intolerable. Not only have these rules been relied upon in the acquisition and disposition of property, but they have received legislative recognition. Section 8, chapter 57, Compiled Statutes (Annotated Statutes, sec. 7307), providing for ascertainment of damage to lower owners by retention of water in mill ponds; section 32, article 3, chapter 93*a*, Compiled Statutes (Annotated Statutes, sec. 6854); section 6, article 1, chapter 93*a*, Compiled Statutes (Annotated Statutes, sec. 6752); and perhaps section 43, article 2 (Annotated Statutes, sec. 6797), of the last-named chapter—indicate an understanding that riparian owners have rights which must be respected and may only be divested by due process of law. Counsel contend that the irrigation act of 1877 "looked on the law of riparian rights with disapproval." But this statement, already sufficiently refuted in the opinion in *Crawford Co. v. Hathaway*, 60 Nebr., 754, is based upon the fallacious assumption that any taking of water from a flowing stream is an infraction of riparian rights.

For the reasons indicated, we are of opinion that the former holdings of the court must be adhered to, and that, except as altered by statutes, the common-law rules are in force in every part of the state. The details of such rules with respect to irrigation, however, and their application to irrigation in the semiarid portions of the state, have not as yet received careful consideration by this court. It is generally recognized that at common law a riparian owner may take water from a stream for purposes of irrigation. *Embrey v. Owen*, 6 Exch. [Eng.], *353; *Elliot v. Fitchburg R. Co.*, 10 Cush. [Mass.], 191, 57 Am. Dec., 85; *Gillett v. Johnson*, 30 Conn., 180; *Ulbricht v. Eufaula Water Co.*, 86 Ala., 587, 6 So. Rep., 78, 4 L. R. A., 572, 11 Am. St. Rep., 72; Gould, Waters [3d ed.], sec. 217. At an early day there was a tendency to class irrigation

among those uses of a stream which might be carried even to entire consumption of its waters. But another view has long prevailed and is now well established, not only in the eastern portion of the country, but even in the arid and semiarid states (so far as such states recognize the common-law doctrine as to riparian rights), to the effect that irrigation is one of those uses which must be exercised reasonably, with a due regard to the rights of others. *Low v. Schaffer,* 24 Ore., 239, 33 Pac. Rep., 678; *Gillett v. Johnson,* 30 Conn., 180; Black's Pomeroy, Water Rights, sec. 151; Gould, Waters [3d ed.], secs. 205, 217. This subject has been confused needlessly by the unfortunate use of the words "natural" and "ordinary" in this connection to distinguish those uses which the common law does not attempt to limit, and "artificial" or "extraordinary" to designate those which are required to be exercised within reasonable bounds. It is no doubt true that irrigation is a very natural and a very ordinary want, and that use of a stream for such purpose is natural and ordinary in semiarid regions. But such is not the question. The law does not regard the needs and desires of the person taking the water solely to the exclusion of all other riparian proprietors, but looks rather to the natural effect of his use of the water upon the stream and the equal rights of others therein. The true distinction appears to lie between those modes of use which ordinarily involve the taking of small quantities and but little interference with the stream, such as drinking and other household purposes, and those which necessarily involve the taking or diversion of large quantities and a considerable interference with its ordinary course and flow, such as manufacturing purposes. The purpose of the law is to secure equality in the use of the water by riparian owners, as near as may be, by requiring each to exercise his rights reasonably and with due regard to the right of other riparian owners to apply the water to the same or to other purposes. This purpose is not subserved by any arbitrary classification, and in regions where water must be carefully husbanded and is in great

demand for agricultural purposes, it is obviously better to incline towards such a rule as will further equality and a wide participation in the benefits of a stream. *Lux v. Haggin,* 69 Cal., 255. Accordingly, wherever the common-law rules as to riparian rights apply, even in the arid portions of the country, the weight of authority places irrigation among those uses of a stream which must be exercised reasonably under the circumstances of each case. *Union Mill & Mining Co. v. Ferris,* 2 Saw. [U. S. C. C.], 176, Fed. Cas. No. 14,371; *Union Mill & Mining Co. v. Dangberg,* 2 Saw. [U. S.], 450, Fed. Cas. No. 14,370; *Smith v. Corbit,* 116 Cal., 587; *Baker v. Brown,* 55 Tex., 377; *Trambley v. Luterman,* 6 N. Mex., 15; 17 Am. & Eng. Ency. Law [2d ed.], 487; Black's Pomeroy, Water Rights, sec. 151. This conclusion is not altered, so far as concerns the case at bar, by section 65, article 2, chapter 93*a,* Compiled Statutes (Annotated Statutes, sec. 6819), which declares water for irrigation to be a "natural want." If that section was meant to enact a new rule, we have here a cause which arose two years prior to its adoption. If it was meant to be declaratory, we must consider it in connection with section 43, which says that domestic uses must come before agricultural uses, and is inconsistent with any construction that would allow complete diversion of a whole stream for irrigation as against those who desire to use its water for domestic purposes. It would doubtless be impolitic to give an arbitrary or hard and fast meaning to the word "reasonable" in this connection. The use of water for irrigation always involves some loss, and we do not think it would be wise to declare every perceptible diminution of the waters of a stream to be unreasonable. The necessity of a liberal view of what constitutes a reasonable use of water for irrigation has been judicially recognized (*Harris v. Harrison,* 93 Cal., 676; *Bathgate v. Irvine,* 126 Cal., 135, 77 Am. St. Rep., 158), and we think caution in that respect entirely proper. If the rights of the upper owner in the water are no more than those of the lower owner, they are at the same time

no less. His right to reasonable use of the water for irrigation ought not to be rendered nugatory by requiring it to be exercised in an impossible manner. We do not think this conflicts with what was said in *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*, 45 Nebr., 798, and reaffirmed in *Slattery v. Harley*, 58 Nebr., 575, since the court was there considering only whether the common-law rules were in force, not the definition of the reasonable use allowed by those rules as applied to sections of the state shown by pleadings and proofs to be arid. Nor does it conflict with the holding in *Crawford Co. v. Hathaway*, 60 Nebr., 754, hereinbefore reiterated, to the effect that the common-law rules apply in every part of the state. For, if we regard the question of what is reasonable use as in great part one of fact, the conditions of soil, climate, and rainfall in any given locality, when proved, may be considered properly as important elements of fact, without in the least affecting the general rule. But if we concede so much, the law insists that the lower owner shall not be deprived of the use of the water to an unreasonable extent. *Sampson v. Hoddinott*, 1 C. B., n. s. [Eng.], 590. The uses which an upper riparian owner may make of a stream for purposes of irrigation must be judged, in determining whether they are reasonable, with reference to the size, situation and character of the stream, the uses to which its waters may be put by other riparian owners, the season of the year, and the nature of the region. These circumstances differ in different cases, and what use is reasonable must be largely a question of fact in each case. *Lux v. Haggin*, 69 Cal., 255; *Baker v. Brown*, 55 Tex., 377; *Harris v. Harrison*, 93 Cal., 676; *Minnesota Loan & Trust Co. v. St. Anthony Falls Water-Power Co.*, 82 Minn., 505, 85 N. W. Rep., 520; *Embrey v. Owen*, 6 Ex. [Eng.], *353; *Pitts v. Lancaster Mills*, 13 Met. [Mass.], 156. Some things, however, are clearly unreasonable, and it may be laid down absolutely that the upper owner, in using the water for irrigation, must not waste, needlessly diminish, or wholly consume it, to the injury of other

owners, nor so as to prevent reasonable use of it by them also. *Union Mill & Mining Co. v. Dangberg,* 2 Saw. [U. S. C. C.], 450, Fed. Cas. No. 14,370; *Lux v. Haggin,* 69 Cal., 255; *Harris v. Harrison,* 93 Cal., 676; *Gould v. Eaton,* 117 Cal., 539, 38 L. R. A., 181; *Coffman v. Robbins,* 8 Ore., 278; *Gillett v. Johnson,* 30 Conn., 180.

Judged in this way, we think the use made of the streams in question by three of the defendants may not be said to be reasonable. Hat creek is a small stream, about ten feet wide where it passes the plaintiff's lands, formed by the junction of a number of similar streams a few miles above. Of these, Warbonnet creek, after gathering in several small tributaries, flows into Munroe creek, which is received by Sowbelly creek, and the latter soon joins Hat creek, into which, some distance above, a number of smaller streams have been united. All of these creeks are fed by springs in the hills and flow the year round, although at times somewhat reduced in volume in dry weather. There is some conflict in the testimony as to the disposition of the water diverted by the several defendants, and how far it or some of it may return to the creeks. The most satisfactory testimony is that of the county surveyor, and we have looked chiefly to his statements for an understanding of the facts. The defendant Brewster maintains a dam on Warbonnet creek, and a ditch, by means of which he irrigates some 300 acres. The capacity of this ditch is sufficient to contain the entire stream. It takes the water away from the creek to a point about a mile off, where the dip is but very slightly toward the creek, and there discharges it, so that practically all that is not used in irrigation will, in hot weather, evaporate, and not return to the creek. On one occasion, when the season was very dry in that vicinity, and a number of Mr. Brewster's neighbors below him were complaining because they could get no water, it appears that he was turning the water upon a meadow of 80 to 100 acres so that it stood there from one to one and one-half inches deep; and, as we have seen, what was not used was sub-

stantially wasted. This is obviously unreasonable. The defendant Wilcox maintains a ditch on Munroe creek, with which he irrigates 150 acres. This ditch also is sufficient to carry the whole stream, and the water is so discharged that none gets back into the creek, since the ground slopes in another direction at the point of discharge. With respect to the defendant Coffee, who maintains a ditch on Hat creek, with which he irrigates 160 acres, the case is not so clear. But at the time the writs were served in this case, while there was abundance of water in his ditch, the sheriff found the creek dry a mile and a half below, and the bed of the creek opposite the plaintiff was so dry that dust blew in it. It is claimed that the character of the creek bed and nature of the soil in that vicinity, shown by the testimony to be close to the "bad lands," at an altitude of 4,500 feet, in an arid region, is such that in a dry season the waters of the creek would evaporate or be absorbed in the ordinary course of things before they reached the plaintiff. This, if true, would be a strong circumstance to consider in determining what would be a reasonable use of the water. *Union Mill & Mining Co. v. Dangberg*, 2 Saw. [U. S. C. C.], 450, 459, Fed. Cas. No. 14,370. But a large number of witnesses, well acquainted with the neighborhood, deny this, and the fact that in a former very dry season plaintiff had had water except for two or three days, and that as soon as the injunction was served, water flowed several inches deeper than usual past his land, would indicate that the condition of the creek when suit was brought was due to complete diversion of its waters by the dam above. With respect to the defendant Steele, however, who is on Middle Hat creek, above Coffee, the evidence is that all of the water taken out by him, except what is consumed by evaporation, goes back to the creek, and there is no evidence of unreasonable use or of injury to the plaintiff.

The further claim of the defendants, based upon section 2339 of the Revised Statutes of the United States [U. S. Compiled Statutes, 1901, p. 1437], so far as such sec-

tion is relied upon in connection with the legislation of this state to set up rules at variance with the doctrines of the common law, is disposed of adversely in *Crawford Co. v. Hathaway,* 61 Nebr., 317. But they also contend that by virtue of said section as prior appropriators who have duly entered and received patents to their lands, they are entitled to take the waters of said streams as against the plaintiff, who is a subsequent patentee from the government. The section in question has been construed repeatedly by the federal courts, and its meaning is not open to question. *Basey v. Gallagher,* 20 Wall. [U. S.], 670, 22 L. Ed., 452; *Broder v. Natoma Water & Mining Co.,* 101 U. S., 274, 25 L. Ed., 790; *Jennison v. Kirk,* 98 U. S., 453, 25 L. Ed., 240. In *Jennison v. Kirk,* the court says (p. 460): "In other words, the United States by the section said that whenever rights to the use of water by priority of possession had become vested, and were recognized by the local customs, laws, and decisions of the courts, the owners and possessors should be protected in them," although the title to the lands might be in the government. In *Basey v. Gallagher* it is said (p. 683): "It is very evident that congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the state or territory, or the decisions of the courts. The union of the three conditions in any particular case is not essential to the perfection of the right by priority; and in case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, must necessarily control." In the Pacific and mining states, appropriation of water by squatters on the public land became the subject of legislation and judicial decision very early in the history of those communities, whereby customs that had grown up and come to be well-defined, widely recognized, and generally respected in the regions in question were

given legal force. Irrigation is very young in this state, as the semiarid portions did not begin to be settled till about 1880. Neither by legislation nor by judicial decision had appropriation of water been recognized in this state as conferring any right until the statutory period of prescription had elapsed. Nor had any such general, well-recognized or widely respected custom grown up in this state as to justify the application of the federal statute thereto. The customs in the states to which congress had reference were wide-spread and notorious. The custom attempted to be proved in this case was at best very confined in its limits, known to few, admitted by few, and as the testimony shows, often disputed. The defendants testify that they began taking the water "by squatter's right." One witness says that in 1880 and 1881 it was usual for every man in northwestern Nebraska to "take what water he could." Others testify that at that time no one respected any other's rights in this regard, but each put in a ditch wherever he could. Another says: "About all the rule there was, if a man went and took out a ditch, he went and took it out." There is some testimony of a custom of respecting prior appropriations. But the weight of the evidence is to the effect that there were very few settlers, and all took what was at hand, without regulation or custom of any sort. Hence we do not think use of the water under such circumstances for a less period than ten years operated to give any right to the defendants as against the plaintiff under the section in question. On the other hand, however, we are of the opinion that under that section the period during which the defendants maintained their ditches as squatters, and afterwards under homestead entries, prior to obtaining patents for their land, may be counted by them in making out the statutory period of prescription as against the plaintiff, a subsequent patentee from the government. The statute has been construed to be a recognition by the government of all claims which might accrue to such squatters as against other settlers, and to intend that all patents which might

issue should be subject to such rights. As a right began to accrue as soon as the ditches were dug, we think the period during which the defendants appropriated water "by squatter's right," while giving rise to no rights against the government, is available in proving rights by prescription against the plaintiff. *Tolman v. Casey,* 15 Ore., 83.

This brings us to the last claim made by the defendants, namely, that they are entitled to divert the water of the several streams in question by virtue of ten years' adverse user. We may leave the defendant Steele out of account, because, as has been seen, the evidence does not show that his use of the water is unreasonable. Likewise the defendant Wilcox may be dismissed with a few words, since his dam was not built till 1884, and his ditch as it now stands was not dug till 1886. As this suit was begun in 1893, he can claim nothing by prescription. The defendant Brewster put in his dam in 1879 or 1880, and though he made some enlargements, his system of irrigation seems to have been in existence in its present condition for ten years before the bringing of this action. As to Coffee's ditch, the testimony is conflicting. It was begun in 1881, but seems to have been added to several times, and there is testimony that it was enlarged as late as 1886. But we need not review the testimony on this point, because, conceding that his ditch was in its present form ten years prior to the bringing of this action, neither he nor the defendant Brewster has proved a right to consume all the water of the streams by prescription. The plaintiff settled upon his land in 1886, five years after Coffee began his ditch, and from that time until 1893 there is abundant evidence that he had water in the creek at all times except for a day or two in 1890. No right to divert and dissipate the whole stream was acquired by making such use thereof as would still leave water for the plaintiff. So long as the water was sufficient for all, there was no adverse user. *Anaheim Water Co. v. Semi-Tropic Water Co.,* 64 Cal., 185; *Bathgate v. Irvine,* 126 Cal., 135, 77 Am. St. Rep., 158; *North Powder Milling Co. v. Coughanour,* 34 Ore., 9;

Church v. Stillwell, 12 Colo. App., 43; *Egan v. Estrada,* 56 Pac. Rep. [Ariz.], 721. One of the elements to be considered in determining what is a reasonable use of the water of a stream, is the season of the year, and its effect upon the stream. Riparian owners are not to be debarred from use of water because the season is dry and the stream low. But at such time they must take care "to do no material injury to the common right of plaintiff, having regard to the then stage of the river." *Union Mill & Mining Co. v. Dangberg,* 2 Saw. [U. S. C. C.], 450, 458, Fed. Cas. No. 14,370. The testimony is that the season of 1893 was unusually dry. Hence what might have been a reasonable use of the water, or at least such use as gave the plaintiff no ground of complaint, in other years, became highly unreasonable when it had the effect of giving Coffee and Brewster all the water and leaving none for other owners. Only a continuous and adverse user of the whole stream could give a right to take out a greater proportion of such water as was in the stream at the time than they had habitually taken in former years.

It is therefore recommended that the decree be affirmed as to the defendant Steele, but reversed as to the defendants Coffee, Brewster and Wilcox, with directions to make new and further findings of fact in conformity with this opinion, and to enter a decree enjoining the defendant Wilcox from wasting or unreasonably diminishing the waters of Monroe creek, and enjoining the defendants Brewster and Coffee from consuming all the waters of Warbonnet and Hat creeks, respectively, in the irrigation of their lands, or permanently diverting in any year a greater proportion of the water in such streams for the time being than they were accustomed to take out prior to the summer of 1893, having regard to the nature of the season and the condition of the stream at the time. In consequence, however, of the long time that has elapsed since the trial, we think it would be entirely proper to take further evidence upon the question of the amount of water

which such defendants may divert, should the lower court so desire.

SEDGWICK, C., concurs.

OLDHAM, C., having been of counsel in *Crawford Co. v. Hathaway**, did not sit.

By the Court: For the reasons set forth in the foregoing opinion, the decree of the district court is affirmed as to the defendant Steele, but reversed as to the defendants Coffee, Brewster and Wilcox, with directions to make new and further findings of fact in conformity with said opinion, and to enter a decree enjoining the defendant Wilcox from wasting or unreasonably diminishing the waters of Munroe creek, and enjoining the defendants Brewster and Coffee from consuming all the waters of Warbonnet and Hat creeks, respectively, in the irrigation of their lands, or permanently diverting in any year a greater proportion of the water in such streams for the time being than they were accustomed to take out prior to 1893, having regard to the nature of the season and the condition of the stream at the time; that proportion and other questions of fact necessary to the rendition of such a decree to be ascertained from the evidence already taken or by taking further evidence at the discretion of the district court.

JUDGMENT ACCORDINGLY.

NOTE.—*Riparian Ownership as Between States—Islands—Kentucky and Missouri—Delaware and New Jersey—Victoria and New South Wales.*—The reader is referred to volume 65 of the Nebraska Reports, pp. 154, 156; to *Missouri v. Kentucky*, 11 Wall, [U. S.], 395; to *Long v. Olsen*, 63 Nebr., 327; and to the forthcoming decision in the suit between New Jersey and Delaware, now pending before the supreme court of the United States in its original jurisdiction.

Pental Island.—The colony of Victoria was separated from New South Wales by the Australian Constitutions Act of 1850, and the course of the Murray river fixed as its northern boundary. This river was navigable, and at that time the principal avenue of transit and commerce to and from the interior. The jurisdiction in the boundary

* 60 Nebr., 754.

river not being clearly defined by the original act, an imperial act five years later declared that the course of the River Murray lying between the two colonies should form part of the territory of New South Wales. 18 & 19 Vict., ch. 54, A. D. 1855. This would appear to have settled the controversy for all time. But it afterwards developed that at one point in its course the River Murray passed along the northern side of a strip of land about fifteen miles in length, with an average breadth of two miles. This strip was constituted an island by the fact that on its southern side it was bounded by a channel which connected with the Murray at both ends. There was a constant flow of water in both channels, and the southern stream was deep enough for navigation during a greater part of the year. But owing to the obstruction of bridges, the northern channel only was used for navigation. The island was claimed by both colonies; by New South Wales on the ground that both streams were the watercourse of the Murray, by Victoria on the ground that the northern stream alone was the Murray, the southern channel being formed by the action of the Loddon, a Victorian river which is tributary to the Murray, and has the appearance on the map of entering the latter by two mouths, which is, probably, not a physical fact. The colonies supported their respective claims by arguments drawn (1) from the natural features of the country, (2) the history of its exploration and settlement, (3) its political and legal history, and (4) reputation.

The question of the exercise of jurisdiction came up before the executive council in 1852, in reference to collecting customs duties on goods coming up the river through South Australia. The imperial act was passed in consequence of this.

The arguments and proofs before the judicial committee as to the jurisdiction, were on the respective parts as follows, that is to say:

Victoria showed that the course of the Murray was marked by a line of trees, while the course of the Loddon was treeless, and that these features marked the northern and southern channels, respectively.

New South Wales pointed out that the juncture of the Loddon with the southern channel was below the point where that channel left the Murray, and that the southern channel was in constant flow while the Loddon was frequently dry.

Victoria answered that the southern channel above the junction of the Loddon was a course forced by floods, which were so common that for a part of most years the greater part of Pental Island was under water.

New South Wales: The question as to what was the course of the Murray was not a question of interpretation of a statute, but of indentifying the object described.

Victoria: Even if physical geography is against us, the true question is not what an elaborate investigation by experts may show to be the relation of the two streams, but what was meant by those who used the description; and this is to be proved by evidence of

knowledge and reputation. The northern stream, at the enactment of the statute, had always been known as the Murray, while the southern stream was spoken of by various names, as Murrabit, Murrabeet, Murrabout, *et cætera.*

New South Wales: We deem this unimportant. If the stream is actually a part of the Murray, simply calling it by another name does not make it another river.

The question was this: Shall the statute be interpreted by physical geography or by the common and ordinary interpretation of the language of the parliamentary enactment?

The case was closed by an order in council dated August 9, 1872, which, after reciting the reference and the report of the judicial committee thereon, awarded Pental Island to Victoria. *Roma locuta, causa finita.* Law Quarterly Review, vol. 20, p. 236, article by Prof. Moore, University of Melbourne.

When a river is the boundary between two nations or states, if the original proprietor is neither, and there be no convention respecting it, each holds to the middle of the stream. But when one state is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly erected state extends to the river only, and the low water mark is its boundary. *Handly's Lessee v. Anthony,* 5 Wheat. [U. S.], *374; *Howard v. Ingersoll,* 13 How. [U. S.], 380. *Alabama v. Georgia,* 23 How. [U. S.], 505, is frequently cited as maintaining the same doctrine. But it is a different question, to wit: *Was there an implication in the language of the contract of cession between the United States and Georgia?* In *Fleming v. Kenney,* 4 J. J. Marsh. [Ky.], 156, the first proposition laid down in *Handly's Lessee v. Anthony, supra,* is followed.—W. F. B.

CLAYTON F. TIDBALL, APPELLANT, V. CHALLBURG BROTHERS, APPELLEES.

FILED FEBRUARY 4, 1903. No. 12,517.

Commissioner's opinion, Department No. 2.

1. **Written Agreement: GRAIN ELEVATOR: FIXTURES: OPTION: CONSIDERATION: ENFORCEMENT OF CONTRACT.** It seems that a written agreement to convey a grain elevator, together with the fixtures belonging thereto and property used therewith, at the option of the proposed vendee, within a given time and for a fixed price, if made upon sufficient consideration, will be specifically enforced in a proper case.
2. **Withdrawal of Offer.** Where the writing does not indicate, nor is it shown, that the proposed vendee did or gave anything for such

Syllabus by court; catch-words by editor.

option, and it is not contained in or a part of some contract between the parties, which may supply a consideration, it is a mere offer from which the vendor may withdraw if he chooses.

APPEAL from the district court for Clay county. Action to enforce specific performance of a contract to convey an elevator. Heard below before STUBBS, J. Judgment on demurrer to petition. *Affirmed.*

Fayette I. Foss, Ben V. Kohout and *R. D. Brown*, for appellant.

Thomas H. Matters, contra.

POUND, C.

This is a suit for specific performance of an alleged contract to convey an elevator. The agreement sued on is in these words: "We, the undersigned, hereby give R. M. Tidball an option on the purchase of our elevator at Saronville, Nebr., of thirty days (30 days) from date, for the sum of fifteen hundred dollars ($1,500), which includes the elevator building, and all machinery thereto belonging, scales and office, corn crib, two horses, harness and all other fixtures belonging to the house. At the end of said time said R. M. Tidball pays us the above named sum, namely, fifteen hundred dollars ($1,500), we will give to him a bill of sale and clear title to above described property." A demurrer was sustained in the lower court, and the plaintiff has appealed. It appears that the property was situated upon a railroad right of way and was personalty. For this reason, and because the writing gives an option only, it is argued that there is an adequate remedy at law and that the alleged contract lacks mutuality, so that a suit for specific performance would not be maintainable. Were these questions necessarily involved, we should be disposed to agree with the appellant. We are inclined to think that when the agreement is to convey a grain elevator, the remedy at law is inadequate. Grain elevators are not ordinary articles of merchandise,

easily found in the market, nor do they always possess a readily ascertainable market value. They appear to meet all substantial requirements of the rule as to contracts to convey land. We think also that a written agreement to convey, at the option of the vendee, within a given time and for a fixed price, if made upon sufficient consideration, will be specifically enforced in a proper case. *Johnston v. Trippe,* 33 Fed. Rep., 530; *Hawralty v. Warren,* 18 N. J. Eq., 124, 90 Am. Dec., 613; *Smith's Appeal,* 69 Pa. St., 474; Fry, Specific Performance [2d ed.], sec. 291 [3d ed., sec. 445]; Waterman, Specific Performance, sec. 200. But one needs only to read the alleged agreement to see that it is not an option contract, but is a mere offer. The writing does not indicate, nor is it alleged, that the proposed vendee did or gave anything for the option; there are no mutual promises; and the alleged agreement is not contained in or a part of any contract between the parties which might supply a consideration. It is no more than an offer from which the vendors were at liberty to withdraw if they chose. In *Rice v. Gibbs,* 33 Nebr., 460, 40 Nebr., 264, there was a consideration for the option, and it was a contract to hold the sale open for the vendee during the time agreed on.

We recommend that the decree be affirmed.

BARNES and OLDHAM, CC., concur.

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

AFFIRMED.

EDGAR C. SMITH v. JOHN A. THOMPSON.

FILED FEBRUARY 4, 1903. No. 12,609.

Commissioner's opinion, Department No. 2.

Indorsee. An indorsee of a negotiable instrument, who takes it before maturity in part payment of a preexisting debt, and credits it thereon, is a purchaser for value in the due course of business.

ERROR from the district court for Otoe county. Action by indorsee in the nature of *indebitatus assumpsit,* upon one promissory note given for a policy of life insurance. Plea of fraud, and that indorsee was not a bona-fide holder without notice. Reply in the nature of a specific traverse. Issue joined upon the affirmative defense. Tried below before JESSEN, J. Judgment for defendant. *Reversed.*

Edwin F. Warren, for plaintiff in error.

L. F. Jackson, contra.

POUND, C.

The plaintiff brought suit upon a promissory note given by defendant in payment of a premium upon a policy of life insurance. Defendant pleaded that he made application for a certain form of policy and that the policy written did not conform to his application; that the application "was obtained by fraud and misrepresentation"; and that plaintiff was not a bona-fide holder for value, but took with notice of these defenses. In reply, besides a general denial, plaintiff pleaded that he purchased the note before maturity, for value, and without notice of any defense. At the trial, it was shown that the plaintiff took the note in part payment of a preexisting indebtedness of the payee, crediting it thereon and canceling the indebtedness in the amount of the note. Plaintiff also adduced evidence tending to show that he did this in good faith, without notice of any defense. There is nothing

Syllabus by court; catch-words by editor.

in the record to the contrary, except as suspicion might arise from the relation of plaintiff to the company which issued the policy. The policy issued conforms to the written application signed by defendant, but he was allowed to show that according to the oral agreement between himself and the agent of the company who took the application, he was to get something quite different. Whether such evidence was admissible under his answer, we are inclined to doubt. We are much inclined to doubt, also, whether a verdict for the plaintiff should not have been directed. But we need not go into these matters, because of an obvious error in the instructions. It will have been noticed that the case was not unlike *Martin v. Johnston,* 34 Nebr., 797, and *First Nat. Bank of Cobleskill v. Pennington,* 57 Nebr., 404. If there was enough to go to the jury as to whether plaintiff was not a bona-fide holder, the jury should have been carefully and correctly instructed on that point. Plaintiff requested an instruction to the effect that giving the payee credit for the note upon an indebtedness then owing by the payee to the plaintiff and canceling such indebtedness to that extent, would be payment of value. The trial court refused this request and instructed the jury in general terms that a bona-fide holder must "buy" the note for a valuable consideration, in the regular course of business, before maturity. The instruction given is undoubtedly correct, and is well drawn. But under the evidence in this case, it needed the further explanation which plaintiff requested. An indorsee of a negotiable instrument, who takes it before maturity in part payment of a preexisting debt, and credits it thereon, is a purchaser for value in the due course of business. *Martin v. Johnston, supra; Struthers v. Kendall,* 41 Pa. St., 214, 80 Am. Dec., 610. The words "buy," "purchaser," and "regular course of business," in the instruction given, without any explanation, might well lead a jury to suppose that there must be a purchase and sale for cash or a present consideration; and so long as the court's attention was called to this matter by tender

of a proper request, we think some such instruction should have been given. There is so little in the evidence to justify a holding adverse to the plaintiff on this issue that we are unable to say that the error was without prejudice.

We therefore recommend that the judgment be reversed, and the cause remanded for a new trial.

BARNES and OLDHAM, CC., concur.

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

REVERSED AND REMANDED.

TAYLOR FLICK V. CITY OF BROKEN BOW.

FILED FEBRUARY 4, 1903. No. 12,519.

Commissioner's opinion, Department No. 3.

Validity of Ordinance. One can not question the validity of an ordinance until his rights are directly affected thereby.

ERROR from the district court for Custer county. This proceeding is, apparently, in the nature of an action on the case at common law. The opinion is short, and the facts appear therein. Read and classify. Tried below before SULLIVAN, J. The court directed a verdict for the defendant. Judgment on the verdict. *Affirmed.*

See note at end of case.

Taylor Flick, for himself.

Augustus R. Humphrey, contra.

DUFFIE, C.

The city council of the city of Broken Bow passed an ordinance making it unlawful to operate a saloon for the

Syllabus by court; catch-words by editor.

sale of intoxicating liquors, ale, wine or beer, or to operate bowling-alleys, billiard-halls or pool-rooms on parts of certain designated streets in said city. The plaintiff in error, being the owner of certain premises within the territory covered by said ordinance, brought suit against the city to recover damages sustained, as alleged, in consequence of being unable to rent his property for billiard-hall purposes on account thereof. The court directed a verdict for the defendant, and the plaintiff has brought the case on error to this court.

The city of Broken Bow is a city of the second class, of less than five thousand inhabitants; and subdivision 1, section 39, chapter 14, of the Compiled Statutes of 1901 (Annotated Statutes, sec. 8639), relating to cities of that class, gives the city council the following powers: "To restrain, prohibit, and suppress billiard tables and bowling alleys kept for public uses, houses of prostitution, and unlicensed tippling shops, gambling and gambling houses, and other disorderly houses and practices, and all kinds of public indecencies, and all lotteries or fraudulent devices and practices for the purpose of obtaining money or property."

Subdivision 8, section 69, chapter 14, of the Compiled Statutes (Annotated Statutes, sec. 8719), gives the city council the following authority: "To raise revenue by levying and collecting a license tax on any occupation or business within the limits of the city or village, and regulate the same by ordinance. All such taxes shall be uniform in respect to the classes upon which they are imposed; *Provided, however,* That all scientific and literary lectures and entertainments shall be exempt from such taxation, as well also as concerts and other musical entertainments given exclusively by citizens of the city or village."

If there be any authority conferred upon the city council to license billiard-halls or bowling alleys, it is under the section last above quoted, and it is not contended by the plaintiff in error that a billiard-hall may be operated

in the city of Broken Bow without a license. If the ordinance is void, the council may disregard it and issue a license authorizing a billiard-hall to be operated within the prescribed district. It is not shown that any application was made to the city council for a license to operate a billiard-hall upon the plaintiff's property, and until this is done and the license refused because of the supposed binding force of the ordinance, the plaintiff in error has no cause of complaint. Had he applied to the city council for a license, and had the license been refused upon the ground that the council was bound by the ordinance, then the question of the validity of the ordinance would become a material question in the case. In the present condition of the record the question of the validity of the ordinance is not fairly raised and will not, therefore, be considered. We recommend the affirmance of the judgment of the district court.

AMES and ALBERT, CC., concur.

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

AFFIRMED.

NOTE.—*Remote and Consequential Damages.*—An amusing instance of this kind occurred in Cedar county, in this state. A certain miller had ordered a lot of flour-sacks. The sacks were sent to Gayville, Dakota, the railroad point where the miller was to receive them. The shipping clerk had inserted, by mistake, the letter r, making the direction read Grayville, for Gayville. Then, too, there were then two Gayvilles in Dakota, one in Lawrence, the other in Yankton county. The latter was the point of destination. From the double confusion there was considerable delay before the miller received his flour sacks. Shortly after the miller received his sacks, he received a bill for the same for $86. He claimed that by reason of not receiving his sacks, he had lost a United States government contract worth $800. The miller claimed that the "jobbers" who furnished him the sacks owed him a balance of $714. This cause never came to the supreme court. For a good commentary on the maxim, *Causa proxima et non remota spectatus*, see Field, Damages, sec. 10; *Johnson v. Mathews*, 5 Kan., 118; *Pollock v. Gantt*, 69 Ala., 373.

Municipal Corporation.—A city is not liable for the negligence of its

officers or agents in executing sanitary regulations, adopted for the purpose of preventing the spread of contagious disease, or in taking the care and custody of persons afflicted with such disease, or of the house in which such persons are kept. In executing these legislative functions the city acts as a *quasi*-sovereignty, and is not responsible to individuals for the negligence or nonfeasance of its officers or agents. *Ogg v. City of Lansing*, 35 Ia., 495.—W. F. B.

ROBERT W. MCHALE, APPELLEE, V. WILLIAM F. MALONEY ET AL., APPELLANTS.

FILED FEBRUARY 4, 1903. No. 12,597.

Commissioner's opinion, Department No. 3.

1. **Mechanic's Lien:** PERSONAL JUDGMENT. On the foreclosure of a mechanic's lien the plaintiff may take a personal judgment against the party personally liable for the debt.

2. **Trial:** THEORY: CONTRACT: HUSBAND: WIFE: AGENCY: JOINT LEASE: MECHANIC'S LIEN: PETITION: ALLEGATION: REVERSAL: CONTRACT WITH BOTH. Where a case is tried on the theory that a contract signed by the husband alone for performing labor and furnishing material by a contractor in the erection of a building, was made by the husband for himself and as agent for his wife, they holding a joint lease of the premises, this court will not reverse a decree enforcing a mechanic's lien against both husband and wife on the ground that the petition does not in plain terms charge that the contract was with both.

APPEAL from the district court for Douglas county. Foreclosure of a mechanic's lien. Personal judgment below against appellants. Tried below before DICKINSON, J. *Affirmed.*

Abraham L. Knabe, for appellants.

Charles S. Lobingier, Charles W. Haller, Martin Langdon, Lawrence Rath, Richard S. Horton, George W. Shields, Charles A. Goss, L. D. Holmes and *Jacob L. Kaley, contra.*

DUFFIE, C.

This is an appeal from a decree foreclosing a mechanic's lien taken by William F. and Emma F. Maloney. The

Syllabus by court; catch-words by editor.

plaintiff entered into a written contract with William F. Maloney to furnish the material and do the brick and stone work necessary in the construction of a theatre building in the city of Omaha. The defendants Charles H. and Annie Downs and Carlotta C. Chrisman, are the owners of the premises on which the building is located, and, prior to the date of the plaintiff's contract with —— Maloney, had leased said ground to William F. and Emma F. Maloney for a term of eight years. The other defendants are parties who furnish material for the building, and filed liens against the same. The court found the amount due each of the claimants, entered judgment therefor, and establesh a mechanic's lien in their favor against the leasehold estate of the Maloneys, decreed a foreclosure of the same and a sale of the leasehold estate in case the amount found due was not paid within a certain specified time. Appellants complain that the holders of mechanics' liens were allowed a personal judgment against them in addition to their decree of foreclosure. *Meyers v. Le Poidevin,* 9 Nebr., 535, recognizes the practice of entering a personal judgment against a party personally liable for the debt on the foreclosure of a mechanic's lien, and that has been the rule, as we understand, since the statute giving the lien was enacted. Because of this long practice and the seeming concurrence of the profession in the view that the statute authorized and contemplated it, we should not feel inclined to disturb it at this time, even if it were a doubtful question.

It will be observed from the statement above made that William F. and Emma F. Maloney were the lessees of the premises on which the theatre was erected, and that the contract for the stone and brick work to be done by McHale was signed by William F. alone. The appellants now insist that McHale is not entitled to a mechanic's lien against Emma F. Maloney, for the reason that the petition does not allege that McHale furnished any material or did any labor by virtue of a contract, either express or implied, with the said Emma F. Maloney. Our

statute gives a lien to the laborer or material man "who shall perform any labor, or furnish any material * * * for the erection * * * of any * * * building * * * by virtue of a contract or agreement expressed or implied with the owner thereof or his agents."* The petition alleges that the plaintiff made a contract with William F. Maloney, who held himself out to be the lessee and agent of the premises on which the building was erected. William F. and Emma F. Maloney made joint answer to this petition. The answer contains: (1) A general denial of all allegations not thereafter admitted; (2) admits that William F. Maloney entered into the contract with the plaintiff set out in the petition; (3) alleges that the plaintiff failed to do the work contracted for in a workmanlike manner and failed to furnish as good material as provided by the contract, by reason of which the defendants were damaged in the sum of $500, for which judgment was prayed. While the petition does not charge in plain terms that William F. Maloney was the agent of Emma F. Maloney in making the contract, the defendants must have so construed it, as otherwise it is difficult to see how Emma F. Maloney could assert a claim for damages for a failure to perform. If William F. Maloney was not her agent, and the contract made for her benefit as well as his own, no right to damages for its breach could accrue to her and she would hardly assert such a claim. She certainly can not claim to recover on a contract to which she is not a party. The evidence was not preserved, and we have nothing before us but the pleadings and the decree entered, and can not say, therefore, except as we judge from the decree rendered, upon what theory the case was tried. We must presume, in the absence of a showing to the contrary, that the court entered the proper decree and that the parties understood and treated the allegation of the petition above quoted as charging that William F. Maloney was agent for the lessees of the property. The reply

* Cobbey's Annotated Statutes, sec. 7100; Compiled Statutes, ch. 54, sec. 1.

of the plaintiff specifically alleges that William F. Maloney acted for his wife, Emma F., as well as himself; and while a defective petition can not usually be cured or aided by the allegations of the reply, it is another circumstance leading us to believe that the case was tried upon the theory that the pleadings were sufficient to charge Mrs. Maloney as one of the parties to the contract.

We recommend the affirmance of the decree appealed from.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree appealed from is

AFFIRMED.

NOTE.—*Mechanic's Lien—Husband and Wife—Agency.*—Mechanic's lien for material furnished to husband for improvements upon wife's property with her knowledge. *Howell v. Hathaway*, 28 Nebr., 807; *Rust-Owen Lumber Co. v. Holt*, 60 Nebr., 80.—W. F. B.

FRANK E. MOORES, MAYOR OF THE CITY OF OMAHA, V. STATE OF NEBRASKA, EX REL. SAMUEL I. GORDON.

FILED FEBRUARY 4, 1903. No. 12,911.

Commissioner's opinion, Department No. 3.

1. **Res Adjudicata.** Matters once litigated and determined will not be reexamined in a subsequent action between the same parties.

2. **City Council:** APPROPRIATION: WARRANT: INSTALMENT: SALARY OF MUNICIPAL OFFICER: ALTERNATIVE WRIT OF MANDAMUS: VOID ORDINANCE. When a warrant has been drawn pursuant to an appropriation by a city council for the payment of an instalment of the salary of a municipal officer, and an alternative writ of mandamus has been issued and served to compel the execution and delivery of the instrument, an ordinance, passed during the pendency of the action, and assuming to repeal the ordinance making the appropriation and authorizing the payment, is void.

3. **City Officer, De-Facto, De-Jure.** One who is both a de-facto and a de-jure incumbent of a city office can not be deprived of the

Syllabus by court; catch-words by editor.

salary attached thereto by reason of the usurpation of the office at the instance of the city authorities.

ERROR from the district court for Douglas county. Application below for a writ of mandamus to compel the mayor of the city of Omaha to sign a warrant on the city treasury in favor of relator. The facts appear in the opinion. Tried below before ESTELLE, J. Writ allowed. *Affirmed.*

W. J. Connell, for plaintiff in error.

James W. Eller, contra.

AMES, C.

The relator, Samuel I. Gordon, was elected police judge of the city of Omaha for a term of two years, beginning in January, 1896. After occupying the office for the full term he continued therein because of a failure by the city to choose a successor to him. In *State v. Moores,* 61 Nebr., 9, this court held that, while so continuing, he was a de-jure officer and entitled to the rate of compensation fixed by the statute at the time of his election. These matters will not be reexamined in a subsequent action between the same parties. On the 2d day of January, 1902, nothing having occurred to affect the relator's tenure of office, the city council enacted an ordinance appropriating $1,600 to pay him a residue of his salary accrued at that time. Pursuant to the ordinance, the city comptroller drew and signed a warrant upon the treasurer for the sum named, and presented it to the respondent Moores, mayor of the city, for the signature of the latter, which was refused. Gordon then obtained from the district court of the county an alternative writ of mandamus requiring the mayor to sign the warrant, or on the return day of the writ show cause for not having done so. The return recites that after the issuance and service of the writ the council had passed, and the respondent, as mayor, had approved, an ordinance repealing the appro-

priation and directing the comptroller to cancel the warrant, and that the comptroller had obeyed the direction by stamping upon the face of the warrant the word "Canceled," so that the instrument was in legal effect no longer in existence. The proposition that this action of the city officials was wholly ineffectual upon the rights of the relator, seems to us so obvious as to require neither argument nor authority for its support. Although the writ ran against Moores alone, it was directed to him in his official character, and the proceeding was, in effect, a suit against the city, of which all the officials mentioned had constructive, if not actual, notice, and to which, for practical purposes, they were parties. At the time the alternative writ was issued and served, the respondent owed to the relator the performance of a definite ministerial act. It is not pretended that anything subsequently occurred which satisfied the relator's demand for his salary or tended to defeat his right thereto. To hold that a mere shifting of the pieces on the chess-board would deprive him of the fruits of an action already begun and then pending, would bring the courts and the administration of justice into merited contempt. We are of opinion that the repealing ordinance is void, and that such an ordinance enacted during the pendency of the action would have been so, under any circumstances. The controversy had been drawn into the exclusive cognizance of the court. If, after the alternative writ had issued and been served, anything had occurred by which the relator had lost his right to the salary, a recital thereof would have been a sufficient return to the process. If nothing of that kind had taken place, and the relator's right was complete when the writ was served, no such return could have been made. *State v. Ramsey,* 8 Nebr., 286; *State v. Cole,* 25 Nebr., 342.

At one time a futile attempt, under an unconstitutional statute, was made by the city authorities to remove the relator from office, and for several months an intruder was thrust into his place. *Gordon v. Moores,* 61 Nebr.,

345. Under the supposed authority of this void statute, the city compensated the intruder for several months of his incumbency. It is now contended that the sums so expended should be deducted from the salary of the relator. To justify this defense the respondent cites *State v. Milne*, 36 Nebr., 301, 19 L. R. A., 689, 38 Am. St. Rep., 724. We do not think that decision is in point. In that case two persons claimed the office of county treasurer, each asserting title thereto as the result of the same election, which was contested. One of them succeeded in the contest before the county court and was installed in office under color of its judgment, and continued to hold the place and receive its emoluments until the judgment was reversed upon appeal. It was held that the person finally successful was not entitled to compensation during the time his adversary rightfully received the same under color of title and of the judgment in his favor. But in the case at bar the intruder was never in office under color of title, and never was entitled to receive pay for discharging its duties. He was attempted, not to be appointed by the city council as police judge, but to be designated as a person who should perform the functions of that officer during a supposed suspension of the latter, and while unauthorized proceedings were in progress for his removal. In the view of the law and the decisions of this court, the transaction amounted to no more than a temporary usurpation of the functions and emoluments of one who was both the de-jure and the de-facto officer. If such a procedure could be regarded as effectual for any purpose, as against the person rightfully entitled, the tenure of a public officer would be of little worth, and the choice of the electors might easily be held for naught.

Upon consideration of the foregoing circumstances, the district court granted a peremptory writ of mandamus requiring the respondent to sign and deliver the warrant, treating the attempted cancelation thereof as void, and regarding even the physical destruction thereof as immaterial, since in that case it would be the duty of the

comptroller, as a virtual party to the suit, to prepare and sign a duplicate of it.

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

DUFFIE and ALBERT, CC., concur.

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

AFFIRMED.

DANIEL S. CURTIS ET AL., APPELLEES, V. CITY OF SOUTH OMAHA ET AL., APPELLANTS.

FILED FEBRUARY 4, 1903. No. 12,129.

Commissioner's opinion, Department No. 3.

City Council: BOARD OF EQUALIZATION: NOTICE: RECORD: VOID ASSESSMENTS. Notice of the meeting of a city council, as a board of equalization, recites that they would thus meet, in Pivonka Block, in the city, on three certain days from 9 A. M. to 5 P. M. The record shows a meeting on the first of such days, and no further meeting until 7 P. M. of the third day and that one of such meetings was held at the office of the city clerk, the other at the council chambers. *Held*, That there was no valid equalization, and that assessments levied in pursuance thereof are void.

APPEAL from the district court for Douglas county. Case is stated in the opinion. Heard below before FAWCETT, J. Judgment for plaintiffs. *Affirmed.*

W. C. Lambert, for appellants.

A. H. Murdock, contra.

ALBERT, C.

This action was brought to restrain the collection of certain special assessments levied against the property of the plaintiffs for paving, curbing and sewerage, on the

Syllabus by court; catch-words by editor.

ground that such assessments are illegal and void. The court granted the relief prayed, and the defendants bring the case here on appeal.

The plaintiffs contend that there was no valid equalization of any of the assessments, and that they are void for that reason. The record shows two attempts at equalization. The notice of the first is to the effect that the council would meet, as a board of equalization, for the purpose of equalizing the sewer assessments, at Pivonka Block, South Omaha, on the 15th, 16th and 18th days of September, 1893, from 9 A. M. to 5 P. M. The record of this attempt at equalization shows a meeting of the board, held at the office of the city clerk, September 15, 1893; that such meeting adjourned, without the transaction of any business, to September 18 at 7 P. M.; that on September 18 the board met at the council chambers and adjourned without taking any action. The notice of the second attempt at equalization is to the effect that the council would meet as a board of equalization on the 13th, 14th and 16th days of October, 1893, from 9 A. M. to 5 P. M., for the purpose of equalizing the paving and curbing assessments. The history of that attempt, as shown by the record, is precisely the same as that of the former attempt, so that it is unnecessary to detail it. The statute requires notice of the time and place of such meetings. Such notice, when thus required, is an indispensable prerequisite to a valid levy. *Wakeley v. City of Omaha,* 58 Nebr., 245, and cases cited. There can be but one object in requiring such notice, and that is to enable those interested to know when and where the board meets to equalize the assessments. That being true, that the board meet at the time and place specified is just as essential as the notice itself. In this case, each of the notices gave those interested to understand that the board would be in session for three days, in Pivonka Block, from 9 A. M. to 5 P. M. Those interested had a right to rely on that notice and to expect to find the board in session at such place on any one of those three days, between the hours specified. Instead

of that, so far as appears from the record, the board only met on one day between the hours of 9 A. M. and 5 P. M., omitted one whole day, and did not meet until 7 P. M. of the third day. Furthermore, the notice named Pivonka Block as the place of meeting. The record shows the meetings were held at the office of the city clerk and at the council chambers. There is no presumption that Pivonka Block, the clerk's office and the council chambers are all one and the same place. These irregularities are jurisdictional, and their existence precludes all idea of a valid levy. *John v. Connell,* 61 Nebr., 267. In this view of the case, it is unnecessary to consider the other objections urged against the validity of the assessments.

It is recommended that the decree of the district court be affirmed.

DUFFIE and AMES, CC., concur.

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

AFFIRMED.

THOMAS LYNCH, APPELLEE, REVIVED IN THE NAME OF HELEN LYNCH, ADMINISTRATRIX OF THE ESTATE OF THOMAS LYNCH, ET AL., V. DANIEL EGAN, APPELLANT.

FILED FEBRUARY 4, 1903. No. 12,167.

Commissioner's opinion, Department No. 3.

1. **Evidence.** Evidence examined, and *held* sufficient to sustain the findings of the trial court.
2. **Fact Omitted from Finding.** 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 this court, will be treated as though found by the court.
3. **Boundary Line.** 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

Syllabus by court; catch-words by editor.

boundary, is binding upon the parties and subsequent purchasers having notice thereof, although the boundary agreed upon may not be the true line.

4. Trespasser: FENCE. The destruction of a fence by a trespasser, and his threat to repeat such act as often as the fence should be replaced, entitles the owner of the premises invaded to an injunction against the trespasser, even though the latter may not be insolvent.

APPEAL from the district court for Grant county. Case stated in opinion. Heard below before SULLIVAN, J. Judgment for plaintiff. *Affirmed.*

Lester E. Kirkpatrick and *William H. Thompson,* for appellant.

Constantine J. Smyth and *Ed P. Smith, contra.*

ALBERT, C.

This action was brought by Thomas Lynch against Daniel Egan to restrain the latter from breaking down a division fence between their lands, and from repeated trespasses on the property of the plaintiff. A trial was had, and the court found as follows:

"1. That the plaintiff, Lynch, was at the commencement of this suit the owner of the east half of the northwest quarter and the west half of the northeast quarter of section 8, township 22, range 37 north, according to the government survey of 1876, and the defendant was then the owner of east one-half of the northeast one-fourth of section 8 and the west one-half of the northwest one-fourth of section 9, town and range aforesaid.

"2. That the strip of land in dispute in this action is described as follows, that is to say: Commencing at the closing corner on the east boundary of the Light homestead and the north boundary of the Pratt homestead, running thence south naught degrees and twenty-seven minutes west along the east boundary of the Light homestead, as surveyed by the United States government surveyor

Alt, thirty-two chains and forty-three links to the southeast corner of the Light homestead, as shown to said Alt by Mr. Lynch; thence west along the south boundary of the Light homestead, as shown by Mr. Lynch, five chains and fifty-three links to the closing corner established on the west boundary of the Pratt homestead and the south boundary of the Light homestead; thence north along the west boundary of the Pratt homestead thirty-two chains eleven links to the northwest corner; thence north eighty-six degrees forty-four minutes east along the north boundary of the Pratt homestead, five chains and seventy-eight links to the place of beginning. The court finds that the monuments or stakes or corners and all evidence of the survey of 1876 were, at the time of the settlement and entry made upon the lands mentioned in the petition and answer, obliterated and lost.

"3. The court further finds that one Light made homestead entry on the land mentioned in the petition in 1888, and made final proof thereto on August 9, 1892.

"4. That one Pratt made entry on the quarter adjoining this on the east mentioned in the pleadings on September 24, 1890, and made final proof in support of his entry October 12, 1896.

"5. That sometime in the year 1892 or 1893 the county surveyor of Grant county was requested by the claimant Light to make a survey of the east line of his homestead; that the county surveyor made such survey and located corners along the east line of the same.

"6. That the survey made by the county surveyor was incorrect and was not the line originally established by the government surveyors.

"7. That after said survey was made and marked the original claimants, Light and Pratt, entered into an agreement that this should be the true line between their respective tracts, and thereafter, in the latter part of 1893, or the spring of 1894, a fence was built along said survey by the said Pratt and Light; that the man Light enclosed within this fence that part of the hay land situated

upon his entry lying immediately west of said fence and that Pratt also enclosed within the fence by other fences the hay land upon his land lying immediately east of the first-named fence.

"8. That in March, 1897, the plaintiff purchased from Light the land included in his said entry; that shortly thereafter defendant Egan purchased from Pratt the land included in his entry.

"9. That from the date of said entries continuously up to the time of the said purchases both of the purchasers had lived in the vicinity of said land and knew of the existence of said division fence and knew that the then respective owners were mutually recognizing the same as the division fence between their respective tracts.

"10. That the plaintiff went into the possession of the land purchased by him from Light immediately after said purchase and [was] in the possession thereof at the commencement of this suit; that while he has never attempted to exercise control or dominion over any of the land lying east of the fence he has been ready and willing at all times to claim land lying east of it.

"11. That the defendant, as soon as he had purchased the land from Pratt, or shortly thereafter, asserted and claimed that the fence was not upon the true line and insisted that the strip of land in dispute was part of his tract.

"12. That without the knowledge of the plaintiff the defendant in 1897 went on to the strip of land in dispute and cut and stacked the hay thereon and afterward hauled it across the division fence and fed it to his stock; and in 1898 he again, without the knowledge or consent of the plaintiff, and before the plaintiff could himself cut the hay, went upon the said strip and began cutting the hay, when he was enjoined by the plaintiff.

"13. That plaintiff from the time he purchased said land from Light cut the hay thereon, on the land not in dispute between the parties, and then fed it out during the winter season to his stock, and his cattle have been

accustomed to run upon the inclosure formed by the division fence with the other fences connected with it.

"14. That the defendant has not had the continuous possession of said strip of land, but that from time to time and at various times early in the haying season he went upon the said strip of land and cut the hay and removed it and fed it to stock upon land lying east of the fence.

"15. That during the said period the defendant took down the said fence, at various places, that he might go in to cut the hay and remove the same, and plaintiff from time to time replaced the fence.

"16. That at the time this suit was instituted the defendant threatened to continue tearing down the fence and cutting and removing the hay from said strip, and intended to do so, and intended to do so against the will and consent and in spite of the protestations of the plaintiff.

"As a matter of law the court concludes from the foregoing findings of fact that the plaintiff and defendant are bound to accept the division line agreed upon between their grantors, Light and Pratt, that is to say the line describing the east boundary of the tract of land in dispute as heretofore found as the true boundary line between their respective tracts of land as heretofore described; that the plaintiff is entitled to the peaceable and undisputed possession of the strip of land in dispute and to the crops growing thereon; and that the defendant be perpetually enjoined from interfering with the plaintiff's possession and occupancy of the said strip of land, and from removing the crops therefrom or in any way interfering with the same."

On the foregoing findings a decree was rendered for the plaintiff, from which the defendant appeals to this court.

Complaint is made that some of the findings essential to the decree are not sustained by sufficient evidence. We have gone over the evidence with some care with respect to each finding complained of and are satisfied that it is sufficient.

The question then arises whether the facts found by the court are sufficient to sustain the decree. The appellant contends they are not. In this behalf it is first urged that the agreement between the respective grantors of the parties, found by the court, is not binding, for the reason that it does not appear from the findings that the dividing line between such grantors was so indefinite and uncertain that it could not be ascertained from their patents. In support of this contention he invokes the rule laid down in *Trussel v. Lewis,* 13 Nebr., 415, 42 Am. Rep., 767, to the effect that 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 the true line when discovered, unless the statute of limitation has run, or equitable reasons exist for establishing the erroneous line. The only finding of the court on the question of the possibility of ascertaining the true line, is that the monuments and all evidence of the survey of 1876 at the time of the settlement and entry made on the land mentioned in the petition and answer, were obliterated and lost. By reference to the record, the survey referred to in the findings just mentioned was a government survey, under which the entry of the lands was made. The finding, as it stands, is certainly not sufficient to show that at the time the survey was made by the county surveyor in 1892, upon which the agreement mentioned in the seventh finding was based, the true line between the parties could not have been ascertained. But we do not understand the rule to be that in order that an agreement of that kind should be binding, the true line should be absolutely unascertainable. Another rule announced in *Trussel v. Lewis, supra,* is that where the line is ambiguous and uncertain, if the parties agree upon a line and mutually enter upon the occupancy of their lands in conformity thereto and make improvements thereon, they are concluded by such agreement. As to the rule first stated, it is simply a reiteration of the principle that a

contract founded on mistake is not binding. But in this case there is no evidence of mistake. The true division line between the owners of the two tracts of land was unknown to them and uncertain. If ascertainable at all, it could only be ascertained at considerable trouble and expense. Under such circumstances, we think it was competent for the parties to agree upon a division line, and that such agreement, when acted upon and fully executed, as in this case, would be binding upon them, even though the true line should afterward be ascertained. The agreement involved no mistake. When it was made both parties knew that the true line was uncertain, and that the line upon which they agreed might or might not be the true line; but they accepted it, right or wrong, rather than to take further steps to ascertain the true line. We know of no reason why a different rule should apply to a contract of that kind than to any other. It was an agreement between parties competent to contract, supported by a sufficient consideration. Its complete execution removes it from the operation of the statute of frauds. So far as we are able to see, it lacks none of the elements of a valid contract. The findings of the court are not as specific on this point as they might have been. But the evidence is uncontradicted that at the time the survey upon which the agreement in question is based was made, the parties affected thereby were ignorant of the true line. That being true, when the case is presented to this court on appeal, it should be treated as one of the established facts in the case, if necessary to uphold the decree.

The ninth finding shows that both parties to this suit, at the time they obtained their respective titles, had full knowledge of the division fence that had been placed by their grantors on the line agreed upon by their grantors, and that such grantors recognized that as the true line. Such facts, if not sufficient in themselves, suggested inquiries which, if pursued with diligence, would have led the appellant to a knowledge of the agreement concerning the line. That being true, he is chargeable with notice of

such agreement, and is as effectually bound thereby as his grantor, who was a party to it.

The appellant insists that the plaintiff's remedy was at law, and not in equity. The proposition is not argued at length, nor do we think it can be maintained successfully in the face of the decisions of this court. The findings, we think, are ample to bring the case within the rule laid down in *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Nebr., 364, to the effect that the destruction of a fence, and the threatened repetition thereof by the trespasser as often as the fence should be replaced, entitled the owner to relief by injunction against the invader, even though the latter may not be insolvent.

We recommend that the decree of the district court be affirmed.

DUFFIE and AMES, CC., concur.

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

AFFIRMED.

LUTHER D. BAILEY, APPELLEE, V. ANNA DOBBINS ET AL., APPELLANTS.

FILED FEBRUARY 4, 1903. No. 12,577.

Commissioner's opinion, Department No. 3.

1. **Purchase-Money:** CONVEYANCE: TITLE: ESTATE IN TRUST: PRESUMPTION. Generally, where the purchase-money of land is paid by one person and the conveyance is taken in the name of another, the party taking the title is presumed to hold the estate in trust for him who pays the purchase-price.

2. **Legal or Moral Obligation:** ADVANCEMENT: NOMINAL PURCHASER. But where the conveyance runs to one for whom the purchaser is under a legal or moral obligation to provide, the presumption arises that the conveyance was intended as an advancement to the nominal purchaser.

3. **Presumption of Fact:** REBUTTAL BY EVIDENCE: INTENTION OF PURCHASER. In either of the foregoing cases the presumption aris-

Syllabus by court; catch-words by editor.

ing is one of fact, which may be rebutted by evidence tending to show that the intention of the purchaser was different from that to be inferred from the bare fact of the conveyance to another person. When such intention is ascertained, the courts will give it effect, if possible.

4. Evidence: CONVEYANCE: WIFE: LIFE ESTATE: HUSBAND PURCHASER: SONS: EQUITABLE TITLE: ENFORCEMENT OF TRUST. Evidence in this case examined, and *held* sufficient to show that by the conveyance the wife should take a life estate, and the husband, the purchaser, or in case of his death, his two sons, should hold the equitable title to the remainder; *held, further*, that under such circumstances the trust thereby created would be recognized and enforced.

APPEAL from the district court for Valley county. The case is stated in the opinion. Heard below before PAUL, J. Judgment for plaintiff. *Affirmed.*

Victor O. Johnson (*Henry H. Wilson* and *Elmer W. Brown*, on motion for rehearing), for appellants.

Alphonso M. Robbins, contra.

ALBERT, C.

In 1898 Luther D. Bailey entered into a contract with another party for the purchase of two lots in the city of Ord, agreeing to pay therefor the sum of $825. In pursuance of that contract, he paid the agreed purchase-price, and the other party, at his request, conveyed the property to the wife of the purchaser. Afterward the purchaser made improvements on the property, alleged to have been of the value of about $2,100, the expenses of which were borne by him. Afterward, in 1901, the wife died. She was the second wife of the purchaser of the property, and died without issue. The purchaser had children by a former wife. Afterward the purchaser brought this action against her heirs at law, alleging that the property had been conveyed to her in trust for him, and asking that such trust be established, and the legal title vested in him. The court found for the plaintiff, and granted the relief prayed. The defendants appeal.

Generally speaking, where the purchase-money of land is paid by one person, and the title is taken in the name of another, the party taking the title is presumed to hold it in trust for him who pays the purchase-price. The reason given for this rule is that the party who pays the money is presumed to intend to become the owner of the property, and the beneficial title follows such intention. This presumption, however, does not arise where the legal title is taken in the name of some person for whom the purchaser is under a legal or moral obligation to provide. In such case, the presumption arises that the conveyance was intended as an advancement to the nominal purchaser. The foregoing will be recognized as elementary. Whether the conveyance be to a stranger, or to one for whom the purchaser is bound to provide, the presumption arising therefrom is not of law, but of fact, which may be rebutted by evidence tending to show that the intention of the purchaser was different from that to be inferred from the bare fact of such conveyance. This, also, is elementary. Hence, in either case, when it appears that the purchase-money has been paid by one person, and the title taken in the name of another, the question is whether it was intended that the one to whom the conveyance was made should take the entire estate, or that the one paying the purchase-price should hold the equitable title to the property. When the intention in that behalf is ascertained, the courts will give it effect, if possible.

In this case the conveyance was taken in the name of the wife of the purchaser, and the only question presented by the record is whether the evidence is sufficient to sustain a finding that the intention of the purchaser was other than that to be implied from the naked transaction, namely, an advancement to his wife, but to hold a beneficial or equitable title in the property himself. The testimony on this phase of the case is too voluminous to set out at length. One witness, who was present when the conveyance was made, in response to a question intended to elicit what reason the purchaser gave at that time for

taking the conveyance in the name of his wife, testified as follows: "A. It was this: The contract was made between L. D. Bailey, personally, and myself, as cashier of the Ord State Bank; and when coming to execute the deed, subsequent to the making of the contract, he says: 'I want the title made in Clara W. Bailey.' Of course, I naturally asked him why, and he simply stated that he wished to protect his wife; so long as she lived, of course, she would have a home, and when she was through with it the intention was to give it to him, in case he survived her, and in case of his death the property was to descend to his two sons, who were then in business with him, and at the present time, also." Again: "A. I could not give the identical words. He simply stated he wanted to protect her and have a home for her during her life, and that in case of his death she would have a home; that if she died before he did, he expected the property to be his, and if he should die before she did, he expected the property to go to his two sons, Clarence and Ota." Another witness, asked to detail a statement subsequently made by the wife in regard to the property, says: "A. I heard her say that the property had been fixed so that it would be left to her if Mr. Bailey should die first, and if she should die first it was his until they were both dead, and then it should be divided between the two boys that were here."

It seems to us that the evidence just quoted, which is uncontradicted, aside from the corroborative facts and circumstances running through the bill of exceptions, is irreconcilable with the presumption that the conveyance was intended as a gift of the entire estate to the wife, and that it is sufficient to overcome that presumption. Fairly construed, the legal effect of the evidence is that it was intended that the wife should take a life estate, and that the husband, or, in case of his death, his two sons, should hold the equitable title to the remainder.

The appellants insist that no case can be found "to show that a remainder can be grafted upon a life estate by a

parol trust" and that no such trust has ever been recognized by any text-writer. Probably that is true. At least, our investigation, which of necessity has been limited, would lead us to that conclusion. It is equally true, however, that we have found no case where any court has refused to recognize such trust as intrinsically impossible; the text-books are equally barren in that respect. We are unable to see any good reason why a trust of that character should not be recognized and enforced. The greater includes the less. If the wife might have taken the entire estate in trust, what legal principle or rule of equity would prevent her thus taking the entire estate, minus a life estate? We have been cited to none, and confess we know of none.

Appellants contend that the evidence shows that the object of the husband was to secure a home for himself and wife against the event of his failure in business, and that as trusts are created to carry out, and not to defeat, the intention of the parties, the construction heretofore placed upon the transaction would defeat the purpose of the husband, because his beneficial interest might still be taken in satisfaction of his debts. The evidence just referred to does not seem to be incompatible with what has already been said as to the nature of the trust. The life estate conveyed to his wife, at least, was secure as against his future acts and creditors. It is true, to the extent of the homestead interest, it would have been equally secure without the conveyance, but the husband may have contemplated the contingency of its abandonment. It appears to us that the evidence shows a clear intention that the wife should take only a life estate, and hold the legal title to the remainder in trust for the husband, or, in case of his death, for his two sons; that such intention is easily carried out, and, consequently, there is no good reason for the court to refuse to enforce the trust.

It is recommended that the decree of the district court be affirmed.

DUFFIE and AMES, CC., concur.

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

AFFIRMED.

JOSEPH J. GALLENTINE, APPELLEE, V. BLANCHE FULLERTON ET AL., APPELLANTS.

FILED FEBRUARY 17, 1903. No. 12,494.

1. **County Treasurer:** PRIVATE TAX SALE: FILING REPORT: REVENUE LAW. The county treasurer is without authority to sell lands at private tax sale until he has made and filed in the office of the county clerk the report required by section 113 of the general revenue law.
2. **Filing Report:** TAX-SALE CERTIFICATE: PRESUMPTIVE EVIDENCE. But a tax-sale certificate is presumptive evidence that such report was made and filed in due time.
3. **Revenue Law:** MEANING: DECISIONS. The meaning of section 179, and section 2, article 5, of the revenue law, as unfolded by the previous decisions of this court, is that an action to foreclose a tax-lien may be maintained at any time within seven years from the date of the tax-sale certificate.
4. **Evidence.** Evidence examined, and found sufficient to warrant the conclusion of the trial court that the presumption of regularity resulting from the tax-sale certificate was not rebutted, and that the subsequent taxes included in the decree had been paid plaintiff.

APPEAL from the district court for Buffalo county. Foreclosure of tax lien. Heard below before SULLIVAN, J. Judgment for plaintiff. *Affirmed.*

Willis L. Hand and *John M. Ragan,* for appellants.

Frank E. Beeman, contra.

SULLIVAN, C. J.

This action was brought by Gallentine against Blanche Fullerton and others to foreclose a tax lien upon real estate in Buffalo county. The answer of defendants is a general denial, coupled with a plea of the statute of limi-

Syllabus by court; catch-words by editor.

tations. The court entered a decree in accordance with the prayer of the petition, and defendants have appealed.

The first contention is that the tax sale was illegal, and that the court, therefore, erred in allowing interest for two years at the rate of 20 per cent. and an attorney fee equal to 10 per cent. of the amount of the decree. The plaintiff purchased the land in question at private tax sale, and there is in the record no evidence tending to show that the county treasurer had previously made and filed with the county clerk the report required by section 113 of the revenue law. It was held as far back as *State v. Helmer*, 10 Nebr., 25, that the treasurer is without authority to sell at private sale until such report has been made and filed; and this decision has been repeatedly approved. *Stegeman v. Faulkner*, 42 Nebr., 53; *Adams v. Osgood*, 42 Nebr., 450; *Medland v. Linton*, 60 Nebr., 249; *Johnson v. Finley*, 54 Nebr., 733. But the tax-sale certificate is presumptive evidence of the regularity of all proceedings prior to the sale (sec. 116, ch. 77, art. 1, Compiled Statutes); and this presumption is not overborne by the proof in this case. The fact that the treasurer's report was not found in the office of the county clerk, is, in view of the character of the search and the manner in which the records had been kept, without weight or value as evidence.

It is said that there is no proof of the payment of subsequent taxes, but we think there is. The deputy treasurer testified without objection, from the records of his office, that "under the sale" to plaintiff subsequent taxes amounting to $14.85 had been paid. Evidently the idea the witness intended to convey was that these taxes had been paid by the holder of the tax-sale certificate.

The argument in support of the contention that the right to maintain an action for the foreclosure of a tax lien is barred at the expiration of five years from the date of the tax-sale certificate is logical and convincing, but it comes too late. The meaning of section 179, and section 2, article 5, of the revenue law, as unfolded in a series of

decisions, which are now a rule of property, is that an action to foreclose a tax lien may be brought at any time within seven years from the date of the tax sale.

The judgment is

AFFIRMED.

NOTE.—*Taxation.*—Under the ancient Roman state, the farmers of the public revenue were called *publicani*. Their official name was derived from *publicum*, which signified anything belonging to the state. It was sometimes used as synonymous with vectigal. *Vectigalia* was the general term for all the public revenues of the Roman state. The revenues which Rome derived from conquered countries, consisted chiefly of tolls, tithes, the *scriptura*, or tax which was paid for the use of public pasture-lands, *salinæ*—the duties paid for the use of mines and salt-works—and harbor-dues. This last is supposed by some writers to have been the original method of taxation, for the reason that *vectigalia* is derived from *veho*, to carry, and is generally believed to have originally signified things imported and exported *quæ vehebantur*. The censors—who fixed the terms on which the revenues were let—sold the revenues at a time stated, generally in the month of Quinctilis (July); and the sale was for a *lustrum*—five years. This corresponds to our modern (Nebraska) tax-sale, on the first of November. Indeed, if we examine our statute beside Roman law, it will be hard to determine in what manner the modern dealer in tax-titles differs in principle from the ancient publican. Taxation, as Adam Smith says, is an attribute of sovereignty. The Roman state transferred a portion of its sovereign power to the publican, and the state of Nebraska does the same with the buyer of tax-titles.—W. F. B.

WALTER W. PARKER V. STATE OF NEBRASKA.

FILED FEBRUARY 17, 1903. No. 12,972.

1. **Witnesses: JURY: PROBATIVE VALUE OF TESTIMONY.** The credibility of witnesses and the probative value of their testimony, are matters which it is the peculiar function of the jury to determine.
2. **Verdict: CONFLICTING EVIDENCE.** A verdict based upon substantially conflicting evidence will not be set aside by this court.
3. **Appeal for Conviction by Advocate.** An appeal for conviction based altogether upon the evidence, however fervent it may be, is not an abuse of the privilege of advocacy.

Syllabus by court; catch-words by editor.

4. ———: OBJECTION: WAIVER. Ordinarily a party who did not promptly object to an argument alleged as misconduct will be held to have waived his right to complain.

5. Misconduct of Counsel: NEW TRIAL. But 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. *Chicago, B. & Q. R. Co. v. Kellogg*, 55 Nebr., 748.

6. Shooting With Intent to Kill: INFERIOR MARKSMANSHIP. A person who has been found guilty of shooting with intent to kill, can not found a valid claim to judicial leniency upon his inferior marksmanship.

ERROR from the district court for Boyd county. Indictment for shooting with intent to kill. Tried below before HARRINGTON, J. Conviction. Sentence to penitentiary for a term of ten years. *Affirmed. Held that the imposition of half the maximum penalty was not an abuse of discretion.*

Willis G. Sears and *W. T. Wills*, for plaintiff in error.

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

SULLIVAN, C. J.

Section 16 of the Criminal Code is as follows: "If any person shall maliciously shoot, stab, cut, or shoot at any other person, with intent to kill, wound, or maim such person, every person so offending shall be imprisoned in the penitentiary not more than twenty years nor less than one year." Upon an information charging a violation of this section the defendant, Parker, was tried, found guilty, and sentenced to imprisonment in the penitentiary for a term of ten years.

The grounds upon which he claims a reversal of the judgment are (1) that the evidence is insufficient to sustain the verdict; (2) misconduct of the county attorney in addressing the jury; and (3) that the sentence is excessive.

The defendant quarreled with his father-in-law, Peter Hansen, and intentionally shot him, at a livery stable in the village of Spencer, in Boyd county. This is conceded, but whether the shooting was malicious or done as a measure of necessary self-defense, is a point upon which the evidence is in irreconcilable conflict. The credibility of the witnesses and the probative value of their testimony were matters which it was the peculiar function of the jury to determine, and we see no reason for interfering with their determination or to seriously doubt its correctness.

The alleged misconduct of the prosecuting attorney consisted of an appeal for conviction in which the duty of the jury to the state, to society in general, and particularly to the people of Boyd county, was pointed out in forcible and impressive language. It seems probable from affidavits filed by some of the jurors that counsel based his claim for conviction altogether upon the evidence, and that he did not at all exceed the limits of legitimate discussion. But, in any view of the matter, it is certain that he committed no such serious fault as to make it the duty of the court to set aside the verdict. No objection was interposed by counsel for defendant at the time the remarks were made, and they were therefore neither approved nor condemned by the trial court. This being so, the following extract from the opinion in *Chicago, B. & Q. R. Co. v. Kellogg,* 55 Nebr., 748, is pertinent: "In this case there was no formal objection, and consequently no ruling, or contumacious refusal to rule, which we are authorized to review. Had the court, in response to a proper objection, vigorously condemned the remarks of counsel, we think they would have left no prejudicial impression on the minds of the jury. By prompt action the defendant's counsel might have obtained an effective antidote for the poison in Shafer's speech; but he failed to act, and is, therefore, not in an attitude to have his complaint now considered. We do not, however, wish to be understood as holding that a rebuke from the court, or even a complete

retraction by the offending counsel, is in all cases of this kind a sovereign remedy. If the transgression be flagrant —if the offensive remark has stricken deep, and is of such a character that neither rebuke nor retraction can entirely destroy its sinister influence—a new trial should be promptly awarded, regardless of the want of an objection and exception."

In our opinion, the sentence imposed is not excessive. If the defendant's aim had not been faulty he might have been sentenced to hang. A claim to leniency based on inferior marksmanship is not a very meritorious or persuasive claim. The district court had a large discretionary power, and we can not regard a sentence imposing half the maximum penalty as an abuse of discretion.

The judgment is

AFFIRMED.

NOTE.—*Felonious Assault—Assault With Firearms—Malice, et cætera.* —Section 16 of our Criminal Code corresponds to the 13th section of chapter 3, Ohio Penal Code (Wilson, Criminal Code (1878), pp. 36, 38*); while our section 14 corresponds to the same number of the Ohio Code. It was held in Ohio, in 1853 (twenty years before we adopted the Ohio statute), that, if the assault was committed by shooting, shooting at, cutting or stabbing, then section 14 does not apply, but rather section 24 of the Crimes Act (section 16 of our Criminal Code); opinion by Thurman, J., *Smith v. State*, 1 Warden, n. s. [Ohio], 5, 11. Some would pronounce the foregoing in the *Smith Case* a mere *dictum*. But if it is not, does the interpretation of the supreme court of Ohio bind the courts of this state? If so, to what extent? See preliminary list of cases overruled, in this volume (pp. —), and in volumes 62 to 66.

There can be a rightful conviction on a charge of malicious cutting, stabbing or shooting with intent to wound, under such circumstances that, had death insued, the crime would not have been murder either in the first or second degree, but would have been manslaughter only. On the trial of such a charge, it is not error for the court to refuse to charge the jury that they can not rightfully convict, save for assault or assault and battery, if they find the facts to be such that, had death ensued from the wound, the crime would have been manslaughter; nor is it error for the court to charge the converse of the proposition requested to be charged. *Nichols v. State*, 8 Ohio St., 435.

Where, on the trial of an indictment for malicious shooting with

* On the latter page it reads *eighteenth* section, but this is a patent misprint.—W. F. B.

intent to kill, the jury returned for their verdict that they "find the defendant guilty of shooting with intent to kill in a fit of passion and excitement, but without malice," it is not error for the court to refuse to receive such verdict, and to require the jury to further consider the case. *Heller v. State*, 23 Ohio St., 582.

The first count in the indictment charged the defendant with the offense of maliciously stabbing with intent to kill, under section 24 of the Crimes Act. The second count charged the offense of maliciously cutting with intent to wound, under the same section. The third count charged the offense of unlawfully and purposely cutting with intent to maim and disfigure, under section 23 of the Crimes Act—section 15 of Nebraska Criminal Code. The jury returned the following verdict:

The jurors in this case find the defendant guilty of cutting with intent to wound. GEO. WRIGHT, *Foreman.*

The court held the verdict insufficient to sustain a judgment of conviction; and said:

We think this verdict did not respond to the whole charge as made in this count, but omitted to find the essential ingredient of malice. This finding is not equivalent to a verdict of guilty, as charged in the second count. If the verdict had been *guilty*, and nothing more, or *guilty under the second count*, it would support the judgment. In such form it would be taken to mean *guilty as charged*. But in the form before us, the guilt of the defendant is limited, in terms, to the mere fact *of cutting with intent to wound*. On the trial, the fact of *cutting with intent to wound* was not controverted, but was sought to be justified on the ground that it was done in self-defense. Upon the face of this verdict, when strictly construed (and we are bound to construe it strictly), the existence of this ground of defense is not ignored. *Riflemaker v. State*, 25 Ohio St., 395, 398.

In a prosecution for maliciously shooting with intent to wound or kill, it is error to charge that the defendant should be found guilty of such felony, if he might properly have been convicted of manslaughter had death resulted from the shooting. To convict of the crime of maliciously shooting with intent to wound or kill, it is necessary to show malice and an intent to kill or wound. *Cline v. State*, 43 Ohio St., 332.

On an indictment for maliciously cutting with intent to kill, the prisoner can not be convicted of maliciously cutting with intent to wound. *Barber v. State*, 39 Ohio St., 660.

Criminal intent may properly be asserted of an injury by malicious shooting, cutting or stabbing in either of the following cases:

1. Where the person shot, cut or stabbed is the real object of the perpetrator's malice; in which case the deed falls within the plain letter of the statute.

2. Where a shot discharged or a blow struck at one injured another, who is at the time known to be in such position or proximity

that his injury may be reasonably apprehended as a probable consequence of the act; in which case the law does not permit such reckless disregard of, and indifference to, results to pass with impunity, but will hold the intent to have embraced the victim; and the principle is the same whether one or many are imperiled.

3. Where one is purposely shot, cut or stabbed, under the mistaken supposition that he is a different person; in which the immediate objective intention of the perpetrator is to hit the person at whom his shot or blow is directed, while his subjective intention, which impels the deed, is to injure another against whom his malice is inflamed. *Callahan v. State*, 21 Ohio St., 306, 309.

In the trial of an indictment for shooting or shooting at another with intent to wound or kill, the gun must be loaded with material calculated to produce death or injury; and the distance must be sufficiently short to accomplish that result; and there is no presumption that the gun is so loaded, without proof, either direct or circumstantial. *Henry v. State*, 18 Ohio, 32; *Fastbinder v. State*, 42 Ohio St., 341.

In the trial of an indictment under the Ohio statute which corresponds to section 16* of the Criminal Code of Nebraska, the defendant may be convicted of an assault. *Mitchell v. State*, 42 Ohio St., 383.

Maiming.—Where one shot another in the trunk of the body, and the result was to produce paralysis of a leg, causing a permanent disability to that member, a verdict of guilty of shooting with intent to maim is supported by sufficient evidence. The accused might fairly be presumed to have intended the actual and natural result of his unlawful act. *Ridenour v. State*, 38 Ohio St., 272.

An indictment for shooting with intent to maim, is not defective for want of an averment as to which member or members of the body the accused intended to injure or disable. If in the words of the statute it is sufficient. *Ridenour v. State*, 38 Ohio St., 272.—W. F. B.

FRANK KEATING V. STATE OF NEBRASKA.

FILED FEBRUARY 17, 1903. No. 12,997.

1. **Credibility of Witness: INSTRUCTION: WITNESS INDIVIDUALLY NAMED.** The trial court gave an instruction of general application regarding the credibility of the witnesses who had testified in the case, including the defendant, who was accused of a felony, and of the weight to be attached to the testimony of the several witnesses, which announced a correct rule of law. At the request of the state, the jury were also instructed that the

* Shooting and stabbing section.

Syllabus by court; catch-words by editor.

defendant had a right to be sworn and testify in his own behalf, but that in weighing his testimony and in determining the weight which should be given thereto the jury might take into consideration his interest in the result of the trial, and the further fact, if the same was proved (which was admitted by the defendant), that he had been convicted of a felony, as affecting his credibility as a witness. *Held*, That the latter instruction was not prejudicially erroneous because of the repetition of the matter contained in the general instruction on the subject, nor, under the circumstances, was it erroneous because the defendant was individually named and his testimony alone alluded to in the latter instruction.

2. **Prior Conviction of Felony:** CREDIBILITY OF WITNESS. By virtue of the statute, a prior conviction of a felony may be proved for the purpose of affecting the credibility of a witness, and the court may properly instruct the jury as to the purpose of such evidence.

3. **Prior Statements as to How a Crime May Be Committed as Evidence.** The accused was charged with and tried for robbery. *Held*, His prior statements as to how the robbery might be committed* were properly admissible in evidence, to be considered by the jury with other facts and circumstances proved, in determining the question of guilt or innocence.

4. **Evidence.** Evidence examined, and found sufficient to support a verdict of guilty, as found by the jury.

ERROR from the district court for Webster county. Indictment for robbery. Tried below before ADAMS, J. Conviction. Sentence to imprisonment in the penitentiary for a period of seven years. *Affirmed.*

John G. Potter, for plaintiff in error.

Frank N. Prout, Attorney General, Norris Brown and *E. U. Overman*, for the state.

* On the trial of an indictment for procuring an abortion, there was evidence that cuts, wounds and bruises were found in the womb of the woman upon whom the operation was alleged to have been performed, indicating the forcible use of some instrument, and that the defendant had the opportunity to commit the crime. *Held*, That evidence that, five months before the alleged operation, the defendant had in his possession an instrument which he described as well fitted to procure an abortion, was admissible. *Commonwealth v. Blair*, 126 Mass., 40.—W. F. B.

HOLCOMB, J.

The defendant was informed against in the district court for Webster county, tried for, and convicted of the crime of robbery, and sentenced to imprisonment in the penitentiary for a period of seven years. He brings the record of his trial and conviction to this court for review by proceeding in error.

The petition in error assigns three different grounds or alleged errors as reasons for a reversal of the judgment rendered in the trial court: First, it is contended that the court erred in the giving of one of its instructions to the jury which was requested by the state; second, in admitting the testimony of a witness as to an alleged conversation between him and the defendant regarding a method or plan by which the robbery could be committed on the person whom the defendant was convicted of robbing; and, third, that the evidence is not sufficient to sustain the verdict of guilty returned by the jury.

Taking the assignments of error in their order, the instruction complained of will be first noticed. The court, at the request of the state, gave an instruction in which the jury were, in substance, told that the defendant had the right to be sworn and testify in his own behalf, but that in weighing his testimony and in determining the weight which should be given thereto the jury might take into consideration his interest in the result of the trial and his action and demeanor while on the witness stand, and the further fact, if the same was proved (which was admitted by the defendant), that he had been convicted of a felony, and confined in the penitentiary of another state, as affecting his credibility as a witness. It is argued that the instruction is erroneous and prejudicial, because giving undue prominence and weight to the matter touched upon in the instruction, and having the effect of disparaging the standing of the defendant as a witness in his own behalf, and therefore prejudicial. The sixth instruction, given by the court on its own motion, was a general in-

struction as to the credibility of all witnesses who had testified, including the defendant, unobjectionable in form; and because of this latter instruction it is urged that the one given at the request of the state was prejudicially erroneous. While the general instruction on the subject of the credibility of witnesses was probably sufficient, and rendered it unnecessary to give the one requested, we are not disposed to the view that the giving of the requested instruction was error calling for reversal of the judgment, nor that its effect was to unduly make prominent the rule enunciated, nor to improperly single out and disparage the testimony of the defendant, as contended for. Instructions of this character have been repeatedly upheld by this court. *St. Louis v. State,* 8 Nebr., 405; *Murphy v. State,* 15 Nebr., 383; *Clark v. State,* 32 Nebr., 246; *Housh v. State,* 43 Nebr., 163; *Argabright v. State,* 49 Nebr., 760.

The mere fact of repetition is not alone, in every case, reversible error. If the propositions given are correct, and it is clear that the defendant was not prejudiced thereby, nor the jury unduly influenced in their deliberations in weighing the testimony submitted in the case, the verdict and judgment will not be disturbed. *Hill v. State,* 42 Nebr., 503. The instruction complained of can hardly be condemned without overturning the rule heretofore prevailing, and we observe no sufficient reason for such a departure. The instruction excepted to was the only one calling attention directly to the defendant as a witness in his own behalf and announcing a correct rule as to the weighing of his testimony by the jury. The other instruction announced the rule applicable to the testimony of the witnesses generally in the case who had testified, including the defendant. The defendant stood in a peculiar position, and an instruction applicable to his testimony could be made intelligible only by naming him as a witness to whom the rule applied. The instruction in principle is analogous to those which may be given where a witness's reputation for truth and veracity has been shown

by the evidence to be bad, in which case it would not be error for the court to name such witness or witnesses in stating the rule applicable to the testimony given by him or them. By the statute, conviction of a felony may always be shown for the purpose of affecting the credibility of a witness, and we apprehend no error was committed by the trial court in advising the jury of the purpose and effect of the evidence showing defendant's conviction of a felony prior to the time he testified in the case at bar.

The state was permitted to prove, over the defendant's objection, that in the late winter or early spring prior to the time of the commission of the offense of which he was convicted, which was December 4, 1901, in a conversation with the witness testifying and one other, in which the parties spoke of there being no bank in Rosemont, where the crime was committed, and that the elevator men, the complaining witness and one other, certainly carried quite a sum of money, and it was a wonder they had not been robbed or held up, the defendant had said, in substance, during such conversation, that it would be an easy matter to hold them up and get their money; that, there being no saloon in Rosemont, and they sometimes having a keg or case of beer, a person could get the crowd keyed up and slip some knock-out drops in the elevator men's beer, and when they got a few drops of that down them they would be dead to the world for awhile, and it would be an easy matter to get their money; that if that failed a fellow could hold them up and get their money any way; that he could sand-bag them and hold them up. The robbery was committed by the perpetrator calling the complaining witness, one of the elevator men alluded to in the conversation just referred to, to the door of his residence shortly after dark, and under the pretense that the party had a load of grain at his elevator, induced the complaining witness to accompany the party as though going to the elevator, and when a short distance from his home was struck over the head with a bag of sand or shot, knocked down, and dragged a short distance from the road, where.

by threats to shoot, he was compelled to give up all the money he had on his person. The testimony as to the defendant's prior statements, we think, must be held to be of some probative value. The statement of the defendant as to how a robbery might be perpetrated, and the perpetration thereof by some person later on in one of the ways spoken of by the defendant, were circumstances having a legitimate bearing on the ultimate fact to be proved, which the jury were entitled to consider in determining the question of the guilt or innocence of the defendant. Standing alone, the statement could be regarded only as creating in the mind a suspicion or conjecture as to the defendant's guilt; but when considered in connection with other facts and circumstances proved, the prior conversation of the defendant relating to a plan or design for the commission of such an offense has a material bearing on the issues to be tried and determined by the jury. While it is argued that the difference in time between the conversation and the commission of the crime renders it too remote to be of any value, we can not so regard it. It is probable that the evidence would carry greater weight if close in time; yet this fact does not render the evidence inadmissible on the ground of being too remote. As is said by the supreme court of North Carolina in *State v. James,* 90 N. Car., 702, 705: "A single fact may be strong evidence; a multitude may be so slight and so slightly bearing upon each other, tending to support an allegation, that they do not altogether make evidence; a multitude of little facts and circumstances, each proving nothing in itself, taken in their relative and natural bearing upon each other, may make the strongest evidence." The prior statements of the defendant testified to by the witness, if believed by the jury, disclosed that a possible robbery of the complaining witness had been thought of by the accused, and in his mind he had evolved a plan by which the same could be accomplished, and, as he stated, quite easily. This, with what followed, was admissible in evidence under the general rule which admits the prior

statements and actions of one accused which may tend to develop a plan or design to commit the act of which he is charged. 1 Greenleaf, Evidence [16th ed.], secs. 14*k* and 162*c*. It can hardly be doubted that had the peculiar method spoken of by the defendant with reference to the use of some drug in beer drank by the elevator men been resorted to for the purpose of committing a robbery, the crime committed, and the defendant afterwards arrested, and charged with its commission, his statement as to the manner in which the crime could be accomplished, and its accomplishment in that particular manner, with other circumstances in evidence pointing to his guilt, would be a very potent factor in the final determination of the question. As presented by the record, the only difference regarding the admissibility of such evidence is in degree, or in the lack of striking peculiarity of one of the plans, and not in principle. We find no error in the admission of this testimony, and regard the statement, if believed by the jury, as a legitimate fact or circumstance to be considered by them in connection with all the other evidence in reaching a conclusion as to the defendant's guilt or innocence.

Lastly, it is argued that the evidence is insufficient to support the verdict. As a defense, the accused undertook to prove an alibi. To sustain his defense, several witnesses were produced who testified that the defendant was in Dakota county at the time the robbery was committed in Webster county, the two counties being near 200 miles apart. There is evidence of a convincing character that the defendant was arrested in Dakota county near the hour of 12 o'clock on the 6th of December, the second day following the commission of the crime, which occurred soon after dark on the evening of the 4th. Some of the witnesses for the defendant fix the time of his arrival in Dakota county on the 3d or 4th of December; possibly some of them a day or two earlier. It is conceded that he had been absent from Dakota county for two or more months immediately preceding his return early in De-

cember. The defendant testifies that he arrived in Dakota county on the 2d. On the other hand, the complaining witness identifies the defendant quite positively as his assailant. Several other witnesses are equally positive that they met him on the highway going towards Rosemont on the afternoon and evening of the 4th, and within a mile or two of that place. Other witnesses testify to having seen him in Nuckolls county on the morning of the day on which the robbery was committed in the evening. There was also testimony tending to prove a confession made by the defendant after his arrest, and much other evidence of facts and circumstances tending to establish his identity as the perpetrator of the crime. In view of the evidence of the very conflicting character just spoken of, much of which seemingly is entirely credible, we can not say the jury's finding of guilt is unsupported by sufficient competent evidence. It is quite possible, if not probable, that the defendant, after the commission of the crime, may have made his way to Dakota county as rapidly as he could go, and was there immediately arrested; possibly under arrangements made with his accuser or others, for the very purpose of fortifying himself in an attempt to establish an alibi in the event he was accused of the crime of which he now stands convicted. In no view of the record are we justified in saying that the evidence tending to establish guilt must be disbelieved, and credence given only to that which was introduced in support of an alibi.

The judgment of the district court is accordingly

AFFIRMED.

NOTE.—On the 14th day of September, 1862, Lura Villie Libbey—a girl less than ten years of age—was murdered, near the town of Strong, Franklin county, Maine. She was murdered on her way from home to Sunday school. To conceal the crime of rape was the apparent motive for the crime. She was found buried. The turf had been cut with some sharp instrument (apparently a knife) in the form of a trunk-cover. It had been turned up, and an excavation made in the uncovered section. In this hole, the body had been placed. In order to force it into the space, the knees had been stamped upon till

the bones of the legs were broken. The murderer had placed evergreens about the replaced turf to conceal the grave. But the heat of the sun had caused the transplanted shrubs to wilt, and the crime was revealed. Upon the trial of Lawrence Doyle, accused of the murder, a witness testified that Doyle had told him that, at one time, in Cape Breton, one man had murdered another and concealed the body in a manner corresponding to the method described and that the crime had never been detected. The accused had two trials, but was finally convicted. Both trials were before Walton, J. Doyle was sentenced to be hanged, but was never executed; and died of consumption in the penitentiary at Thomaston, Maine, August 8, 1869. Public opinion was divided as to his guilt. The honorable Eben F. Pillsbury, of his counsel, always mantained his innocence, and Doyle asserted it on his deathbed. Doyle was a native of Cape Breton, and about 29 years old at the time of the murder. The case is historic, as being the first trial in England or America where a defendant in a criminal case ever testified in his own behalf. Franklin B. Evans, hanged at Concord, N. H., in the winter of 1873-4, is said to have confessed the murder of the Libbey girl.—W. F. B.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V. HALLECK C. YOUNG, ADMINISTRATOR OF THE ESTATE OF ELLSWORTH H. MORSE, DECEASED.

FILED FEBRUARY 17, 1903. No. 12,026.

Commissioner's opinion, Department No. 1.

1. **Statute of Limitations:** AMENDED PLEADING. "The statute of limitations does not run against an amended pleading wherein the amendment consists in setting forth a more complete statement of the original cause of action." *Norfolk Beet-Sugar Co. v. Hight*, 59 Nebr., 100.

2. **Petition:** LORD CAMPBELL'S ACT: AMENDMENT OF PETITION. 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.

3. **Damages:** AMOUNT: DEPENDENT RELATIVES. Damages in the sum of $1,100 on behalf of a mother and a sister to whom a son and brother, thirty-five 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, *held* not excessive.

Syllabus by court; catch-words by editor.

3. Deposition: FIVE YEARS: PRESUMPTION. 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.

ERROR from the district court for Lancaster county. Action in the nature of case, under Lord Campbell's Act, for the death of plaintiff's intestate. Tried below before CORNISH, J. Judgment for plaintiff. *Affirmed.*

W. F. Evans, Lorenzo W. Billingsley, Robert J. Greene and *Richard H. Hagelin,* for plaintiff in error.

Jesse B. Strode and *Edmund C. Strode, contra.*

HASTINGS, C.

This case was previously before the court, and the opinion by which it was then decided is found in 58 Nebr., 678. The former judgment against the railroad company was there reversed, because the petition did not set forth the facts indicating pecuniary loss on the part of the next of kin by the death of the plaintiff's intestate. After the reversal in that action, an amended petition was filed, setting out that the deceased, prior to his death, for many years had expended, and would have continued to expend, large sums of money for the benefit of his mother, brothers and sisters; that at the time of his death he was employed at a salary of $1,800; that he was unmarried, and was adding, and would have continued to add, to his estate, and to the pecuniary interest and expectancy of those relatives in it. The amendment consisted simply of those added particulars of pecuniary loss which were found to be wanting in the original petition.

The errors complained of are that the action was at the time of the amendment barred by the statute of limitations; that the court erred in permitting these amendments; that the damages are excessive; and that there is no next of kin, so far as the evidence shows.

Counsel for plaintiff in error say that the former de-

cision shows that no cause of action was alleged at all in the original petition, therefore the amendment must set forth a new one; and that the doctrine is that as to any new cause of action brought in by an amendment the statute applies at the date of the amendment, and not at the date of the original commencement of the action. The reasoning seems fallacious. A petition is not necessarily a nullity because it does not fully and properly set out a cause of action and because an objection to it is sustained. *Merrill v. Wright,* 54 Nebr., 517, 519. The question of whether or not the statute of limitations should prevail against an amendment, seems to turn, not upon the correctness of the pleading, but upon the identity of the cause of action sought to be set up. If the cause of action attempted to be set forth in the amended pleading is the same, the fact that it was defectively stated in the first petition will not prevent the application of section 19 of the Code of Civil Procedure, which provides that an action shall be deemed commenced, within the provisions of the statute of limitations, at the date of the summons which is served on the defendant. In many cases, the question as to the identity of the action is a nice one, and there are many precedents as to when it is to be deemed the same cause of action and when it should be considered a different one. Both are freely cited in the able briefs of counsel in this case. There seems no question that we have here in the amended petition exactly the same cause of action attempted to be set out in the original one, but which this court found defective, because not alleging the facts from which pecuniary damage was inferable. It was thought that such facts were required under the ruling adopted by this court in *Chicago, B. & Q. R. Co. v. Van Buskirk,* 58 Nebr., 252, and *Chicago, B. & Q. R. Co. v. Bond,* 58 Nebr., 385. It is impossible to see how the identity of the cause of action is in any way changed by the addition of particulars as to pecuniary damage suffered by the next of kin. The case, therefore, seems to be determined by that of *Norfolk Beet-Sugar Co. v. Hight,* 59 Nebr., 100,

the syllabus of which says: "The statute of limitations does not run against an amended pleading wherein the amendment consists in setting forth a more complete statement of the original cause of action."

With regard to the propriety of the amendment and of the court's action in permitting it, it would certainly seem that there can be as little question. Section 144 of the Code of Civil Procedure permits the court to allow amendments by correcting a mistake in the name of the party or a mistake in any other respect, or by inserting other allegations material to the case. In the original petition a general allegation of damages was made. The petition was held defective for not inserting the particulars of the damages. To have refused the plaintiff permission to insert these particulars would have been a denial of justice because of the oversight of the pleader. Such action might properly have been complained of as an abuse of discretion.

It is urged in support of the complaint as to excessive damages that the testimony of the mother shows that she had seen her son only three times between 1887 and August, 1894, the date of his death; that during these seven years he had made gifts and paid bills for her to the amount of about $200; that her expectancy of life at that time was less than fourteen years; that the sister had testified that during these seven years she had received gifts from her brother to the amount of $15 or $20, and her expectancy of life was less than twenty-nine years. It is contended that on this basis the verdict of the jury, $1,100, is not supported by the evidence. The evidence, however, shows that the deceased was thirty-five years of age, able-bodied and of good habits, successful in business, and employed at a salary of $1,800 a year, and accustomed to make gifts to his relatives, and provide for the comfort and welfare of his mother. The action of the jury in fixing his pecuniary value to the mother and sister at $1,100 seems to have been reasonable.

With regard to the complaint that there is no showing

of the next of kin's existence, it is conceded that the mother's deposition was taken in 1895, shortly after the institution of the action. It was admitted at the second trial under an agreement that it might be used "as of this date." The last trial was on May 10, 1900. This deposition of the mother is the only evidence of her continued existence, and the same fact seems to be true as to the sister. These next of kin were certainly alive and able to give their deposition in 1895, and to be cross-examined. This evidence, even if there was no agreement that it should be received and used at the trial in May, 1900, would be sufficient to raise the presumption that both were still alive at that date. It can not be said that there is no evidence to support the finding of the jury as to the existence of the next of kin.

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

LOBINGIER and KIRKPATRICK, CC., concur.

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

AFFIRMED.

NOTE.—*Deposition—Objection First Made on Trial of Appeal.*—"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 trial in the appellate court." *Collier v. Gavin*, 1 Nebr. [Unof.], 712. This is said to be the only case in the United States or England where this point has been decided.

CITY OF SOUTH OMAHA V. MARIE TIGHE ET AL.

FILED FEBRUARY 17, 1903. No. 12,588.

Commissioner's opinion, Department No. 1.

1. **Grading Street: PETITION: NECESSARY PREREQUISITE: ABUTTING PROPERTY.** A petition signed as required by statute, is a necessary prerequisite to the assessment of the cost of grading a street upon the abutting property.

Syllabus by court; catch-words by editor.

2. **Title of Petitioner: RECORD: EVIDENCE.** Evidence that the petitioners have no title of record to the premises described in the petition, will support a finding that the petitions were unauthorized and insufficient where the only evidence of ownership is the recitals of the petitions themselves.

ERROR from the district court for Douglas county. Action for an injunction, brought to restrain the collection of certain special taxes for grading in the city of South Omaha. Tried below before ESTELLE, J. Injunction made perpetual. *Affirmed.*

William C. Lambert, for plaintiff in error.

James A. Kerr, contra.

HASTINGS, C.

This is an injunction brought to restrain the collection of certain special taxes for grading in the city of South Omaha. From a decree in favor of the plaintiffs the city brings error, and alleges that the decree is not based upon sufficient evidence. The basis of the city's contention seems to be, in the first place, that the only requisite to confer jurisdiction on the part of the city authorities to provide for improvements and to assess their cost upon abutting property, is the filing of petitions sufficient upon their face, by their own recitals, to confer jurisdiction. This doctrine is not in accordance with the frequent decisions of this court, so numerous and so recent that there is no occasion to cite them here.

The next contention is that the decree of the district court is not sustained by sufficient evidence. While no proof was offered to sustain the petitions, the only evidence adduced against them was that of the register of deeds, who testified that a large number of the petitioners did not appear of record to have any ownership of the abutting property. It is conceded that if the names of those as to whom this was true are taken from the petitions, there are not left the owners of a major part of the

foot-frontage. The trial court distinctly found that the owners of the major part of the frontage of property abutting upon the proposed improvements did not sign the petitions. As above stated, no evidence was introduced by the city. It is true that the only evidence presented by the plaintiffs on this question was that of the register of deeds that a large number of the signers had no title of record. This was undoubtedly admissible proof and constitutes some evidence tending to sustain the action of the trial court, at all events better than the bare recitals of the petitions, which is all the proof on the other side. It would seem that under the circumstances the finding of the trial court should be sustained. If that finding is sustained, then the taxes must be held to be void and subject to injunction.

It is recommended that the decree of the district court be affirmed.

LOBINGIER and KIRKPATRICK, CC., concur.

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

AFFIRMED.

JOSEPH H. LEHMER, APPELLANT, V. RICHARD S. HORTON, TRUSTEE OF GREATER AMERICA EXPOSITION ET AL., APPELLEES.

FILED FEBRUARY 17, 1903. No. 12,582.

Commissioner's opinion, Department No. 1.

Mechanic's Lien: EXPOSITION BUILDING. One who furnishes, under a running account with the common owner of a group of exposition buildings, materials for use in the illuminating equipment thereof, is entitled to a lien on such buildings, where they are maintained for a common purpose, though they are not all situated on contiguous lots, and though the claimant is not able to show what portions were used in a particular building.

Syllabus by court; catch-words by editor.

APPEAL from the district court for Douglas county. Action to foreclose a mechanic's lien on the buildings of the Greater America Exposition for electrical appliances and illuminating equipment. Heard below before DICKINSON, J. Judgment for defendants. *Reversed.*

Isaac E. Congdon, for appellant.

Timothy J. Mahoney and *Richard S. Horton,* for appellee Horton.

William Douglas McHugh, for appellee Chicago House Wrecking Company.

LOBINGIER, C.

This is a suit to foreclose a lien on the buildings of the Greater America Exposition for electrical appliances and materials used in the illuminating equipment of that enterprise. These buildings were all owned by the exposition company, and were situated on land leased by it. One charge admitted a visitor to the entire grounds, and all were connected by walks, driveways and viaducts; but the site included a number of distinct city lots, and was in some parts intersected by public streets. The court below found that the plaintiff was not entitled to a lien and dismissed his action, from which decree plaintiff appeals.

One of the principal questions below was whether these buildings were subject to a mechanic's lien. This has already been determined in *Zabriskie v. Greater America Exposition Co., post,* p. 581, and will not be further considered here.

The materials furnished were clearly such as would entitle appellant to a lien. *Southern Electrical Supply Co. v. Rolla Electric Light and Power Co.,* 75 Mo. App., 622; *Keating Implement and Machine Co. v. Marshall Electric Light and Power Co.,* 74 Tex., 605; *Badger Lumber Co. v. Marion Water Supply, Electric Light and Power Co.,* 48

Kan., 182, 15 L. R. A., 652, 30 Am. St. Rep., 301; *Hughes v. Lambertville Electric Light, Heat and Power Co.*, 53 N. J. Eq., 435. But it is earnestly argued, and such appears to have been the view of the learned trial judge, that the erection of the buildings and the character of appellant's contract with the exposition company were not such as would entitled him to a lien, even conceding that the buildings were subject thereto. The essentials which appellees claim must appear before the lien could in any event attach, are thus stated in their brief:

"1st. That the material was furnished or the work done upon one single or entire contract for all the buildings.

"2d. That the lots upon which the buildings are situated are contiguous.

"3d. That the material was furnished with a view to its being used in the construction or repair of the buildings."

We shall consider these in their order:

1. It may be assumed at the outset that in a case of this kind the contract must be entire, both in the sense of providing materials for all the buildings (*Meek v. Parker*, 63 Ark., 367, 58 Am. St. Rep., 119), and also in the sense of constituting one continuous transaction, and not merely an aggregation of independent accounts. *Baker v. Fessenden*, 71 Me., 292. The evidence relative to the contract in question consists entirely of appellant's testimony and the statutory account of items filed by him in order to perfect his lien. Appellant says that the negotiations were commenced by Mr. Rustin, the exposition company's assistant superintendent of electricity, who came to appellant, and stated that the company would need such appliances as he afterward furnished. Pursuant to this, appellant submitted a written proposition to the company, which was formally accepted, and he received a written order for certain of the materials. Other portions of appellant's testimony are as follows:

Q. As a matter of fact, when you sold these items of

goods to the Greater America Exposition, it was simply a matter of bargaining and selling of so much goods without reference to its use on any building?

A. They came to me and told me that they needed this material for completing their electric wiring in these buildings, and they said nothing to me whatever about any wire outside, and the character of most of the material is inside wire. * * *

Q. So you don't know today, Mr. Lehmer, of any item furnished for use in any particular,—on any particular tract of ground out there?

A. No, sir; I simply know that the material I furnished was designed to be used in and on the buildings. * * * I continued to sell them goods on written orders, verbal orders, and orders by telephone. Mr. Rustin would often come in my store in the morning and leave orders with me for goods to be delivered that day. And other times they would telephone these orders to me what they called "hurry-up," "rush" orders. * * *

Q. State if you know whether or not the Greater America Exposition was engaged in any other business than holding an exposition on those grounds?

A. Not to my knowledge.

Q. And you sold this wire to them for use in their enterprise?

A. I did.

It was formally admitted in the record that these materials were sold to the exposition company by appellant and actually delivered by him on the exposition grounds. But appellees' counsel, in commenting on this testimony in their brief, contend that "there was no contract which showed that the purpose of the sale was that the goods sold should become a part of the buildings." It seems to us that the evidence is sufficient, in the absence of contradiction, to disclose a distinct understanding that these materials were to be used in the buildings. But even if counsels' interpretation of the testimony were to be accepted, it would not necessarily be fatal to the lien. In *Great*

Western Mfg. Co. v. Hunter Bros., 15 Nebr., 32, 36, the contention was urged, as here, that "the material must have been furnished by the express terms of the contract for the particular building on which the lien is claimed." But this court, by COBB, J., said: "I have no doubt that, under the provisions of our statute then in force, lumber or other building material, sold on general book account without regard to any particular building, if used by the purchaser in the erection or reparation of a building upon land of which he is the owner, the vendor of such lumber or other building material may have his lien."

The statute then in force was identical with our present section 1 of chapter 54 (Annotated Statutes, sec. 7100), which prescribes the character of the contract under which the lien may be obtained. We think, moreover, that appellant's testimony sufficiently shows that the materials were furnished for use in the buildings indiscriminately, and that the case falls within the doctrine of *Badger Lumber Co. v. Holmes*, 44 Nebr., 244, 48 Am. St. Rep., 726, so that the debt may be charged against all of them. The nature of the service desired was common to all, and the materials, which consist mostly of wire, tape and insulators, are such as would naturally be needed in each building. In such a case it is not necessary for the lien claimant to show what portion of the materials enters into a particular building. *Bowman Lumber Co. v. Newton*, 72 Ia., 90; *Lewis v. Saylors*, 73 Ia., 504. In the case last cited it is observed: "If the question is of any materiality to the defendant, the burden would be upon him to show how the materials were expended. The holding might well be based upon the familiar rule that the burden of proof as to any particular fact is upon the party who, from the circumstances of the case, has the exclusive knowledge of the fact." This case was cited with approval in *Bohn Sash & Door Co. v. Case*, 42 Nebr., 281, 301.

"When materials are furnished under a single contract for buildings put up on two lots, it can not be expected of the vendor to know how much is used on one of them and

how much on the other." *Chadbourn v. Williams,* 71 N. Car., 444, 448.

"The person who sells the materials is not presumed to know anything of the condition and progress of the buildings being erected or repaired. He credits the party with reference to certain houses together, and the law gives him a lien against all." *Okisko Co. v. Matthews,* 3 Md., 168, 177.

The fact that some of these materials may have been used apart from the buildings, though connected with and forming an integral part of the illuminating equipment thereof, would not deprive appellant of a lien. As was said in *Southern Electrical Supply Co. v. Rolla Electric Light and Power Co.,* 75 Mo. App., 622, 629: "We do not think that the plaintiff ought to be denied a lien on the property because the wire it sold to Waples was strung upon poles situated on the streets of the city. The wires were attached to the building; they formed an integral part of the improvement, and were attached to it at the time it was built. They are absolutely necessary to the operation of the plant, and hence ought to be regarded as a part of the machinery of the plant and as an appurtenance of the lot upon which the plant is constructed." See also *Badger Lumber Co. v. Marion Water Supply, Electric Light and Power Co.,* 48 Kan., 182, 184, 15 L. R. A., 652, 30 Am. St. Rep., 301. A criterion for determining whether the contract is also entire in the sense of being one continuous transaction is thus stated by Thurman, J., in *Choteau v. Thompson,* 2 Ohio St., 114, 126: "Where materials are furnished, from time to time, for a particular purpose, as, for instance, the construction of a house, and the dates are so near each other as to constitute one running account, the lien dates from the time when the first article was supplied, although, strictly speaking, the articles were not furnished under one entire contract." The above case has been cited with approval in at least two decisions of this court (*Doolittle v. Plenz,* 16 Nebr., 153, 156; *Henry & Coatsworth Co. v. Fisherdick,* 37 Nebr.,

207, 218), and its requirements appear to be met in this transaction. The materials here were furnished "for a particular purpose," viz., as testified to by appellant, "for completing their electric wiring in these buildings." Moreover, the dates are so near each other as to "constitute one running account." The whole transaction extended for a period of less than three months, while there seems to have been no interval of more than ten days between the various items. The account is not different in this regard from that in *Doolittle v. Plenz*, 16 Nebr., 153.

2. The contention that no lien could attach because the lots on which these buildings were situated were not all contiguous, is foreclosed by the decision of this court in *Bohn Sash & Door Co. v. Case*, 42 Nebr., 281, where, in upholding a lien on buildings located in different blocks, we said (p. 300): "It is the entirety of the contract and not the location of the property which must determine whether a claim or claims shall be filed for a lien or liens." This doctrine is also well established in other states. *Tenney v. Sly*, 54 Ark., 93; *Goldheim v. Clark & Co.*, 68 Md., 498; *Chadbourn v. Williams*, 71 N. Car., 444; *Sergeant v. Denby*, 87 Va., 206. Even in Pennsylvania, where the statute requires the buildings to be "adjoining," the lien is not prevented from attaching because they are divided by a private way. *Fitzpatrick v. Allen*, 80 Pa. St., 292.

3. In support of appellees' third proposition, we are cited to *Wetherill v. Ohlendorf*, 61 Ill., 283, where a lien was denied because the materials were sold on the personal credit of the contractor. There is, of course, no suggestion of this in the testimony before us. We are also referred to *Hills v. Elliott*, 16 Serg. & Raw. [Pa.], 56, and *Poole v. Union Pass. R. Co.*, 16 Atl. Rep. [Pa.], 736, holding that no lien attaches unless the materials be furnished on the credit of the building. This is inconsistent with *Great Western Mfg. Co. v. Hunter Bros.*, 15 Nebr., 32. Moreover, in *Green & Co. v. Thompson*, 172 Pa. St., 609, the same court explains this by declaring that where the

claimant has compiled with the statutory requirements relating to the lien, the presumption arises that the materials were furnished on the credit of the building.

This appeal presents no question as to the relative credibility of witnesses, and no conflict of evidence. We have before us the bare legal question whether appellant showed himself entitled to a lien. It seems to us that he brought himself within the rule of the authorities heretofore cited, and we recommend that the decree be reversed, with directions to enter a decree as prayed in the petition.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded with directions to enter a decree in accordance with the prayer of the petition.

REVERSED AND REMANDED.

NOTE.—*Mechanics' Liens.*—A note containing a summary by title, volume and page of every decision in the Nebraska reports from 1 to 59, inclusive, may be found in volume 60, at pp. 88-90. The following opinions appear in subsequent volumes to last one published (65) at the writing of this note. *Rust-Owen Lumber Co. v. Holt*, 60 Nebr., 80; *Bradford v. Anderson*, 60 Nebr., 368; *Stevens v. Burnham*, 62 Nebr., 672; *Urlau v. Ruhe*, 63 Nebr., 883; *Terry v. Prero*, 1 Nebr. [Unof.], 198; *Cornell v. Kime*, 2 Nebr. [Unof.], 478; *Conover v. Wright*, 3 Nebr. [Unof.], 211.—W. F. B.

E. ZABRISKIE, APPELLEE, V. GREATER AMERICA EXPOSITION COMPANY ET AL., APPELLEES, IMPLEADED WITH CHICAGO HOUSE WRECKING COMPANY, APPELLANT.

FILED FEBRUARY 17, 1903. No. 12,625.

Commissioner's opinion, Department No. 1.

Mechanic's Lien: LEASEHOLD INTEREST. A mechanic's lien attaches to a leasehold interest and to buildings erected by one tenant and sold to another, who has acquired a lease of the same

Syllabus by court; catch-words by editor.

interest, and this, notwithstanding the removal of the buildings at the end of the term is expressly required by the lease.

APPEAL from the district court for Douglas county. Action to foreclose a mechanic's lien for materials furnished and labor performed. Heard below before DICKINSON, J. Judgment for plaintiff. *Affirmed.*

James M. Woolworth, William Douglas McHugh and *Timothy J. Mahoney,* for appellant.

James W. Hamilton and *Henry Maxwell,* for appellee Zabriskie.

Richard S. Horton, for himself.

LOBINGIER, C.

This is a suit to foreclose a statutory lien for materials furnished and labor performed in repairing certain buildings of the Greater America Exposition at Omaha. The company which promoted and carried on this exposition acquired its interest in these buildings and the land whereon the same were situated through an instrument executed by a purchaser from the Trans-Mississippi and International Exposition, which had maintained a similar enterprise on the same site during the previous year. This instrument purported to pass "all the buildings, fences, trees, shrubs, plants, colonnades, booths, water and sewer-pipes, electric plant, wires, appliances, appurtenances, * * * and also all right, title and interest, including leaseholds, of the said Trans-Mississippi and International Exposition to or in the said exposition grounds." But this grant was expressly made "subject to the contracts, agreements and obligations of the Trans-Mississippi and International Exposition with the various property holders in the city of Omaha to restore to their original condition the grounds, buildings and property taken possession of or occupied by the said Trans-Mississippi and International Exposition." The Greater Amer-

ica Exposition Company also entered into a lease for one year with the fee owner of the grounds on which the buildings were situated, by which it undertook: "That it will use said lands for exposition purposes only; that by and upon the expiration of the term herein limited, it will refill in a thoroughly good and substantial manner all excavations at any place and time made on said lands since the entry thereon of said Trans-Mississippi and International Exposition; that by and upon the expiration of the term herein limited it will remove from said lands all buildings and structures and all debris of every description whatsoever."

One of the buildings in which the materials sued for was used is thus described by a witness, and the description will apply generally to the buildings in controversy: "The power-plant building was constructed of heavy timbers as framework, and sheeted outside with corrugated iron, also roofed with corrugated iron; and the foundation of the building consisted of piling driven in the ground, and the foundation timbers fastened to the same. The floor was of wood construction—that is, the machinery part of it—with heavy joists or sleepers covered with heavy lumber; and the boiler-room was constructed, the flooring was of concrete or slag—some kind of stone. * * * The foundations for the engines and dynamos were built of brick and concrete. There were excavations made in the ground, to considerable depth, enough to make them perfectly suitable, and bolts, extending up from the foundations, imbedded in the concrete, and these bolts extending up over the frame of the engines and also the frame of the dynamos."

A decree was rendered below finding that plaintiff was entitled to a lien as prayed, and from this the exposition company and its vendee, the Chicago House Wrecking Company, appeal.

It is contended by appellants that the exposition buildings "were merely trade-fixtures"; that as personal property they were not subject to a mechanic's lien, but that

they must have entered into and become a part of the realty. We are cited to cases from certain jurisdictions holding that there can be no such lien on a building distinct from the land. *Kellogg v. Littell & Smythe Mfg. Co.*, 1 Wash. St., 407; *Belding v. Cushing*, 1 Gray [Mass.], 576. Cf. *Coddington v. Dry Dock Co.*, 31 N. J. Law, 477. These cases appear to be greatly in the minority. "The general rule undoubtedly is that a lien may exist upon the building alone under certain circumstances." 20 Am. & Eng. Ency. of Law [2d ed.], 284, where the authorities are set out *in extenso*. The Massachusetts case above cited was decided under a statute no longer in force. The present doctrine in that jurisdiction is thus stated: "In our opinion this makes it clear that Gen. Sts., c. 150, and Pub. Sts., c. 191, were intended by the legislature to give a lien upon buildings the owner of which had no estate or interest in the land upon which the building was erected, as well as upon any interest which the owner of a building might have in land on which it might be erected, and that the lien might extend to a building erected upon land although the building was personal property." *Forbes v. Mosquito Fleet Yacht Club*, 175 Mass., 432, 436.

In our neighboring state of Iowa the statute provides, like our own,* a lien "upon such building * * * and upon the land." Code (1897), sec. 3089. This has been construed to subject a building to a lien, though the owner of it was a trespasser on the land whereon it was located. *Lane v. Snow*, 66 Ia., 544. Cf. *Smith v. St. Paul Fire & Marine Ins. Co.*, 106 Ia., 225. In *Mahon v. Surerus*, 9 N. Dak., 57, the court, in construing a statute which gives a

*As to the rule that a state which adopts the statute of another state, *ipso facto*, adopts the construction placed thereon by the court of last resort of that state, see *Franklin v. Kelly*, 2 Nebr., 79, 104; *Hallenbeck v. Hahn*, 2 Nebr., 377; *O'Dea v. Washington County*, 3 Nebr., 118; *Bohanan v. State*, 18 Nebr., 57, 73, 74; *Parks v. State*, 20 Nebr., 515, 518; *Coffield v. State*, 44 Nebr., 417, 423; *Forrester v. Kearney Nat. Bank*, 49 Nebr., 655, 663; *Morgan v. State*, 51 Nebr., 672; *Rhea v. State*, 63 Neb., 461; *State v. McBride*, 64 Neb., 547, 549; *Goble v. Simeral*, 67 Nebr., 276—W. F. B.

lien "upon such building * * * and upon the land,"* adjudged a lien on a house on a government homestead, and said (p. 60): "The lienholder might in any case have the building sold separately and removed. This was a valuable right. It often happened, in the early settlement of Dakota territory, that expensive buildings were erected, and subsequent events, such as the locating of railroads or changing of business centres, rendered them practically worthless where they were, but they would have value if they could be removed. Our construction of these statutes leads to the conclusion that plaintiffs had a lien upon the house that in no manner affected the land. It will be noticed that the right to remove the building is not dependent upon the manner in which the building is attached to the land. It may stand upon blocks, or it may rest upon the most substantial stone or brick foundation."

In *Dustin v. Crosby,* 75 Me., 76, the court, in speaking of a lien such as our statute affords, observes (p. 76): "It is a lien upon the realty if the debtor owns realty, and upon the building as personalty if the debtor owns the building only."

The Alabama statute has been thus construed: "The declaration is clearly made in the statute, that the lien shall be good upon these structures, 'and' upon the land on which they are situated, to the extent of one acre. Code, §§ 3440, 3444. It is a several, and not a joint lien; and both the letter and spirit of the law contemplate that the improvements erected may, in proper cases, be sub-

* Compiled Laws (1887), section 5469. This section must be read in connection with section 5480 of Compiled Laws, which is quoted with section 5469 in the opinion cited above. A decision in a mechanic's-lien case is necessarily a statutory decision. But I would advise any lawyer, before he cites this case as authority, to read the case in connection with the statute which it construes.

In this case it was also held that the party residing upon such land, and for whose immediate use the house was built, was the owner of the land under the terms of section 5483, Compiled Laws, which reads as follows: "Every person for whose immediate use and benefit any building, erection or improvement is made, having the capacity to contract, including guardians of minors, or other persons, shall be included in the word 'owner' thereof."—W. F. B.

jected to sale and removal from the premises by the purchaser." *Bedsole v. Peters,* 79 Ala., 133, 136, 137. Cf. *Buchanan v. Smith,* 43 Miss., 90; *Ombony v. Jones,* 19 N. Y., 234.

The proposition that a building is not subject to a mechanic's lien unless it enters into and forms a part of the realty, has not been adopted by this court. It is now well settled that a lien attaches to a leasehold interest and to buildings erected by the tenant. *Moore v. Vaughn,* 42 Nebr., 696; *Waterman v. Stout,* 38 Nebr., 396; *Henry & Coatsworth Co. v. Fisherdick,* 37 Nebr., 207. Now, a leasehold interest is but a chattel, however long its term. "It is only personal estate if it be for a thousand years." 2 Kent's Commentaries, *342. The doctrine contended for would, if carried to its logical conclusion, preclude the attaching of a mechanic's lien, unless the owner of the building were also the owner of the fee.

Stress is laid upon the fact that by the terms of its lease the Greater America Exposition Company is required to remove these buildings at the end of the term. This fact does not appear to have prevented the attaching of a lien in the cases already referred to. In *Lane v. Snow,* 66 Ia., 544, the owner of the building was, as has been said, a trespasser. Under the conceded facts of that case he had no right to erect the building on that land at all, and his duty to remove was immediate, and not, as here, fixed at a considerable time in the future. A lien was, nevertheless, allowed. In *Pickens v. Plattsmouth Land & Investment Co.,* 31 Nebr., 585, the owner of the building had at the time the lien was enforced apparently no interest in the land at all. When he built he had a contract of purchase with the owner of the land, but this was subsequently abandoned, and, as he does not seem to have acquired any new right, his duty, or at least right, of removal would seem to have arisen by virtue of the abandonment. A lien was declared, however, against the building, and the doctrine of the case in this regard is not changed on the second hearing in 37 Nebr., 272. In *Hath-*

away v. Davis, 32 Kan., 693, where a tenant expressly reserved the privilege of removing any and all improvements, the lien was held to attach not only to the leasehold interest and the building erected by the tenant, but also to machinery and fixtures. In *Jessup v. Stone,* 13 Wis., 521, it is said concerning the owner of the building (p. 523): "If his interest in the land is that of a mere occupant, having the right to remove whatever buildings he might place upon it, then this right of occupancy and removal would go to the mechanic, or those obtaining occupancy under his lien."

There would seem to be little, if any, legal difference whatever on this point between reserving the right to remove and imposing the duty to do so. In either case, removal is so far contemplated as to afford room for the contention that the building is personalty. In either case, moreover, the fact of a failure to remove during the term of the lease would be the same—the buildings would become the property of the lessor. See *Friedlander v. Ryder,* 30 Nebr., 783; *Free v. Stuart,* 39 Nebr., 220. In a case like the one before us the lessor might also have an action for damages resulting from the failure to remove, but this could hardly change the legal character of the buildings.

Counsel for appellants have, with commendable industry, collected for us a large number of authorities determining questions concerning liens on fixtures. We have examined these with care, and are ready to concede that a lien can not be acquired on merely portable and unattached articles. Many of these cases, however, were decided under statutes unlike our own, and others are rendered inapplicable here by the holding of this court in *United States Nat. Bank v. Bonacum,* 33 Nebr., 820, that a lien will attach even to a furnace when placed in a building. This disposes of cases like *Union Stove Works v. Klingman,* 20 App. Div. [N. Y.], 449, 46 N. Y. Supp., 721. We have already seen that under the present Massachusetts doctrine a lien attaches even though the building be treated as personalty. And in *Ombony v. Jones,* 19

N. Y., 234, 235, a lien was upheld on a ball-room, described as follows: "The ground was graded, and the building placed upon stone pillars, which were sunk into the ground from one to two feet. The pillars were laid up without any kind of cement, and the sills of the building placed thereon, but in no manner attached thereto, except by the weight of the building. The building was not attached to any other building upon the premises." This, it will be seen, was hardly, if at all, more permanent in character than the structures here in controversy. But the court said concerning it (p. 239): "There was nothing in the mode of its annexation to the soil, or to the main edifice, which necessarily imparted to it the legal characteristics of immovability. It could be detached and taken away without injury to the reversion. Beyond all doubt, it would be real estate, as between vendor and vendee of the land, or between the heir and the executor of the owner."

As the sole ground of complaint in this case is that the property is not subject to a mechanic's lien, we feel constrained to recommend that the decree be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the decree of the district court be

AFFIRMED.

NOTE.—For a note of all Nebraska decisions in mechanic-lien cases up to that date, see 60 Nebr., pp. 88-90. See note to preceding case in this volume.—W. F. B.

ITTNER BRICK COMPANY v. RUDOLPH KILLIAN.

FILED FEBRUARY 17, 1903. No. 12,253.

Commissioner's opinion, Department No. 1.

1. **Allegata et Probata:** VARIANCE. 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.

2. **Negligence:** YOUTH AND INEXPERIENCE: INSTRUCTION. Youth and inexperience being inherent, and not the result of carelessness or negligence, it is not error to state, in an instruction in an action for personal injuries, that if plaintiff, "because of his youth and inexperience, failed to appreciate the danger," without adding, "or by the use of reasonable care on his part could or would not have known it."

3. ———: ———: ———: SERVANT: LIABILITY OF MASTER. If a servant, on account of his youth, lack of prudence and understanding, and because of the want of proper instruction, fails properly to appreciate the risks involved in certain labor which he is commanded by the master to perform, and is injured, the master will be liable.

4. **Child of Fourteen:** PRUDENCE AND UNDERSTANDING: PRESUMPTION. There is no presumption that a child of fourteen years has as much prudence and understanding as an adult, and where such child has been injured while engaged in dangerous work which he has been commanded to do, it is for the jury to say, considering his age and experience, whether he assumed the risks of his employment.

5. **Servant:** COMMAND OF MASTER: CONTRIBUTORY NEGLIGENCE. A servant can not undertake the performance of a service, even in obedience to the command of the master, where the danger is so obvious that injury would be inevitable, and if he does so, he will be held guilty of contributory negligence.

6. ———: ———: ———: BOY OF FOURTEEN. Where a boy fourteen years old undertakes dangerous work in obedience to the command of the master, the law will not deny him relief on the ground of contributory negligence, unless the danger was so manifest and glaring that it must have been known to one of his age and experience that he could not do it without injury.

7. ———: ———: ———: ———: OILING BRICK-MACHINE: QUESTION FOR JURY. A servant, a child of fourteen years, was ordered by his master to assist in cleaning and oiling a brick ma-

Syllabus by court; catch-words by editor.

chine while the same was in motion by steam. The work was highly dangerous, but could be accomplished without injury. *Held*, That the question whether the servant was guilty of contributory negligence was properly left to the jury.

8. **Instructions.** Instructions examined, and *held* not erroneously given.

ERROR from the district court for Douglas county. Action in behalf of a minor by his next friend, against his master, to recover damages for a personal injury. Plaintiff prayed for judgment in the sum of $10,000. Tried below before SLABAUGH, J. Verdict for $3,000. Judgment upon the verdict and for costs. *Affirmed.*

John C. Cowin, for plaintiff in error.

Phil E. Winter, Charles E. Winter and *Carl E. Herring, contra.*

KIRKPATRICK, C.

This is an action brought in the district court for Douglas county by Rudolph Killian, defendant in error, by his father, as next friend, against the Ittner Brick Company, plaintiff in error, to recover damages for personal injuries sustained by defendant in error while in the employ of plaintiff in error assisting in the operation of a pressed brick machine. The petition alleged, in substance, that plantiff was a minor, fourteen years old; that he was employed by defendant company to take brick from the brick-machine, which, it was alleged, was not a dangerous employment; that defendant company knew the youth and inexperience of plaintiff, and wrongfully required plaintiff to perform more dangerous service than that for which he had been employed, to wit, cleaning and greasing the brick-machne, and that defendant company wholly failed to inform plaintiff of the dangerous nature of the machinery, or to instruct him in the risks of the employment; that while plaintiff was assisting in the cleaning and greasing of the brick-machine, his right hand was caught in the machine, and in the cogs operating the same; that his

hand and arm were drawn into the cogs and crushed and mangled so that it was necessary at once to amputate his arm, and, although proper care was taken of the arm, a second amputation was necessary; that plaintiff had been damaged in the sum of $10,000. The answer admitted the employment of plaintiff, and alleged that he was employed to do general work in and around the brick-yard of defendant; and alleged that plaintiff was fully instructed regarding the dangers of the employment; that he had been employed in working in the brick-yard the previous year, that he was expressly forbidden to clean and grease the machine while it was in motion; admitted that plaintiff was injured by getting his hand crushed while it was in the brick-moulds cleaning and greasing the same; that plaintiff knew of the danger in cleaning the machine; that the dangerous character of the machinery was open and obvious to any person; and that plaintiff was guilty of negligence contributing to the injury. A reply was filed, denying generally new matter contained in the answer. Trial to a jury resulted in a verdict for defendant in error.

It is disclosed by the record that in the year 1898, defendant in error, who was then thirteen years old, was employed in the brick-yard of defendant in error, and worked there during the brick-making season. The greater portion of the time he was employed in removing the brick from the machine and placing them on a cart to be hauled away to the kiln. In the following year he was again employed, and during that season, and up to the date of the injury, which occurred August 21, 1899, his employment consisted in standing in front of a circular revolving table in which were certain brick-moulds, and taking from the table, alternating with another boy, who stood by his side, the moulded bricks from the table after they emerged from the moulds. The front part of the revolving table was open, but at the sides and back the table was covered, the table as it revolved passing under a heavy iron frame. While passing under this frame, the moulds in the table were filled with clay from a hopper situated

above the back part of the machine, and a plunger, which was at the bottom of the machine, was forced upwards by machinery so as to press the brick in shape. As the revolving table brought the brick from under the frame or cover, the plunger in the bottom of the table was further forced upward to a height sufficient to raise the bottom of the brick a little above the top of the table. The brick were then taken off by the boys working in front of the table, placed upon carts and hauled away. After quitting work for the day, it was necessary to clean and oil the plungers and other parts of the moulds in the table. It had been customary, while this was being done, to shut off the steam, and cause the table to revolve sufficiently to permit of cleaning the moulds in rotation by moving the belt by hand. As the moulds passed out from under the iron frame the dirt was scraped out, and they were greased and oiled, using waste for the purpose, the plungers having been previously removed. About quitting time on the day the injury occurred, Ittner, who was general manager for plaintiff in error, and who was personally in charge of the work, told the boys, among whom was defendant in error, to hurry up and clean the machine. He thereupon went away, and defendant in error, with one or two other boys, began cleaning the machine, which was being run by steam, although it had been slowed down to permit of cleaning. While defendant in error had one of his hands in a mould of the revolving table, greasing the sides of the mould, his arm between his hand and his elbow was caught by coming in contact with the sides of the iron frame as the mould in which he had his hand passed under the frame. The arm was so crushed and mangled that amputation was immediately necessary, which was done, and later a second amputation occurred. Defendant in error had previously on one occasion assisted in cleaning the machine while it was being run slowly by steam power, although it appears that it had been customary for one of the machinists to clean the moulds and plungers, while the boys, defendant in error included, cleaned up around the machine at the close of work.

On the trial of the cause plaintiff in error introduced no testimony, but at the close of the testimony offered by defendant in error asked the court to instruct the jury to bring in a verdict for it, which request was denied, and this is the first error assigned. In support of this contention it is urged that the allegations of the petition and the proof submitted vary materially, in that the petition charged as negligence on the part of defendant below failure to instruct defendant in error as to the dangers of the work, whereas the proof shows that the danger was open and manifest, and was well known to defendant in error; and it is said that under this state of facts he assumed the risks of the employment. It is further urged that the proof shows that defendant in error was negligent and failed to exercise due care, and for that reason could not recover. The variance between *allegata et probata* relied on is that it is pleaded that defendant in error was injured by the cogs in the brick-machine, and that the testimony fails to show the existence of any cog-wheels near the place of the injury, or that defendant in error was injured in the way claimed. The allegation upon which this contention is based is in part as follows: "And in consequence thereof on Monday, August 21, 1899, this plaintiff, while so engaged as aforesaid, according to defendant's command and direction, in cleaning out and oiling said grooves and machinery, and in the exercise of due care, had his right hand caught in said machine and drawn into and between the said cog-wheels, and mashed and mangled and torn, hand and forearm to the elbow, to such an extent that amputation was immediately necessary and was performed at once," etc.

Plaintiff in error, in answer to the petition, alleged as follows: "Defendant further alleges that the said Rudolph Killian well understood the said work, and was instructed and properly cautioned as to the performance of all said services, and was strictly forbidden to oil or clean said grooves or moulds of said machine while the same was in motion, and was told not to attempt to oil or

clean the said grooves or moulds when the motive power was attached to said machine, and that the said Rudolph Killian fully understood that he was not to oil or clean the machine while the same was in motion, and knew of all the dangers connected with the cleaning and oiling or attempting to clean and oil the said moulds or grooves while the machine was in motion. * * * Defendant admits that about August 21, 1899, the said Killian was injured by having his right hand caught in one of said moulds, but in this behalf alleges the fact to be that said Rudolph Killian was clearly negligent and reckless, and not while in the performance of any service or duty required of him, or which he was directed to perform, thrust his hand in one of said moulds while the machine was in motion."

Upon the trial of the cause no objection seems to have been urged on the ground that there was a variance between *allegata et probata*. We think the test is, was plaintiff in error surprised or misled by reason of the allegations in the petition? Code of Civil Procedure, sec. 138.* The petition charges that the cleaning of the machine was highly dangerous; that defendant well knew of its dangers; that plaintiff, on account of his youth and inexperience, was unable properly to appreciate the dangers of the work; that defendant wrongfully neglected to instruct him as to the dangers; that it was the duty of defendant, knowing the youth and inexperience of plaintiff, to warn him, and to protect him from risks which, by reason of his youth and inexperience, he could not properly appreciate; and that because of this failure of defendant, plaintiff, while cleaning and oiling the machine, according to the direction and command of the defendant, caught his right hand in the machinery, "the hand being drawn into and between the said cog-wheels," and thus injured. The answer expressly pleaded that plaintiff was forbidden to oil the machine while the motive power was

*In Cobbey's Annotated Code, a valuable note follows this section. —W. F. B.

attached, and that he was injured by reason of his own negligence. We think, that, construing the pleadings liberally, as we are bound to do, the issue was whether defendant in error was injured as a consequence of cleaning and oiling the machine while acting in obedience to the command and direction of the master; and whether, by reason of his age, lack of prudence, and inexperience, the danger of the task was such that he did or did not assume the risks incident thereto. The fact that in addition to other allegations, it is alleged that there were cog-wheels beneath the moulds, and that the hand was drawn into and between the cog-wheels, the answer admitting that the hand was caught in one of the moulds, but that defendant in error was at the time engaged in performing his task in a manner forbidden by the defendant, can not be material, unless it actually misled the defendant below to its prejudice in maintaining its defense upon the merits. We are quite confident that no such prejudice resulted, and it therefore follows that the first contention of plaintiff in error must be overruled.

The next contention relates to instructions Nos. 5, 6, 8, 10 and 14, given by the court on its own motion, these instructions being assailed for reasons which will be considered.

It is not necessary to discuss the complaint made of instruction No. 5, inasmuch as it is based upon the theory that there is a substantial variance between *allegata et probata,* and may, therefore, be deemed already disposed of.

Instruction No. 6 is as follows: "Under the law when one is known to be inexperienced, who is put to work upon a machine which is dangerous to operate unless with care and by one who is familiar with its structure, it is the duty of the employer to instruct such person so that he will fully understand and appreciate the danger of his employment and the necessity for the exercise of due care therein. Therefore, if you find from the evidence that the employment of plaintiff at the time of his injury was

dangerous, and that plaintiff was known to be inexperienced, and that defendant knew the peril or should have known the peril to which plaintiff would be exposed, and did not give him sufficient instruction therein, and if he from youth or inexperience failed to appreciate the danger, and was injured in consequence thereof, and because of defendant's negligence, and the plaintiff was not guilty of contributory negligence, then the defendant is responsible."

With reference to this instruction, it is said that before a defendant can be held liable for failure to instruct, it must be shown that plaintiff—taking, for instance, the case of a minor—from his youth and inexperience, did not know and appreciate the danger, or "by the exercise of reasonable care on his part would or could not have known it."

It may be admitted that, ordinarily, an employee will be charged with notice, not only of danger known to him, but of dangers which, by the exercise of reasonable care, he might have known. But we think the hypothesis of youth and inexperience precludes the capacity of exercising such care. If plaintiff did not know of the dangers because of his youth and inexperience, how can he be required to ascertain their existence by the use of a capacity which he did not possess? Youth and inexperience are inherent—as, for instance, blindness or deafness—and are inconsistent with the exercise of what would be reasonable care in adult persons. It could not well be said that if plaintiff, by reason of his deafness, could not hear the machinery, or by the exercise of reasonable care on his part could not have heard it, he should have exercised reasonable care in that regard; because if he is deaf, reasonable care in hearing could not be required of him. And so here, if by reason of youth and inexperience he failed to appreciate the danger, it would be idle to tell the jury to go further, and inquire whether, nothwithstanding he failed to appreciate the danger because of his youth and inexperience, he could not have exercised reasonable care and overcome his youth and inexperience.

This construction of the law would be unwarranted, and we think the instruction, in regard to the contention urged, is without error.

Instruction No. 8 reads as follows: "It is the duty of every master to conduct his business with reasonable care and prudence so as not negligently or carelessly to subject his servants to any danger not ordinarily incident to or connected with his employment, and it is the duty of the master to provide his servant with a reasonably safe working place, and with reasonably safe machinery with which to work, and if the master fails in this regard, and the servant is injured thereby and for such reason, then the master is liable in damages for such injury, unless the negligence or want of ordinary care of plaintiff contributed to his injury."

The two objections urged against this instruction are, first, that it is wholly inapplicable to the issues; and second, that it is wrong as a proposition of law, because in it the master is held to more than the exercise of ordinary care in furnishing a reasonably safe place for the servant to work, in effect making the master the insurer.

It is disclosed by the testimony, that at the time Ittner, manager for plaintiff in error, told the boys, including defendant in error, to hurry up and clean the brick-machine, it was running by steam-power. The manager, after giving this order, immediately went away and was not present when the injury was received. It is further shown, and may be said to be apparent to any one, that the work of cleaning and oiling the moulds of the machine while the motive power was attached was highly dangerous. It had been customary to detach the steam-power from the machine before cleaning was undertaken, but on one or two occasions this had not been done. Horace Ittner was not called as a witness, and there was no testimony by plaintiff in error. From the evidence in the record we think it is fairly inferable that the manager in charge of the works understood that the machine was being cleaned while the motive power was attached. We think plaintiff

in error must be held to know that this was highly dangerous. When the extreme youth and presumptive inexperience of defendant in error are taken into consideration, there can be no doubt that plaintiff in error owed the affirmative duty to its employees, charged with the task of cleaning and oiling the machine, to see that the motive power was detached, and to have it run by hand. The duty of the master to exercise care in having reasonably safe machinery for the servant was in this regard violated by plaintiff in error, and we are of opinion that the instruction quoted, while it might have been modified to make it more clearly applicable, can not be held to have been so inapplicable as to be prejudicially erroneous.

As to the second objection urged, going to the correctness of the abstract proposition stated, viz., that it states without qualification that the duty rests upon the master to provide a reasonably safe place, we think that when read as a whole, the instruction could not have misled the jury. As a general proposition, it is therein said to be the duty of every master to conduct his business with reasonable care and prudence, so as not negligently or carelessly to subject his servants to any danger not incident to the employment; and this being the requirement of the law, therefore it is manifestly his duty—that is, a specific duty under the general "duty to conduct his business with reasonable care and prudence to provide his servant with a reasonably safe working place," etc. The instruction may be thus read, and we think it was so understood by the jury.

Instruction No. 10 reads in part as follows: "The same degree of care and prudence in avoiding danger is not required from a child with less prudence, discretion and understanding as from an adult, if you find from the evidence that plaintiff possessed less prudence, discretion and understanding than an adult." It is said that this instruction is erroneous because it ignores the principle that it is not the mere fact of minority which entitles a child to immunity, but the immaturity which is apt to be,

but which is not necessarily, a concomitant of minority. The observation accords with experience that a youth less than twenty-one years of age may have much more prudence and discretion than a man of more than twenty-one years. But in the case at bar, defendant in error was a child of little more than fourteen years. There was no proof that he was possessed of more or less prudence and understanding than the average boy of that age. He testified at the trial, and the jury saw and heard him, and were clearly at liberty to say whether, taking into consideration his age and experience, he could be held to the same degree of care and prudence as an adult. The master is liable if the servant failed fully to understand and appreciate the risk on account of his infancy. *Omaha Bottling Co. v. Theiler,* 59 Nebr., 257, 80 Am. St. Rep., 673.

It is also said that the instruction is objectionable because it virtually tells the jury that a child possesses less prudence and understanding than an adult. We do not think so. The instruction states with manifest correctness that the same degree of care is not required of a child who actually possesses less discretion, prudence and understanding than an adult, and that this principle would apply to defendant in error if they found from the evidence that he, as a child, did possess less prudence, discretion and understanding than an adult.

It is suggested that there is no proof tending to show that defendant in error was limited in his mental capacity, or that he was feeble-minded. But this does not make the instruction inapplicable. We are of opinion that there is no presumption that a child fourteen years of age has as much discretion, prudence and understanding as an adult. It was not necessary for defendant to prove that he had less than the average child of fourteen. It was clearly within the right of the jury to say from the knowledge they had that defendant in error possessed less discretion and understanding than an adult, and to conclude therefrom that, as a matter of law, he could not be held to the same degree of care and prudence.

It is suggested that the testimony of defendant in error shows that he understood and appreciated the danger as well as any adult could, with respect to the manner in which he did get hurt. On cross-examination, defendant in error, in answer to the question, "You knew that if you did not take it [his hand] out [of the mould] it would get caught?" said, "Yes, sir." And, further, "You understood that perfectly well, just as well as you know that if you put your finger in the fire it will be burned." Answer: "Yes, sir." We can not see the significance of this testimony, which is emphasized by counsel. In all probability a child of eight or ten years would have given the same answers to these questions. Grant that defendant in error knew perfectly well that if his hand were allowed to remain in one of the moulds of the revolving table too long, it would get caught, the question still remains, did he possess sufficient prudence, discretion and understanding properly to appreciate the extraordinary danger of inserting his hand in the moulds while they were slowly but steadily carrying it to certain destruction? We can not discover that there is any error in this instruction.

Instruction No. 11 states as a matter of law that a servant assumes the ordinary risks arising from dangerous machinery when they are known to him, or would be apparent to persons of his experience and understanding, if he voluntarily entered upon the work and continued therein without objection; and it is then said: "But when a servant in obedience to the requirements of the master incurs the risk of machinery, which, although dangerous, is not of such a character that it may not be safely used by the use of reasonable skill and care on the part of such servant, considering his age, experience and understanding, then, as a matter of law, the servant does not necessarily assume the risk of danger arising from the use of such machinery." It is urged that this instruction incorrectly states the rule of assumed risk. Read as a whole, we think the court therein states two propositions: (*a*) The servant assumes the ordinary risks known to him

when he voluntarily enters upon the work, and continues therein without objection; but (*b*) the risk of using dangerous machinery is not necessarily assumed by the servant as a matter of law, if the servant incurs the risk in obedience to the command of the master, and if the machine is not so glaringly or obviously dangerous that it may not be safely used by the use of reasonable care and skill; and this latter question is to be determined by considering the age, experience and understanding of the servant. Under this instruction, the jury would be required to find, first, that defendant in error incurred the risk in obedience to the requirements of the master; and second, although the machinery was dangerous, yet, considering the age, experience and understanding of defendant in error, it was nevertheless not of such a character that it might not have been safely used in the exercise of reasonable care and skill. This instruction is, doubtless, correct. The servant can not fly in the face of the manifest and inevitable danger—danger that can not be avoided, even by the exercise of ordinary care and skill—even though he be commanded by his master to incur the risk; and if he does so he can not recover. *Shortel v. City of St. Joseph,* 104 Mo., 114, 24 Am. St. Rep., 317. But we are clearly convinced, that defendant in error, a boy fourteen years of age, can not, as a matter of law, be said necessarily to have assumed the risk involved in the work in which he was injured, if he was commanded by plaintiff in error to do it in the manner in which he undertook its performance. It was not impossible to do it in that manner. It is possible that even he, using reasonable skill and care, could have done the work without injury. And this being true, if on August 21, 1899, Rudolph Killian was commanded to clean and oil the moulds of the machine, and it was the intention and understanding of both master and servant that they should be cleaned and oiled while the machine was in motion, then Killian did not necessarily assume the risk of the work as a matter of law, and the question was properly left to the jury. *Dorsey v.*

Phillips & Colby Construction Co., 42 Wis., 583. "The servant occupies a position of subordination, and may rely upon the skill and knowledge of his master, and is not free to act on his own suspicions of danger." *Iron Ship Building Works v. Nuttall*, 119 Pa., 149. "If, therefore, the master orders the servant into a place of danger, and the servant is injured, the law will not deny him a remedy against the master on the ground of contributory negligence, unless the danger is so glaring that a reasonably prudent man would not have entered into it. *Shortel v. City of St. Joseph*, 104 Mo., 114, 120. We think this instruction is free from error.

Instruction No. 12, regarding which substantially the same complaint is made, need not be further considered, except as to the contention that there was error in submitting the question whether the manager of plaintiff in error ordered defendant in error to assist in cleaning and oiling the machine while it was running by steam, as the evidence does not warrant the submission of such issue. We think the evidence warrants a reasonable inference that when the order to hurry up and clean the machine was given, it was understood that the machine was to be cleaned while it was running by steam.

Instruction No. 14, laying the rule for the measurement of damages, is complained of, because it does not limit the recovery to the period within which defendant in error would be entitled to his own earnings. It is said that defendant in error testified that all of his earnings were received by his father. We do not so understand his testimony. He said that he was not in a hurry to get his money because his father received it for him, and would let him have it if he wanted it. The instruction is not vulnerable to the objection urged.

It is finally urged that there was error in the action of the trial court in recalling the jury in the absence of plaintiff in error or its counsel, and orally stating to the jury a modification of instruction No. 13. This instruction originally told the jury that if defendant in error

understood that the machine should stand still when being cleaned, and was so instructed, plaintiff in error would not be liable. As modified, they were told that if he so understood or was so instructed, plaintiff in error would not be liable. This modification was manifestly in favor of plaintiff in error, and its failure to except thereto could not have been prejudicial.

We have examined the record carefully, and are convinced that the proceedings in the trial court were without error. It is, therefore, recommended that the judgment be affirmed.

HASTINGS, C., concurs.

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

AFFIRMED.

NOTE.—*Variance Between Pleading and Proof.*—Where the insured property is situated on the northwest quarter of a certain section of land, instead of the northeast quarter thereof, as described in the policy, the variance is not material, and the insured is not compelled, in case of loss, to seek reformation of the contract in equity before he can recover in a court of law. Opinion by REESE, C. J. *State Ins. Co. v. Schreck*, 27 Nebr., 527, 20 Am. St. Rep., 696.—W. F. B.

WEEMS H. MCLUCAS ET AL. V. ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY.*

FILED FEBRUARY 17, 1903. No. 12,551.

Commissioner's opinion, Department No. 1.

1. **Railroad:** PUBLIC HIGHWAY. Under the provisions of section 4, article 11, of the constitution of Nebraska, a railroad constructed and operated in this state is a public highway.

2. ———: ———: INTEREST OF GENERAL PUBLIC: TITLE. The general public has the same interest in the preservation and mainte-

Syllabus by court; catch-words by editor.

*Rehearing allowed. See opinion, page 612, *post.*

nance 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, can not be divested by adverse possession.

ERROR from the district court for Jefferson county. Action in ejectment brought to recover possession of a strip of land 100 feet wide, included between a line 150 feet from the central line of the railroad track and a line fifty feet from such central line, the right of way being 300 feet in width. Plea of prescription by adverse possession. The cause was submitted on an agreed statement of facts, in which it was stipulated that the defendants had had the actual, notorious, exclusive and uninterrupted possession of the premises in controversy for fifteen years. Tried below before STULL, J. Judgment for plaintiff. *Affirmed.*

NOTE.—The real question involved in this case was, did the maxim, *Nullum tempus occurrit reipublicæ*—no time runs against the state, apply to this case. If the railroad is the mere tenant of the state, adverse possession could not prevail against the sovereignty.—W. F. B.

Hon. Edmund H. Hinshaw, for plaintiffs in error:

An easement may be abandoned, and extinguished by non-use. *Henderson v. Central P. R. Co.,* 21 Fed. Rep., 358.

Mere non-user will not extingiush an easement granted by deed; but adverse possession for the statutory period will. Washburn, Easements, pp. 717, 719.

An easement to take water which is appurtenant to a mill, is lost when the mill goes to decay, or is destroyed and not rebuilt. *Day v. Walden,* 46 Mich., 575.

W. H. Barnes, also for plaintiffs in error.

M. A. Reed, W. P. Freeman and *M. A. Hartigan, contra.*

Benjamin T. White and *James B. Sheean, amici curiæ:*

The questions of law involved in this suit being of general interest to the railroads of this state, and being involved in a case soon to be submitted by us to your honors, we ask leave to file herein this brief or memoranda of authorities. We appreciate that counsel in the case have carefully and ably briefed the main questions at issue. The only purpose of this brief, therefore, is to present more fully the authorities on the questions incidentally at issue and to avoid having the same disposed of without a thorough consideration thereof.

The propositions to which the court's attention will be directed are as follows:

1. A railroad company's right of way is held for public use and is, therefore, a public highway, and title thereto can not be lost or acquired by adverse possession.

2. A right of way acquired by land grant from the government can not be lost by adverse possession, the fee thereto being in the government.

3. In those states where a right of way may be lost by adverse possession, such possession must be inconsistent with the easement of the railroad and actual notice thereof must be given the company.

That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. *Olcott v. Supervisors*, 83 U. S., 678, 694.

A railroad right of way is such a public use as to prevent the running of the statute of limitations, or the acquisition of adverse title thereto by prescription. *Southern P. R. Co. v. Hyatt,* 132 Cal., 240, 64 Pac. Rep., 272.

This grant is a conclusive legislative determination of the reasonable and necessary quantity of land to be dedicated to this public use, and it necessarily involves a right of possession in the grantee and is inconsistent with any adverse possession of any part of the land embraced

within the grant. *Southern P. R. Co. v. Burr,* 86 Cal., 279, 284; *Wilcox v. Jackson,* 13 Pet. [U. S.], *498; *United States v. Northern P. R. Co.,* 152 U. S., 284; *Hastings & D. R. Co. v. Whitney,* 132 U. S., 357; *Stringfellow v. Tennessee Coal, Iron & Railroad Co.,* 117 Ala., 250; *Wood v. Missouri, K. & T. R. Co.,* 11 Kan., 323, 349.

It is held that possession and use by the owner of the fee, of a portion of land covered by a railroad right of way, for agricultural and the like purposes, is not adverse so as to confer title upon the land owner. And this applies as well when the portion of the right of way is fenced as when unfenced. The owner of the fee having the right to make any use of the land covered thereby not inconsistent with the use by the railroad company, it must necessarily follow that the inclosure and cultivation by him of portions of the right of way not in present use by the railway company, is permissive and not inconsistent with the use of the premises by the railway company, and hence not adverse so as to confer title by adverse possession. One of the essential elements of adverse possession, is that the possession must be exclusive and inconsistent with the estate against which it is sought to be applied.

In the case of *Slocumb v. Chicago, B. & Q. R. Co.,* 57 Ia., 675, the action was brought to enjoin the railroad company from entering upon or using or in any manner interfering with a strip of land, about twenty-one feet in width, to which plaintiff claimed title by adverse possession. It appeared that the predecessor in interest of the defendant railroad company, had procured, by parol agreement with plaintiff's grantors, a right of way seventy feet in width over the premises in question, and had entered upon and constructed a railroad thereover. Plaintiff secured her title after the construction of the road, and under a conveyance which recited that the premises were conveyed subject to the right of way of the railroad company. At the time of acquiring her title a fence stood within fourteen feet of the railroad track, and there was nothing of record showing the extent of the right of way.

After plaintiff had been in possession of the strip in question for more than ten years, the defendant moved in the fence upon plaintiff's inclosure about twenty-one feet, and proceeded to construct an additional railroad track thereon. The court held, that notwithstanding the fence stood within fourteen feet of the railroad track when plaintiff acquired her title, she was advised by the presence of the railroad track and the recitals in the conveyance, as well as the law under which the company could have acquired a one hundred foot right of way, that the railway company claimed a right of way over the premises, and by inquiry could have ascertained the extent thereof.

Joseph W. Carr, also *amicus curiæ.*

W. A. Stewart and *Hector M. Sinclair, amici curiæ,* on rehearing.

R. A. Brown and *John Heasty,* also (on rehearing) for defendant in error.

J. W. Deweese and *Frank E. Bishop,* on September 19, 1902, filed an additional memorandum for defendant in error.

KIRKPATRICK, C.

This is an action in ejectment brought in the district court for Jefferson county by the St. Joseph & Grand Island Railway Company, defendant in error, against Weems H. McLucas and John C. McLucas, plaintiffs in error, to recover possession of a strip of land extending along the track of the railroad in the city of Fairbury; being 150 feet wide from the centre of the track. The land was in possession of plaintiffs in error. The petition alleged that defendant in error was a duly incorporated railway company, operating its line of road through Jefferson county as a common carrier of passengers and freight; that it has a legal estate in and was entitled to the immediate possession of the strip of land described in

the petition. The answer pleaded that the cause of action stated in the petition did not accrue within ten years next before the commencement of the action, and that plaintiffs in error were at the commencement of the action, and for more than ten years prior thereto had been, in the open, notorious, exclusive, adverse possession of the premises, and that such possession had ripened into a title in fee simple. To this answer, for reply, the railway company filed a general denial. Trial was had to the court, without the intervention of a jury, resulting in a finding and judgment for defendant in error.

There has been a very thorough and painstaking investigation of the questions involved, and the authorities bearing thereon, and an able presentation thereof at the bar of this court, not only by counsel in the case, but by other distinguished counsel, who appear as *amici curiæ*, which has enabled us the more readily to reach a conclusion satisfactory to ourselves.

The trial court found that plaintiffs in error had been in the open, notorious, exclusive possession of the premises in controversy for fifteen years prior to the commencement of the action, and it is not claimed that this finding is not abundantly sustained by the evidence. Relying upon this finding, plaintiffs in error contend that the judgment should as matter of law have gone in their favor. A number of reasons are urged by defendant in error in support of the correctness of the judgment of the lower court, among which are, first, that in jurisdictions where a right of way may be lost to a railroad company by adverse possession—our own claimed not to be of that number—possession, in order to be adverse, must be of a character inconsistent with the easement of the railroad company. In other words, it is said that in such jurisdictions the possession is not adverse as long as it is compatible with the use to subserve which the right of way was in the first instance granted. The ground upon which this contention rests is stated at length and somewhat aptly, by the supreme court of Tennessee, in *Railroad v.*

French, 100 Tenn., 209, 66 Am. St. Rep., 752, as follows (p. 753): "It appears from the record that the railroad company, under its charter, has an easement or right of way over one hundred feet on each side of the centre of its road, and it has been repeatedly held by this court that a user by an adjacent landowner of the right of way up to the line of the road for an indefinite time is not adverse to the road-easement. It may be used for agricultural or any other legitimate and proper purpose. A house may be built upon it and occupied, and it may be inclosed, and the railroad will not lose its easement. The possession for such purpose is consistent with the easement, no matter what kind of a paper title the party in possession may have, and the possession could not be adverse, until the railroad may need the premises and demand them for railroad purposes. Occupancy with a house or inclosure and cultivation and use, are not sufficient to defeat the easement of the road, inasmuch as the road can only demand and take its full right of way when it becomes necessary for railroad purposes, and until then the possession is not adverse." Again, the supreme court of Michigan, in *Matthews v. Lake S. & M. S. R. Co.,* 110 Mich., 170, 172, 64 Am. St. Rep., 336, has said: "We recognize the doctrine that, if the use of the owner of the servient estate be consistent with its use for an existing easement, the owner of the servient estate can not acquire title by such possession."

While there is some conflict, the great weight of authority sustains the doctrine announced above. From among the cases the following may be cited: *East T., V. & G. R. Co. v. Telford's Executors,* 89 Tenn., 293, 10 L. R. A., 855; *Northern Comus Investment Trust Co. v. Enyard,* 24 Wash., 366; *Mobile & O. R. Co. v. Donovan,* 104 Tenn., 465; *Railroad v. French, supra; Union P. R. Co. v. Kindred,* 43 Kan., 134; *Carolina C. R. Co. v. McCaskill,* 94 N. Car., 746; *Southern P. R. Co. v. Hyatt,* 132 Cal., 240, 54 L. R. A., 522. While the following cases, though some are distinguishable from the case at bar, adhere to the

contrary view: *McKinney v. Lanning,* 139 Ind., 170; *Louisville & N. R. Co. v. Quinn,* 94 Ky., 310; *New York, N. H. & H. R. Co. v. Benedict,* 169 Mass., 262; *Woodruff v. Paddock,* 130 N. Y., 618.

A second reason urged, and one upon which we place the determination of this case, is that under the constitution of this state a railroad is a public highway, and that as such, title to its right of way can not be taken from it by adverse possession. Section 4, article 11 of the constitution of this state, is in part as follows: "Railways heretofore constructed, or that may hereafter be constructed in this state are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law." The exercise of the right of eminent domain in the condemnation of land for right of way purposes by railroad companies is wholly inconsistent with any other theory than that the railroad is a public highway; and the universal holding of the courts, so far as we are aware, is that railroads are highways. *Olcott v. Supervisors,* 83 U. S., 678, 21 L. Ed., 382; *San Francisco, A. & S. R. Co. v. Caldwell,* 31 Cal., 367, 371. That the companies operating them may be compelled to transport passengers and freight alike for all persons is well settled. This court has many times so held. That railroads are impressed with a public character, is the more manifestly true under the terms of the constitutional provision quoted. 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. *Welton v. Dickson,* 38 Nebr., 767, 22 L. R. A., 496, 41 Am. St. Rep., 771. The power to acquire title to the right of way of a railroad company by adverse possession, is wholly inconsistent with the right and interest of the general public in the highways of the state. The fact that a railroad is owned and operated by a private corporation, and

that passengers and freight can only be transported thereon upon tracks and in cars constructed especially for that purpose, does not make it any the less a public highway. If a railroad company could lose any portion of its right of way because it has no present or immediate need of it for the actual construction or maintenance of trackage thereon, it might at some time result in so curtailing its right of way and road-bed as to prevent the performance by it of the duties owing to the public, and to perform which it was created. In *Krueger v. Jenkins,* 59 Nebr., 641, this court, speaking by SULLIVAN, J. (the question under consideration being the power to acquire title to a county road by adverse possession), said (p. 643): "The right involved in this litigation is one belonging exclusively to the public at large. Neither Douglas county nor its citizens have any peculiar interest in it. A county does not hold the legal title to country roads within its borders; it has no power of disposition over them; it has no proprietary interest in them; in performing the duties with which it is charged in connection with them, it acts as an agent of the state, and in the interests of the general public. A county, being a mere political subdivision of the state, created for the purposes of government, ought not to be bound by limitation laws any more than the state itself. And, as to property or rights held exclusively in trust for the general public, the decided weight of authority is that such laws have no application." We apprehend that there is no essential distinction between the case cited and that in hand, and can see no reason why the principle invoked in the former should not be accorded controlling force in the latter. The public has the same interest in a railroad as it has in all other public highways of the state, and we are of opinion that title to the unused portion of the right of way of a railroad being operated in this state can not be acquired by adverse possession.

The judgment of the lower court is right, and it is, therefore, recommended that the same be affirmed.

HASTINGS and LOBINGIER, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed November 5, 1903. *Former judgment of affirmance adhered to:*

1. **Federal Statute:** INTERPRETATION OF THE U. S. SUPREME COURT. 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.

2. ———: ———: RAILROAD RIGHT OF WAY. According to the decision of the supreme court of the United States in the case of *Northern P. R. Co. v. Townsend*, 190 U. S., 267, 23 Sup. Ct. Rep., 671, a congressional grant of a right of way for the construction of a railroad is upon an implied condition, which is inconsistent with the acquisition in any manner of any part of such right of way by a private individual or corporation.

3. **Railroad Right of Way:** GRANT FROM GOVERNMENT: STATUTE OF LIMITATIONS. The right of way of the Grand Island Railway Company, having been acquired by grant from the general government for the construction of a railroad, the statute of limitations is not a defense to an action brought by said company to recover possession of a strip of land within such right of way.

SULLIVAN, C. J.

This was an action of ejectment, brought by the railroad company to recover possession of a strip of land situated within its right of way in the city of Fairbury. Defendants asserted title by adverse possession, and, according to the findings of fact, proved exclusive occupancy under claim of right for fifteen years. The trial court, however, held that the statute of limitations had no application to the case and accordingly gave judgment in favor of the plaintiff. This judgment was brought here for review and affirmed for the reasons stated in the opinion of Commissioner KIRKPATRICK (*ante*, p. 607). Our faith in the validity of these reasons was somewhat shaken

by the argument supporting the motion for a rehearing, but whether they are sound or unsound it is, at this time, unnecessary and inadvisable to determine. The plaintiff acquired its right of way for the construction of a railroad by congressional grant, and it contends that the implied condition upon which the grant was made necessarily excludes the theory that a private individual or corporation may obtain title to any portion of such right of way by adverse possession or otherwise. The question thus raised involves a construction of a federal statute, the act of July 23, 1866,* and is therefore a federal question, upon which, as the law now stands, this court is not at liberty to exercise independent judgment. Since the decision was rendered affirming the judgment of the district court, the supreme court of the United States has held, construing an act of congress in all material respects identical with the one here involved, that a state statute of limitations is not a bar to an action brought by a railroad company to recover a portion of its right of way. *Northern P. R. Co. v. Townsend,* 190 U. S., 267, 23 Sup. Ct. Rep., 671, 47 L. Ed., 1044. We quote at length from the opinion: "The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same as long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company cease to use or retain the land for the purpose for which it was granted. This being the nature of the title to the land granted for the special purpose named, it is evident that, to give such efficacy to a statute of limitations of a state as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use, would be to allow that to be done by indirection which could not be done directly; for, as said in *Grand Trunk R. Co. v. Richardson,* 91 U. S., 454, 'a railroad company

* 14 Statutes at Large, p. 210, ch. 212.

is not at liberty to alienate any part of it so as to interfere with the full exercise of the franchises granted.' Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by congress, for, as said in *Northern P. R. Co. v. Smith*, 171 U. S., 260, speaking of the very grant under consideration: 'By granting a right of way 400 feet in width, congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance.' Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of a railroad, and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right of way must be presumed to be necessary for the purpose of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes. To repeat, the right of way was given in order that the obligations to the United States, assumed in the acceptance of the act, might be performed. Congress having plainly manifested its intention that the title to, and possession of, the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way can not be treated, without overthrowing the act of congress, as forming the basis of an adverse possession which may ripen into a title good as against the railroad company."

With this decision before us, and with an imperative obligation resting upon us to accept it as binding authority, it would be manifestly unprofitable to inquire whether a different conclusion might not be reached if the right of way had been acquired otherwise than by grant from the general government. Other cases are pending in this court which will, we are advised, bring before us in a short time the broad question of the applicability of the limitation law to actions brought by railroad companies

to recover land acquired for right of way by condemnation or purchase. Until these cases, or some of them, are reached and submitted, we decline to either affirm or repudiate the doctrine announced in the former opinion. The matter will, meanwhile, remain *res integra*.

The judgment of affirmance is adhered to.

FORMER JUDGMENT ADHERED TO.

NOTE.—*Northern P. R. Co. v. Townsend* is cited in this opinion. This was an action in ejectment begun in the district court of Wadena county, Minnesota, by the railroad company to recover possession of two strips of land situated on either side of its track, where the same crossed three forties of the northwest quarter of section 24, township 134, range 35. It was considered that under the land grant of July 2, 1864 (12 United States Statutes at Large, 365), the filing of a map of definite location in 1871, and by the construction of the railway, the plaintiff's predecessor acquired a right of way 400 feet in width where the road ran over what was then public domain, which included the strip in question. The defendant was the grantee of two persons who entered the forties under the United States Homestead Act, subsequent to 1871. Defendant admitted the right and constructive possession to be in the plaintiff, but claimed that possession and the right thereto had been wholly lost by reason of the fact that defendant and defendant's grantors had been in actual, open, notorious and adverse possession of these strips, cultivating the same continuously for more than fifteen years. The case was tried by Searle, J. Verdict and judgment for plaintiff. The judgment was reversed by the supreme court. Opinion by Collins, J., 84 Minn., 152. On error to the supreme court of the United States, the decision of the supreme court of Minnesota was reversed. Opinion by White, J.; Harlan and Brown, JJ., dissenting, 190 U. S., 267.—W. F. B.

JOHN GOES V. GAGE COUNTY.

FILED FEBRUARY 17, 1903. No. 12,539.

Commissioner's opinion, Department No. 2.

1. **County:** TOWNSHIP ORGANIZATION: HIGHWAY: CULVERT: CONSTITUTION: MAINTENANCE: LIABILITY. 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.
2. **Duties and Liabilities of Townships.** Such duties and liabilities are imposed upon the townships, in counties so governed.
3. **Counties Which Have Adopted Township Organization.** Counties which have adopted the township organization act, are 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 by reason of such failure or neglect.

ERROR from the district court for Gage county. Action, in the nature of case, against a municipal corporation charged with the repair of highways (as was alleged) for injury received in the death of a mare, the property of plaintiff, in said county. Plaintiff below sued for $75, the alleged value of the mare. Tried below before LETTON, J., upon an agreed statement of facts, without the intervention of a jury. Finding and judgment for defendant. *Affirmed.*

Edwin N. Kauffman, for plaintiff in error.

Harry C. Sackett and *Harry E. Spafford, contra.*

BARNES, C.

This suit was commenced by the plaintiff in error against Gage county to recover the sum of $75 on account of damages alleged to have been sustained by him for the loss

Syllabus by court; catch-words by editor.

of a mare, injured while traveling upon a public road or highway situated in that county. A jury was waived, and the cause was submitted to the district court on a stipulation or agreed statement of facts which is as follows:

"First, that the defendant, the county of Gage, is a municipal corporation, duly organized and existing under and by virtue of the general laws of the state of Nebraska, and is a county within said state, and is under township organization. Second, that the plaintiff is a resident of said county; that on the 17th day of March, 1900, plaintiff was driving his team upon and over the public highway between the northwest quarter of section 18, township 1, range 7, and the northeast quarter of section 13, township 1, range 6 east of the 6th P. M. in Gage county, Nebraska; that this section of said highway is in road district No. 1, and under the supervision of Paddock township in said county; that at a certain point in said highway there were defects consisting of a washout creating an impassable ditch across all of said highway, except about twelve feet on the west side of said public highway, and that under and across this part of said highway there had been an old lumber culvert which had been covered by earth graded over it; that said washout extended up to and under said culvert in such a way that plaintiff in driving over the regularly traveled track upon said highway, and while crossing over and upon said culvert, his team broke through said culvert and one of the horses, a mare, fell into said ditch or washout, breaking her leg and receiving other injuries by reason of which she was rendered wholly worthless and plaintiff was compelled to kill her. Said mare was reasonably worth the sum of $75, and that the plaintiff was damaged by reason of the loss of said mare in the sum of $75; that said accident was caused by the defective construction of said road or culvert and was without any negligence or [want of] care on the part of the plaintiff; that an action was commenced by the plaintiff for the recovery of said dam-

ages within thirty days of the time of said accident; that the cost of construction and keeping in repair the said culvert would not exceed the sum of $25."

Upon these facts the court found generally for the defendant, and that the defendant was not liable for injuries sustained by the defective condition of the highway in Paddock township, because the county, in which the highway was situated, being under township organization, was not made liable by law for the care, construction, repair and maintenance of the highways and culverts situated therein; that the effect of the township organization act of 1895, was to take away the liability of counties under township organization to construct, repair and maintain the highways situated within the respective townships therein, and place that liability upon said townships. Upon these findings, judgment was rendered for the defendant, and plaintiff thereupon prosecuted error to this court.

The single question presented for our consideration is whether or not a county in this state is liable for special damages occasioned by reason of the defective condition or construction of the ordinary highways within its several townships, where the county is governed by the township organization act. It was held before the passage of the act of 1889, making counties liable for injuries occasioned by the defective condition of highways or bridges which they were required to maintain and repair, that a county was 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 on account of the negligence of the county commissioners. *Woods v. Colfax County,* 10 Nebr., 522; *Hollingsworth v. Saunders County,* 36 Nebr., 142, 144. Prior to the passage of the act of 1889, above mentioned, it was the settled law of this state that a county was not liable for injuries caused by the defective condition of its highways and bridges. Section 117, chapter 78, of the Compiled Statutes of 1901 (Annotated Statutes, sec. 6135), by which counties were

made liable for such damages, is as follows: "If special damage happens to any person, his team, carriage, or other property by means of insufficiency, or want of repairs of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in a case against the county, * * * *Provided, however,* that such action is commenced within thirty (30) days of the time of said injury or damage occurring." By this act it appears that damages can not be recovered against the county for the defective condition of highways and bridges unless it is liable to keep them in repair. Following the enactment of this law, the legislature of 1895 passed the present township organization act, and it is conceded and agreed that Gage county, the defendant in error, is one of the several counties of the state which has adopted township organization, and is governed by the terms of that act. The act above mentioned, article 4 of chapter 18 of the Compiled Statutes of 1901 (Annotated Statutes, secs. 4522-4595), provides for the adoption of township organization, and the manner in which counties adopting the provisions thereof shall be governed. We may state in a general way that the law provides for a board of supervisors, consisting of seven members; that after the adoption of that method of government the county commissioners shall divide the county into districts and appoint supervisors for district vacancies; that thereupon the board of supervisors shall meet and organize, and at once divide the county into townships; that after having made such division the board shall proceed to designate the name of each town, and may change the name of any town at any other meeting upon a petition of a majority of the voters of such town. It is further provided that the county clerk shall record, in a book kept for that purpose, the names and boundaries of each town as designated by the county board, and shall forthwith forward an abstract thereof to the auditor of public accounts of the state, who is required to make a record of the same. Provisions are

made for the appointment of township officers, and for their election; for town meetings, elections, and for a town board, consisting of the town clerk, the town assessor and the justice of the peace in and for the township. Section 21 of the act provides that: "Every town shall have corporate capacity to exercise the powers granted thereto, or necessarily implied, and no others. It shall have power: first—to sue and be sued; second—to acquire, by purchase, gift, or devise, and to hold property, both real and personal, for the use of its inhabitants, and again to sell and convey the same; third—to make all such contracts as may be necessary in the exercise of the powers of the town." Section 22 confers certain powers upon the electors of the town, present at the annual town meeting, among which it is stated that the electors shall have power to take action to induce the planting and cultivation of trees along highways in such towns, and to protect and preserve the trees standing along or on highways; to construct and keep in repair public wells, and regulate the use thereof; to prevent the exposure or deposit of offensive or injurious substances within the limits of the town; to make such by-laws, rules and regulations as may be deemed necessary to carry into effect the powers granted them, and impose such fines and penalties, not exceeding $20, as shall be deemed proper, except when the fine or penalty is already allowed by law, such fine or penalty to be imposed by any justice of the peace of the town where the offense is committed; to direct the raising of money by taxation for the following purposes: "For constructing or repairing roads and bridges within the town to the extent allowed by law. 2d. For the prosecution or defense of suits by or against the town or in which it is interested. 3d. For any other purpose required by law. 4th. For the purpose of building or repairing bridges over streams dividing said town from any other town." Besides many other matters too numerous to mention here. Section 26 further provides that: "The electors of each town shall have power at their annual town meetings to elect such town offi-

cers as may be required to be chosen to direct the institution and defense of suits at law or equity in which such town may be a party in interest; to direct such sum to be raised in such town for the support and maintenance of roads and bridges, or for any other purpose provided by law as they may deem necessary; to take measures and give directions for the exercise of their corporate powers; to impose penalties upon persons offending against any such regulations, and to make rules, regulations and by-laws necessary to carry into effect the powers herein granted." It may be further stated that this law provides that the money necessary to defray the town charges of each town shall be levied on the taxable property in such town in the manner prescribed by law for raising revenue; that the taxes, when so collected, shall be paid over to the town treasurer, and shall be paid out by him on orders drawn on him signed by the town clerk and countersigned by the justice of the peace; that the money raised by the direction of the legal voters at the annual town meeting for constructing or repairing roads and bridges within the town shall be paid to the township treasurer, and shall be expended by the town under the direction of its officers and the overseers of highways therein. In fact, the whole matter of township government is committed to the town boards, or the electors of the township, as the case may be, and each township is made a body corporate, capable of suing and being sued, and for the express purpose of conducting the town's affairs separate and apart from the affairs of the county. By section 67 of article 1 it is provided that, in addition to the powers generally conferred upon all county boards, the board of supervisors shall have power to appropriate funds to aid in the construction of roads and bridges, not exceeding two mills of the levy of the current year for general purposes, and section 100 of chapter 78 of the Compiled Statutes of 1901 (Annotated Statutes, sec. 6098), entitled "Roads," provides that when it shall be necessary to build, construct, or repair any bridge, or road, in any town, which would be an unreasonable burden

to the same, the cost of which will be more than can be raised in one year by ordinary road taxes in such town, the town board shall present a petition to the county board of the county in which such town is situated, praying for an appropriation from the county treasury to aid in the building, constructing or repairing of such bridge or road, and such county board may (a majority of all of the members elect voting for the same) make an appropriation of so much for that purpose as in their judgment the nature of the case requires and the funds of the county will justify."

By section 57 of the township organization act, it is provided that the matters for which the town is authorized to raise money by a vote at the town meeting, together with the compensation of the town officers for services rendered, shall be deemed town charges. And in section 91, chapter 78 of the Compiled Statutes (Annotated Statutes, sec. 6089), entitled "Roads," we find the following: "In counties under township organization the township road tax and the town treasury from the several road districts in discharge of road tax, and all moneys paid into the town treasury from the several road districts in discharge of labor tax, shall constitute a town road fund, which shall be at the disposal of the town board for the benefit of the road districts of the town for road purposes. Provided that one-half of all moneys paid into the town treasury from the several road districts in discharge of road and labor tax shall constitute a district road fund, and shall be expended by the town board in the road district from which it was collected, for the following purposes: First—For the construction and repair of bridges and culverts, and making fire-guards along the line of roads. Second—For the payment of damages of right-of-way of any public road. Third—For payment of wages of overseers and for necessary tools. Fourth—For the payment of wages of commissioners of roads, surveyor, chainman and other persons engaged in locating or altering any county road,

if the road be finally established or altered, as hereinbefore provided. Fifth—For work and repairs on roads."

It is therefore clear that in counties under township organization the county itself is no longer liable for the construction, maintenance and repair of the public highways within the several towns; that in such case the towns are chargeable with that duty, and are liable for its performance. The only exception to this rule is provided for by sections 102*a* and 102*b* of chapter 78, which are classified under the head of "Bridges of the County," and are as follows:

"Sec. 102*a*. That in counties under township organization, the expense of building, maintaining, and repairing bridges on public roads over streams shall be borne exclusively by the counties within which such bridges are located.

"Sec. 102*b*. The county board of every such county shall build, maintain and repair every such bridge, and make prompt and adequate provision for the payment of the expense thereof."

It appearing by the stipulation of facts in this case that the plaintiff received the injuries to his property for which he sues, by reason of the negligent construction or failure to repair a part of the highway in Paddock township, which the county was not liable to construct, maintain or repair, and not upon any bridge or portion of the highway which the county was liable in any way to maintain, there is no law authorizing a recovery in his favor therefor.

It is clear that the township organization act relieves the counties governed thereby of any liability for the ordinary construction, maintenance or repair of the highways and culverts therein, and delegates to and imposes such liabilities and duties upon the several towns. This, in effect, takes such counties out of the operation of the act of 1889, hereinbefore quoted, and, the county not being liable at common law for damages sustained by reason of a failure to repair highways and bridges, it follows that no recovery can be had in this case.

The judgment of the district court, therefore, was right, and we recommend that it be affirmed.

OLDHAM and POUND, CC., concur.

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

AFFIRMED.

FRANK MATOUSHEK V. DUTCHER & SONS.

FILED FEBRUARY 17, 1903. No. 12,635.

Commissioner's opinion, Department No. 2.

1. **New Trial:** MISCONDUCT OF JURY. 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.

2. **Motion for New Trial:** ACCIDENT: SURPRISE. A motion for a new trial on the grounds of accident or surprise, is addressed to the sound discretion of the trial court, and where it is shown that the facts on which such claim is based were known during the trial, and it is not shown that an effort was made to meet these conditions, it can not be said that there was an abuse of discretion in overruling the motion.

3. **New Trial:** NEWLY DISCOVERED EVIDENCE: MATERIAL EVIDENCE: CUMULATIVE EVIDENCE: INABILITY TO DISCUSS AND PRODUCE: GROUND FOR NEW TRIAL. To entitle a party to a new trial on the ground of newly discovered evidence, it is not enough that the evidence is material, and not cumulative, but it must further appear that the applicant for a new trial could not have discovered and produced such evidence at the trial; and where the evidence is merely cumulative, the failure or inability to produce it is not ground for a new trial.

4. **Witness:** WEIGHT-CHECKS: IDENTIFICATION: INTRODUCTION BY OPPOSITE PARTY. 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.

5. **Evidence:** VERDICT. *Held*, That the amount of the verdict in this case was amply sustained by the evidence.

ERROR from the district court for Boyd County. Action on account for livery hire, hauling freight, *et cætera*, to recover an alleged remainder due of $387.15. Plea of the general issue as to a portion of the items, set-off as to remainder, closing with a prayer for judgment for $263.83 in favor of defendant. Reply, general denial. Tried below before HARRINGTON, J. Verdict of $127 for plaintiff. Judgment according to verdict. *Affirmed.*

Syllabus by court; catch-words by editor.

A. H. Tingle, Frederick Shepherd, Lorenzo W. Billingsley, Robert J. Greene and *Richard H. Hagelin,* for plaintiff in error.

W. T. Wills and *D. A. Harrington, contra.*

BARNES, C.

Dutcher & Sons commenced this action in the district court of Boyd county to recover from Frank Matoushek a remainder alleged to be due them for hauling freight, for livery hire, and various other items of account, amounting to the sum of $387.15. Matoushek, by his answer, admitted certain of the items set forth in the petition, denied others, and set up a set-off or counter-claim against the Dutchers for and on account of payments made and certain goods, wares and merchandise sold and delivered to them, and prayed for a judgment in his favor for the sum of $263.83. The reply consisted of a denial of a part of the items of credit set forth in the answer, explained others, and concluded with a prayer for judgment in accordance with the prayer of the petition.

The real issues thus presented were, who was entitled to recover, and the amount due him on the mutual accounts set forth in the pleadings. The trial to a jury resulted in a verdict for the plaintiff for the sum of $127. Defendant's motion for a new trial was overruled, judgment was rendered against him on the verdict, and he thereupon prosecuted error to this court. The defendant in the court below will hereafter be called the plaintiff, and the plaintiff therein will be called the defendant.

The petition in error contains a great many assignments, but in plaintiff's brief and argument only four of them are presented, and therefore all of the others must be treated as waived and abandoned.

1. Plaintiff contends that the court erred in refusing to grant him a new trial on the ground of the alleged misconduct of the jury. In support of that ground we find the

affidavit of W. A. Goble, one of the plaintiff's attorneys, in which he states, in substance, that after the jury had heard the evidence, and while they were separated, and before they retired to deliberate on the evidence and their verdict at about 6:30 A. M. on the 28th day of September, 1901, he saw four or five jurymen conversing with Mr. W. T. Wills, one of the attorneys for the plaintiff, at the office door of Mr. Wills, in Butte, Nebraska, in a subdued and low-voiced manner, very earnestly; that the name of one of said jurymen was Frank Crouch; that he did not and does not know the names of the others; that he had reasons to believe and does believe that said Wills was talking to said jurymen about the action; that the conversation entirely ceased when he drew near them; and that nothing was said in his hearing. Opposed to this affidavit is one made by W. T. Wills, one of the defendant's attorneys, and the person mentioned in Goble's affidavit, in which we find the following statement: Affiant says that during the trial of this cause he never had any talk with any of the jurors concerning the cause, and none of the jurors talked with this affiant concerning the cause, and at no time did any of the jurors talk with the affiant, or affiant with the jurors concerning the case.

It further appears that on the hearing of the motion for a new trial, plaintiff produced one M. S. Dailey, who testified, in substance, as follows: I had a conversation with one of the men, who said he was a juror. I learned afterwards that he was. We were engaged in conversation the morning after the evidence was in, and before the jury retired. I told him sometime when it came handy that I would tell, I think it was plaintiff Dutcher's folks, just what I thought regarding the matter of that book, and I went on to state that I believed the book was sold here at my sale, but I could not swear to it. He said, "I believe that too." The conversation went on a little further, and I took it he was a juror from his talk, and I asked him and he said he was, and I told him to excuse me, that I did not know he was, and I went off. I think he said that it did

not make any difference if he was a juror. I afterwards learned that his name was Frank McEwen. The witness also stated that he at once communicated the fact to one of plaintiff's attorneys. The juror named testified that he did not talk with any person on the streets of Butte, or at any other place, about the case during its trial; neither did he talk about the evidence adduced or being adduced during the progress of the trial; that he did not during the progress of the trial have a conversation with one M. S. Dailey concerning the case; that he did not say that in his opinion one of the witnesses had sworn falsely; that he did not say to Mr. Dailey, or any other person, that it did not make any difference; and that during the progress of the trial he had no conversation with any person concerning the case, or the evidence in the case, or the witnesses who testified in the case.

The court, on consideration of this conflicting evidence, found that the jury was not guilty of misconduct, and overruled the motion for a new trial. In the case of *McMahon v. State*, 46 Nebr., 166, Justice HARRISON, delivering the opinion of the court, said: "Another assignment of the petition which is urged, is one in relation to alleged misconduct of the jury after the cause was submitted and they had retired to deliberate. The evidence in respect to the allegations of misconduct was directly conflicting, and the finding of the trial court on this point will not be disturbed." This rule was adhered to in *Carleton v. State*, 43 Nebr., 373. The showing in support of this ground for a new trial was clearly insufficient.

In the case of *Johnson v. Greim*, 17 Nebr., 447, 449, it was shown that the jury, while on their trip to examine the real estate alleged to be damaged by overflow of water, were taken by the bailiff, by the order of the sheriff, to the residence of the defendant in error, without his solicitation or the solicitation of the jury, and there being no other convenient place to procure it, dinner was served to said jury and paid for by the bailiff. It was affirmatively shown that the defendant in error had no conversation

with the jury upon the subject of the cause on trial, and it was held that no misconduct on the part of the defendant in error or the jury, was shown which would require a new trial.

In the case of *Omaha Fair & Exposition Ass'n v. Missouri P. R. Co.,* 42 Nebr., 105, the court said (p. 109): "Mere communications between a party and a juror, not referring to the case, and unaccompanied by circumstances creating obligations, or such as would probably create a sense of obligation, have never been held in this state sufficient alone to vitiate a verdict."

The affidavit of Goble, if true, did not show that the jurors were conversing with defendant's counsel about the case, and the finding of the court on this question was amply sustained by the evidence. Again, it will be observed that it is quite clear that the plaintiff's counsel were aware of the alleged misconduct of the jury before the cause was finally submitted; that they waited until after the verdict had been returned against their client before they made any complaint or in any manner brought the alleged misconduct to the attention of the court. The objection, when it was made, came too late. *Peterson v. Skjelver,* 43 Nebr., 663; *Nye & Schneider Co. v. Snyder,* 56 Nebr., 754; *Parkins v. Missouri P. R. Co.,* 4 Nebr. [Unof.], 113.

The order of the district court refusing a new trial for alleged misconduct of the jury was right, and should be sustained.

2. Plaintiff insists that the court erred in refusing to grant a new trial on the grounds of accident, surprise or newly discovered evidence. His affidavit in support of those grounds set forth the following facts: That during the trial of the case certain weight-tickets were submitted to him by counsel for plaintiff, which tickets he was asked to identify; that a large number of the tickets were unsigned, and all or nearly all were written in pencil; that he has since examined such tickets and has discovered that a large number of them are not in his handwriting, the handwrit-

ing of his sons, or any one working for or authorized by the defendant to write them; that after the tickets were shown to him, and during the further progress of the trial, he had not the time to investigate and discover the truth as to the tickets; that he was surprised by the introduction of the tickets in evidence, and had neither time nor opportunity to closely examine the same or compare them with his own accounts; that after the testimony, and during the trial, he was unable to find his scale book containing duplicates of each and every one of the weigh tickets issued at any time during the time covered by the pleadings in said case, to the plaintiff, by himself or by any one authorized to do so; that he has now in his possession the scale books containing said duplicates, that the tickets testified to by plaintiff, Clarence Dutcher, and exhibited to affiant as aforesaid, furnish all of the excess which plaintiff claims over the amount shown by the defendant's book account introduced in evidence in said trial, and defendant's testimony and weights shown by said unsigned tickets did not correspond with any weights shown in defendant's said books, but do correspond with weights shown by tickets issued to the plaintiff by one Chapman for William Krotter & Company, and for which transaction the plaintiff received payment from said William Krotter prior to the commencement of this action. It appears from reading the bill of exceptions that while the plaintiff was on the witness stand giving evidence in support of the matters set forth in his answer, the weight-checks or tickets in question, were exhibited to him; that he took time to and did examine them, and after such examination identified all of them but four, which he laid to one side; and he then testified that with the exception of the four they were all issued from his yard, either by himself or his clerks; that he was in doubt about the four. Defendant's counsel at that time was about to offer them in evidence, and the court stated they would be received on rebuttal. It thus appears that the plaintiff properly identified these checks himself, and that he knew from the time that he so identified them that

they would be offered in evidence on rebuttal; yet, so far as the record discloses, he made no effort to procure his scale books, or any other evidence to impeach their validity, until after the trial was over and the verdict was rendered against him. No surprise was shown such as would entitle him to a new trial. No diligence was used by him, and no effort was made to procure the scale books described in his affidavit for use on the trial. He did not even ask the court to delay the final submission of the case in order to enable him to procure his scale books, or any other evidence to impeach the validity of the scale tickets. These scale books can not be said to be newly discovered evidence, within the meaning of the statute upon that question. To entitle a party to a new trial on account of newly discovered evidence, it is not enough that the evidence is material, and not cumulative, but it must further appear that the applicant for a new trial could not, by the exercise of reasonable diligence, have disovered and produced such evidence in the trial. *Fitzgerald v. Brandt,* 36 Nebr., 683. Diligence, or want of it, in discovering the testimony in a particular case, depends in so great a degree upon various circumstances surrounding the parties and the conducting of the case, which are peculiarly within the knowledge of the trial court, that its discretion upon a matter of granting a new trial, made in view of them, will not be disturbed. A motion for a new trial on the ground of accident or surprise is addressed to the sound discretion of the trial court, and unless there appears to be an abuse of that discretion the ruling upon such motion will not be disturbed. *Zimmerer v. Fremont Nat. Bank,* 59 Nebr., 661. At most, the stubs of the scale books were cumulative evidence. The plaintiff testified that all of the business transactions between himself and the defendants were entered on his books. These books were introduced in evidence. So that the scale books, if produced, would have corresponded with the entries in his books which were already in evidence, if his theory of what they showed be true. As a general rule newly discovered evidence, which is simply

cumulative, is not a sufficent ground for a new trial. *Bolar v. Williams,* 14 Nebr., 386.

We hold that there was no error in refusing to grant a new trial on the ground of accident or surprise and for want of newly discovered evidence.

3. It is contended by the plaintiff that there was reversible error in the admission of evidence, to wit, in the admission of the weigh tickets or scale tickets, exhibits 16 to 69, inclusive, because it is claimed that they were not properly identified, and that a large number of them did not purport to be signed by any one. We can not sustain this contention. It appears that the plaintiff himself, when on the witness stand, identified all of these tickets except four, which were laid aside. Being thus identified, it was proper to use them to rebut his testimony, and there was no error in permitting them to be read to the jury.

4. Lastly, it is contended that the verdict is an impossible one; that it can not be explained on any other theory than that it was arrived at by an arbitrary agreement or by chance. It is sufficient to say, in relation to this contention, that the plaintiff figures out a different sum than that fixed by the verdict as his view of what the evidence showed, while the defendant takes the same evidence, and by a system of figures which appears to be intelligible, finds the sum of $127 due to him, which was the exact amount of the verdict. The evidence was all before the jury, and it was the duty of that body to determine from it which one of the parties was indebted to the other, and the amount of such indebtedness. A careful reading of the bill of exceptions convinces us that the evidence justified the jury in finding the verdict which was returned by them, and it should not be set aside by a reviewing court.

We therefore recommend that the judgment of the district court be affirmed.

OLDHAM and POUND, CC., concur.

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

AFFIRMED.

MARK LEONARD, TREASURER OF SCHOOL DISTRICT NO. 39, KEITH COUNTY, V. STATE OF NEBRASKA, EX REL. WESLEY TRESSLER, COUNTY SUPERINTENDENT OF PUBLIC INSTRUCTION OF KEITH COUNTY.

FILED FEBRUARY 17, 1903. NO. 12,581.

Commissioner's opinion, Department No. 2.

1. **Treasurer of School District:** ORDERS: REGISTRATION: PAYMENT: MANDAMUS. It is the duty of the treasurer of a school district to register and pay, from the funds in his hands as treasurer, orders properly drawn by the director and countersigned by the moderator, and if he refuses to pay such orders, mandamus will lie to compel the performance of such duty.

2. **Repairs on Schoolhouse:** DIRECTOR: MODERATOR: CONTRACT. The director of a school district, with the consent of the moderator, may contract for repairs on a schoolhouse of the district during vacation.

3. **Contract:** REGULAR MEETING. It is not necessary that such contract be entered into at a regular meeting of the school board of the district.

ERROR from the district court for Keith county. Application, on the relation of the county superintendent, for a writ of mandamus to the treasurer of school district numbered 39, to require him to register and pay a certain school order. Heard below before GRIMES, J. Writ allowed. *Affirmed.*

John H. Bower, for plaintiff in error.

H. E. Goodall, contra.

OLDHAM, C.

This was an action of mandamus brought by the county superintendent of Keith county, Nebraska, to compel the treasurer of a school district of said county to register and pay a certain school order. The affidavit, which takes the place of a petition, sets forth the official capacity of the relator; the fact that the director and moderator of the

Syllabus by court; catch-words by editor.

school district had contracted for repairs to the schoolhouse and the erection of an outhouse adjacent thereto; that the work had been performed by the party named in a proper and satisfactory manner; that the order had been drawn by the director and countersigned by the moderator of the district, and duly presented to the treasurer, who refused to register and pay the same; that the disputed matter was referred to the relator as county superintendent, who decided that the objections of the treasurer were not well taken and directed the order to be registered and paid, which the treasurer of the school district wrongfully refused to do. The return and answer of the respondent to the alternative writ admitted the facts set forth in the affidavit, but alleged that the contract made with the moderator and director of the district for repairs to the building was not entered into at a regular meeting of the board, and was made in vacation, while no term of school was in session, and over the objection of the respondent. A demurrer was filed to this answer and sustained by the trial court, and, respondent refusing to further plead, the writ was allowed and respondent brings the cause here on error.

The authority of the county superintendent to maintain an action of this nature is specifically conferred by section 11, subdivision 3, chapter 79, Compiled Statutes (Annotated Statutes, sec. 11055), and has been approved by this court in *Montgomery v. State*, 35 Nebr., 655, 659.

The only contention urged against the allowance of the writ is that the contract was not entered into at a regular meeting of the board. This contention, we think, is without merit, in view of the provisions of section 13, subdivision 4, chapter 79, Compiled Statutes (Annotated Statutes, sec. 11068), which is as follows: "The director shall, with the concurrence of the moderator and treasurer, or either of them, provide the necessary appendages for the schoolhouse, and keep the same in good condition and repair during the time school shall be taught in said schoolhouse, and shall keep an accurate account of all expenses incurred

by him as director. Such account shall be audited by the moderator and treasurer, and on their written order shall be paid out of the general school fund." This section clearly confers the right on the director of a school district, with the concurrence of either the moderator or the treasurer, to contract for improvements and repairs on the schoolhouse during the time it is occupied for school purposes; it is not necessary that school be actually in session or that the board as such be in regular meeting at the time the contract is made. The duty is imposed upon the director to keep the house in repair, and only requires that he have the concurrence of either the moderator or the treasurer when he contracts for such repairs. In the case at bar it is admitted that the contract for the improvements and repairs was made with the consent of the moderator. This is all the statute requires, and when this was done and the order of the director, countersigned by the moderator, was presented to the treasurer, it was his duty under the provisions of section 5, subdivision 4, chapter 79, Compiled Statutes (Annotated Statutes, sec. 11060), to register and pay the order.

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

BARNES and POUND, CC., concur.

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

AFFIRMED.

HENRY BARTLING V. STATE OF NEBRASKA.*

FILED FEBRUARY 17, 1903. No. 12,657.

Commissioner's opinion, Department No. 2.

1. **State Decisis.** *Hesselgrave v. State*, 63 Nebr., 807, and *State v. Murdock*, 59 Nebr., 521, examined, approved and distinguished.

2. **Conditions of Recognizance.** The conditions of a recognizance for

Syllabus by court; catch-words by editor.
* **Rehearing allowed.** See opinion, p. 643, *post.*

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.

3. **Recognizance: SURETY: EXTENSION OF LIABILITY.** In such case, the liability of the surety on the recognizance is extended to the next term of court actually held, as though no adjournment or continuance had been had.

4. ———: ———: **CONDITIONS.** 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.

ERROR from the district court for Cheyenne county. Action upon a recognizance forfeited in a criminal case. Tried below before GRIMES, J. Judgment for plaintiff. *Affirmed.*

William P. Miles, James H. McIntosh, Francis G. Hamer and *Thomas F. Hamer,* for plaintiff in error.

Henry E. Gapen, Wesley T. Wilcox and *J. J. Halligan, contra.*

OLDHAM, C.

On December 5, 1900, the county attorney of Cheyenne county filed an information in the district court of that county against John Bartling in proper form, charging him with the crime of horse-stealing and of receiving stolen horses knowing the same to have been stolen. December 7, John Bartling and Henry Bartling personally appeared before the district court of Cheyenne county in open court, and entered into a recognizance in the sum of $2,000, containing the following conditions: "The condition of this recognizance is such that if the said John Bartling shall personally appear at the adjourned December, 1900, term of the district court in and for Cheyenne county, on the 26th day of December, 1900, to answer the offense of horse-stealing and receiving stolen horses wherewith he stands charged in said court, on an information pending therein,

wherein the state of Nebraska is plaintiff and said John Bartling defendant, and abide the order and judgment of said court, and not depart without leave thereof, then this recognizance to be void, otherwise to remain in full force and effect." This term of court was subsequently adjourned until December 26, 1900. On December 22, 1900, the judge of the district court, on account of the prevalence of smallpox in the county of Cheyenne, made an order on the clerk of the court to further adjourn the term until January 21, 1901. When the notice of this adjournment was received by the clerk of the court, he notified the defendant, John Bartling, of such adjournment; but notwithstanding this notice, on December 26, 1900, the defendant appeared at the office of the clerk of the district court accompanied by one of his attorneys. On January 3, 1901, on account of the continued prevalence of smallpox in the county seat and county of Cheyenne, the judge of the court directed the clerk to adjourn the term without day, and this order was accordingly entered. The first regular term of the district court of Cheyenne county for the year 1901 had been fixed for February 4, but on January 22, on account of the continuance of smallpox in the county seat, the judge of the district court made a further order adjourning the February term of court until May 14, 1901, at which time the court was duly held. When court met pursuant to the last adjournment the defendant, John Bartling, failed to appear, and his bond was formally defaulted, and this cause of action was subsequently instituted by the county attorney of Cheyenne county against John Bartling and Henry Bartling, his surety, to recover the penalty of the bond. There was no disputed question of fact in the controversy, and the court accordingly directed the jury to return a verdict for the state, and defendant brings the cause to this court for review on error.

It is earnestly urged by counsel for plaintiff in error that the undisputed facts in this case place the case within the rule recently announced in *Hesselgrave v. State*, 63 Nebr., 807, and *State v. Murdock*, 59 Nebr., 521, and that

consequently, the trial court should have directed a verdict for the defendants instead of directing it for the state. In each of the cases relied upon the term of court at which the defendants were recognized to appear was actually held and no action was taken by the court until a subsequent term for the purpose of forfeiting the recognizances. In each of the cases it was held that a recognizance to appear at a term of court named should not be construed as an obligation to appear from term to term. We have not the slightest criticism to offer on the conclusions reached in either of these cases, but we think the conceded facts in the instant case take it without the reason of the rule therein announced.

In the case at bar, after the recognizance was entered into and approved, no term of court was held in Cheyenne county until May 14, 1901, and as soon as this term was held proceedings were immediately instituted to forfeit the recognizance. While there is no dispute about the fact that the principal in the recognizance came to the place at which court was designated to have been held on December 26, it is also conceded that he knew at the time that he did so that no court would be held there at that time. This is the only appearance that he ever attempted to make in satisfaction of the conditions of his recognizance. Hence the question to be determined in this case is not what would have been the effect of this appearance on December 26, if court had actually been held and adjourned to another term without action being taken to forfeit the recognizance, but the question is what, if any, effect has this pretended appearance, made after court had been adjourned, and no sitting provided for at which the prisoner could either be put upon trial for the offense with which he was charged, or any action taken to forfeit his recognizance if he departed the court without leave? To determine this we must first ascertain what, if any, statutory liability is imposed upon a surety on a recognizance for the appearance of his principal at a term of court subsequent to that at which he was recognized to appear, when for any suffi-

cient cause such term is never held. The provisions of the statute defining this liability are found in sections 32 and 33, chapter 19, Compiled Statutes (Annotated Statutes, secs. 4742, 4743), and are as follows:

"Sec. 32. No recognizance, or other instrument or proceeding, shall be rendered invalid by reason of there being a failure of the term, but all proceedings pending in court shall be continued to the next regular or special term, unless an adjournment be made as authorized in the last preceding section.

"Sec. 33. In case of such continuances or adjournments, persons recognized or bound to appear at the regular term, which has failed as aforesaid, shall be held bound, in like manner, to appear at the time so fixed, and their sureties (if any) shall be liable, in case of their non-appearance, in the same manner as though the term had been held at the regular time, and they had failed to make their appearance thereat."

These sections are preceded by section 31, which authorizes the judge of the court if he be sick, or for any other sufficient cause is unable to attend court at the regularly appointed time, by written order to the clerk to direct an adjournment to a day named. A cause which shall be sufficient to authorize an adjournment rests in the discretion of the district judge, and ordinarily will not be reviewed by this court. *Smith v. State,* 4 Nebr., 277, 285. Even if the rule were otherwise, the record in this case discloses a most meritorious cause for the various adjournments.

By the orders of December 22, 1900, and January 3, 1901, the adjourned October term of 1900 was blotted out of existence and absolutely failed. By the order of January 22, 1901, the February term, 1901, was continued until a day certain, *i. e.,* May 14, 1901, and was held at the time so fixed. Now, applying the provisions of sections 32 and 33, *supra,* to the record in this case, we find that the adjournment of the October term of court did not invalidate the recognizance, and that after such adjourn-

ment the surety on the bond was held for the appearance of his principal on the day fixed for the next sitting of court as though no continuance or adjournment had ever been had. We think this construction reflects the plain and obvious intention of the lawmakers in the enactment of these sections of the statute. They undoubtedly anticipated that conditions might occur after the announcement of a term of court which would prevent its being held, and that such a condition might not operate as a jail-delivery for those recognized to appear to answer for some violation of the law, they extended the liability of the sureties on recognizances to such time as court should actually be held. We do not think that these provisions imposed any unreasonable burdens upon the surety on a recognizance of one charged with a criminal offense. By assuming the obligation of a surety on such an undertaking, the bondman becomes the custodian and voluntary jailer of the accused, and if the time for which he is first bound for such appearance is extended by the continuance or failure of a term of court, he has the right to exonerate himself from further liability on the undertaking by delivering the prisoner to the sheriff or jailer of the county in which the cause is pending. *State v. Benzion,* 79 Ia., 467, 44 N. W. Rep., 709.

It is urged by counsel for the plaintiff in error that such a construction as this would render the statute unconstitutional and ex-post-facto in its provisions. This statute appears to have been passed in 1879 and has remained in continuous operation ever since. The obligation of the surety on the recognizance in this case was not entered into until 1900, or more than twenty years after the enactment of this statute; consequently we are unable to understand how the passage of this act could possibly have a retroactive effect on obligations entered into a generation after its enactment.

We think that a surety on a recognizance must take notice of the obligations imposed upon him by the law providing for such recognizance; that the object of the recog-

nizance in a criminal proceeding is to secure the presence of the accused at the next term of court actually held after such recognizance has been entered into and approved; and that when the surety fails to either deliver his principal into the custody of the proper officers of the law or to procure his attendance at a term of court actually held, his liability upon the recognizance becomes absolute.

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

BARNES and POUND, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed November 18, 1903. *Former decision adhered to:*

AMES, C.

This case has been elaborately briefed and reargued upon a rehearing from a former determination of it (*ante*, p. 637), but we are not convinced that there is any error in either the reasoning or conclusion of the former decision and recommend that it be adhered to.

HASTINGS, C., concurs.

OLDHAM, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the former decision be adhered to.

FORMER DECISION ADHERED TO.

HOME FIRE INSURANCE COMPANY, APPELLANT AND APPELLEE, V. CHARLES J. BARBER, APPELLEE AND APPELLANT.

FILED FEBRUARY 17, 1903. No. 12,158.

Commissioner's opinion, Department No. 2.

1. **Corporation:** SUBSEQUENT STOCKHOLDERS: PRIOR MANAGEMENT. Subsequent stockholders have no standing, as a general rule, to attack prior mismanagement of the corporation.

2. **Such Stockholder's Right to Sue.** Such a 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.

3. **Stockholders:** WRONG-DOERS: ACQUIRING OF STOCK: STANDING TO COMPLAIN. Stockholders who have acquired their shares and their interest in the corporation from the alleged wrong-doers and through the prior mismanagement, have no standing to complain thereof.

4. **Stockholder's Title to Corporate Property:** CORPORATION MUST ACT THROUGH PROPER AGENTS. 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.

5. **Corporation:** STOCKHOLDERS: SEPARATE AND DISTINCT PERSONS. 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.

6. **Corporation:** STOCKHOLDERS: SUBSTANTIAL BENEFICIARIES: STANDING IN EQUITY: RIGHT TO RECOVER. But where it is 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.

7. **Overruled.** The proposition announced in the fourth paragraph of the syllabus in *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Nebr., 374, was in effect, if not expressly, retracted on rehearing in *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Nebr., 463, and is disapproved.

Syllabus by court; catch-words by editor.

8. **Basis of Recovery.** 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.

9. **Contract of Employment:** SERVICE: FIXED PERIOD: AFTER CONTINUANCE: PRESUMPTION. Where service 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.

10. **Corporation:** GENERAL MANAGER: SALARY: CONTRACT: EXPIRATION: CONTINUANCE OF EMPLOYMENT WITHOUT NEW AGREEMENT: VOLUNTARY REDUCTION: JUDGMENT FOR BACK SALARY. The general manager of a corporation, after expiration of a contract fixing his salary at $5,000 *per annum*, continued in the same employment, without any new agreement, and afterwards voluntarily reduced his salary to $3,000 *per annum*, drawing it from month to month thereafter on that basis for many years, until he gave up the office. After the original contract, no action was taken by the directors with reference to his salary; but the evidence that he took the less sum from time to time in full payment was clear and convincing. *Held*, That a judgment for back salary at the rate of $2,000 *per annum* could not be sustained.

APPEAL from the district court for Douglas county. There is a better statement of the case in the opinion than the editor feels able to make. Heard below before KEYSOR, J. *Reversed.*

Byron G. Burbank and *Halleck F. Rose*, for the Home Fire Insurance Company.

Westel W. Morsman and *Virgil O. Strickler, contra.*

POUND, C.

The plaintiff is an insurance company, organized in 1884, with a capital stock of $100,000, divided into 1,000 shares of $100 each. Its business is conducted by a board of directors, a finance committee, an executive committee and certain other officers, including a secretary and general manager. It appears that the secretary and general manager, at least down to December, 1899, was at all times intrusted with the active management and control

of the company's affairs, and the president and the remaining officers appear to have given very little, if any, attention thereto. The appellant and principal defendant, Charles J. Barber, was one of the original incorporators of the company and was a stockholder therein from its organization until December 2, 1899. During that period, he was secretary and general manager, one of the directors, and a member of the executive committee. His codefendants, Lovett, Woodman and Reynolds, were also original incorporators and stockholders, and from time to time from its organization until December 2, 1899, were directors and members of the executive and finance committees. On December, 1899, the defendant Barber entered into a contract with one Funkhouser, whereby he agreed to sell to said Funkhouser all of the shares of the capital stock of said company, except two shares, which he was to obtain if possible, and to procure the resignation of all the officers and a majority of the directors. He also agreed not to engage in the insurance business directly or indirectly, for a period of three years. By the terms of the contract he was to furnish to Funkhouser a true and complete statement of all the assets and liabilities of the company, and if upon investigation the statement of assets and liabilities proved to be correct and satisfactory to Funkhouser, the latter was to pay the sum of $75,000 for said shares, less $200 for the two shares above mentioned, in case they could not be obtained, and a further sum of $40,000 as a bonus for obtaining all of the shares of stock and for procuring the resignation of the officers, relinquishing his control of the company, and agreeing not to engage further in the business of insurance. On December 2, 1899, pursuant to said contract, the defendant Barber delivered to said Funkhouser all of the shares of the capital stock of said company except eight. He also delivered an option contract for six of the remaining shares, and subsequently procured and delivered the other two. In payment therefor he received the sum of $94,380.60 in cash and $20,619.40 in assets

of the company—namely, $12,350 of collateral loans, which he had agreed to accept at the time when the contract of sale was made, and certain other assets amounting to $8,269.40, which Funkhouser had refused to accept at the time when the list of assets was under consideration. Accordingly the shares of stock were transferred on the books of the company, under the direction of Funkhouser, to himself and certain others, his associates in the transaction, and he and his said associates became thereupon and now are the only stockholders in the company. None of them had held stock therein theretofore. At the same time, pursuant to the contract, the defendant Barber resigned his office and procured the resignation of the defendants Reynolds, Woodman and Lovett and of the other principal officers and directors of the company, and a new board of directors was elected and new officers took charge. On November 20, 1899, evidently in contemplation of a transfer of all his interest in the corporation, the defendant Barber drew out $2,200 of the company's money upon a claim of unpaid salary. Subsequent to the change in management of the company, this was discovered, and a controversy arose between Barber and the new management with reference thereto, as a result of which suit was brought by the company to recover said sum. Thereupon Barber made a counter-claim for some $10,000 of salary alleged to be due him and not withdrawn, and as a result of examination and investigation of the company's books with reference to this claim, certain irregularities and mismanagement came to light, which were set forth in an amended petition and furnished the principal points of controversy in the case as finally tried.

Thus there are two branches to the case: Upon the one hand a suit by the corporation to recover the money taken out by Barber as back-salary just prior to the time he sold his stock, and certain other money which at various times he is alleged to have appropriated wrongfully to his own use, and on the other hand a suit to recover for Barber's mismanagement and for profits made by him

through the use of the company's money at a time when he stood in a fiduciary relation thereto. The principal mismanagement consisted in borrowing funds of the company to purchase its stock and in making a profit out of the purchase of the stock and the dividends accruing thereon. At the time the stock was bought with money borrowed from the company it was worth about $55 a share. But seven years later, when the defendant Barber sold out his interest in the company, it had come to be worth $115 a share. During that time dividends had accrued in considerable amounts, and had been paid to and received by Barber. The decree compels Barber to account for the profits and for the dividends, on the ground that the loan of the company's funds and the use of those funds in purchase of the stock was unauthorized, and that the profits and the dividends belonged in equity to the company. Upon the issue as to salary, the court found that Barber was entitled to recover for back-salary, as claimed, and applied the amount found to be due him thereon upon the amounts found due the company by reason of his mismanagement.

The facts with reference to the mismanagement, as found by the court, are substantially these: In January, 1892, and for some time prior to that date, the stockholders of the company were divided into two factions. The one consisted of the defendants Barber, Lovett, Reynolds and Woodman, who held 237 shares, and some other stockholders, not sufficient, however, to constitute a majority. The other faction was controlled by one Hamilton, and held in the aggregate 507 shares. As the controversy became acute, the Hamilton faction required the Barber faction to purchase their 507 shares of stock, or else to submit to the election of a board of directors who would choose a new secretary and general manager and entirely alter the policy and management of the company. It appears that Barber and his associates were experienced insurance men, while Hamilton and his faction were not, and the court has found that Barber, Lovett, Woodman

and Reynolds believed it to be for the best interests of the company, as well as for their own interest, that the company should be managed by persons of experience in the business. Accordingly, they agreed among themselves to purchase the 507 shares and thus preserve control of the company. For that purpose they agreed also to procure money temporarily by borrowing of banks on their own notes, paying said notes with money which they could borrow from the company as soon as they could obtain control thereof, unless in the meantime they were able to sell enough of the shares purchased to pay off their notes, or to pay them off by the sale of other property. In pursuance of this design, they borrowed the necessary funds of banks, purchased the shares, and distributed them among themselves, the majority going to the defendant Barber. A period of financial depression was imminent, and after the purchase it became impossible to dispose of the shares, as the defendants had hoped, so that it was necessary to borrow of the company in order to pay off their notes at the banks. Accordingly the defendants resorted to the company's funds, borrowing a portion upon real estate security and another portion upon notes secured by pledge of the stock. As to the money borrowed upon real estate security, the court has found that the loans were made in good faith, with bona-fide intention of repaying them in full, principal and interest; that the security was fair and reasonable; that the loans were made according to the usual mode of business of the company; were entered upon the books in the regular way; were known to the officers, directors and stockholders of the company; were in large part included in the annual reports of the company, and have all been paid in full, either by cash or conveyances of property to the company, except the interest on a mortgage loan to the defendant Barber. The loans on collateral security, on the contrary, were not carried on the books of the company openly in the name of the parties who obtained them. They were not such loans as the statute authorized the

company to make, and the court has found that they were not properly secured. The court has also found that it was agreed between the defendants Barber, Lovett and Reynolds, when these collateral loans were originally obtained from the company, that they would pay no interest thereon, and that after a short time they ceased to pay any. These loans were kept standing on the books, in one form or another, until the sale of the stock of Funkhouser in December, 1899, when the collateral loan account, which consisted of these items, was turned over to Barber, as before stated. The court found on this point that the apportionment of the consideration which Funkhouser was to pay and did pay to Barber for all the shares of stock in the company, as provided for in the contract, whereby $75,000 was stated to be the consideration for the shares of stock, and the remaining $40,000 a bonus, was made after the sale was practically consummated, to enable Barber to buy in the shares of the company held by other stockholders for the purpose of selling and delivering them, and that the real value of the stock and the true consideration received therefor was not $75,000, but the full sum of $115,000. Upon this basis the court found that the portion of said 507 shares of stock which was covered by the collateral loans, namely, 203 1-6 shares, was at all times, after the sale by Hamilton, in equity the property of the company, and that the company was entitled to recover the full consideration which Funkhouser paid Barber therefor, namely, $115 a share.

Another item of mismanagement grew out of a mortgage loan to the defendant Woodman. In 1886, Woodman and his wife borrowed $1,400 of the plaintiff upon a mortgage. In January, 1898, there were $1,600 due upon the loan, and on that date Woodman assigned to Barber his half interest in 75 shares of the stock purchased from Hamilton and his associates, which had been apportioned to Lovett and Woodman as partners. Thereupon the company released the mortgage, and Barber charged the $1,600 on the books of the company as cash. This item was

carried on the books in various ways until December 1, 1899, when Barber paid it. The court considered that this amounted to a use of $1,600 of the company's funds in the purchase of the stock, and that the profits on 37½ shares, amounting to $2,612.50, should be accounted for to the company.

A similar item grows out of the purchase by Barber from the plaintiff of 20 shares of stock, originally held by the wife of the defendant Reynolds. This stock was sold to the company on August 1, 1899, and applied on a mortgage of $2,700, given by her and her husband to the company. The court found that Barber purchased the stock of the company, giving his note for a portion, and carrying the remainder upon the books of the company by various devices until December 1, 1899, when the whole was paid. It held, therefore, that he was liable to the company for the profit on these shares.

A further item of mismanagement grows out of a mortgage for $2,600 executed by one Raff. In January, 1894, an instalment of principal and a large amount of accrued interest and taxes had fallen due. At that time the mortgage was assigned by its then holder to the defendant Barber for about the sum of $1,300. The court has found that Barber knew at the time that foreclosure would be necessary, and immediately instituted a suit in his own name for that purpose. Pending a stay on order of sale pursuant to decree in the foreclosure suit, Barber assigned the mortgage to the plaintiff company as collateral security for a note which he owed it, and afterwards drew out $2,500 of the company's money in payment therefor. Subsequently, the foreclosure sale was confirmed and a large deficiency judgment entered. This judgment was never assigned to the company; but after receiving a master's deed in the foreclosure proceedings, he conveyed the property by warranty deed to the plaintiff. The court found that the company paid taxes amounting to nearly $1,200, and, taking this into account, held that the total amount of the company's money used in the transaction

was over $5,100. It found further that this was an improvident and unlawful investment, in case the mortgage was bought originally for the company, as Barber alleged; and that if it was not so bought originally, the sale to the company pending stay in the foreclosure suit was a violation of his trust, so that in either event he did not act for the best interests of the company, and upon reconveyance should account to it for said sum of $5,100.

The other items are of a different nature. In 1895 Barber, while secretary and manager of the company, drew two checks for $1,500 each—one to the defendant Reynolds and the other to the defendant Lovett. These checks were indorsed, and deposited by Barber in his personal account. Thereupon he drew his check in favor of the company for the aggregate sum, deposited it to the credit of the company, and credited said sum of $3,000 on collateral notes signed by himself and said defendants, as a payment thereon. These checks were issued in payment of alleged claims for services rendered by Lovett and Reynolds in preventing legislation hostile to the company and other similar matters, and the court has found that such claims were not bona-fide and were barred by the statute of limitations, and that the transaction was in effect a conversion of $3.000 of the company's money. It has also found that at various times the defendant collected sums amounting to $237.37, belonging to the company, for which he failed to account. We think that the item of interest on the mortgage loan above mentioned is to be put in the same category. And here belongs also the claim for $2,200 of the company's funds withdrawn by Barber on November 20, 1899, on account of back-salary. Upon the issues as to salary, the court found that in 1890 a contract was entered into between Barber and the company, whereby he was to receive a certain salary for the remainder of that year and for the year 1891, and from January 1, 1892, to January 16, 1895, a salary at the rate of $5,000 *per annum*. The term of employment under the contract was for five years. Barber served, however, continuously from

the inception of the contract until December 2, 1899, and after the expiration of the term provided, no action of any kind was ever taken by the company, by its board of directors or by any committee or officer, other than Barber, with reference to the amount of salary. But in 1895, on account of general financial depression, it became necessary to reduce the salaries of all employees, and at that time Barber voluntarily reduced his own salary to $3,000 *per annum*. The court finds that from that date he drew his salary from month to month substantially on the basis of such reduction until he terminated his connection with the company. The evidence tends to show that during the period from 1895 to 1899 he made repeated admissions that his salary was paid, that he made statements of the condition of the company from which it is evident he considered his salary was $3,000 a year, and that the statement of the assets and liabilities which he made to Funkhouser, pursuant to his contract, was made upon the same basis. The court found, however, that he was not estopped by his voluntary action, but was entitled to receive salary at the rate of $5,000 a year during the whole period from 1895, and that there was due him on account of undrawn salary the sum of $9,485.22.

Thus, as already indicated, this suit involves two distinct questions. The liability of the defendant Barber to account to the company, as at present constituted, for his mismanagement and unauthorized dealings with the company's funds prior to the sale of all the stock to Funkhouser and his associates is one question. His liability to the company for money and assets of the company withdrawn and converted to his own use is quite another question. Connected with this last question is his claim for unpaid salary.

We shall first address ourselves to the question of Barber's liability for mismanagement. Complaint is made of the findings of fact of the trial judge upon the several items with respect to which mismanagement is charged. The evidence on these points is very voluminous, and in

some respects is conflicting. Much of it takes the form of expert testimony with reference to the company's books, and is made up of conclusions deduced by accountants from their examinations of the books and papers of the company, which are difficult to follow, and at times are somewhat conjectural. But upon review of the evidence, we are satisfied that the findings of fact are accurate and complete, and are well sustained by competent and credible evidence. We have no disposition to interfere with any of them. Accepting these findings of fact, however, several important questions of law arise with reference to which the decree rendered must be tested.

Counsel for the appellant makes three points. The first is that the several transactions recited amounted to loans of the company's money to Barber, and that, as the money borrowed has been repaid, he and not the company is entitled to the profits. We can not assent to this proposition. The use of the company's money amounted, as the court has found, to a speculation by one of the officers in violation of his trust, which resulted in a profit. Were this an ordinary case, we think there can be no question that the corporation would be entitled to sue, or a stockholder on its behalf and for the benefit of all others. But it is urged that this is not an ordinary case. None of the present stockholders were owners of stock in the corporation at any time previous to December 2, 1899. All of them acquired their interest in the corporation by and through the sale from Barber to Funkhouser on that date. Accordingly, the second point made by counsel is that as the defendant Barber came to own all of the stock, and the present stockholders acquired their stock through him, there was a merger in said defendant of all the claims which the corporation or its stockholders might have held against him, and such claims became extinguished thereby. We do not think this point is well taken. The trial court has found, upon conflicting evidence, that the defendant was never the owner of all the stock in the corporation, but was only the agent of some of those whose stock he

procured and sold to the present stockholders. There is ample evidence to show that this is true, and that as to several shares of stock he had at no time any beneficial interest. The third and most serious point is that a recovery in the present case would be entirely for the advantage and inure to the benefit of the present stockholders. It would amount in substance to a recovery back by them of the purchase-money which they paid the defendant Barber for his stock, since the money, when recovered for the corporation, would be for distribution among them—the sole stockholders of the company as now constituted.

This raises numerous and difficult questions. It must be determined whether the present stockholders or any of them are entitled to complain of the acts of the defendant and of his past management of the company; for if any of them are so entitled, there can be no doubt of the right and duty of the corporation to maintain this suit. It would be maintainable in such a case even though the wrong-doers continued to be stockholders and would share in the proceeds. 1 Morawetz, Private Corporations, sec. 294. We have therefore to consider first, how far, if at all, subsequent shareholders may complain of prior mismanagement of the corporation. Next we must consider how far subsequent shareholders may complain of mismanagement when they hold through such mismanagement or have acquired their shares from persons who participated therein. The third question to be considered is whether the result of a recovery in this case would be inequitable, as permitting the present stockholders to recover back purchase-money, or a portion thereof, for which they received full consideration, and to acquire shares worth $115 each at $55 a share, and in addition thereto, recover and divide among themselves a further sum of $60 a share, imposed upon the defendant Barber for his delinquencies in matters which have in no way injured the present stockholders, or any of them, or their interests. Finally, assuming that by reason of the foregoing propo-

sitions the present stockholders are in no position to complain and have no standing in equity, may the court look beyond the corporation to the ultimate and substantial beneficiaries of a recovery, or is it bound to deal with the corporation as a separate person in all respects?

Sound reason and good authority sustain the rule that a purchaser of stock can not complain of the prior acts and management of the corporation. *Hawes v. Contra Costa Water-works Co.*, 104 U. S., 450, 26 L. Ed., 827; *Dimpfell v. Ohio & M. R. Co.*, 110 U. S., 209, 3 Sup. Ct. Rep., 573, 28 L. Ed., 121; *Taylor v. Holmes*, 127 U. S., 489, 8 Sup. Ct. Rep., 1192, 32 L. Ed., 179; *Southwest Natural Gas Co. v. Fayette Fuel-Gas Co.*, 145 Pa. St., 13, 23 Atl. Rep., 224; *Alexander v. Searcy*, 81 Ga., 536, 8 S. E. Rep. 630, 12 Am. St. Rep., 337; *Clark v. American Coal Co.*, 86 Ia., 436, 53 N. W. Rep., 291, 17 L. R. A., 557; *United Electric Securities Co. v. Louisiana Electric Light Co.*, 68 Fed. Rep., 673; *Venner v. Atchison, T. & S. F. R. Co.*, 28 Fed. Rep., 581; *Heath v. Erie R. Co.*, 8 Blatchf. [U. S. C. C.], 347, Fed. Cas. No. 6,306; *Dannmeyer v. Coleman*, 8 Sawy. [U. S. C. C.], 51, 11 Fed. Rep., 97; *Pennsylvania Tack Works v. Sowers*, 2 Walk. [Pa.], 416; 4 Thompson Corporations, sec. 4569. In *Alexander v. Searcy, supra*, the court say (p. 550): "The weight of authority seems to be that a person who did not own stock at the time of the transactions complained of, can not complain or bring a suit to have them declared illegal." In *United States Securities Co. v. Louisiana Electric Light Co.* it is said (p. 675): "As a general proposition, the purchaser of stock in a corporation is not allowed to attack the acts and management of the company prior to the acquisition of his stock; otherwise, we might have a case where stock duly represented in a corporation consented to and participated in bad management and waste and, after reaping the benefits from such transactions, could be easily passed into the hands of a subsequent purchaser, who could make his harvest by appearing and contesting the very acts and conduct which his vendor had consented

to." These remarks are not without application to the case at bar. The present shareholders are all subsequent purchasers; they obtained their stock through the defendant Barber; they hold a large number of their shares under a purchase from him and his associates through the very mismanagement now complained of; a majority of the remaining shares come directly from Barber and his associates in the wrongs upon which this suit is based. In other words, the present stockholders are contesting acts through which they get title to a large portion of their stock, and acts which those through whom they derived the greater part of the remainder could not have challenged because they participated therein, and, by contesting these acts, which did not injure any of the present stockholders in the least, are recovering back a large part of the purchase price of stock which was admittedly worth all that they paid for it. Such cases illustrate forcibly the wisdom of confining complaints of this kind to those who were stockholders at the time or their successors by operation of law.

The rule that a suit for mismanagement can not be maintained by one who was not a stockholder at the time, has been criticised as based on jurisdictional considerations peculiar to the federal courts and on obsolete common-law doctrines as to champerty and maintenance. 4 Thompson, Corporations, secs. 4569-4571; 1 Morawetz, Private Corporations, sec. 270. In our judgment it does not depend upon either. The federal equity rule, while designed in part to prevent collusive proceedings in fraud of the jurisdiction of those courts, goes far beyond the requirements of such a purpose. If that were the sole purpose of the rule, it should go no further than to prevent such suits where the vendor of the stock was a citizen of the same state as the corporation. If the vendor and purchaser were citizens of the same state, and the vendor, an original stockholder, had never had the same citizenship as the corporation, no fraud on the jurisdiction of the court would be possible, and in such case, if recovery were

proper and the purchaser's cause were meritorious, it would be highly unjust for the court to abrogate its jurisdiction. This consideration alone disposes of the criticism. The rule has its foundation in a sound and wholesome principle of equity,—namely, that the rules worked out by chancellors in furtherance of right and justice shall not be used, because of their technical character, as rules, to reach inequitable or unjust results. Resting on this basis, the "value and importance [of the rule] are constantly manifested." Field, J., in *Dimpfell v. Ohio & M. R. Co.*, 110 U. S., 209, 3 Sup. Ct. Rep., 573, 28 L. Ed., 121. The right of the stockholder to sue exists because of special injury to him for which otherwise he is without redress. If his interest is trifling and the injury thereto of no consequence, he can not sue to compel righting of wrongs to the corporation. *McHenry v. New York, P. & O. R. Co.*, 22 Fed. Rep., 130; *Albers v. Merchants' Exchange of St. Louis*, 45 Mo. App., 206. Hence there is obvious reason for holding that one who held no stock at the time of the mismanagement 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. *City of Chicago v. Cameron*, 22 Ill. App., 91, 120 Ill., 447, 11 N. E. Rep., 899, is a case of the first type; *Carson v. Iowa City Gaslight Co.*, 80 Ia., 638, 45 N. W. Rep., 1068, is one of the second type. Except in such cases, the purchaser ought to take things as he found them when he voluntarily acquired an interest. If he was defrauded in the purchase, he should sue the vendor. As to the corporation and its managers, so long as he is not injured in what he got when he purchased, and holds exactly what he got and in the condition in which he got it, there is no ground of complaint. *Clark v. American Coal Co.*, 86 Ia., 436, 53 N. W. Rep., 291, 17 L. R. A., 557.

The cases which hold that a subsequent stockholder may sue for mismanagement, may be noticed briefly. Those commonly cited are: *Ramsey v. Gould*, 57 Barb. [N. Y.], 398; *Young v. Drake*, 8 Hun [N. Y.], 61; *Parsons v.*

Joseph, 92 Ala., 403, 8 So. Rep., 788; *Winsor v. Bailey,* 55 N. H., 218; *Forrester v. Boston & Montana Consolidated Copper & Silver Mining Co.,* 21 Mont., 544, 55 Pac. Rep., 353. In *Ramsey v. Gould,* plaintiff, believing that there had been mismanagement, bought shares for the purpose of proceeding against the directors and officers and "bringing them to justice." The court permitted the suit upon the ground that plaintiff's motives were immaterial. But it is assumed, without discussion, that he had an interest to vindicate, and had suffered some wrong, which is the real question on which such cases depend. Moreover, it is by no means clear that the motives behind a stockholder's suit are immaterial. Where stock is acquired for the purpose of bringing suit, it has been held that the complainant is a mere interloper, entitled to no consideration. *Hawes v. Contra Costa Water-works Co.,* 104 U. S., 450, 461, 26 L. Ed., 827; *Moore v. Silver Valley Mining Co.,* 104 N. Car., 534, 10 S. E. Rep., 679; *Kingman v. Rome, W. & O. R. Co.,* 30 Hun [N. Y.], 73; *Du Pont v. Northern P. R. Co.,* 18 Fed. Rep., 467, 471. And stockholders' suits not brought in good faith in the interests of the corporation have been dismissed on that ground. *Beshoar v. Chappell,* 6 Colo. App., 323, 40 Pac. Rep., 244; *Belmont v. Erie R. Co.,* 52 Barb. [N. Y.], 637. In *Young v. Drake,* the court follow *Ramsey v. Gould.* The further point is made that "the plaintiff acquired all the rights of the person of whom he purchased." Of course, in a case where those of whom he purchased had participated or acquiesced in the mismanagement, this view would preclude the purchaser from suing. And he could not sue as being a bona-fide purchaser in ignorance of the disability attaching to his vendor, because shares of stock are not negotiable, and the sale can not pass greater rights than those possessed by the vendor. *Clark v. American Coal Co.,* 86 Ia., 436, 53 N. W. Rep., 291, 17 L. R. A., 557; 4 Thompson, Corporations, p. 3410. But it may be doubtful whether a purchaser of stock buys or intends to buy anything beyond the vendor's present interest in the corporation and its

assets. His vendor's causes of action for past injuries and rights to complain of past mismanagement are scarcely in contemplation of the parties. We must not suffer ourselves to be deceived by speaking of causes of action of the corporation in this connection, since causes of action of this character belong to the corporation for the benefit and in the interest of its stockholders. *Parsons v. Joseph* and *Winsor v. Bailey* adopt the view of Mr. Morawetz that the rule announced by the federal courts is a rule of practice based on jurisdictional peculiarities of those courts and not of general application. In *Forrester v. Mining Co.*, the transaction was not complete and still required ratification by the stockholders. The complainants, although they bought after the acts were done, were stockholders while the matter was still formative, and had an undoubted right to interfere to prevent its consummation. Hence what is said as to the point in question, is *dictum* only.

The fallacy in the view that one who has not been injured by a transaction and is not affected thereby can acquire a right to sue in equity to set it aside because he has acquired the shares of the person injured, is exposed in such cases as *Graham v. La Crosse & M. R. Co.*, 102 U. S., 148, 26 L. Ed., 106, and *Hoffman v. Bullock*, 34 Fed. Rep., 248. The right to complain of such transactions is one which the stockholders injured may or may not exercise as they choose. Where such transactions are not absolutely void, they may, if they so elect, acquiesce and treat them as binding. The discretion whether to sue to set them aside or to acquiesce in and agree to them is incapable of transfer. If the new stockholder is injured, there is another question. In that case he also has a power of proceeding or remaining inactive as he may prefer. Where he is not injured, he can take no advantage of the power which was in his vendor and the latter did not care to exercise. In *Graham v. La Crosse & M. R. Co., supra,* the point was urged which is so often made in connection with suits by subsequent stockholders, and upon

which Mr. Morawetz bases his statement that such stockholders should be allowed to sue. Bradley, J., says (p. 153): "But it is contended that this is a case in which the debtor corporation was defrauded of its property, and that, as the company had a right of proceeding for its recovery, any of its judgment and execution creditors have an equal right; that it is a property right, and one that inures to the benefit of creditors. Conceding that creditors who were such when the fraudulent procurement of the debtor's property occurred * * * the question still remains, whether * * * subsequent creditors have such an interest that they can reach the property for the satisfaction of their debts. We doubt whether any case, going as far as this, can be found. * * * It seems clear that subsequent creditors have no better right than subsequent purchasers, to question a previous transaction in which the debtor's property was obtained from him by fraud, which he has acquiesced in, and which he has manifested no desire to disturb. Yet, in such a case, subsequent purchasers have no such right." Hence, upon review of the authorities and the principles on which they appear to proceed, notwithstanding the position of some of the text-writers, the sounder doctrine, sustained by the better and more numerous adjudications, appears to be that subsequent stockholders have no standing, as a general rule, to attack prior mismanagement of the corporation.

It appears to be well settled, also, that stockholders who have acquired their shares and their interest in the corporation from the alleged wrong-doers and through the prior mismanagement have no standing to complain thereof. *Brown v. Duluth, M. & N. R. Co.*, 53 Fed. Rep., 889; *Matter of Application of Syracuse, C. & N. Y. R. Co.*, 91 N. Y., 1; *Schilling & Schneider Brewing Co. v. Schneider*, 110 Mo., 83, 19 S. W. Rep., 67; *Langdon v. Fogg*, 14 Abb. N. Cas. [N. Y.], 435; *Parsons v. Hayes*, 18 Jones & Sp. [N. Y.], 29; *Hollins v. St. Paul, M. & M. R. Co.*, 9 N. Y. Supp., 909; *Clark v. American Coal Co.*, 86 Ia., 436, 53 N. W. Rep., 291, 17 L. R. A., 557; 4 Thompson,

Corporations, p. 3410; Cook, Corporations, secs. 40, 736, note. If a stockholder's predecessor in title has acquiesced in a course of mismanagement, it has even been held that he can not maintain a suit to restrain its continuance. *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq., 340, 48 Atl. Rep., 912. In Thompson, Corporations, *supra*, the learned author says (p. 3409): "But as share certificates do not, under any theory, rise to the grade of strictly negotiable paper, it should follow, and especially in regard to the transfer of any litigious rights which may attach to them, that their holder can not, by selling them to another, transfer to that other any better litigious rights, inhering in them, than he himself possesses. If, therefore, he has, by his conduct as a shareholder, estopped himself from maintaining a suit in equity to undo corporate action, * * * this estoppel will attend the shares in the hands of his vendee." In consequence, it would make no great difference in the case at bar, as to the standing of the present shareholders of the company in a court of equity, if we held that subsequent shareholders could attack prior mismanagement. The present shareholders hold 260 shares through a purchase from Barber, who acquired title through the acts complained of, and the money which they paid for those very shares, which they hold through such purchase, is now claimed to belong to the corporation, and is sought to be recovered from their vendor. Nor is this all. The greater part of the remaining shares were held by Barber and his associates when the alleged wrongs were committed, and are now held by the present stockholders under a purchase from Barber. To allow them to open up these transactions is to allow them to go counter to their own title to a large part of the stock, and to assert rights and claims which their vendor could never have asserted, and this, too, as to past transactions, which have no present effect upon the value of their stock, and do not continue to be felt in any way in the corporate management.

There is another and still stronger reason why the

present stockholders have no standing in a court of equity to complain of the transactions on which this suit is based. To permit them to recover, under the circumstances of the case at bar, would be highly inequitable. It would be to give them moneys to which they have no just title or claim whatever, and enable them to speculate upon wrongs done to others with which they have no concern. It would enable them to recover back a large part of the purchase-money they paid and agreed to pay for the stock, notwithstanding the stock was worth all that they paid for it, and notwithstanding they obtained and now retain all that they bargained for. So long as they received all that was contracted for, there is no equity in allowing them to recover back a considerable portion of what they paid, merely because their vendor had previously wronged some one else who could have obtained redress in the name of the corporation which they are now able to use. This is especially manifest in respect to the dividends. As Barber and his associates acquired shares by unauthorized borrowings of the company's money, and so held them in trust for the corporation, as representing all the then stockholders, in equity the dividends paid upon such shares doubtless were received impressed with the same trust. But who were the beneficiaries of that trust? Not the other stockholders only, but Barber and his associates, together with such remaining stockholders. Barber and his associates held most of the stock outside of the shares in question. Instead of receiving all the dividends on those shares, they should have received, in equity, the greater portion only. Had a stockholder gone into equity at that time and recovered the dividends for the company, they would simply have been for distribution among those who held the shares not subject to a trust for the company, and Barber and his associates would still have been the heaviest beneficiaries. For it is well settled that a recovery in such case inures to the benefit of all stockholders, as well those who were wrong-doers as those who were innocent. 4 Thompson, Corporations, sec. 4491. But after an entirely

new set of stockholders have come in, holding these shares under Barber and his associates and the remainder of the latters' shares under purchase from them, to let them recover back these dividends is to let them reclaim over fifty per cent. of the purchase-money, and recover from Barber moneys which in equity belonged to him when he took them. The fact that a relatively small portion belonged to others can not alter the unconscionable character of such a recovery, so long as the present stockholders are not those others and have no standing in equity as their representatives. Recovery by or for the benefit of the present stockholders means, to put it plainly, that through the instrumentality of a court of equity they are to get shares, worth by their own valuation $115 each, for $55 each; are to get back-dividends which never would have been payable to them in any event and were not bargained for when they bought, and are to receive, in addition to the shares worth $1.15 on the dollar, 60 cents more on each dollar, imposed on Barber for his delinquencies. Barber wronged the old stockholders. His conduct in many respects was unconscionable and indefensible. But his fellow-stockholders were supine for many years. They took no steps to investigate what he was doing, or to protect or assert their rights. Now third parties, who bought all of Barber's shares, including those which he held as a result of his wrongful manipulations, seek to assert those rights and reap a profit thereby. Because the inequitable conduct of Barber shocks the conscience of a chancellor is no reason why he should give his conscience a further shock by allowing Funkhouser and his associates to recover money to which they have no legal or equitable claim.

Conceding, then, that all of the present stockholders are so circumstanced that no relief should be afforded them in a court of equity, may the corporation recover, notwithstanding? We think not. Where a corporation is not asserting or endeavoring to protect a title to property, it can only maintain a suit in equity as the representative of its stockholders; if they have no standing in equity to

entitle them to the relief sought for their benefit, they can not obtain such relief through the corporation or in its name. *Arkansas River Land, Town & Canal Co. v. Farmers' Loan & Trust Co.*, 13 Colo., 587, 22 Pac. Rep., 954; *Des Moines Gas Co. v. West,* 50 Ia., 16; *Schilling & Schneider Brewing Co. v. Schneider,* 110 Mo., 83, 19 S. W. Rep., 467; *Flagler Engraving Machine Co. v. Flagler,* 19 Fed. Rep., 468; *Parsons v. Hayes,* 14 Abb. N. Cas. [N. Y.], 419; *Langdon v. Fogg,* 14 Abb. N. Cas. [N. Y.], 435. It would be a reproach to courts of equity if this were not so. If a court of equity could not look behind the corporation to the shareholders, who are the real and substantial beneficiaries, and ascertain whether these ultimate beneficiaries of the relief it is asked to grant have any standing to demand it, the maxim that equity looks to the substance and not the form would be very much limited in its application. "It is the province and delight of equity to brush away mere forms of law." POST, J., in *Fitzgerald v. Fitzgerald & Mallory Construction Co.,* 44 Nebr., 463, 492. Nowhere is it more necessary for courts of equity to adhere steadfastly to this maxim, and avoid the danger of allowing their remedies to be abused, by penetrating all legal fictions and disguises, than in the complex relations growing out of corporate affairs. Accordingly, courts and text-writers have been in entire agreement that equity will look behind the corporate entity, and consider who are the real and substantial parties in interest, whenever it becomes necessary to do so to promote justice or obviate inequitable results. In 4 Thompson, Corporations, sec. 4479, the learned author says: "As in point of substance and sense, the corporation consists of the aggregate body of its shareholders, it is obvious that, in the most substantial sense, the directors are trustees for the shareholders, and that in any action to redress breaches of trust on the part of the directors, the shareholders are the real parties in interest." Again: "For the purpose of substantial right, though not for the conveniences of legal procedure, the aggregate body of shareholders in a joint

stock company should be deemed the corporation." 1 Thompson, Corporations, sec. 17. Mr. Morawetz also writes very cogently to the same effect: "It is essential to a clear understanding of many branches of the law of corporations to bear in mind distinctly, that the existence of a corporation independently of its shareholders is a fiction; and that the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being." 1 Morawetz, Private Corporations, sec. 1. "While a corporation may, from one point of view, be considered as an entity without regard to the corporators who compose it, the fact remains self-evident that a corporation is not in reality a person or thing distinct from its constituent parts. The word 'corporation' is but a collective name for the corporators or members who compose an incorporated association." 1 Morawetz, Private Corporations, sec. 1. In *Moore v. Schoppert*, 22 W. Va., 282, 290, the court say: "The relation between a corporation and its several members may, for all practical purposes, be treated as that of trustee and *cestui que trust*. In contemplation of law, the property and rights of an incorporated company belong to the united association acting in the corporate name, and not to the stockholders. The latter, however, are the real owners; and a technical trust thus arises in their favor, which will be protected and enforced by the courts of equity."

This principle that in equity the corporation is regarded as a trustee for those who are the ultimate substantial beneficiaries of what is held and acquired in the corporate name, finds many important illustrations in various departments of the law of corporations. Thus it has been held that a sole stockholder may be treated in equity as the corporation, when the equities of a case so require. *Swift v. Smith*, 65 Md., 428, 57 Am. Rep., 336; 7 Thompson, Corporations, sec. 8403; 4 Thompson, Corporations, sec. 5097. The case of *Swift v. Smith* has been criticised, as we think with some reason, so far as it deals with the

sole stockholder as if he had some title to the property. But so far as it sustains the proposition that between the corporation and the stockholder the latter is to be recognized as the real beneficiary, and consequently that equitable rights and remedies the benefit whereof would inure solely to the shareholder are to be regarded as exercised for him by the corporation, and not as something belonging to it independently, the decision is in accord with the authorities. It has also been applied frequently where acts have been done or assented to by the whole body of shareholders and attempt has been made to evade liability by conjuring with the corporate name. 1 Morawetz, Private Corporations, sec. 262; *Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Machine Co.,* 90 N. Y., 607, 613; *Omaha Hotel Co. v. Wade,* 97 U. S., 13, 23, 24 L. Ed., 917. Another case where this principle comes into play is to be seen in attempts to place property beyond the reach of creditors by fraudulent incorporations. In such cases, courts do not hesitate to look behind the corporation to the real and substantial beneficiaries. *First Nat. Bank of Chicago v. Trebein Co.,* 59 Ohio St., 316, 52 N. E. Rep., 834; *Terhune v. Hackensack Savings Bank,* 45 N. J. Eq., 344, 19 Atl. Rep., 377; *Kellogg v. Douglas County Bank,* 58 Kan., 43, 48 Pac. Rep., 587; 62 Am. St. Rep., 596; *Lusk v. Riggs,* 65 Nebr., 258. In *First Nat. Bank v. Trebein Co.* the court say (p. 326): "The fiction by which an ideal legal entity is attributed to a duly formed incorporated company, existing separate and apart from the individuals composing it, is of such general utility and application as frequently to induce the belief that it must be universal, and be, in all cases adhered to, although the greatest frauds may thereby be perpetrated under the fiction as a shield. But modern cases, sustained by the best text-writers, confine the fiction to the purposes for which it was adopted." It has likewise been applied to cases of estoppel. Thus Mr. Thompson says: "We may also conclude from the premise that the body of stockholders are in substance the corpora-

tion, that estoppels are concurrent as between the stockholders and the corporation,—in other words, that whatever will estop the stockholders will estop the corporation, and whatever will estop the corporation will estop the stockholders." 4 Thompson, Corporations, sec. 5269. But the commonest instance of application of this principle is in stockholders' suits for mismanagement. Ordinarily such suits are to be brought in the name of the corporation, at the instance of the corporate authorities. But where, for some reason, this course is not open, the stockholders injured will not be deprived of all remedy, but upon proper showing will be permitted to sue directly by joining the corporation as a defendant. The very basis of these suits is that "courts of equity recognize that the stockholders are ultimately the only beneficiaries." *City of Chicago v. Cameron,* 120 Ill., 447, 457. Stockholders are allowed to sue in order to obtain redress for such wrongs because "in their effect and essential character they are wrongs to the individual shareholder, inflicted upon his corporate interests by means of the control over those interests secured through the corporate organization and management." *Brewer v. Boston Theatre,* 104 Mass., 378, 395. See also *State v. Holmes,* 60 Nebr., 39, 42. It is but another application of the same principle to hold that where no question of title is involved, but some equitable remedy is sought in the corporate name, depending purely upon the doctrines of a court of equity, the court, to prevent abuse and perversion of its doctrines and remedies, will look through the corporation to the real parties in interest, and, if those parties have no standing in equity, will refuse the remedy.

Cases of this kind must be differentiated sharply from those where the proceeding is at law, or where a question of title to the corporate property is involved. There is no question that stockholders, as such, have no title to the corporate property which they can convey or incumber in their own names. *Humphreys v. McKissock,* 140 U. S., 304, 11 Sup. Ct. Rep., 779, 85 L. Ed., 473; *Wheelock*

v. Moulton, 15 Vt., 519; *Smith v. Hurd,* 12 Met. [Mass.], 371, 385, 46 Am. Dec., 690; *Parker v. Bethel Hotel Co.,* 96 Tenn., 252, 34 S. W. Rep., 209, 31 L. R. A., 706; *Button v. Hoffman,* 61 Wis., 20, 50 Am. Rep., 131; *Spurlock v. Missouri P. R. Co.,* 90 Mo., 199. But this, in substance, is only another way of saying that the corporation must act through its proper agents and in the prescribed way. 4 Thompson, Corporations, sec. 4476. It is also true, for convenience of legal procedure and to avoid confusion, that restitution or redress, even where the injury has affected the interests of the stockholders, is to be sought primarily through the corporation. But this rule must always yield to the requirements of equity, and is cast aside in view of the fact that the stockholders are the real beneficiaries whenever the usual course is not open. *Brewer v. Boston Theatre, supra;* 4 Thompson, Corporations, sec. 4477. Cases like the one at bar are obviously within the same reason. To permit persons to recover through the medium of a court of equity that to which they are not entitled, simply because the nominal recovery is by a distinct person through whom they receive the whole actual and substantial benefit, and that nominal person would, in ordinary cases, as representing beneficiaries having a right to recover, be entitled to relief, is a perversion of equity. It turns principles meant to do justice into rules to be administered strictly without regard to the result. It is contrary to the very genius of equity. When the corporation comes into equity and seeks equitable relief, we ought to look at the substance of the proceeding, and if the beneficiaries of the judgment sought have no standing in equity to recover, we ought not to become befogged by the fiction of corporate individuality, and apply the principles of equity to reach an inequitable result.

Hence, we think the rule to apply to such cases is this: 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. But where it is 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. This rule finds many illustrations in the authorities.

In *Arkansas River Land, Town & Canal Co. v. Farmers' Loan & Trust Co.*, 13 Colo., 587, 22 Pac. Rep., 954, the court said (p. 598): "It is true that, for some purposes, a body corporate is sometimes regarded as a legal entity, or a fictitious person having a distinct existence. This fiction is not recognized in equity. The reason is clear. Without organization and members, without officers and stockholders, a corporation is but a naked body. It may be authorized to exercise corporate franchises, but is without means or instrumentalities for such exercise. It is clear, therefore, that a body corporate can not maintain a suit for equitable relief, except as the representative of the stockholders. It necessarily follows that if the shareholders are without equity they can not, through the corporate organization, or in its name, obtain relief either for themselves or for the corporation. 'In equity the conception of a corporate entity is used merely as a formula for working out the rights and equities of the real parties in interest, while at law this figurative conception takes the shape of a dogma, and is often applied rigorously, without regard to its true purpose and meaning. In equity the relationship between the shareholders is recognized whenever this becomes necessary to the attainment of justice; at law this relationship is not recognized at all.' 1 Morawetz, Private Corporations, 227. At the very outset of the discussion, then, it must be assumed that, in a suit of this nature, the corporation and

the individual plaintiffs can not be separated. It follows that, if the individual plaintiffs are not entitled to relief, as counsel admits, the corporation is not, and the judgment dismissing the bill might, very properly, be affirmed without further discussion."

In *Parsons v. Hayes,* 14 Abb. N. Cas. [N. Y.], 419, 431, the court say: "Again, considering that the fundamental position is, that Catlow became, in fact, shareholder to the amount of all the capital stock, the following was the relation between the parties: The corporation was the holder of the legal title of the property of the corporation, subject to corporate uses. Excepting this legal title for corporate uses, the shareholders were the parties interested in the property, in fact, owning all of it, excepting the legal title, which, as against them, could be used for corporate purposes. The trustees were the statutory corporation. The shareholders were members or a part of the corporation. The corporation held the legal title for the pecuniary benefit of the shareholders having no beneficial or pecuniary benefit in it. On the claims for the plaintiff, the thing possessed is the right of the corporation to have an action against its trustees for damages for their acts, which it is claimed were wrongful to the corporation. This right, if it existed, was held by the same tenure and for the same purposes that other property would be held. The corporation would have a bare title to it for the beneficial use of shareholders. It seems to be evident, that the corporation could not claim as damage to its interest what would be damage to the beneficial interest, when the owners of the latter had consented to the so-called injury."

In *Flagler Engraving Machine Co. v. Flagler,* 19 Fed. Rep., 468, the promoters and directors of a corporation put in certain patent rights as part of its capital. Afterwards by fraudulent practices they induced others to buy stock at extravagant prices. The purchasers got control of the corporation and brought a suit in equity in the name of the corporation against the former directors for

mismanagement. The court said that the purchasers might have a right to set aside the sales of stock made to them through fraud, but that they could not, by obtaining control of the company, set up an artificial case and recover through the company what was really their loss individually, and not as stockholders.

In *Schilling & Schneider Brewing Co. v. Schneider*, 116 Mo., 83, 19 S. W. Rep., 67, a corporation brought suit against certain stockholders to have shares which they held declared to be the property of the corporation. The court treated the remaining stockholders as the real parties in interest, and expressly referred to them as such, and held that as their predecessors in interest could not have complained of the use of money of the corporation in acquiring the shares, the stockholders in whose interest the suit was brought could not do so in their own name or in that of the corporation.

The only decision which has been cited to the contrary is *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Nebr., 374, 429. There it was held that a suit for mismanagement was maintainable in equity as to a transaction in which four-fifths of the stockholders participated and the remainder acquiesced. There had been no change in the stockholders. Suit was brought by one who had acquiesced to recover for the benefit of the corporation. It was said that the action was for the benefit of the corporation, which was a distinct person, and was not affected by the circumstance that the stockholder himself was in no position to complain. But a rehearing was granted, if we may judge from the motion and brief of counsel, on this very ground; and upon rehearing this branch of the case was decided upon an entirely different point, namely, that there had been no acquiescence on the part of the complaining stockholder. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Nebr., 463. Hence, while there is no express retraction of the statement in the former opinion, we are satisfied that the court intended to recede from it, and that we are not bound

thereby. We reach this conclusion the more readily because the proposition that acquiescence of all the stockholders does not preclude the right of the corporation to relief, as advanced in the first opinion, is contrary to the uniform and long established course of decision in all courts, and the understanding of all writers upon the subject. 2 Cook, Corporations, secs. 278, 279; 4 Thompson, Corporations, sec. 5269; 2 Beach, Private Corporations, sec. 887; 1 Morawetz, Private Corporations, secs. 262-264. The adjudications to the same effect as the statements of the text-writers cited are legion.

But it is said the defendant Barber, by reason of his delinquencies, is in no position to ask that the court look behind the corporation to the real and substantial parties in interest. The trial court took this view, saying: "I have come to the conclusion that, there being no equities in this case in favor of Mr. Barber, it is not the duty of this court to look behind the entity of the corporation." We do not think such a proposition can be maintained. It is not the function of courts of equity to administer punishment. When one person has wronged another in a matter within its jurisdiction, equity will spare no effort to redress the person injured, and will not suffer the wrong-doer to escape restitution to such person through any device or technicality. But this is because of its desire to right wrongs, not because of a desire to punish all wrong-doers. If a wrong-doer deserves to be punished, it does not follow that others are to be enriched at his expense by a court of equity. 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. When it is disclosed that he has no standing in equity, the degree of wrong-doing of the defendant will not avail him. This principle can hardly need demonstration; but abundant illustrations are at hand. For instance, a creditor can not complain of a fraudulent conveyance by his debtor unless he is injured thereby. *Baldwin v. Burt,* 43 Nebr., 245.

The conduct of the debtor may have been ever so fraudulent. But if it appears that the creditor has not been prejudiced, he acquires no right merely from the evil intent of unconscientious acts of the debtor. Another example may be seen in *Roberts v. Northern P. R. Co.*, 158 U. S., 1, 13, 15 Sup. Ct. Rep., 756, 39 L. Ed., 873. In that case a county had granted land to a railroad company without authority, and the grant, under statutes and decisions of the state, was of no effect. Afterwards the county sold the same land to an individual. The court said: "Whatever might be the result in a court of law of a contest between these respective grantees of the county, it may well be doubted whether a court of equity could be successfully appealed to by a purchaser from the county of property worth upwards of two hundred thousand dollars for a nominal consideration of less than four hundred dollars. If the county had found that it had been overreached in its bargain with the railroad company, or had learned that its grant of these lands was invalid for want of power, and had come into a court of equity, offering to do equity by an offer to return or account for the consideration received, the condition of things would have been different from what it now is. In such a proceeding the rescission would have inured to the benefit of the taxpayers of the county; but under the present claim, the benefit would go to a private party, who bought with knowledge of the county's previous sale, and who admits in his answer that he secured his own grant for a grossly inadequate consideration because of the fact of such previous sale." In other words, the wrongdoing of the defendant will not blind a court to the fact that the plaintiff may have no standing in equity.

Counsel say that the court will not look through the corporation to the real plaintiffs in order to preserve to Barber the fruits of his wrong-doing. If such were the only purpose, we should agree. But the court will bear in mind the real parties in interest, in order to prevent those parties from misusing equitable rules and remedies

to obtain relief to which they have no right, and recover back money which they paid out voluntarily upon full consideration, without any deception, and to which they can assert no legal claim whatever.

Turning, now, to those items which involve withdrawal of money and assets of the company by Barber and conversion thereof to his own use, it must be evident that the foregoing discussion does not apply thereto. So far as its title to property and its right to its money and assets are concerned, a clear distinction between the company and its stockholders is always drawn. As we have seen, even if Barber had owned all the stock in the company, he would have had no title to the corporate property, so far as to be able to deal with it in his own rather than in the corporate name. But he was only a majority stockholder. When he withdrew money or assets of the corporation and converted it to his own use, there was as clear a conversion as if the transaction had taken place between natural persons. If he concealed and covered up these transactions by availing himself of the opportunities afforded him as secretary and manager of the company, and they were not discovered until a change in management resulted in an investigation of the books, we see no reason why the company should not recover the sums so misappropriated. We are therefore of opinion that so far as relates to the $3,000 converted under pretense of payment to Reynolds and Lovett for services as lobbyists, detailed in the twenty-third finding of the district court, and the conversion of the various collections, detailed in the twenty-ninth finding, the plaintiff should have judgment. We think, likewise, that it ought to recover the interest on the mortgage loan as found in the sixteenth finding. The trial court held that this loan was made in good faith, was duly entered on the books of the company and properly secured and acquiesced in by the company and its officers. But it further found that a large amount of interest on the loan remained unpaid. There is nothing

in the record to justify any inference, much less a finding, that Barber was not to pay all the interest on this loan. He had charge of the books and accounts of the company, and the evidence shows conclusively that he manipulated them in many ways so as to conceal the true nature of his dealings and the actual condition of the transactions between himself and his employer. As to this item of interest, the case stands the same as any other between debtor and creditor.

The same considerations apply to the money withdrawn on November 20, 1899. Unless the claim for back-salary is a just and valid one, this was simply a conversion of that amount of money of the company. It becomes necessary, therefore, in this connection, to pass upon the issues as to Barber's claim for unpaid salary, since the company has filed a cross-appeal from that portion of the decree in which such claim is allowed. Undoubtedly, as a general rule, when parties have contracted for performance of certain services for a definite period at a fixed salary, and the employment continues beyond the period agreed upon, in the absence of any new contract, it will be presumed that the employment continued under the same contract and upon the terms originally fixed. *Wallace v. Floyd,* 29 Pa St., 184, 72 Am. Dec. 620; *Crane Bros. Mfg. Co. v. Adams,* 142 Ill., 125, 30 N. E. Rep., 1030. But this presumption must yield to evidence showing a change of terms. *Hale v. Sheehan,* 41 Nebr., 102; *McCullough Iron Co. v. Carpenter,* 67 Md., 554; *Commonwealth Ins. Co. v. Crane,* 6 Met. [Mass.], 64. It may be conceded that it would take two to make the new agreement, and that a mere intention on the part of Barber to accept a less sum, or even an express statement by him that he would accept the less sum, would not of itself bind him so to do. *Richard Thompson Co. v. Brook,* 14 N. Y. Supp., 370. In that case certain employees of a corporation agreed among themselves to accept a reduction of salary. The corporation was not a party to the agreement, and it was never communicated to or acted on by the corpora-

tion or its directors. Such a case is very different from the one at bar. Here, while there was no action by the corporation expressly, the court has found that from the time Barber as general manager reduced his own salary, along with the salaries of other employees, to the time he ceased to be an officer of the company, he drew his salary from time to time substantially on the basis of the reduction; and the evidence is clear and convincing that he took the money withdrawn in full satisfaction of his claim for salary, and had no thought of claiming more until his right to withdraw the $2,200 was challenged after the new management took charge. We think these circumstances are sufficient to show that the company relied on his voluntary action in reducing his own salary, and took no express action thereon, because none was necessary, and that it was understood by both parties that his salary was that which he had voluntarily fixed upon. In *Shade v. Sisson Mill & Lumber Co.*, 115 Cal., 357, 47 Pac. Rep., 135, the corporation rendered statements monthly to an employee, in which he was credited with a less salary a month than he should have received. It was held that the employee, by acquiescence in these statements so rendered him, was estopped to claim afterwards a salary in excess of that for which he was given credit. So long as Barber's reduction of his own salary was carried out by himself for a long series of years, and even at the time when he withdrew the $2,200 he did not claim the right to withdraw any such sums as would be due to him if his present claims were allowed, we see no ground whatever on which to sustain the judgment in his favor in this behalf. Hence we are of opinion that the company should recover the item of $3,000 converted on April 17, 1895, the item of $237.37 for collections unaccounted for, the unpaid interest on the mortgage loan, amounting at the date of the decree in the lower court to $1,510, and the item of $2,200 withdrawn on November 20, 1899.

It is therefore recommended that the decree of the

district court be reversed, and the cause remanded with directions to enter a new decree in favor of the plaintiff and against the defendant Barber for the several sums last above stated and interest thereon at the rate by law provided. We further recommend that each party pay his own costs in this court.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is reversed, and the cause is remanded with directions to enter a new judgment in favor of the plaintiff and against the defendant Barber in accordance with said opinion. It is further ordered that each party pay his own costs in this court.

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6. 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 & Shuman v. Chamberlain Banking House* 196

Bonds.

1. Where a bond is executed in pursuance of a statute which is afterward declared unconstitutional, the test of the enforceability of such a bond is: (1) Does a consideration exist independent of the statute? (2) Does the bond have the

Bonds—*Continued.*

other essentials of a common-law contract? *Stevenson v. Morgan* 207

2. A bond executed in pursuance of a statute, is not necessarily rendered void because the statute is afterwards pronounced unconstitutional. *Stevenson v. Morgan* 207

3. A cause of action accrues upon a bond conditioned to do a certain act as soon as there is a default in the performance, whether the obligee has suffered damage or not, and the statute of limitations begins to run from that date. *Northern Assurance Co. v. Borgelt*..... 282

4. If, however, the bond is conditioned to indemnify, damage must be shown before the party indemnified is entitled to recover, so that a cause of action accrues, and the statute begins to run, not from the date of the act which causes damage, but from the time when pecuniary loss ensues therefrom. *Northern Assurance Co. v. Borgelt*..... 282

5. Courts incline strongly to construe bonds as contracts of indemnity only, and will attach more importance to the general purpose of a bond, as shown by its provisions as a whole and the interests of the parties in the subject-matter, than to the precise form of words employed. *Northern Assurance Co. v. Borgelt*..... 282

6. Although a cause of action for a prior breach of a bond furnished by an agent for the protection of his principal may have been barred by limitation, such fact will not bar an action for another and subsequent breach; the statute of limitations runs as to each breach from the time when it takes place. *Northern Assurance Co. v. Borgelt*..... 282

7. It is the duty of an agent of limited authority to adhere faithfully to the instructions of his principal, and if he exceeds, violates or neglects them, and loss results to his principal as a natural and ordinary consequence, it is his duty to make such loss good. *Northern Assurance Co. v. Borgelt* 282

8. A bond furnished by insurance agents to the company was conditioned that the agents should "in all respects observe and fulfil the instructions of the said company" and that they should "in all other respects well and faithfully perform their duties as such agents." The agents neglected to cancel a policy when directed so to do, and the company was afterwards compelled to pay a loss upon the policy. In an action on the bond, *held* (1) that, as to the condition last mentioned, the bond was to be construed as a contract of indemnity; (2) that even if not a contract of

Bonds—*Concluded.*

indemnity, as it was the duty of the agents to make good any loss which accrued to the company through their neglect or violation of their instructions, the condition that they would fully perform their duties as agents was broken when they failed to repay to the company the amount it was compelled to pay out through their misconduct, and hence, in either view, the cause of action was not barred until five years from the time when loss to the obligee ensued. *Northern Assurance Co. v. Borgelt* 282

Boundaries.

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. *Lynch v. Egan* 541

Claims. See COUNTIES AND COUNTY OFFICERS, 1-3.

Common Law.

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* 500

Constitutional Law.

The appellate court will not pronounce a statute unconstitutional and void where a determination of the case does not require that the constitutionality of the statute be determined. *Morse v. City of Omaha* 426

Contracts. See ATTORNEYS, 1.

1. Where service 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* 644

2. A contract entered into between two irrigation companies by the terms of which one company sells and conveys its canal to the other, reserving a lien on the property sold as security for a balance of the consideration remaining unpaid, may, in default of the payment of such consideration,

Contracts—*Concluded.*

be foreclosed as a mortgage. *Almeria Irrigation Canal Co. v. Tzschuck Canal Co*..... 290

3. The contract provided that that part of the consideration secured by a lien on the property should be paid in water rights issued to the vendor or to such party or parties as the vendor should designate, and such latter-named parties were also to have a lien on the property for their security. *Held*, That on foreclosure of the contract and a sale of the property, the lien of such parties would still continue as against the purchaser at the foreclosure sale. *Almeria Irrigation Canal Co. v. Tzschuck Canal Co*..... 290

4. The purchasing company owned an irrigation canal constructed through the country below the canal which it had purchased, and after the purchase connected the two so that they became one system. *Held*, That the lien reserved by the vendor company might, notwithstanding this, be foreclosed and that part of the canal covered by said lien sold. *Almeria Irrigation Canal Co. v. Tzschuck Canal Co*..... 290

5. Parties owning water rights purchased from the vendee company along the lower part of the canal sought to interfere in the action. *Held*, That they had no such right or interest in the foreclosure proceedings as entitled them to do so. *Almeria Irrigation Canal Co. v. Tzschuck Canal Co.*, 290

Conversion.

In an action to recover damages for the conversion of goods, the only purpose of a demand is to establish the fact of a conversion. Where a wrongful conversion is established by other testimony, a demand need not be shown. *Gross v. Scheel* 223
Zieman v. Scheel..... 223

Corporations. See BILLS AND NOTES. COUNTIES AND COUNTY OFFICERS. MUNICIPAL CORPORATIONS. RAILROADS.

Agency of Manager.

1. The general manager of a corporation in effectuating a sale of the entire capital stock of his company, acts as the agent of all the stockholders, and he can not receive and retain a secret compensation from the vendee for effectuating the contract of sale. *Barber v. Martin*..... 445

Franchise.

2. 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; the question of whether such franchise was acquired or held rightfully being de-

Corporations—*Continued.*

terminable 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*.... 111

Fraud of Manager.

3. 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*..... 445

4. In an action by a shareholder, as principal, against the general manager and secretary of the corporation, as agent for the sale of the shareholder's stock, to recover the difference between the actual consideration received therefor and the amount accounted for, it appeared that the general manager led the shareholder to believe that he would not purchase her stock under any circumstances; that an option to purchase the shares for a sum much larger than the manager stated he would take for his own was given to the manager by a son of plaintiff, which was fully explained to have been given for the express purpose of enabling the manager to effect a sale to third parties. A few days later the manager sent a telegram to plaintiff, stating, "Have offer $900 cash." He had never received such offer, but as a result of negotiations then pending, he later received a much higher offer. *Held*, That the manager was the plaintiff's agent for the sale of the stock. *Barber v. Martin*..... 445

Personality of Corporation and Stockholders.

5. 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 Ins. Co. v. Barber*..... 644

6. But where it is 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

Corporations—*Concluded.*

advantage, the corporation will not be permitted to recover. *Home Fire Ins. Co. v. Barber*..... 644

Salary of Manager.

7. The general manager of a corporation, after expiration of a contract fixing his salary at $5,000 *per annum*, continued in the same employment, without any new agreement, and afterwards voluntarily reduced his salary to $3,000 *per annum*, drawing it from month to month thereafter on that basis for many years, until he gave up the office. After the original contract, no action was taken by the directors with reference to his salary; but the evidence that he took the less sum from time to time in full payment was clear and convincing. *Held*, That a judgment for back salary at the rate of $2,000 *per annum* could not be sustained. *Home Fire Ins. Co. v. Barber*..... 644

Stockholders.

8. Subsequent stockholders have no standing, as a general rule, to attack prior mismanagement of the corporation. *Home Fire Ins. Co. v. Barber*..... 644

9. Such a 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*..... 644

10. Stockholders who have acquired their shares and their interest in the corporation from the alleged wrong-doers and through the prior mismanagement, have no standing to complain thereof. *Home Fire Ins. Co. v. Barber*..... 644

11. 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*..... 644

12. The officers and directors of a corporation and the shareholders thereof sustain to each other the relation of trustees 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*..... 445

Counties and County Officers. See TAXATION, 2, 3, 7, 8.

Appeal of Claims.

1. 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 can not accept the part that is in his

Counties and County Officers—*Continued.*

favor and appeal from the remainder. *Dakota County v. Borowsky* 317

2. 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*..... 317

Funds.

3. 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" being legally only a part of the general fund, known by a term which designates its source. *Dakota County v. Bartlett* 62

4. 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 conclusion not overcoming the presumption that officers do their duty. *Dakota County v. Bartlett*..... 62

5. 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 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*..... 40

6. A county warrant, in excess of eighty-five per cent. of the levy against which it is drawn, is void. The county board can not 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 face appear to be within the statutory limit. *Bacon v. Dawes County*, 66 Nebr., 191. *National Life Ins. Co. v. Dawes County*..... 40

7. 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. *F. C. Austin Mfg. Co. v. Colfax County*..... 101

8. Where the record contains a general admission that county warrants were "issued" by and signed by the proper county

Counties and County Officers—*Concluded.*
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*..... 62

Treasurer.

9. The county treasurer is without authority to sell lands at private tax sale, until he has made and filed in the office of the county clerk the report required by section 113 of the general revenue law. But a tax-sale certificate is presumptive evidence that such report was made and filed in due time. *Gallentine v. Fullerton*..... 553

Courts. See COMMON LAW. JUSTICE OF THE PEACE. RAILROADS, 13.
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*..... 612

Criminal Law and Procedure. See LARCENY. NUISANCE. RAILROADS, 13.

Crime.

1. No person can be punished for any act or omission not made penal by the plain import of the written law. *State v. De Wolfe*..... 321
2. While there are in Nebraska no common-law crimes, the definition of an act forbidden by the statute, but not defined by it, may be ascertained by reference to the common law. *State v. De Wolfe*..... 321

Evidence.

3. Evidence examined, and found sufficient to support a verdict of guilty, as found by the jury. *Keating v. State*..... 560

Indictment and Information.

4. A person accused of a felony must be charged by an information or indictment which discloses the *nature and cause of accusation* preferred against him. *Moline v. State*, 164
5. An information for a felony must charge explicitly all that is essential to constitute the offense. It can not be aided by intendment nor by way of recital or inference, but must positively and explicitly state what the accused is called upon to answer. *Moline v. State*..... 164

Larceny.

6. Evidence sufficient to support a conviction of larceny. *Martin v. State*..... 36
7. In the trial of an indictment for larceny from the person, evidence was admitted that the passengers on the train,

Criminal Law and Procedure—*Continued.*

where the offense was alleged to have been committed, had had their suspicions excited by the action and conduct of the defendant and a traveling companion at and prior to the time the larceny was committed. Taken in connection with other testimony, of the same witness, the admission of this evidence was not prejudicial. *Martin v. State*.....36, 39

Oleomargarine.

8. Section 245*m*, *et seq.*, prohibiting the sale of colored imitation butter, with the regulations imposed by the act, are constitutional. *Beha v. State*..... 28

9. The Food Commission law does not repeal by implication the Oleomargarine law. *Beha v. State*..... 28

Robbery.

10. The accused was charged with and tried for robbery. *Held*, His prior statements as to how the robbery might be committed were properly admissible in evidence, to be considered by the jury with other facts and circumstances proved, in determining the question of guilt or innocence. *Keating v. State*..... 560

Shooting With Intent to Kill.

11. A person who has been found guilty of shooting with intent to kill, can not found a valid claim to judicial leniency upon his inferior markmanship. *Parker v. State*..... 555

Trial.

12. The reference of a prosecuting attorney to the failure of a prisoner charged with a crime to testify in his own behalf, is altogether inexcusable; and such reference merits a prompt reproof by the court. But, in the absence of competent proof in the record, it will be presumed that the order of the court in overruling the motion for a new trial on this ground, at least, was correct. *Martin v. State*.....36, 38

13. In the trial of a criminal case, the following instruction was given with regard to reasonable doubt: "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 cause a reasonable and prudent man to hesitate and pause*, it is insufficient to authorize a verdict of not guilty." It will not be presumed that the words italized confused the jury as to the main idea sought to be conveyed by the instruction, and it was not prejudicial to the accused. *Martin v. State* 36, 39

14. The trial court gave an instruction of general applica-

Criminal Law and Procedure—*Concluded.*

tion regarding the credibility of the witnesses who had testified in the case, including the defendant, who was accused of a felony, and of the weight to be attached to the testimony of the several witnesses, which announced a correct rule of law. At the request of the state, the jury were also instructed that the defendant had a right to be sworn and testify in his own behalf, but that in weighing his testimony and in determining the weight which should be given thereto the jury might take into consideration his interest in the result of the trial, and the further fact, if the same was proved (which was admitted by the defendant), that he had been convicted of a felony, as affecting his credibility as a witness. *Held*, That the latter instruction was not prejudicially erroneous because of the repetition of the matter contained in the general instruction on the subject, nor, under the circumstances, was it erroneous because the defendant was individually named and his testimony alone alluded to in the latter instruction. *Keating v. State*..... 560

Writ of Error in Behalf of the State.

15. A demurrer to an information was sustained. In a proceeding by the prosecuting attorney, by exceptions brought under section 515 *et seq.* of the Criminal Code, the opinion of the supreme court, sustaining the exceptions, affects in no manner the judgment of the court below in the proceeding in which the demurrer was sustained, but only determines the law of the case. *State v. De Wolfe*..... 321

Deeds.

1. A quitclaim deed purporting to convey all the grantor's interest in the 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*..... 183

Conveyance Before Partition.

2. A conveyance before partition by one of the owners to a brother, purporting to convey all his interest, where by its other terms 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*, 183

Depositions. See EVIDENCE.

Dower.

Assignment and Transfer.

1. Where a dower fund is, on the death of the widow, to

Dower—*Concluded.*

revert to heirs, an assignment of an interest in such reversionary fund may be oral. *Curtis v. Zutavern*..... 183

2. Where, on partition, a certain sum set apart as the widow's dower is to revert to the other parties to the partition suit at her death, a quitclaim deed of the land, made after the confirmation of the partition sale to the purchaser at such sale, though evidence of the assignment of an interest in the reversionary fund, does not constitute such an assignment. *Curtis v. Zutavern*..... 183

Parties to Suit.

3. 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, and on his bond conditioned for its repayment into court at her death, it will come into court for distribution in the same proportions as originally decreed for the remainder of the estate, unless transfers have intervened. *Curtis v. Zutavern*..... 183

4. The owners of land as ascertained in a partition suit, and the representatives of any who are deceased, may join as plaintiffs in a suit on a bond given in such proceedings for the repayment of a fund set apart for the use of the widow as her dower. *Curtis v. Zutavern*..... 183

Electricity.

1. Evidence *held* to show that if fatal contact was with defendant's guy-wire, such contact was voluntary, and after warning to the deceased. *New Omaha Thompson-Houston Electric Light Co. v. Johnson*..... 393

2. Evidence *held* not to support a finding that plaintiff's intestate came to his death from accidentally stepping upon scrap iron electrically charged from the wires of the electric light company. *New Omaha Thompson-Houston Electric Light Co. v. Johnson*..... 393

3. Defendant company *held* to be under a 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 Thompson-Houston Electric Light Co. v. Johnson*..... 393

Eminent Domain.

Power of Legislature.

1. The legislature has not abolished, nor does it possess the power to abolish, the rights of riparian proprietors, which have become vested, except as such rights be taken or impaired for a public use in an exercise of the powers of

Eminent Domain—*Concluded.*

eminent domain, for which compensation must be made for the injury sustained. *Crawford Company v. Hathaway*.. 325

Public Streets.

2. Poles and wires which permanently and exclusively occupy portions of a public street or highway, constitute an additional burden for which the abutting owner is entitled to compensation in case he is injured thereby. *Bronson v. Albion Telephone Co*..... 111

Remedy at Law and Not by Injunction.

3. 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 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*..... 111

Trees.

4. Where an abutting owner has planted trees along the street adjacent to his property, under the terms of a city ordinance pursuant to statutory provisions, a telephone company which removes, destroys or injures such trees in erecting poles and wires under its franchise, is liable for the resulting damage, even though no unnecessary injury is inflicted. *Bronson v. Albion Telephone Co*..... 111

Waters.

5. A permit from the state board of irrigation to divert the waters of the state to specific lands described in the application, is a condition precedent to the prosecution of the work, the appropriation of the waters and the condemnation of the right of way. *Castle Rock Irrigation Canal & Water Power Co. v. Jurisch*..... 377

Evidence. See APPEAL AND ERROR. COUNTIES AND COUNTY OFFICERS, 4. CRIMINAL LAW AND PROCEDURE, 3, 6, 7. ELECTRICITY, 1, 2. TAXATION, 5, 10, 11. TRIAL. WITNESSES.

Correspondence.

1. 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

Evidence—*Concluded.*

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*.. 445

Depositions.

2. 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*..... 568

Exclusion of Evidence.

3. 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*..... 445

Judicial Notice.

4. 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 sucessful agriculture, a custom or practice has existed of appropriating and diverting waters from natural channels, into irrigation canals, and the application 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 Company v. Hathaway*..... 325

Parol Testimony.

5. The rule that parol testimony can not 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 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*..... 445

Sufficient Evidence.

6. Sufficient to support the verdict in an action against a common carrier for personal injury. *Chicago, B. & Q. R. Co. v. Winfrey*..... 13

Executors and Administrators.

1. Allegations of collusion and fraud on the part of defendants are sufficient to entitle a creditor to bring an action

Executors and Administrators—*Concluded.*
without showing a technical refusal by the administratrix to sue. *McGlave v. Fitzgerald*..... 417

2. An allegation by a personal representative, in a suit for specific performance of a contract of purchase, that the property is a homestead, is for the benefit of the heirs, and is not prejudicial to them. *Solt v. Anderson*..... 103

3. Except in case of a homestead, a sale of real property is an equitable conversion of the land into money; and the vendor's interest passes to his personal representative on his death, and the legal title is considered to be held as security for payment of the price. *Solt v. Anderson*..... 103

4. The district court is not deprived of jurisdiction of a case, involving the taking of illegal fees, 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*..... 417

5. In an action by a creditor (suing in behalf of all) of an insolvent estate, against the administratrix thereof and the county judge for an accounting, a petition which alleges collusion between the defendants, and a fraudulent payment and retention of illegal fees to the prejudice of the creditors, is sufficient as against a demurrer. *McGlave v. Fitzgerald*.. 417

6. Under chapter 23, section 335*a*, Compiled Statutes, 1901, (Annotated Statutes 5185), the personal representative of a deceased vendor may maintain a suit for specific performance of a contract. *Solt v. Anderson*..... 103

7. In an action by a personal representative of a deceased person to recover purchase money for a homestead, where the law requires the heirs at law to be made parties, the decree should provide that they, and not the personal representative, recover the purchase money. *Solt v. Anderson*, 103

8. The money recovered by a personal representative of a deceased person in a suit for specific performance, is personalty and is to be distributed as such; but a homestead is an exception to the rule; in such case, the proceeds stand exempt and in lieu of the land, and the purchase money, not exceeding $2,000, should be turned over to those to whom the homestead would have descended by operation of law. *Solt v. Anderson*..... 103

Fees and Salaries. See PRISONS.

1. An officer can not charge fees not authorized by statute for services performed, and any service rendered for which

Fees and Salaries—*Concluded.*

no statute authorizes a fee must be performed gratuitously. *Red Willow County v. Smith*..... 213

2. Under the revenue laws of this state, a sheriff in whose hands the county treasurer has placed a distress warrant can not charge the county a fee of fifty cents for a return upon such warrant, "No property found." *Red Willow County v. Smith*..... 213

Fraudulent Conveyances.

1. In an action to set aside a conveyance from a father to his son as fraudulent, the financial condition of the grantor at the time of making the conveyance need not be pleaded. *Dufrene v. Anderson*..... 136

2. A father being heavily indebted, conveyed certain land to his son, and the deed was withheld from record for more than a year. All of the indebtedness of father to son save a claim of $126 was secured by mortgages; but the interest and taxes were accumulating; and, on foreclosure, the amount realized was not sufficient to satisfy the decrees. The value of the property conveyed was estimated at $4,200. It was subject to a lien of some $1,600. Other property conveyed at the same time was worth about $2,700 more than the incumbrances. The consideration was a debt due for less than $500. This conveyance was fraudulent as to creditors. *Dufrene v. Anderson*..... 136

Guardian and Ward.

1. A guardian is discharged, within the purview of section 32, chapter 34, Compiled Statutes (Annotated Statutes, 5402), when the ward becomes of age. *Goble v. Simeral*..... 276

2. As to the sureties upon the guardian's bond, the period of limitation provided in said section begins to run from the date of such discharge, not from the time when a cause of action has accrued upon final settlement; if no cause of action accrues within the period fixed, by reason of failure to take or complete the necessary steps, the sureties do not continue to be liable. *Goble v. Simeral*..... 276

3. The reluctance of courts to construe a statute so as to permit it to operate harshly in particular cases, must yield to plain and unequivocal indications of legislative intent. *Goble v. Simeral*..... 276

Herd Law. See ANIMALS.

Highways. See TRIAL, 5, 6.

In Counties Under Township Organization.

1. Counties governed by the township organization act of 1895

Highways—*Concluded.*

are relieved from the duty and liability to construct, maintain and keep in repair ordinary highways and culverts. *Goes v. Gage County*..... 616

2. Counties which have adopted the township organization act, are 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 by reason of such failure or neglect. *Goes v. Gage County*..... 616

3. In counties under township organization, the duty to repair highways and culverts, and the liability for defects in the same are imposed by law upon the local township. *Goes v. Gage County*.....616

Homestead.

1. If the vendor of a homestead dies before conveyance, or abandonment of the homestead pursuant to the contract those who succeed to his rights under the statute may refuse to complete the sale. *Solt v. Anderson*..... 103

2. The vendor in a contract for sale of a homestead which has not been acknowledged properly, may withdraw at any time before a deed has been executed and delivered, or the homestead right abandoned pursuant thereto. *Solt v. Anderson* 103

Husband and Wife.

Authorized Signature.

1. Authorized signature of wife by husband tantamount to signature by wife. *Portsmouth Savings Bank v. City of Omaha* 50

Emancipation of Married Woman.

2. Under our statute, a married woman is but partially emancipated from her common-law disability to contract. *Farmers' Bank v. Boyd*..... 497

Promissory Note by Married Woman.

3. The signing of a promissory note by a married woman creates no presumption of consideration or of her intention to bind her separate estate. *Farmers' Bank v. Boyd*..... 497

4. 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*..... 497

Indemnity.

A purchaser of a lot at sheriff's sale, who does not appear to have obtained any possession or control of the premises except such as arises constructively from the delivery and recording of a sheriff's deed, is not responsible to the city, which has paid a judgment for injuries received by one falling into a negligently constructed coal-hole in front of such lot three weeks after the issuance of the sheriff's deed, and while the former owner is still in possession. *City of Lincoln v. First Nat. Bank of Lincoln* 401

Indorsers. See BILLS AND NOTES.

Infants. See MASTER AND SERVANT.

Injunctions.

Evidence.

1. Evidence examined, and *held* sufficient to sustain the findings of the trial court. *Lynch v. Egan* 541

Interpretation.

2. The injunction heretofore allowed in this case, *held* to have reference only to direct attempts to postpone the accruing of the city's right to purchase. *Poppleton v. Moores* 388

Municipal Authorities.

3. Wholly unauthorized action under color of office by municipal authorities, which injuriously affects the interests of a taxpayer and water user of the city, and for which he has no direct remedy at law, warrants an injunction to protect him. *Poppleton v. Moores* 388

Trespasser.

4. The destruction of a fence by a trespasser, and his threat to repeat such act as often as the fence should be replaced, entitles the owner of the premises invaded to an injunction against the trespasser, even though the latter may not be insolvent. *Lynch v. Egan* 541

Instructions. See MASTER AND SERVANT, 1, 2.

An instruction which states the law correctly in the abstract, but is not entirely applicable, will not be held prejudicially erroneous where the jury can not have been misled. *Chicago, B. & Q. R. Co. v. Winfrey* 13, 25

Insurance.

Fraternal Insurance.

1. A member of a fraternal beneficiary society has no such interest or property in the proceeds of a certificate therein, as will impress such proceeds with a trust in favor of his estate or his creditors. *Warner v. Modern Woodmen of America* 233

Insurance—*Concluded.*

2. Where a certificate in a benefit association provides for payment only to certain persons, and the by-laws of the association, as well as the statutes of the state under which it is organized, contain the same provisions, the death of such member without the existence of any one who is entitled to be made a beneficiary under his certificate creates no interest in his estate to the fund mentioned therein, and his administrator can not recover on such certificate. *Warner v. Modern Woodmen of America*..... 233

3. Where the certificate in a benefit association is payable to the legal heirs of a member, and he dies without heirs, and without designating any beneficiary, and there is no one in existence who could, under the by-laws of the association and the statutes of the state under which it is organized, legally become such beneficiary, no equitable rights accrue to either the creditors or the estate of the deceased member, and the fund reverts to the society. *Warner v. Modern Woodmen of America*..... 233

Statutes.

4. The loaning of money and the investment of its surplus funds by an insurance company, though a necessary part of its business, is not taking risks or transacting the business of insurance within Compiled Statutes, chapter 43, section 23, requiring foreign insurance companies to approve resident agents with authority to accept service of process. Reversed on rehearing. *O'Connor v. Ætna Life Ins. Co*..... 122

Interest.

Where a note provides for ten per cent. interest after maturity, and an extension agreement is entered into betwen 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*..... 91

Judgment.

Accord with Record.

1. A judgment must be in accord with the record as a whole; the fact that it is sustained by the petition and answer is insufficient; if the plaintiff's pleadings when taken together do not sustain it, the judgment is erroneous. *Solt v. Anderson*..... 103

Against City.

2. Judgment against a city in an action of which the lot-

Judgment—*Concluded.*

owner has notice, is conclusive upon the latter as to the fact, cause and extent of the injury. Such judgment is not conclusive as to the responsibility of the lot owner for such cause. *City of Lincoln v. First Nat. Bank of Lincoln*..... 401

Estoppel.

3. 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-Railway Co*..... 469

4. Owners of land, who have given quitclaim deeds of 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 one-third of the 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 such dower fund. *Curtis v. Zutavern*..... 183

Res Judicata.

5. A decree of partition, where the court assigns the several shares of the parties, is conclusive in any collateral proceeding as to the title then held by each of the parties. *Curtis v. Zutavern*..... 183

6. Matters once litigated and determined will not be reexamined in a subsequent action between the same parties. *Wood v. Carter*..... 133

Revivor of Dormant Judgment.

7. In a proceeding to revive a dormant judgment, either party has the right to a jury trial for the determination of a question of fact at issue. *Farak v. First Nat. Bank of Schuyler* 463

8. The district court, in its discretion, may refuse to render a personal judgment against defendants at the time of the rendition of its decree in a suit to foreclose tax liens, and may defer such action until after the execution thereof. *City of Lincoln v. Lincoln Street-Railway Co*..... 469

Judicial Sales. See MORTGAGES.

Appeal.

1. Appeal from an order confirming a judicial sale of real estate. Objection, low appraisement. Conflict between appraisement and three witnesses. Order affirmed. *McKee v. Fagan* 316

Judicial Sales—*Concluded.*

Divestiture of Lien.

2. The sale and purchase of property under a decree of foreclosure divests the property of the lien of the decree; but where the decree is also a third lien upon other property such proceedings do not operate to cancel the lien thereon for the amount of the deficiency arising upon such sale. *City of Lincoln v. Lincoln Street-Railway Co*..... 469

Notice.

3. Notice of a judicial sale published in every issue of a weekly newspaper for thirty days before the day of sale, is sufficient. *Cuyler v. Tate*..... 317

Sale.

4. At an execution sale of lands and tenements the thing offered for sale and the thing actually sold and transferred to the purchaser is the real interest of the debtor in the property, not merely his interest as fixed and determined by the appraisers. *Hart v. Beardsley*..... 145

5. A foreclosure sale of lands and tenements, unless the decree otherwise provides, transfers to the purchaser every right and interest in the property of all the parties to the action. *Hart v. Beardsley*..... 145

Jurisdiction. See ANIMALS, 3. APPEAL AND ERROR, 12. COURTS.

Jury. See JUDGMENT, 7. TRIALS, 7.

Justice of the Peace.

Bond Given Under Unconstitutional Statute.

1. Where, on appeal from a justice of the peace, in a forcible entry and detainer proceeding, under a statute which has afterward been declared unconstitutional, a bond has been given under which the defendant has been enabled to retain possession of the property, recovery can be had upon the bond. *Stevenson v. Morgan*..... 207

Jurisdiction.

2. A decision of the district court reversing an order of a justice of the peace discharging an attachment, reinvests the justice of the peace with jurisdiction; and it then becomes the duty of such justice to tax the costs against the unsuccessful party. *Rhodes v. Samuels*..... 1

3. Pending an error proceeding prosecuted from his order discharging an attachment, a justice of the peace is without jurisdiction to tax the costs of the attachment to either party. *Rhodes v. Samuels*..... 1

4. In an error proceeding from an order of a justice of the

Justice of the Peace—*Concluded.*

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*..... 1

5. Where a justice of the peace has discharged an attachment and the plaintiff prosecutes error from such discharge, the justice has jurisdiction, pending such proceeding in error, to try and determine the main action. *Rhodes v. Samuels* 1

6. Section 601 of the Code of Civil Procedure, which declares that when the judgment of a justice of the peace shall be reversed the cause shall be retained in the district court for trial, has reference only to cases which have been entirely disposed of by final order or judgment and which may be again tried and determined. *Rhodes v. Samuels*..... 1

7. 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 without payment of costs of attachment rightfully incurred, will not dissolve the lien of the attachment. *Rhodes v. Samuels*..... 1

Larceny. See CRIMINAL LAW AND PROCEDURE.

An information with the charge in the following form: "That John Doe, late of the county aforesaid, on the 3d day of June, A. D. 1898, in the county of Nemaha and state of Nebraska aforesaid, knowingly, unlawfully, wrongfully and feloniously in and upon one Richard Roe, unlawfully did make an assault, and, then and there, a gold filled 'boss case' watch of the value of $35.00, the personal property of the said Richard Roe, unlawfully and feloniously without putting said Richard Roe in fear and without threats or the use of force or violence, from the person and against the will of the said Richard Roe, did steal, take and carry away with the intent, then and there, to steal and carry away the said personal property of the said Richard Roe, which said property is described above," *contra formam statuti*, will sustain a conviction for larceny under section 113*a* of the Criminal Code. Transcript, page 3. *Martin v. State*..... 36

Limitation of Actions. See BONDS. GUARDIAN AND WARD. TAXATION, 6.

1. The statute of limitations does not run against an amended pleading wherein the amendment consists in setting forth a more complete statement of the original cause of action. *Chicago, R. I. & P. R. Co. v. Young*..... 568

Limitation of Actions—*Concluded.*

2. The statute of limitations does not begin to run against an action on a lot owner's liability over to a city for a judgment for injuries growing out of a defective sidewalk, until the city's liability is fixed by law or by admission and payment on its part. *City of Lincoln v. First Nat. Bank of Lincoln* 401
3. An averment in an answer couched in the language of a general demurrer to the petition is insufficient to interpose the defense of the statute of limitations. *Dufrene v. Anderson* 136
4. An action is not deemed commenced, within the meaning of the statute of limitations, of the date of the issuance of a summons, unless such summons is served on the defendant. *Reliance Trust Co. v. Atherton*..... 305
5. Where a summons is issued, but not served, and the defendant enters a voluntary appearance, the commencement of the action, within the meaning of such statute, dates from the entry of such appearance. *Reliance Trust Co. v. Atherton*.. 305
6. The defendant entered into a contract with the plaintiff's testator to pay off and discharge a certain note and mortgage executed by the latter to a third party, and to save him harmless from and against the same. *Held*, (1) That the first clause is an absolute undertaking to pay the debt, and upon the failure of the defendant to pay the same within the time contemplated by the contract, a cause of action at once accrued in favor of the testator or his legal representatives; (2) That the latter clause is an undertaking to indemnify the plaintiff against such note and mortgage, and the defendant did not become liable and no cause of action accrued thereon to the testator or his representatives, until they had been damnified by reason of the paper against which the testator was indemnified. Former judgment vacated. *O'Connor v. Ætna Life Ins. Co*..... 129

Mandamus.

1. Before the court is warranted in granting a peremptory writ of mandamus, it must be made to appear that the relator has a clear legal right to the performance by the respondent of the duty which it is sought to enforce. Nothing essential to that right will be taken by intendment. *State v. Weston*..... 175
2. A petition, for a peremptory writ of mandamus directed to the state auditor, requiring him to register refunding bonds issued by a county, and certify thereon that such bonds have been regularly and legally issued and registered in accord-

Mandamus—*Concluded.*

ance with law, will be held defective in substance, on a ruling on a demurrer thereto, where it is not made to appear from the allegations therein contained that there has been filed in the office of the auditor the necessary information and data relative to the issuance of such bonds, from which it may be inferred that they were issued by authority and in pursuance of a valid statute, and that the statutory requirements to entitle them to registration have been complied with. *State v. Weston*..... 175

3. A respondent in mandamus proceedings against whom a writ has been issued and who has performed its commands, after the allowance of a supersedeas and before his motion for a new trial has been disposed of, is not entitled to a review in this court of the question whether the writ should have originally been granted, especially where the judgment complained of provides for his reimbursement for costs and where his official term has meanwhile expired. *Betts v. State*..... 202

Married Woman. See DOWER. HUSBAND AND WIFE.

Master and Servant.

Assumption of Risk.

1. An instruction that before the jury could return a verdict against the defendant for alleged negligence, it must be found that the defendant was guilty of the acts of negligence, or some of them, alleged in the plaintiff's petition, and that such negligence was the proximate cause of the injury complained of, does not embody the principle of the assumption of ordinary risks and render errorless the refusal of the trial court to give an instruction as to the assumption by the servant of the ordinary hazards and risks incident to the business. *Evans Laundry Co. v. Crawford*... 153

2. Refusal to give the following instruction in an action by a servant to recover from his master damages for a personal injury through alleged negligence was *held* to be prejudicial error: "Infants as well as adults assume the ordinary risks of the service in which they engage; but an infant engaging in a hazardous employment is entitled to a warning against dangers which a person of his age and experience would not ordinarily comprehend. Therefore, if you find that the plaintiff Crawford was warned how he might be injured by the machine and that he was warned in such a way as would be sufficient to apprise an ordinary person of his age and experience of the danger then he assumed the risk and

Master and Servant—*Continued.*
the defendant would not be liable for the injury received from causes against which he was warned." *Evans Laundry Co. v. Crawford*.....153, 157

3. When, from inexperience or disqualifying causes, by reason of youth or otherwise, the duty devolves upon the master to give such reasonable instructions and cautions to the servant regarding dangers in the performance of his duties as will best avoid an injury by reason of such dangers, and the master has done so, then the servant is upon the same footing as any other employee and is deemed in law to have assumed the usual and ordinary risk incident to his employment. *Evans Laundry Co. v. Crawford*..... 153

4. A servant who engages in any employment is deemed as a matter of law to have contracted with reference to the ordinary hazards and risk incident thereto and to have assumed the same; and for any injury resulting therefrom, without negligence on the part of the master, the latter can not be held liable to respond in damages therefor. *Evans Laundry Co. v. Crawford*..... 153

5. The rule of law as to the assumption of the ordinary risks incident to an employment, applies to infants as well as to adults. *Evans Laundry Co. v. Crawford*..... 153

6. It is not required that the master who is sued by a servant for an injury received while engaged in the line of his employment, shall plead in his answer that the servant assumed the usual and ordinary risks and hazards incident to the service in order to be entitled to an instruction to the jury as to the rule of law regarding such assumed risks. *Evans Laundry Co. v. Crawford*..... 153

7. Where the assumption of a risk not usually and ordinarily incident to the employment is relied on as a defense in an action against the master for negligence, such assumption of risk must be specially pleaded. *Evans Laundry Co. v. Crawford* 153

8. There is no presumption that a child of fourteen years has as much prudence and understanding as an adult, and where such child has been injured while engaged in dangerous work which he has been commanded to do, it is for the jury to say, considering his age and experience, whether he assumed the risks of his employment. *Ittner Brick Co. v. Killian* 589

Contributory Negligence.

9. A servant can not undertake the performance of a service,

Master and Servant—*Continued.*

even in obedience to the command of the master, where the danger is so obvious that injury would be inevitable, and if he does so, he will be held guilty of contributory negligence. *Ittner Brick Co. v. Killian*..... 589

10. Youth and inexperience being inherent, and not the result of carelessness or negligence, it is not error to state, in an instruction in an action for personal injuries, that if plaintiff, "because of his youth and inexperience, failed to appreciate the danger," without adding, "or by the use of reasonable care on his part could or would not have known it." *Ittner Brick Co. v. Killian*..... 589

11. A servant, a child of fourteen years, was ordered by his master to assist in cleaning and oiling a brick machine propelled by steam, while the same was in motion. The work was highly dangerous, but could be accomplished without injury. *Held*, That the question whether the servant was guilty of contributory negligence was properly left to the jury. *Ittner Brick Co. v. Killian*..... 589

12. Where a boy fourteen years old undertakes dangerous work in obedience to the command of the master, the law will not deny him relief on the ground of contributory negligence, unless the danger was so manifest and glaring that it must have been known to one of his age and experience that he could not do it without injury. *Ittner Brick Co. v. Killian*.. 589

Liability of Master.

13. If a servant, on account of his youth, lack of prudence and understanding, and because of the want of proper instruction, fails properly to appreciate the risks involved in certain labor which he is commanded by the master to perform, and is injured, the master will be liable. *Ittner Brick Co. v. Killian*..... 589

14. An infant engaging in a hazardous employment is entitled to warning from the master of dangers which, on account of youth and inexperience, he does not comprehend and appreciate; and if such warnings be not given, or if they be inadequate, the master is in fault and must answer for the consequences. *Evans Laundry Co. v. Crawford*..... 153

15. If an employer has knowledge that the servant will be exposed to risks and dangers in any labor to which he is assigned, and knows or ought to know that the servant is for any cause disqualified to know, appreciate and avoid such dangers, the same not being obvious to the servant, then it becomes the master's duty to give such reasonable cautions and instructions as to reasonably enable the serv-

Master and Servant—*Concluded.*

ant, exercising due care, to do the work with safety to himself; and a failure to do so renders the master guilty of a breach of duty, for which he would be legally responsible. *Evans Laundry Co. v. Crawford*..... 153

Mechanics' Liens.

1. On the foreclosure of a mechanic's lien the plaintiff may take a personal judgment against the party personally liable for the debt. *McHale v. Maloney*..... 532
2. A mechanic's lien attaches to a leasehold interest and to buildings erected by one tenant and sold to another who has acquired a lease of the same interest, and this, notwithstanding the removal of the buildings at the end of the term is expressly required by the lease. *Zabriskie v. Greater America Exposition Co*..... 581
3. Where a case is tried on the theory that a contract signed by the husband alone for performing labor and furnishing material by a contractor in the erection of a building, was made by the husband for himself and as agent for his wife, they holding a joint lease of the premises, this court will not reverse a decree enforcing a mechanic's lien against both husband and wife on the ground that the petition does not in plain terms charge that the contract was with both. *McHale v. Maloney*..... 532

Mortgages. See CONTRACT. TAXATION, 5.

Accounting.

1. It is the duty of a mortgagee in possession to account to subsequent mortgagees for the full and fair rental value of the premises while controlled by him. *Hatch v. Falconer*... 249

Appraisers and Appraisement.

2. The object of an appraisement is to prevent a sacrifice of the debtor's property by providing that it shall not be sold for less than two-thirds of the value of the debtor's interest as fixed by the appraisers. *Hart v. Beardsley*..... 145
3. Section 495 of the Code of Civil Procedure authorizes a new appraisement of property whenever it is demonstrated by two futile attempts to sell, that the preceding valuation was too high. The number of appraisements is not limited. *Logan v. Wittum*..... 143
4. Where appraisers of land about to be sold on foreclosure deduct a junior lien in favor of one of the parties to the action from the gross value of the property, the error is without prejudice, unless it deprives the mortgagor of the specific right secured to him by the appraisement law. *Hart v. Beardsley* 145

Mortgages—*Continued.*

5. The business of appraisers is to fix the value of debtor's interest, and not to determine the extent of such interest, or the character of the title which will be offered for sale. *Hart v. Beardsley*..... 145

6. Notwithstanding the wrongful deduction of a junior lien by appraisers, the confirmation of the foreclosure sale will divest the junior lien and vest in the purchaser every right to and title in the property of every party to the action. *Hart v. Beardsley*..... 145

7. Where a decree of foreclosure determines that a lien of one of the parties to the action is a junior lien, the appraisers have no authority to adjudge it to be a senior lien. *Hart v. Beardsley*..... 145

First Mortgagee Not Tenant of Subsequent Mortgagee.

8. A first mortgagee in possession of the mortgaged premises, is not the tenant of subsequent mortgagees. *Hatch v. Falconer* 249

Redemption.

9. A person who is entitled to redeem from a sale under decree of foreclosure to which he was not a party, must pay the full amount of the mortgage-lien; though the land may have sold for a less sum. *Dougherty v. Kubat*..... 269

10. But it is equitable to allow the plaintiff in an action for redemption to redeem his interest by paying his equitable proportion of the mortgage debt, and the defendant may, if he sees fit, allow the plaintiff to do so. *Dougherty v. Kubat*, 269

11. As the rule that the debt is a unit, so that redemption of a partial interest only can not be imposed upon the mortgagee, is solely for the benefit and convenience of the latter, if he chooses to accept a portion of the debt and allow redemption of a partial interest, and such course is equitable under the circumstances, the holder of such partial interest can not insist upon redeeming the whole. *Dougherty v. Kubat*..... 269

Sale and Confirmation.

12. Pierce and Mrs. Cotterell, each holding a mortgage on the property of Mrs. Atwood, foreclosed their mortgages; the decree awarding Pierce a first lien on the property and Mrs. Cotterell the second lien. Pending an appeal to this court taken by Mrs. Atwood, the property was sold, and the proceeds of the sale, after satisfying the cost, were paid to the mortgagees. The amount was sufficient to satisfy the claim of Pierce, but not that of Mrs. Cotterell. This court reversed the decree of the district court so far as it awarded Pierce

Mortgages—*Continued.*

a lien on the property, holding that his mortgage could not be enforced against it, and affirmed the decree so far as it awarded a lien to Mrs. Cotterell. After this Mrs. Atwood filed a motion in the district court to compel Pierce to make restitution of the money paid to him. Mrs. Cotterell also appeared and made claim to the fund to the extent that her claim was unpaid. The district court ordered the whole amount paid to Mrs. Atwood. *Held*, That this was error and that Mrs. Cotterell was entitled to sufficient of the fund to satisfy her decree. *Pierce v. Atwood*..... 296

Street-Railways.

13. Section 77 of chapter 11 of the Session Laws of 1887, which creates a lien for paving taxes against the lines of street-railway companies, does not make such special taxes a lien on their personal property. *City of Lincoln v. Lincoln Street-Railway Co*..... 469

14. A street-railway company authorized to construct, equip and operate lines of electric street-railway may purchase lines already constructed and fit and suitable for the extension and completion of its system, as well as construct the same. And a recital contained in a mortgage executed by such company that it has power to borrow any sum or sums of money which may be necessary for the purchase, construction and equipment of its electric street-railway will not render the mortgage void upon its face. *City of Lincoln v. Lincoln Street-Railway Co*..... 469

15. A series of bonds secured by a mortgage or trust deed on the property of a street-railway company are negotiable, and as between bona-fide purchasers thereof for value, are equal in priority; the lien of each bond dating from the recording of the mortgage that secured it and not from the time it was issued. *City of Lincoln v. Lincoln Street-Railway Co*.. 469

16. Such a mortgage is a first lien upon the property of the street-railway described therein as against all special assessments for paving taxes, except such as were assessed for paving already done, or as were in contemplation at the time it was recorded. *City of Lincoln v. Lincoln Street-Railway Co*..... 469

17. Where a street-railway company mortgaged its property and franchises to secure the sum of $600,000 for the purpose of purchasing, constructing and equipping its lines of electric street-railway, and it is shown that it expended for that purpose about $900,000, it can not be said that the mortgage

Mortgages—*Concluded.*

was given to create a fictitious indebtedness. *City of Lincoln v. Lincoln Street-Railway Co*..... 469

18. Where it is claimed that a mortgage executed by a street-railway company is for an amount in excess of that permitted by law and its charter, such alleged fact must be proved, so that an examination of the record will disclose it. Otherwise it will be presumed that the mortgage was not for an excessive amount. *City of Lincoln v. Lincoln Street-Railway Co*..... 469

19. Where a mortgage was placed upon a street-railway property, and afterwards another company, against which certain liens for taxes levied as special assessments existed, was consolidated with the mortgagor company, *held*, that the lien of the mortgage on the property covered thereby, without the consent of the mortgagee, could not be impaired by the agreements and acts of consolidation, and that the tax lien on property consolidated and merged into the new company, and with the property mortgaged, could not be made prior to the mortgage lien on all the property after consolidation; that the tax and mortgage liens attached to the specific properties embraced in the levy and the mortgage respectively, in accordance with their original priorities. *City of Lincoln v. Lincoln Street-Railway Co*..... 469

Tenant in Common.

20. A tenant in common who was not made a party, and is therefore entitled to redeem from a foreclosure sale, may not compel the mortgagee or his successors to accept a part of the debt and relieve his interest only of the burden, but must offer to redeem the whole by discharging the entire incumbrance. *Dougherty v. Kubat*..... 269

Municipal Corporations. See INDEMNITY. JUDGMENT, 2. LIMITATION OF ACTIONS, 2.

Assessments.

1. A petition signed as required by statute, is a necessary prerequisite to the assessment of the cost of grading a street upon the abutting property. *City of South Omaha v. Tighe*, 572

2. The only foundation for special assessments rests in the special benefits conferred upon the property assessed, and, therefore, the frontage rule per foot can not be adopted unless the benefits are equal and uniform. *Morse v. City of Omaha*..... 426

3. Under the provisions of section 110, chapter 12*a*, Compiled Statutes, 1897, a petition signed by the owners of a majority

Municipal Corporations—*Continued.*

of the foot-frontage is requisite to a valid levy of a special assessment against property specially benefited to pay for repaving, and the collection or enforcement of such special assessment will be enjoined where it does not appear that a petition so signed was first obtained. *Morse v. City of Omaha* 426

4. Statutory provisions authorizing assessments of special taxes against property benefited by public improvements, are to be strictly construed, and it must affirmatively appear that the taxing authorities have taken all steps which the law makes jurisdictional; the failure of the record to show such proceedings, will not be aided by presumptions. *Morse v. City of Omaha*..... 426

5. One who has not been guilty of laches, will not be estopped to object to 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*..... 426

6. Assessments for paving one foot outside of the rails of street-car lines will not be held void where such paving was done while the statutes were in force providing that street-railway companies should be required to pave between their tracks and one foot outside of the rails thereof. *City of Lincoln v. Lincoln Street-Railway Co*..... 469

7. Under the statute, the taxes levied as special assessments in cities of the first class draw interest at the rate of twelve per cent. per annum from the time of delinquency, and a decree enforcing a tax lien arising thereon will draw interest at the same rate. A computation of the amount due on special assessments upon that basis will be sustained. *City of Lincoln v. Lincoln Street-Railway Co*..... 469

8. A statutory petition is a jurisdictional prerequisite to assessment by a city council of abutting property to pay for improvements. *Portsmouth Savings Bank v. City of Omaha*... 50

9. Where it affirmatively appears of record that the council in levying the special assessment took into consideration the question of the extent of the benefits, and, preliminary to the levy, formally and specifically found that each parcel of land is specially benefited to an amount equal to the tax assessed against it, it is immaterial that each parcel has been assessed an equal amount per front foot, as a finding that the benefits are equal and uniform need not be in the exact language of the statute. *Morse v. City of Omaha*..... 426

10. Under the provisions of section 161, chapter 12*a*, Compiled

Municipal Corporations—*Continued.*

Statutes, 1897, the council, before assessing property for special benefits, according to the rule per foot-frontage, must find that the benefits accruing thereto are equal and uniform. However, where the council fails so to find, a taxpayer with notice, dissatisfied with the rule per foot-frontage adopted, should cause such action to be reviewed, and on failure so to do he will not, in a proceeding to enjoin the collection of such tax, be heard to say that the tax is void. *Morse v. City of Omaha*..... 426

Equalization.

11. Notice of the sitting of the board of equalization examined, and *held* to comply with the requirements of the statute. *Morse v. City of Omaha*..... 426

12. A city board of equalization sitting in the matter of a special assessment found the property to be benefited "to the full amount in each case of said proposed levies." Such finding is not so defective as to proportional benefit that it lies open to attack by injunction. *Portsmouth Savings Bank v. City of Omaha*..... 50

13. A city board of equalization in regular session with due notice, acts judicially; and such action is not open to collateral attack. *Portsmouth Savings Bank v. City of Omaha*, 50

Officer.

14. One who is both a de facto and a de jure incumbent of a city office can not be deprived of the salary attached thereto by reason of the usurpation of the office at the instance of the city authorities. *Moores v. State*..... 535

Ordinance. Election.

15. One can not question the validity of an ordinance until his rights are directly affected thereby. *Flick v. City of Broken Bow* 529

16. Where a city ordinance requires that, when any repaving shall be declared necessary by the mayor and city council, and an improvement district created, notice to property owners shall be given to designate within thirty days the material to be used, the recording of such declaration is not jurisdictional. *Portsmouth Savings Bank v. City of Omaha*, 50

17. A statute authorizing the city council to repave streets under certain conditions, provided that the abutting property owners should have thirty days from the date of approval and publication of an ordinance declaring such improvement necessary within which to designate the paving material. No other reference was made in the statute to such ordinance declaring the improvement necessary. The

Municipal Corporations—*Continued.*

property owners were given thirty days from the publication of a certain ordinance within which to designate the paving material. *Held*, That the failure of the council to pass and publish an ordinance declaring the improvement necessary would not invalidate the assessment. *Morse v. City of Omaha*..... 426

18. Under a village ordinance calling an election at a given date as to the issuance of bonds for the extension of waterworks, and providing for publication of notice in a certain paper for five weeks before such election, a publication in each issue of the paper thereafter till the election, being five weekly publications, is sufficient notice, although the first one was only thirty-two days before the election. *State v. Weston*..... 385

Paving of Streets.

19. Notice to property owners to select material for paving of streets in cities of the metropolitan class, published for the required time, and in the required manner, substantially in accordance with the requirements of both the statute and the city ordinance, is not bad because not directed to the owners by name. *Portsmouth Savings Bank v. City of Omaha*..... 50

Petition for Repaving.

20. Petition for repaving in case at bar examined, and *held* not signed by owners of most of the foot-frontage. *Morse v. City of Omaha*..... 426

21. A petition asking for the repavement of a street does not come within the provisions of section 4, chapter 36, Compiled Statutes, 1901, as being an incumbrance or conveyance of land, and where the owner in fee signs such petition, the land will be bound thereby without the signature of his wife. *McLain v. Maricle*, 60 Neb., 353, followed. *Morse v. City of Omaha*..... 426

22. Evidence that the petitioners have no title of record to the premises described in the petition, will support a finding that the petitions were unauthorized and insufficient where the only evidence of ownership is the recitals in the petitions themselves. *City of South Omaha v. Tighe*..... 572

Signatures to Petition.

23. The president or secretary of a corporation, either singly or jointly, can not 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*..... 426

Municipal Corporations—*Concluded.*

24. The authorized signing of a wife's name to a petition, by abutting owners to a city council, for the repaving of a street, is tantamount to an actual signature by the wife. *Portsmouth Savings Bank v. City of Omaha*..... 50

25. The signatures by executors and trustees of an estate to whom jointly it is devised to be held and managed by them during the lifetime of the testator's wife, with full discretion in the management and control of said property with the view of increasing its value and deriving the best possible income therefrom, are the signatures of the owners in the meaning of the statute. *Portsmouth Savings Bank v. City of Omaha*..... 50

Negligence. See MASTER AND SERVANT. RAILROADS. WATERS, 40.

1. It is only where the facts are not in controversy, or when but one rational inference can be drawn from the evidence, that the court is warranted in determining the question of negligence as a matter of law. *Chicago, B. & Q. R. Co. v. Winfrey* 13

2. Where there is very slight evidence of intoxication, it is not error to refuse an instruction telling the jury that contributory negligence, caused by intoxication, would be a defense, the court having fully instructed them as to what would constitute contributory negligence. *New Omaha Thompson-Houston Electric Light Co. v. Johnson*..... 393

3. Where, upon an issue of fact raised by a plea of contributory negligence, the testimony is conflicting, or where the evidence as a whole is of such a character that rational minds can fairly draw therefrom different conclusions, the question is one for the jury. *Chicago, B. & Q. R. Co. v. Winfrey,* 13

Negotiable Instruments. See BILLS AND NOTES.

New Trial. See APPEAL AND ERROR, 14.

1. To entitle a party to a new trial on the ground of newly discovered evidence, it is not enough that the evidence is material, and not cumulative, but it must further appear that the applicant for a new trial could not have discovered and produced such evidence at the trial; and where the evidence is merely cumulative, the failure or inability to produce it is not ground for a new trial. *Matoushek v. Dutcher* 627

2. 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*..... 627

New Trial—*Concluded.*

3. A motion for a new trial on the grounds of accident or surprise, is addressed to the sound discretion of the trial court, and where it is shown that the facts on which such claim is based were known during the trial, and it is not shown that an effort was made to meet these conditions, it can not be said that there was an abuse of discretion in overruling the motion. *Matoushek v. Dutcher*..... 627
4. Where an action is brought against several persons for the conversion of a stock of goods and a verdict is rendered against all of them, and the evidence is not sufficient to sustain it against one or more of them, their motion for a new trial may be properly sustained, and judgment rendered on the verdict against the other defendants. *Gross v. Scheel*..... 223
Zieman v. Scheel..... 223
5. Where an ordinance requires a notice to be published for six days, the six days are the six days immediately before the date named in the notice, and unless that date is Sunday, one of the days of publication must be Sunday. *Portsmouth Savings Bank v. City of Omaha*.....50, 60

Nuisance.

The erection and maintenance of any nuisance is declared to be a crime by Criminal Code, 232; and the declaration is not restricted by the enumeration of certain acts; all common law nuisances are crimes. *State v. De Wolfe*..... 321

Oleomargarine. See CRIMINAL LAW AND PROCEDURE.

Partnership.

Partners are jointly and severally liable for partnership debts. *Wood v. Carter*..... 133

Payment.

1. The direction given by defendant to the city treasurer, as shown by the evidence in this case, was specific enough to require him to credit the payment of the $5,000 deposited with him on the taxes which were a first lien upon the defendant's line of street-railway. *City of Lincoln v. Lincoln Street-Railway Co*..... 469
2. A creditor can not divert a payment by his debtor from the appropriation made by him, upon mere equitable considerations that do not amount to an agreement between the parties giving the creditor a right to appropriate the payment otherwise than directed by the debtor, though mere equitable considerations may control where the payment is made without designating its application. *City of Lincoln v. Lincoln Street-Railway Co*..... 469

Pleadings. See LIMITATION OF ACTIONS, 1, 3. REPLEVIN. STATUTES, 1, 2.

Admission in Answer.

1. Admissions in an answer to a suit for specific performance that a contract for the sale of land was executed, in the absence of anything to restrict the meaning of the term, admits that it was duly acknowledged when acknowledgment was necessary to make the contract valid. *Bolt v. Anderson*, 103

Allegation of Demand.

2. In an action on a demand note, the failure to allege a demand before suit brought will not be held fatal after judgment. *Grant v. Commercial Nat. Bank of Omaha*..... 219

Demurrer.

3. Objections to the formal defects of a pleading can not be raised by demurrer, but must be raised by a motion for a more definite and specific statement. *Grant v. Commercial Nat. Bank of Omaha*.....219

Petition Under Lord Campbell's Act.

4. 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*..... 568

Reply.

5. A reply denying each and every allegation of the answer inconsistent with plaintiff's petition is defective and will be held bad on a motion to make more specific. *Gross v. Scheel* 223
Zieman v. Scheel..... 223

6. A reply as follows: "Now comes the said plaintiff and, for reply to the said defendant's amended answer, denies each and every allegation, in said amended answer contained, that in any way conflicts with or contradicts the allegations set forth in plaintiff's petition," was treated as a sufficient denial by both parties on trial of the cause, therefore, it must be so treated in all stages of the case. *Gross v. Scheel*..... 223
Zieman v. Scheel..... 223

Variance.

7. 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* 589

Prisons.

1. The right to determine the necessity for services in guarding prisoners in a jail, is an ultimate question for the courts and belongs neither to the sheriff nor to the county board. *Dakota County v. Borowsky*..... 317
2. A sheriff who has, either in person or by deputy, guarded prisoners in the county jail is, if the services were actually necessary, entitled to recover from the county compensation for such services at the rate of $2 per day. *Dakota County v. Borowsky*..... 317
3. The specific fees provided for in section 5, chapter 28, Compiled Statutes, 1901 (Annotated Statutes, section 9031), pertain to the office of sheriff, and the sheriff is entitled to them whether they were earned by himself or his deputy. *Dakota County v. Borowsky*..... 317

Process.

1. The law of this state makes no distinction as to the service of summons between members of the legislature and other persons. *Berlet v. Weary*..... 75
2. A member of the legislature may, in a proper case, be served with summons while at the seat of government for the purpose of attending the legislative session. *Berlet v. Weary*... 75
3. When one of two or more parties jointly and severally liable for the same debt has been duly served with summons in one county in this state, a summons may be issued to another county and served therein upon another party also so liable. *Wood v. Carter*..... 133

Railroads.

Adverse Possession. Right of Way.

1. Under the provisions of section 4, article 11, of the constitution of Nebraska, a railroad constructed and operated in this state is a public highway. *McLucas v. St. Joseph & G. I. R. Co*..... 603
2. 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, can not be divested by adverse possession. *McLucas v. St. Joseph & G. I. R. Co*..... 603
3. According to the decision of the supreme court of the United States in the case of *Northern P. R. Co. v. Townsend*, 190 U. S., 267, 23 Sup. Ct. Rep., 671, a congressional grant of a right of way for the construction of a railroad is upon an implied condition, which is inconsistent with the acquisition

Railroads—*Continued.*

in any manner of any part of such right of way by a private individual or corporation. *McLucas v. St. Joseph & G. I. R. Co.* 612

4. The right of way of the Grand Island Railway Company, having been acquired by grant from the general government for the construction of a railroad, the statute of limitations is not a defense to an action brought by said company to recover possession of a strip of land within such right of way. *McLucas v. St. Joseph & G. I. R. Co.* 612

Negligence.

5. A passenger attempting to leave the train while it is in motion, is not necessarily guilty of negligence. *Chicago, B. & Q. R. Co. v. Winfrey* 13

6. The existence of contributory negligence on the part of an injured railway passenger, such as will defeat a recovery, is a question of fact for the jury. *Chicago, B. & Q. R. Co. v. Winfrey* 13

7. An imputation of negligence arises where an injury results from the operation of a train carrying passengers; and the liability to respond in damages becomes fixed, except in case (1) of criminal negligence, (2) of the violation of an express rule or regulation of the carrier actually brought to the notice of the party injured. *Chicago, B. & Q. R. Co. v. Winfrey* 13

8. To defeat recovery on behalf of an injured passenger under a plea of contributory negligence, the act imputing negligence must be committed under such circumstances as to render it obviously and necessarily perilous and to show a willful disregard of the danger incurred thereby. *Chicago, B. & Q. R. Co. v. Winfrey* 13

9. The term "criminal negligence," as used in chapter 72, article 1, section 3, Compiled Statutes (Annotated Statutes, 10039), means gross negligence amounting 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. Winfrey* 13

10. Plaintiff was a passenger on defendant company's train. When she had reached her destination, and while attempting to leave the car in which she was riding, and before she had reached the door, the train began to move and she was compelled to choose instantly and without time for reflection as to her course of action, and continued the act of alighting from the train, and in so doing was injured thereby. Such action would not necessarily bar a recovery. The

Railroads—*Concluded.*

question of contributory negligence was properly submitted to the jury. *Chicago, B. & Q. R. Co. v. Winfrey*..... 13

11. Where a railroad company constructs its road across its own land and in so doing erects embankments and bridges and digs ditches and borrow-pits, by reason whereof surface-water is or may be collected and discharged upon a particular portion of the tract, subsequent grantees of that portion can not maintain an action against the company by reason of the maintenance of such embankments, bridges, ditches and borrow-pits in their original condition. *Fremont, E. & M. V. R. Co. v. Harlin*, 50 Nebr., 698, 36 L. R. A., 417, 61 Am. St. Rep., 578, distinguished. *Fremont, E. & M. V. R. Co. v. Gayton*..... 263

12. A railroad company is not liable for injuries caused by a team taking fright at the ordinary operation of a train upon its road. *Hendricks v. Fremont, E. & M. V. R. Co*..... 120

Penalties.

13. The provisions of section 9 of the act of 1893, known as the Maximum Freight Rate Law and entitled: "An act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the state of Nebraska and to provide penalties for the violation of this act," being punitive and not remedial, are to be enforced in accordance with the procedure of the Criminal Code. *State v. Union P. R. Co*..... 141

Replevin.

Joinder. Objection.

1. The objection that a joint plaintiff in replevin was made a party without his consent, is one that can be made only by the party himself. *Cinfel v. Malena*..... 95

Partnership Property.

2. Replevin can be maintained by the members of a partnership, joining in their individual names, to recover partnership property from a stranger withholding possession from one of them. *Cinfel v. Malena*..... 95

Plea in Bar.

3. The dismissal without prejudice of an action in replevin can not be pleaded in bar of another action, where the property was immediately returned to the officer to be delivered to defendant. *Cinfel v. Malena*..... 95

4. In a case where an action in replevin was commenced and immediately dismissed without prejudice, and the property was returned to the sheriff to be delivered to the defendant,

Replevin—*Concluded.*

such property will not be considered to be in the possession of the plaintiff at the commencement of a subsequent action. *Cinfel v. Malena*..... 95

Specific Defense.

5. In an action in replevin the defendant may, if he so desires, plead his defenses specifically; and when he does, his answer will be subject to the ordinary rules of pleading in other civil cases. *Randall v. Gross*..... 255

Sales.

No action can be maintained for the purchase price of goods, unless the delivery or proffer of delivery of the same is alleged and proved. *F. C. Austin Mfg. Co. v. Colfax County*, 101

Schools and School Districts.

Repairs on Schoolhouse.

1. The director of a school district, with the consent of the moderator, may contract for repairs on a schoolhouse of the district during vacation. *Leonard v. State*..... 635
2. It is not necessary that a contract to repair a schoolhouse during vacation be entered into at a regular meeting of the school board of the district. *Leonard v. State*..... 635
3. It is the duty of the treasurer of a school district to register and pay, from the funds in his hands as treasurer, orders properly drawn by the director and countersigned by the moderator, and if he refuses to pay such orders, mandamus will lie to compel the performance of such duty. *Leonard v. State*..... 63

Sheriffs, Constables and Coroners.

Where property is attached at the suit of creditors bringing separate actions, and such property is taken from the sheriff on a writ of replevin issued at the suit of a third party, to whom the property is delivered after the statutory bond is given and approved, and a part of the attaching creditors, while the action in replevin is pending and undetermined, cause the same property, in the same condition and of the same value, to be taken by the sheriff on execution for the debts for which they had attached it, such seizure on execution is a complete defense as to all the attaching creditors in an action on the official bond of the officer serving the writ of replevin for negligently approving an insufficient replevin bond. *Shull v. Barton*..... 311

Specific Performance. See EXECUTORS AND ADMINISTRATORS, 6.

1. It seems that a written agreement to convey a grain elevator, together with the fixtures belonging thereto and prop-

Specific Performance—*Concluded.*

erty used therewith, at the option of the proposed vendee, within a given time and for a fixed price, if made upon sufficient consideration, will be specifically enforced in a proper case. *Tidball v. Challburg*..... 524

2. Where the writing does not indicate, nor is it shown, that the proposed vendee did or gave anything for such option, and it is not contained in or a part of some contract between the parties, which may supply a consideration, it is a mere offer from which the vendor may withdraw if he chooses. *Tidball v. Challburg*..... 524

3. Where an owner of a homestead enters into a contract for the sale of the same, and it is not properly acknowledged, and he dies, and those who succeed to his rights are minors, specific performance of the contract will not be granted at the suit of either party. *Solt v. Anderson*..... 103

Stare Decisis.

1. *Glynn v. Glynn*, 62 Nebr., 872, followed. *Dougherty v. Kubat* 269

2. *Hesselgrave v. State*, 63 Nebr., 807, and *State v. Murdock*, 59 Nebr., 521, examined, approved and distinguished. *Bartling v. State*..... 637

3. The proposition announced in the fourth paragraph of the syllabus in *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Nebr., 374, was in effect, if not expressly, retracted on rehearing in *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Nebr., 463, and is disapproved. *Home Fire Ins. Co. v. Barber*..... 644

Statute of Frauds.

The statute of frauds is satisfied where the *cestui que trust* takes possession of land purchased in pursuance of a trust agreement, notwithstanding it is oral. *Oberlender v. Butcher* 410

Statutes. See ATTORNEYS, 2. BONDS. CONSTITUTIONAL LAW. INSURANCE, 4.

Demurrer.

1. 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*..... 282

2. Where such fact does not appear affirmatively, a demurrer will not lie because the petition fails to allege that the statutory conditions have been complied with. In such case non-

Statutes—*Concluded.*

compliance is a defense to be set up by answer. *Commonwealth Mutual Fire Ins. Co. v. Hayden*, 60 Nebr., 636, distinguished. *Northern Assurance Co. v. Borgelt*..... 282

Foreign Statute Adopted by This State.

3. If a statute adopted from another state had been construed by the courts of that state prior to its adoption here, the same construction should be given ordinarily in this state in the absence of any indication of a contrary intention on the part of the legislature. *Goble v. Simeral*..... 276

Intention of Legislature.

4. In the construction of statutes, the reason and intention of the lawmakers will control, when the strict letter would lead to palpable injustice and absurdity. *Kelley v. Gage County* 6

Repeal by Implication.

5. On the principle that repeal by implication is not favored, it is only where two statutes relating to the same subject are so repugnant to each other that both can not be enforced that the last-enacted statute will supersede the former and repeal it by implication. *Beha v. State*..... 27

Special Legislation. Title of Act.

6. Sections 70-73, chapter 73, Compiled Statutes (chapter 58, Session Laws, 1889; Annotated Statutes, secs. 10275-10278), 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*..... 269

Stipulations.

1. Where a party waits until near the close of a second trial before asking to withdraw from a stipulation of facts used by both parties on both trials, the court may, in its discretion, refuse such request. *City of Lincoln v. Lincoln Street-Railway Co*..... 469

2. One party to a stipulation or an agreement can not be released from a part of it on the ground of a mistake and leave the other party bound thereby; his remedy is not by motion to withdraw from a part of the stipulation, but by a proceeding to reform the agreement, or to set it aside altogether. *City of Lincoln v. Lincoln Street-Railway Co*.. 469

Street Railways. See MORTGAGES, 13-19.

1. The charters of all street-railway companies in this state are created by general law. Cities have no power to grant such charters or impose any limitations thereon, and the act of 1889, authorizing street-railway companies to borrow

Street Railways—*Concluded.*

money for certain purposes and secure the payment of the same by mortgaging their property and franchises, applies to all street-railway companies in this state, whether chartered before or after the passage of that act. *City of Lincoln v. Lincoln Street-Railway Co*..... 469

2. A street-railway company authorized to construct, equip and operate lines of electric street-railway may purchase lines already constructed and fit and suitable for the extension and completion of its system, as well as construct the same. *City of Lincoln v. Lincoln Street-Railway Co*..... 469

Summons. See PROCESS.

Taxation. See APPEAL AND ERROR, 19. COUNTIES AND COUNTY OFFICERS, 7, 9. MUNICIPAL CORPORATIONS.

Caveat Emptor.

1. The rule of *caveat emptor* applies to a purchaser of lands delinquent for city taxes; he is in the same position he was before the enactment of the section of the general revenue law numbered 131; the remedy therein is purely statutory. *Kelley v. Gage County*.....6, 11

City Taxes.

2. In dealing with taxes certified by city authorities to the county clerk, neither the county clerk nor the county treasurer acts as the agent of the county. *Kelley v. Gage County*, 6

3. In an action to recover an indemnity under section 131 of the general revenue act (Compiled Statutes, 1901, p. 1000) upon a tax or special assessment certified to the county clerk by the proper authorities of a city or village, which is void on account of some irregular action taken by such authorities, a sale of real estate for the non-payment of such tax or assessment does not result from the mistake or wrongful act of either the county clerk or county treasurer. *Kelley v. Gage County*..... 6

Equalization.

4. Notice of the meeting of a city council, as a board of equalization, recites that they would thus meet, in Pivonka Block, in the city, on three certain days from 9 A. M. to 5 P. M. The record shows a meeting on the first of such days, and no further meeting until 7 P. M. of the third day and that one of such meetings was held at the office of the city clerk, the other at the council chambers. *Held*, That there was no valid equalization, and that assessments levied in pursuance thereof are void. *Curtis v. City of South Omaha*..... 539

Taxation—*Continued.*

Foreclosure of Mortgage.

5. Where, in the foreclosure of a mortgage, plaintiff prays judgment for taxes by him paid for the protection of his security, and offers in evidence tax receipts for sums so paid, such receipts are prima-facie evidence of the payments of such taxes. *Mutual Benefit Life Ins. Co. v. Daniels* 91

Statutes.

6. The meaning of section 179, and section 2, article 5, of the revenue law, as unfolded by the previous decisions of this court, is that an action to foreclose a tax-lien may be maintained at any time within seven years from the date of the tax-sale certificate. *Gallentine v. Fullerton*..... 553

7. By the adoption of section 131 of the revenue act of 1879, the legislature intended, not to make counties liable for the derelictions of the officers and agents of cities and villages, but only to change the tax-sale purchaser's ground of action,—to take away the right to sue when there is a valid tax, and in its place to give the right to sue when the tax is void or the land not subject to taxation. *Kelley v. Gage County* 6

8. Under section 131 of the general revenue law (Compiled Statutes, 1901, p. 1000), the liability of the county is that of a surety; it is made to answer for the misconduct of the officers by which it levies and collects taxes. But it was not the intention of the legislature to make it liable for the mistakes and wrongful acts of city and village officers, with whom it has no business relations and over whom it has no control or authority. *Kelley v. Gage County*..... 6, 8

Street Improvements.

9. Where street improvements are made and the cost of paving that portion of the street occupied by street-railway companies is levied as special assessments against the property of several street-railways as separate properties, and the different street-railways are afterwards consolidated and merged into one property and operated as one street-railway system, the old companies losing their individuality and identity and the new company assuming the burdens and obligations of the constituent companies, *held*, that, as between the consolidated company and the municipal authorities levying such special assessments, the liens arising by reason of the several assessments against the different constituent companies and properties attach to the new property owned and operated by the substituted com-

Taxation—*Concluded.*

pany as one property in its entirety. *City of Lincoln v. Lincoln Street-Railway Co*..... 469

Sufficient Evidence.

10. Evidence examined, and found sufficient to warrant the conclusion of the trial court that the presumption of regularity resulting from the tax-sale certificate was not rebutted, and that the subsequent taxes included in the decree had been paid plaintiff. *Gallentine v. Fullerton*.... 553

11. Where the trial court finds, on sufficient evidence, that certain assessments for paving taxes were in contemplation at the time of the execution of a mortgage by the street-railway upon its property, it follows as a matter of law that the lien of such taxes is superior to the lien of the mortgage. *City of Lincoln v. Lincoln Street-Railway Co*..... 469

Trial. See JUDGMENT, 7, 8.

Basis of Recovery.

1. 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*..... 644

Evidence.

2. Where one person pays for land, and another receives the title, the question whether it is an advance to one whom the donor is under obligation to support or a trust, is in both cases, upon a presumption of fact, subject to rebuttal. *Bailey v. Dobbins*..... 548

3. Where the presumption is one of fact, it may be rebutted by evidence tending to show that the intention of the purchaser was different from that to be inferred from the bare fact of the conveyance to another person. When such intention is ascertained, the courts will give it effect, if possible. *Bailey v. Dobbins*..... 548

4. 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*..... 627

5. 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*..... 299

6. A person is not estopped to deny the existence of a lawful

Trial—*Concluded.*

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*..... 299

7. When the intention of a party is to be ascertained from disputed or ambiguous circumstances, the necessary inferences to be drawn are for the determination of the jury. *Langan v. Whalen*..... 299

Misconduct of Counsel.

8. 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*..... 555

9. Ordinarily, a party who did not promptly object to an argument alleged as misconduct, will be held to have waived his right to complain. But 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*..... 555

Trover. See CONVERSION.

Trusts.

1. Generally, where the purchase-money of land is paid by one person and the conveyance is taken in the name of another, the party taking the title is presumed to hold the estate in trust for him who pays the purchase price. *Bailey v. Dobbins* 548

2. Where purchase-money is paid by one party, and title taken in another, where the conveyance runs to one for whom the purchaser is under a legal or moral obligation to provide, the presumption arises that the conveyance was intended as an advancement to the nominal purchaser, and not a trust. *Bailey v. Dobbins*..... 548

3. The rule that no trust arises in land purchased for another's benefit unless the purchase-money is furnished at the time, nor, if the claimant is a partial contributor, unless there is an agreement that he shall have an aliquot part of the premises, is restricted to resulting trusts, and has no application to express trusts or those arising by agreement. Possession on the part of the *cestui que trust* is notice to all the world of his rights in the land. *Oberlender v. Butcher* 410

Undertakings.

1. 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*, 637
2. In case of the failure of the term, the liability of the surety on the recognizance is extended to the next term of court actually held, as though no adjournment or continuance had been had. *Bartling v. State*..... 637
3. 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*..... 637

Vendor and Vendee. See RAILROADS, 11.

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*, 263

Waters. See COMMON LAW. EMINENT DOMAIN, 1, 5. EVIDENCE, 4.

Irrigation. Riparian Rights.

1. The right of a riparian proprietor as such to use water for irrigation purposes is limited to riparian lands. *Crawford Company v. Hathaway*..... 325
2. The right can not be extended to lands contiguous to the riparian land nor can water be diverted to non-riparian lands which might be used on riparian lands, but is not. *Crawford Company v. Hathaway*..... 325
3. Land, to be riparian, must have the stream flowing over it or along its borders. *Crawford Company v. Hathaway*.... 325
4. 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 Company v. Hathaway*..... 325
5. 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 Company v. Hathaway*..... 325
6. The act of congress of July 26, 1866, granted to those appropriating waters on the public domain for agricultural

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purposes a right in and to the use of such waters when made according to local customs, or when such right is recognized by the laws of the state or the decisions of the courts. *Crawford Company v. Hathaway*..... 325

7. 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*..... 500

8. Appropriation of considerable quantities of water in seasons when that may be done without sensible injury to lower owners, does not give a prescriptive right to divert the whole stream in dry seasons. *Meng v. Coffee*..... 500

9. An applicant for the appropriation of the waters of the state for irrigation purposes, can not prosecute the work and condemn a right of way for that purpose, until he has a permit from the state board of irrigation to divert the water of the state to specific lands described in his application. *Castle Rock Irrigation Canal & Water Power Co. v. Jurisch*..... 377

10. Injunction is the proper remedy for preventing one, without authority so to do, from crossing the canal of an irrigation company with a lateral for the purpose of carrying water to his land from another canal. *Castle Rock Irrigation Canal & Water Power Co. v. Jurisch*..... 377

11. The common law does not give to a riparian owner an absolute and exclusive right to the flow of all the water of the stream in its natural state, but only a right to the benefit and advantage of the water flowing past his land so far as consistent with a like right in all other riparian owners. *Crawford Company v. Hathaway*..... 325
Meng v. Coffee..... 500

12. The purpose of the law as to the use of water by riparian owners, is to secure equality therein, as near as may be, to each, by requiring each to exercise his rights reasonably, and with due regard to the rights of other riparian owners to apply the water to the same or other purposes. *Meng v. Coffee* 500

13. A riparian owner having a superior title to the use of the water of a stream as against an appropriator is not entitled to maintain an injunction to prevent the diversion of the storm or flood waters of the stream and thereby prevent its application to a beneficial use as contemplated by the statute. *Crawford Company v. Hathaway*..... 325

14. There is no such thing as a prescriptive right of a lower

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riparian owner to receive water as against upper owners. Receiving the full flow of a stream for more than ten years does not give a prescriptive right that will prevent reasonable use of its waters by an upper owner. *Crawford Company v. Hathaway*..... 325

15. The right to the use of water, when acquired by appropriation, is in its nature a property right and becomes a superior and better title to the use and enjoyment of such water than that of a riparian proprietor whose right attaches subsequently. *Crawford Company v. Hathaway*..... 325

16. The irrigation acts of 1889 and 1895 abrogated the law of private riparian rights as theretofore existing, and substituted in its stead a law providing for the appropriation of the public waters of the state and their application to the beneficial uses therein contemplated. *Crawford Company v. Hathaway* 325

17. The legislative enactments referred to did not have the effect of abolishing vested rights of riparian proprietors, but affected only such rights as might have been acquired in the future under the law as theretofore existing. *Crawford Company v. Hathaway*..... 325

18. An appropriation of water by "squatter's right," not recognized by the laws of this state, the decisions of its courts, nor any general, well-recognized or widely respected custom therein, does not, by virtue of section 2339, Revised Statutes of the United States, give to the settler who has appropriated water in that way for a less period than ten years an exclusive right as against other settlers upon the same stream. *Meng v. Coffee*..... 500

19. The duties of the state board of irrigation as provided for in the irrigation act of 1895 (Session Laws, ch. 69), are administrative and not judicial. The sections of the statute creating such board are not unconstitutional, as conferring judicial powers on executive officers. *Crawford Company v. Hathaway*..... 325

20. 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 Company v. Hathaway*..... 325

21. The common-law rule of riparian rights is underlying and

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fundamental and takes precedence of appropriations of water if prior in time. *Crawford Company v. Hathaway*..... 325

22. The two doctrines of water rights, one the right of a riparian proprietor, and the other the right of appropriation and application to a beneficial use by a non-riparian owner, may exist in the state at the same time, and both do exist concurrently in this state. *Crawford Company v. Hathaway* 325

23. Ordinarily, a riparian proprietor's right to the use of water of a stream is limited to its use for domestic purposes, and, if applied to the irrigation of riparian lands, a reasonable use for such purpose in view of an equal right to use belonging to all other riparian proprietors. *Crawford Company v. Hathaway*..... 325

24. The plaintiff in such a suit 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 Company v. Hathaway*..... 325

25. The riparian owner acquires title to his usufructuary interest in the water when he secures the land to which it is an incident, and the appropriator acquires title by appropriation and the application of the water to some beneficial use; the time when either right attaches determining the superiority of title as between conflicting claimants. *Crawford Company v. Hathaway*..... 325

26. The act of 1877 (Session Laws, 1877, p. 168) was an implied recognition of the right to appropriate the waters on the public domain according to the custom prevailing in the arid states immediately west of us, and the irrigation acts of 1889 and 1895 expressly recognized and preserved the rights of those who had appropriated the public waters and applied them to agricultural uses. *Crawford Company v. Hathaway* 325

27. The doctrine of the civil law with respect to the right of acquiring an interest in the use of water by prior appropriation and the application thereof to a beneficial use has never become a part of the laws of this state, and this without regard to whether the doctrine was ever in existence as a part of the laws in force in the territory acquired by the United States known as the Louisiana Purchase. *Crawford Company v. Hathaway*..... 325

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28. The term "domestic purposes" as used in section 43, article 2, chapter 93*a*, Compiled Statutes, 1901 (Annotated Statutes, sec. 6797), has reference to the use of water for domestic purposes permitted to the riparian proprietor at common law, which ordinarily involves but little interference with the water of a stream or its flow, and does not contemplate diversion of large quantities of water in canals or pipe lines. *Crawford Company v. Hathaway*..... 325

29. A riparian owner may take water from a stream for purposes of irrigation. But his use of the water for such purposes must be reasonable with reference to the size, situation and character of the stream, the uses to which its waters may be put by other riparian owners, the season of the year and the nature of the region; and he must not, in so doing, unreasonably diminish or wholly consume such water, to the injury of other owners, nor so as to prevent reasonable use of it by them. *Meng v. Coffee*..... 500

30. What is a reasonable use of water for irrigation is largely a question of fact, depending upon the circumstances of each case, and one which may be viewed with some liberality in semiarid regions, where use for such purposes necessarily involves much loss; but waste, needless diminution, or total consumption of a stream, to the injury of others, is clearly unreasonable. *Meng v. Coffee*..... 500

31. In regulating the use of water by riparian owners, the law distinguishes between those modes of use which ordinarily involve the taking of small quantities and but little interference with the stream, and those which necessarily involve the taking or diversion of large quantities and a considerable interference with its ordinary course and flow. *Meng v. Coffee*..... 500

32. But a settler who appropriates water, and afterwards duly enters and receives a patent to the land from the government, may, as against other patentees from the government upon the same stream, count the time during which he appropriated the water as a mere squatter in making out the statutory period of prescription. *Meng v. Coffee*..... 500

33. The extent of riparian land can not, in any event, exceed the area acquired by a single entry or purchase from the government; and whether, in view of the policy of the government in the disposition of its public lands, such riparian land may exceed the smallest legal subdivision of a section—that is, 40 acres—or in lieu thereof, if an irregular tract, a designated numbered lot, which is bordered by a

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natural stream, or over which it flows, *quære. Crawford Company v. Hathaway*..... 325

34. The irrigation act of 1895 authorizes and regulates the appropriation of the waters of the state for irrigation and other purposes which are declared to be a public use; and in making appropriations of water as contemplated by the act, a riparian owner whose property rights are appropriated or impaired is entitled to compensation for the injuries actually sustained, to be recovered in a suitable action or proceeding instituted for that purpose. *Crawford Company v. Hathaway*..... 325

35. A riparian owner's right to the use of the flow of the stream passing through or by his land is a right inseparably annexed to the soil, not as an easement or appurtenance, but as a part and parcel of the land; such right being a property right, and entitled to protection as such, the same as private property rights generally. *Crawford Company v. Hathaway*..... 325

36. While, as an abstract proposition of law, a riparian proprietor has the right to the ordinary natural flow of a stream, this rule would furnish no basis for compensation where water is appropriated for irrigation purposes; in order to entitle a riparian owner to compensation he must suffer an actual loss or injury to his riparian estate, which the law recognizes as belonging to him by reason of his right to the use and enjoyment of the water of which he is deprived. *Crawford Company v. Hathaway*..... 325

37. As to those streams of water flowing through the state which may be classed as interstate rivers, and along the banks of which meander lines have been run by the government in its survey of the public lands, the question is left open as to whether or not the waters of such streams may not be treated as waters of navigable rivers, to which riparian rights of an adjoining land-owner would not attach as against the right of the public to use the waters thereof by its appropriation and application to beneficial purposes. *Crawford Company v. Hathaway*..... 325

38. The provisions of section 41, article 2, chapter 93*a*, Compiled Statutes, 1901 (Annotated Statutes, section 6795), and of section 21, article 1, 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

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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 Company v. Hathaway*..... 325

Omaha Water-works.

39. The ordinance conferring upon the Omaha water-works company the franchise of the public streets for maintenance of its plant, provided that after twenty years the city might purchase the entire plant, on an appraisement by engineers, without regard to any value in the franchise. *Held*, That an amending ordinance whose sole effect was to put off the time when the city might exercise such right to September 1, 1908, was an extension of the franchise, and forbidden by section 19 of the city charter. *Poppleton v. Moores*..... 388

Trespass on the Case.

40. Unless in cases where the standing water is a nuisance, a railroad company is not negligent in so constructing and maintaining its road as to cause surface-water to be discharged upon a portion of its own land; it is under a duty in this respect toward other owners only. *Fremont, E. & M. V. R. Co. v. Gayton*..... 263

Witnesses.

1. The credibility of witnesses and the probative value of their testimony, are matters which it is the peculiar function of the jury to determine. *Parker v. State*..... 555

2. By virtue of the statute, a prior conviction of a felony may be proved for the purpose of affecting the credibility of a witness, and the court may properly instruct the jury as to the purpose of such evidence. *Keating v. State*..... 560

3. Where an attorney proffers himself as a witness and voluntarily gives testimony in a case, in which he admits having a contingent fee, he should be required to answer on cross-examination as to the amount of such fee. *New Omaha Thompson-Houston Electric Light Co. v. Johnson*..... 393

4. A memorandum in the form of an inventory of goods enabling a witness to testify as to particular items of stock of goods and their value, may be used to refresh the memory of a witness. *Gross v. Scheel*..... 223
Zieman v. Scheel..... 223

5. The questions (1) whether a witness has in the course of his examination willfully and intentionally testified falsely, (2) if so, what effect that fact should have upon the credibility of his other testimony, are, under proper instruc-

Witnesses—*Concluded.*

tions by the court, exclusively for the determination of the jury. *Bankers' Union of the World v. Schwerin*..... 303

6. Where a memorandum is kept in connection with a cash register, upon which all sales in a mercantile establishment, both cash and credit, are entered 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 that the memorandum is correct, it may afterward be put in evidence as to the detailed statement made by the witness. *Gross v. Scheel*..... 223
Zieman v. Scheel..... 223

Words and Phrases.

1. "Advertising fund." *Dakota County v. Bartlett*..... 62
2. "Attorney." *Dakota County v. Bartlett*.....62, 66
3. "Attorney of record." *Dakota County v. Bartlett*.....62, 66
4. "Criminal negligence." *Chicago, B. & Q. R. Co. v. Winfrey*.. 13
5. "Executed." *Solt v. Anderson*..... 103